IN THE SUPREME COURT OF FLORIDA

RONALD HEATH,

Appellant,

v. CASE NO. 77,234

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR ALACHUA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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STATE OF FLORIDA,	:	
Appellee.	:	
	:	

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Ronald Heath is the appellant in this capital case. The record on appeal consists of 19 volumes and references to the pleading and other matters of record will be referred to by the letter "R" while references to the transcripts will be denoted by the letter "T".

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Alachua County on July 12, 1989 charged Ronald Heath and his brother Kenneth Heath with one count of first degree murder and one count of robbery with a firearm (R 23). In September the State filed an amended information charging both men with one count of conspiracy to commit uttering a forgery, one count of conspiracy to commit a forgery, two counts of grand theft, nine counts of uttering a forged instrument, and nine counts of forgery of a credit card (R 202-208). Later, upon a defense motion, the court consolidated the murder and robbery charges with the offenses connected with the forgeries of the credit cards (R 166-67, 193).

Ronald Heath and the State subsequently filed several motions and notices relevant to this appeal:

1. Notice and an amended notice of intention to introduce similar fact evidence of other crimes, wrongs, or bad acts (R 123, 171). Ronald Heath filed a motion in limine to prevent the state from introducing such evidence, but the court denied that motion (T 1220).

2. Notice of intent to seek enhanced penalties as an habitual felony offender or habitual violent felony offender (R 199).

3. Motion to Dismiss under rule 3.190(c)(4) Fla. R. Crim. P. (R 223-224). The State specifically traversed that motion (R 229-234).

4. Motion in Limine (filed by the State) to exclude letters written by Kenneth Heath (R 251-253).

5. Motion in Limine to Suppress Physical Evidence and Statements (R 260-262). Denied (T 1590-91).

Heath proceeded to trial before the honorable Robert Cates. At the close of the state's case, the court granted Heath's Motion for a Judgment of acquittal as to one count of forgery of a credit card, one count of uttering a forgery, and two counts of grand theft (R 310).

After the Defendant had rested, and the jury had been instructed on the law, the jury found Heath guilty of the murder, armed robbery, and the rest of the counts except one count of forgery and one count of uttering a forgery (R 313-317).

Heath proceeded to the penalty phase of the trial, and the jury, after hearing additional evidence, recommended that the court sentence Heath to death (R 427). The court agreed with that recommendation, and in support of that sentence, it found in aggravation that Heath:

> 1. had a prior conviction for second degree murder.
>
> 2. committed the murder during the course of a robbery.

(R 456-60).

In mitigation, the court found:

> 1. Heath was under the influence of an extreme mental or emotional disturbance.
>
> 2. Heath had demonstrated good character while in prison.

3. that Kenneth Heath had been the triggerman in the murder but had been allowed to avoid a death sentence.

As to the other convictions, the court, after finding that Heath was an habitual felon (T2515-16), imposed consecutive sentences as follows:

1. robbery-life as an habitual violent felon

2. Conspiracy to commit uttering a forgery-six months

3. Conspiracy to commit uttering a forgery-six months

4. uttering a forgery-70 years (seven 10 year sentences)

5. forgery-70 years (seven 10 year sentences)

(R 446-52, 525-40).

Heath filed a motion for New Trial which the court denied (R 472-75, 476).

This appeal follows.

STATEMENT OF THE FACTS

By May 1989 Penny Powell and Ronald had been living together for several months as husband and wife in her trailer in rural Douglas, Georgia (T 1996). In the latter part of that month, the couple visited his grandmother in Jacksonville, and during that visit Ronald renewed his friendship with his younger brother, Kenneth (T 1998). Penny did not like this development because she feared the younger Heath, and she told Ronald of her apprehension (T 1999). In truth Ronald and Kenneth had never been close and had not gotten along well (T 1066). An argument ensued and Penny left her common law husband in Jacksonville and returned to Georgia (T 2000).

Ronald and Kenneth left Jacksonville on Monday, 27 May, coming to Gainesville later that day because Ronald had some friends there. That evening the brothers went to the Purple Porpoise lounge where Ronald saw Jennifer Berquist, an old friend of his whom he had not seen for at least two years (T 786-87). Jennifer worked there as a waitress/manager, and though she was glad to see Ronald and meet Kenny, she was too busy to visit with them. In any event, the brothers spent most of the evening there and by the time the business closed, the men were very drunk (T 790). Jennifer invited them to stay with her, and they went to her apartment where, according to Kenny (but denied by Jennifer (T 876, 878)), they shared some marijuana and cocaine, and Kenny and Jennifer had sexual intercourse (T 1071-73).

The next morning Ronald and Kenny left Jennifer and apparently did nothing much for the rest of the day except pawn some jewelry (T 984). They returned to the Purple Porpoise that evening and began drinking beer and mixed drinks (T 985, 1076). Sometime during the evening Kenneth struck up a conversation with Michael Sheridan, a traveling salesman who had come to the lounge for drinks and dinner (T 825, 986). Sheridan bought a drink for Kenneth, and eventually asked him if he ever got high (T 990). Kenneth said he did and his brother had some marijuana (T 990). Sometime later Ronald sat next to his brother, and Sheridan also bought a drink for him (T 999). During the next several hours, the trio went outside to smoke some marijuana and at one point Ronald noted the gold jewelry Sheridan was wearing (T 829-31, 1000). He told his brother they could take Sheridan somewhere and rob him, to which Kenny apparently agreed (T 1016).

Accordingly, the trio eventually climbed into Kenny's beat-up Toyota station wagon and drove to an isolated area of Alachua County. On the way there, they saw a four foot alligator crossing the road, and Ronald caught it and put it in the back of the car (T 1018). Eventually they stopped, Ronald "rolled a joint," and all three piled out of the car (T 1020). Ronald asked his brother if he had "it" and made a shooting motion with his hand (T 1020). Kenny returned to the car, got a .22 caliber gun, and told Sheridan that they were robbing him (T 1021). Incredulous, Sheridan balked at giving them anything, so Ronald told his brother to shoot him. Sheridan,

however, lunged at Kenneth and he shot the victim in the chest (T 1021). Sheridan sat down, saying "it hurt." (T 1022). Ronald demanded the jewelry and Sheridan's wallet. He then kicked him 4 to 6 times and stabbed him in the neck (T 1023). He told his brother to shoot Sheridan, and Kenneth shot him twice in the head to, as he said, prevent any witnesses (T 1023-24). Sheridan died from the gunshot wounds and the knife stabbing (T 1351). Afterwards Kenny said they carried the body further into the woods (T 1024-25).[1]

The brothers returned to the Purple Porpoise to wait for Jennifer and while they sat in Kenny's car, the younger brother saw a drunk staggering about, and Kenny decided to rob him (T 1081). He never got the chance, however, because some of the man's friends insisted they would take him home (T 1082).

The brothers saw Sheridan's car in the parking lot, so they took it to a remote area, and after taking some items from it, burned it (T 1032).

The next day, Ronald and Kenneth went to several shops in a shopping mall in Gainesville, and using Sheridan's credit card, bought clothes, shoes, and other items (T 1036). Kenny signed the credit card receipts on all the purchases because, as he claimed, Ronald said he might not remember how to sign Sheridan's name (T 1034-366). Eventually, Kenny exceeded the

---

[1]The pathologist who testified at trial said the body was dragged rather than carried (T 1367).

limit on the Mastercard, so he switched to using the American Express card. Using it came to an abrupt halt when a clerk at an audio store became suspicious of Kenny (T 1039). When he could not answer some biographical information about Sheridan, he left the store, telling his brother that they had to leave (T 1040).

They returned to Jacksonville and Ronald eventually went to his home in Georgia (T 1040, 2017). During the next two or three weeks, Ronald resumed his normal routine of working at a local truss manufacturer and living with Penny (T 2018). Then about 6 a.m. on June 15 several law enforcement officers converged on the trailer he and Penny Powell shared and arrested him, ostensibly only for using stolen credit cards (T 2024). After taking him into custody, several officers talked with Penny and arguably got her permission to search the trailer and her car (T 1589). They found some of the clothes bought in Gainesville, but most significantly, they found Sheridan's watch in the car (T 1438-1443).

Kenneth and Ronald were both housed in the Alachua County jail and during their stay at that facility, Ronald told one inmate that he had to get out so he could kill two women he identified only as Cindy and Jennifer (T 1265). The two men also made a knife and took a wire off a broom (T 1168, 1172). The other inmate talked with a guard, who said that for $150,000 he could get the two outside of the jail (T 1291, 1296). Nothing further occurred. Kenneth, for his part, told another inmate Ronald had had nothing to do with the

robbery-murder (T 1949) but he would implicate Ronald because Kenny was the black sheep of the family, and his parents had always cared more about Ronald than him (T 1949). Another inmate recounted how Kenneth returned to their cell one time extremely mad and red in the face. Repeatedly he said to no one in particular that "that motherfucker won't lie for him [Kenny]. I'll burn his ass." (T 1983). Still another inmate testified that Kenny admitted committing the murder by himself (T 1977-80).

SUMMARY OF THE ARGUMENT

During its opening statement, the State told the jury that the only person who could tell the jury about the murder was Kenny Heath. That was fairly susceptible of being understood as a comment upon Ronald Heath's Fifth Amendment right to remain silent. It was not a reference to the lack of defense evidence; instead it was at least an indirect attack on the anticipated failure of Heath to personally take the stand and exonerate himself. As such, the defendant's right not to have to testify was violated, and the error cannot said to have been harmless beyond a reasonable doubt.

Over defense objection, the State elicited from Sheridan's widow that her husband was a very nice, generous person among other things pertaining to his character. This information was relevant to none of the material issues in this case such as Heath's intent or participation in the crimes, and had only tangential or collateral bearing on what Heath was being tried for. All it did was create sympathy for this "nice guy" and antipathy towards Heath for what he did.

The State also presented evidence from a jail cell inmate that Heath wanted to escape so he could kill two women who had knowledge of the murder of Sheridan. Heath objected because the evidence showed at best only the very early stages of developing a plan to escape, and such meager evidence was insufficient to establish the minimum required endeavor required. That is, since evidence of flight is inherently ambiguous, the law requires at least an attempt to escape

before evidence of such can be admitted. Idle jail chatter and even preliminary efforts to plan an escape are insufficient to warrant admitting testimony of that stillborn plan.

Heath wanted to present evidence that he had a steady job to show that he had no motive to rob and eventually kill Sheridan. The court excluded it because it was not relevant. Relevant evidence, however, need not conclusively establish a material fact, it only has to tend to do or not do so. Here, the evidence that Heath had a steady job tended to support his defense that he did not participate in the robbery of Sheridan because he did not have any immediate, crushing need for money. Why? Because his steady income alleviated the day to day existence that tends to characterize the unemployed. The evidence of his steady work, therefore, tended to support his theory that he lacked a motive for committing any robbery and subsequent murder.

Heath also wanted his common law wife to say that when Heath unpacked his suitcase upon returning from Gainesville, he said he did not know Sheridan's watch was among his things. The court excluded it as self-serving hearsay. That was error because Heath did not seek to have it admitted for its truth, but to show his mental state at the time. That is, he was surprised to find the watch among his things. Second, even if it was hearsay, it was admissible because it showed his mental condition at the time he made the statement. Finally, calling a statement self-serving hearsay and then excluding it because it was so, is anachronistic and a violation of a defendant's

right to present a defense. It is anachronistic because the tendency today is to trust the jury's common sense and admit evidence tending to favor the defendant. By excluding all such statements without any examination of the defendant's purpose or intent at the time he made them denied him the right to present evidence in his behalf.

Kenneth Heath received a life sentence for killing Sheridan, and the trial court justified sentencing Ronald Heath to death because he was the dominant actor in this case. Yet justifying the disparate treatment for that reason turned a statutory mitigating factor (substantial domination by another) into an aggravating factor which is not allowed. It also created a nonstatutory aggravating factor, which this court has prohibited. Finally, because there is no legal difference between the brother's culpability, they should be treated the same. That is, those who share the same level of culpability should receive the same punishment. In this case, that means that Ronald Heath should be sentenced to life in prison as his brother was.

The court told the jury that they could consider, as an aggravating factor, that Heath committed the murder in an especially heinous, atrocious, and cruel manner. The court read the standard jury instruction on this aggravating factor, but doing so was error because the United States Supreme Court has found that an identical instruction used in Mississippi inadequately informs the jury about the limits of that aggravating factor.

Heath was sentenced as an habitual violent felony offender for the robbery conviction. He should not have been sentenced as an such on that conviction since Section 775.084 Florida Statutes makes no provision for enhancing penalties for first degree felonies punishable by life or life felonies.

The habitual felony offender statute, as defined in section 775.085 Florida Statutes, is unconstitutional. The statute fails the equal protection standards because all who are similarly situated are not being subjected to the enhanced penalty provisions. Furthermore, the statute invites arbitrariness because it does not provide any criteria for determining who, among those who qualify, will receive the enhanced penalties.

ARGUMENT

ISSUE I

THE COURT ERRED IN OVERRULING HEATH'S OBJECTION TO THE STATE'S OPENING STATEMENT THAT THE ONLY PERSON WHO COULD TELL THE JURY ABOUT THE MURDER WAS KENNY HEATH, IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHT TO REMAIN SILENT.

In his opening statement the prosecutor said:

> You're going to hear testimony, ladies and gentlemen, from the only person who can tell you about what Kenny and Ronnie did. Michael Sheridan's dead; he can't tell you what happened. Kenny Heath is going to come before you and tell you how Michael Sheridan died.

(T 708).

Heath objected to what the State had said because it was a comment on his right to remain silent (T 709). "There's two people here; we're only going to hear from one person. It's my understanding that that has been held to be a comment on [Heath's right to remain silent.]" (T 709) The court denied the objection and subsequent motion for a new trial (T 710). That was error.

The law in this area is simple. Comments which are "fairly susceptible" of being interpreted as reflecting upon a defendant's right to remain silent are serious constitutional errors and are impermissible. State v. Kinchen, 490 So.2d 21, 22 (Fla. 1985); David v. State, 369 So.2d 943 (Fla. 1979). That standard includes direct and indirect references to the failure to take the stand. State v. Bolton, 383 So.2d 924, 927 (Fla. 2d DCA 1980). On appeal, they are, nevertheless, subject

to an harmless error analysis. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Extending the right to its logical extremes could mean that the State had infringed upon a defendant's constitutional privilege any time it referred to his failure to present any evidence or argument to refute its allegations. This court, however, has not gone so far, and in fairness to the defendant and the State, it has ruled that the State may legitimately refer to the absence of a defense generally so long as the attack does not extend to include the defendant's failure to take the stand. State v. Sheperd, 479 So.2d 106 (Fla. 1986). Examining some cases will help illuminate how this law applies.

In State v. Moya, 460 So.2d 446 (Fla. 3rd DCA 1984), the State, during its closing argument, said Moya did not deny committing the kidnapping he had been charged with committing. That was a comment on his right to remain silent. In Rosso v. State, 505 So.2d 611 (Fla. 3rd DCA 1987), the State, in its opening statement and closing argument, belittled the defendant's insanity defense. The Third District reversed her subsequent conviction. "The prosecutor's references in the instant case to what Rosso was `saying' through her insanity defense is amenable to interpretation as an indirect comment on her failure to testify." Id. at 612.

On the other hand, when the State in White v. State, 377 So.2d 1149 (Fla. 1980) said "You haven't heard one word of testimony to contradict what she said, other than the lawyer's argument" this court held that it was only a reference to

White's defense and was therefore proper. Whether the objected to comment refers to the absence of a defense or is a comment on the defendant's right to remain silent was clarified in Marshall v. State, 473 So.2d 688 (Fla. 4th DCA 1984). In that case, Marshall was charged with burglary, kidnapping, and sexual battery. As so often happens, only two people could testify about what happened: the victim and the defendant. In its closing argument the State said, "the only person you heard from in this courtroom with regard to the events of November 9, 1981 [the date of the alleged crimes] was Brenda Scavone [the victim]." Id. at 689. That was a comment on the defendant's right to remain silent because of the two people with information about the crimes, only the victim had testified. The court justified this conclusion by relying upon United States v. Bubar, 567 F.2d 192, 199 (2d Cir. 1977), which said:

> A constitutional violation occurs . . . if either the defendant alone has the information to contradict the government evidence referred to or the jury `naturally and necessarily' would interpret the summation as a comment on the failure of the accused to testify."

Here, the only people with information about the murder were Ronald and Kenneth Heath. The State planned to call Kenneth Heath to tell them "how Michael Sheridan died." (T 708) So, after hearing the State's opening statement, the jury could have naturally expected Ronald Heath to take the stand and give his version of what happened. But raising such an expectation, amounted to a comment on the defendant's right to remain silent because it planted the idea in the jury's mind

that the defendant would or needed to take the stand to refute what Kenneth would say. He was, after all, one of the three people who knew about what Kenny and Ronnie had done. Sheridan was dead and Kenny was going to take the stand. By emphasizing that Kenny was the only one who would talk to the jury, the State went beyond merely commenting on the lack of any defense; instead what the prosecutor said can be fairly interpreted as meaning that of the two living persons who left the murder, Kenny Heath would tell them what happened while Ronald would not. That was a comment on Ronald's right not to testify.

The State can, of course, concede this yet still claim the error was harmless. So, even though the State has the burden of establishing the harmlessness of the error beyond a reasonable doubt, State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), Heath would like to launch a pre-emptive strike. Accordingly, the proper analysis assumes first that the improper comment did the most damage that it could do. C.f. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (Fla. 1986). In this case, that would be that the jury expected Ronald Heath to take the stand and deny any complicity in the murder. Further the jury must have concluded that because he did not personally deny his participation in the murder, he admitted his guilt. With those required assumptions in mind, was the error harmless beyond all reasonable doubt?

Kenneth Heath had "sold his soul" to the State in return for a life sentence. His credibility was inherently weak, as

one of the prospective jurors readily said: "[Kenneth Heath] has a vested [interest] in what he's saying, so I would distrust it entirely." (T 642)[2] This juror was more forthright than other jurors, but he nevertheless expressed a commonly held truism: Persons with a motive or self-interest to lie will probably do so. Hence, the jury in this case must have been very skeptical of Kenneth's virtually uncorroborated story of how the murder occurred. This skepticism could only have increased during the trial when other, disinterested witnesses disagreed with Kenneth's version of what happened the night he killed Sheridan. For example, Kenny said he had sexual intercourse with Jennifer, the waitress at the Purple Porpoise who knew Ronald but not Kenny, the night before the murder (T 1073). She denied it (T 876 878). She also denied using cocaine with the brothers or smoking marijuana with them, as Kenny claimed she had done (T 1071). Kenny also claimed that he, not Ronald, cut Sheridan's throat (T 1969). He also said Ronald was not with him at the time of the murder (T 1952). After his arrest Kenny told the police that he had found Sheridan's wallet (T 1116) and that his brother either had not gone with him to buy the clothes or was just "hanging around" with him when he did (T 1117, 1119). He also denied

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[2]At least one other prospective alternate juror agreed with him on that point (T 643).

knowing Sheridan (T 1124), yet he claimed to have sold the gold jewelry taken from Sheridan to black drug dealers (T 1119).

Other parts of Kenny's story were contradicted. Ronald's brother said that after the murder, they had carried the body further into the woods (T 1025). The pathologist, on the other hand, said the body looked as if it had been dragged (T 1368), which would have been consistent with Kenny's story at one time that he had killed Sheridan by himself (T 1949). Kenny also said that when he shot Sheridan, the man staggered back from the force of the blow, but the pathologist said that would not have happened since the murder weapon was a .22 caliber gun (T 1372).

Although Kenny claimed he was trying to protect his brother (T 1147), at some point that attitude changed because Ronnie would not lie for him (T 1982). Kenny, red in the face, announced that he was going to "burn [Ronald's] ass." (T 1982). Kenny also vowed to make his parents suffer because they had treated him like the "black sheep" of the family (T 1949-50).

There is, in short, very little evidence beyond Kenny's self-interested testimony, to corroborate how the murder occurred, and there is plenty of details suggesting that the defendant's brother lied on the stand.

This court, therefore, cannot say beyond a reasonable doubt that the prosecutor's reference to Ronald Heath not taking the stand was harmless.

ISSUE II

THE COURT ERRED IN ADMITTING EVIDENCE ABOUT THE VICTIM, MICHAEL SHERIDAN, THAT HE WAS A NICE PERSON, IN VIOLATION OF HEATH'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL.

The first witness called by state was Michael Sheridan's wife, Regina Sheridan. As part of her testimony, she said her husband was a very friendly person, healthy, used southern slang, worked for a company that required him to travel, had a bachelor's and master's degree, was a season ticket holder for the "Gator games," and was an extremely generous person who would always go out of his way to help people. "He was just a good person." (T 729- 732) Heath objected to this testimony because "all that is doing, seems to me, is building up what a good man he is and invoking sympathy." (T 743) The State, unwilling to disclose its trial strategy, did not explain why the evidence was relevant (T 741). Instead, it merely said it would "tie it in later." The court, accepting that claim, overruled the objections to the evidence of Sheridan's good character (T 741, 744-50). That was error.

As this court has often said, "relevancy is the test of admissibility." Ruffin v. State, 397 So.2d 277 (Fla. 1981). Relevancy, in turn, is defined in section 90.401 Fla. Stat. (1989) as "evidence tending to prove or disprove a material fact." Here the crucial word is "material" and the question is "Why did the State have to present the abundance of good character evidence of the victim?"

The answer appeared in the State's closing argument. Without relating the objected to evidence to its case, the prosecutor at the start of the argument merely repeated what Mrs. Sehridan had said, the implication being that these two low lifes had murdered a good friend, a decent fellow (T 1045, 2055-57). It then claimed Sheridan got into Kenny Heath's car because he was "a friendly person; he's a trusting person." (T 2058) Why he got into the car tended to prove nothing and was without dispute. Even if it was an issue, it was collateral to the material matters in this case.

Florida courts have not said much regarding what is material evidence. Ehrhard, in Florida Evidence (2d Edition), cites the comparable federal definition of relevancy which omits the word "material" in favor of the phrase "any fact that is of consequence to the determination of the action." Id. at 84. Facts which have consequence include "background facts necessary to the trial of a lawsuit" which may not be "technically" in issue." Id. As applied to this case, that Sheridan was a wonderful, college educated person who liked the "gators" was of no consequence to the determination of whether Ronald Heath murdered him.

In Jackson v. State, 498 So.2d 906, 910 (Fla. 1986), this court held that in the penalty phase of a murder trial, it was irrelevant that the victim was married, ran a store alone; had led an honest and good life; would be missed by the community; was an immigrant who had made a good life; and was a kind and likeable man. It was irrelevant to the court's finding that

the murder was especially heinous, atrocious, and cruel because the victim's character was not a fact that had any consequence in determining if the defendant "enjoyed the suffering of the victim." State v. Dixon, 283 So.2d 1 (Fla. 1972).

In Harris v. State, 570 So.2d 397 (Fla. 3rd DCA 1990), although the Third District reversed Harris' convictions for second degree murder and possession of a firearm by a convicted felon and remanded for a new trial, it said the trial court had not erred in excluding evidence that the victim had abused drugs. In short, character evidence of the victim is generally irrelevant.

The court in this case, therefore, erred in admitting the evidence that Sheridan was a nice person, who, in Kenny Heath's words, "treated me pretty much like a friend." (T 1045) All such evidence did was create an unfairly prejudicial attitude towards Ronald Heath, and once planted, it is difficult to believe that anything could dispel it. Rather it permeated the entire trial. That this was the State's purpose is clearly shown by its repeated reference to Sheridan's friendly nature early in its closing argument. The jury could have been influenced by the unspoken but evident argument that Heath, the vicious killer, had murdered "good neighbor Sam." Hence, the court's error in admitting this evidence was harmful, and this court should reverse for a new trial.

ISSUE III

THE COURT ERRED IN ADMITTING TESTIMONY THAT RONALD HEATH WANTED TO ESCAPE FROM THE ALACHUA COUNTY DETENTION CENTER.

Over defense objection, the court allowed the State to introduce evidence that Heath wanted to escape from the Alachua county jail while he was awaiting trial for the charges he was later convicted of committing. Specifically, a cellmate of Heath's, Wayburn Williams, said Heath wanted to kill two women identified only as Cindy and Jennifer because they could tie him to the murder (T 1165-66). He and Williams found a wire and made a knife of sorts out of a piece of metal they took off the wall (T 1169, 1171). According to Williams, a guard said that for $150,000 he could get them out of the jail (T 1291). It would also take four men and four radios to effect the escape (T 1291).[3] Williams, in the mean time, had contacted his lawyer about the plan, and eventually the jail staff moved Heath (T 1169).

Heath had no objection to Williams' testimony that he wanted to kill the two girls (T 1177), but he was bothered that the State wanted the witness telling the jury about the defendant's plans to escape (T 1177). It was, as he argued, "mere talk; there's no attempt to escape just by talking." The

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[3]Williams also claimed he could get the money, and he said that if that plan did not work, Heath planned to rush a guard and escape out the back door of the jail with Williams' help (T 1170). The jury did not hear this testimony.

court, after hearing argument on the issue, allowed William's testimony about Heath's plan to escape. That was error.

The law in this area is well settled. Although flight or escape is inherently ambiguous, Merritt v. State, 523 So.2d 573 (Fla. 1988), this court has held:

> [I]t is well settled that evidence that a suspected person in any manner endeavors to escape or evade a threatened prosecution, by flight, concealment, resistance to lawful arrest, or other ex post facto indication of a desire to evade prosecution, is admissible against the accused, the relevance of such evidence being based on the consciousness of guilty inferred from such actions.

Mackiewicz v. State, 114 So.2d 684, 689 (Fla. 1959); Harvey v. State, 529 So.2d 1083, 1086 (Fla. 1988).

The key phrase of that quote is "in any manner endeavors to escape." The trial court in this case essentially ruled that any evidence of an escape or a plan to escape was admissible. Mere talk or preparations of a very preliminary sort became admissible. Yet, this court's holding in Mackiewicz rejects such a broad rule of admissibility. At a minimum, the evidence must show at least an "endeavor" to escape.

In the context of the theft statute, section 812.014 Fla. Stat. (1977), this court has interpreted that "endeavor" as being synonymous with "attempt." State v. Sykes, 434 So.2d 325, 327 (Fla. 1983). Black's Legal Dictionary defines the word as "to exert physical and intellectual strength toward the attainment of an object. A systematic or continuous effort." Somewhat differently, Webster's Third New International

Dictionary says the word means "a serious, determined effort." Endeavor, thus, means more than idle talk or even preliminary efforts to achieve a goal. This becomes clearer if we focus upon endeavor as an attempt.

Legally, merely planning to do a criminal act or even preparing to do it is insufficient evidence of an attempt. An attempt requires a "direct movement toward the commission after preparations are completed." State v. Coker, 452 So.2d 1135 (Fla. 2d DCA 1984). Merely thinking or talking about the crime cannot be an attempt. Fla. Std. Jury Instr. (Crim.)

The cases cited by the State (T 1178-82) to support its argument have no relevance here because their facts involved actual escapes, Washington v. State, 432 So.2d 44 (Fla. 1983); Bundy v. State, 471 So.2d 9 (Fla. 1985); Harvey v. State, 529 So.2d 1083 (Fla. 1988) or attempts to flee. Freeman v. State, 547 So.2d 125 (Fla. 1989); Hernandez v. State, 397 So.2d 435 (Fla. 3rd DCA 1981) None of them presented the issue now before this court: what is the threshold level of evidence of an endeavor to escape?

At best the evidence of Heath's escape shows only the very early stages in realizing that plan. It was still in the concept stage. Some preliminary preparations had been made by securing a wire and a knife,[4] but neither the $150,000, the

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[4]Prison inmates probably make weapons more for self defense or to assault other inmates than to assist in escaping. (Footnote Continued)

four radios, and four other men to assist the pair had been procured. No date had been set for the escape, nor had the details of what they planned to do once outside the jail been solidified. For that matter, there were no details of how the alleged jailer/conspirator would help them get out of the jail. In short, Heath had talked about escaping, but the evidence that he was going to flee was hearsay and ambivalent, and was in any event, insufficient to show that he had attempted or endeavored to escape. In contrast, the defendant in Freeman tried to escape by climbing through the roof of his holding cell but was caught before he could leave the courthouse. That was an attempt to escape. What Heath did or rather never did cannot amount to an endeavor, and the court erred by letting the jury hear of such evidence.

But so what? The jury certainly had a lot of evidence to convict Heath. While that may be true, letting them hear of the defendant's escape plans was not harmless beyond a reasonable doubt in the guilt phase of his trial, nor was it harmless in the penalty phase.

Kenneth Heath gave the most damning testimony about his brother's role in the murder. Yet, he also had the greatest motive for lying to incriminate his brother and save himself. The State had let him plead to first degree murder and a life

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(Footnote Continued)
Demps v. State, 395 So.2d 501 (Fla. 1981); Christian v. State, 550 So.2d 450 (Fla. 1989). There is, therefore, some ambiguity about the purpose of the weapons Heath fabricated.

sentence in return for his testimony. His credibility was so shaky that the court excused one prospective juror during voir dire who said that he could not, under any circumstances, credit Kenny's testimony (T 642-43).

Wayburn Williams likewise had a motive to lie. In return for his testimony against Heath, in which he claimed Heath admitted stabbing Sheridan (T 1270), the State agreed not to prosecute him for raping his daughter (1279-80). That would not affect the other charge against him that he had solicited the murder of his wife (T 1277). Thus, in the guilt phase of the trial, the jury may have simply concluded that the evidence of the escape bolstered Williams' credibility because he was one of the alleged participants in it. That conclusion became even stronger when they considered the physical evidence the State introduced. It was Williams' lawyer's business card, and on the back of it were the names "Cindy" and "Jennifer" the two women Heath said he wanted murdered.

In the penalty phase of the trial, the jury may well have voted for death because Heath had an inclination to escape, and there are no stronger bars to those efforts than the electric chair.

The court, therefore, erred in admitting the testimony that Heath wanted to escape, and this court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE IV

THE COURT ERRED IN REFUSING TO LET DEFENSE WITNESS LAMAR STODGHILL TESTIFY REGARDING HEATH'S WORKING FOR HIM, THUS TENDING TO ESTABLISH THAT HEATH HAD NO MOTIVE TO ROB SHERIDAN.

As part of his case, Heath sought to introduce evidence that he had no need to rob Sheridan because he had a steady job. Lamar Stodghill managed a company that made trusses, and in May 1989 he had hired Heath to help construct the roof supports (T 1927). Heath did not work for a week that month, but Stodghill rehired him (T 1928). Counsel for Heath argued this evidence was relevant because it went "directly to motive for robbery. My client was gainfully employed, getting a paycheck every week; was [employed] before this robbery; was [employed] after this robbery." (T 1929)

The State objected on two grounds: 1) it was not relevant, and 2) it only bolstered the character of the defendant (T 1929-30). The court sustained that objection, "Based on the definition of `relevance' in the evidence code" (T 1931), which was error.

Relevance as defined in section 90.401 Fla. Stat. (1989) is "evidence tending to prove or disprove a material fact." In a murder case, the motive or reason a defendant commits the homicide certainly is relevant because it tends to prove the defendant's intent or frame of mind at the time of the killing. See, Craig v. State, 510 So.2d 857, 863 (Fla. 1987). If evidence showing motive is relevant, evidence tending to disprove motive must also be relevant.

In this case, the State over-stated Heath's proposition regarding the relevance of Stodghill's testimony.

> As to motive, Mr. Rush--if Mr. Rush can assert that a person who is working has never committed a robbery before, your Honor, then I will accept it as to the issue of motive.

(T 1929).

The State misunderstood the definition of relevancy. Evidence is not relevant only if it conclusively establishes what it is offered to prove. It is admissible if it tends to prove or disprove a material fact. It is the tendency to establish a fact in the minds of reasonable men that makes the evidence relevant.

In this case, experience suggests that people who have a job and no immediate, pressing need for money are less likely to steal or rob. The truth of this is evident by considering the last time this court or any court in this state had a case involving a robbery or theft in which the defendant was not represented by a Public Defender. Bank presidents just do not walk the streets robbing people. Crack addicts, alcoholics, and other people from the gutter, on the other hand, regularly are charged with rolling hapless victims for their loose change and occasional dollar bills. Now we are not saying that the poor and unemployed universally turn to crime, but the undeniable tendency is that those without a job need money, and they have a greater temptation to get it illegally. Conversely those who have money, while maybe wanting more, tend to not do something so drastic as to rob just to satisfy that need.

Hence, the evidence that Heath had a steady job and paycheck was relevant because it tended to show that he had no motive or reason to want to rob and kill Sheridan.

But what of the harm of excluding this evidence. If we assume the jury would have given the excluded evidence great weight had the court admitted it, See, Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (Fla. 1986), then it is evident that excluding the evidence was harmful. Kenny Heath was the State's key witness because he was the only one who testified about Ronald telling him they could rob Sheridan (T 1000) and the facts of the subsequent murder. If the jury believed Ronald had no need for money then they very well could have disbelieved Kenny's claim regarding Ronald's robbery suggestion. If Ronald had no motive to take Sheridan into a remote area of Alachua County, then he may not have done so. Hence, the jury could well have believed the defendant had nothing to do with this murder, or at least it is not clear beyond a reasonable doubt that this scenario was unlikely. Hence the error was not harmless, and this court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE V

THE COURT ERRED IN EXCLUDING TESTIMONY OF PENNY POWELL THAT HEATH SAID HE DID NOT KNOW SHERIDAN'S WATCH WAS IN HIS SUITCASE BECAUSE IT WAS SELF-SERVING HEARSAY IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

As part of his case, Ronald Heath called Penny Powell to testify about Ronald's reaction to finding Sheridan's watch in the suitcase he had used for his trip to Gainesville. The court let her testify that Heath acted shocked and surprised when he found the watch there (T 2021). The State, however, objected to Powell saying that Heath had said "I didn't know the watch was there." (T 2020) The court sustained the objection, ruling that it was self-serving hearsay. That was error.

It was error because what Heath said was not offered for its truth but to show his state of mind, his shock and surprise at finding this watch among his things.

In Downs v. State, 574 So.2d 1095 (Fla. 1991), Bobby Downs killed his wife, and at his trial for first degree murder he wanted to introduce statements he had made to friends and police officers some hours before the homicide. The court excluded these statements on hearsay grounds, but it did allow the witnesses to say that Downs had spoken to them and "to testify about his sobriety at the time they saw or talked to him."

This court said that excluding the statements was error (though harmless) because the defendant did not seek to admit

them for their truth, but to show his state of mind. "He argues that the excluded testimony shows he was in a state of mental and emotional confusion and rebuts the state's theory that he went to [his wife's] house on April 20 with the intent to kill her." The excluded testimony was relevant because the defendant was charged with a specific intent crime for which his state of mind was a relevant issue. See also, Baird v. State, 572 So.2d 904 (Fla. 1990); Barber v. State, 576 So.2d 825 (Fla. 1st DCA 1991).

In this case, Powell's testimony about what Heath said was relevant because it supported his defense that he had no motive or reason to kill Sheridan (T 2083). It would have directly challenged his brother's testimony that Ronald had taken the watch from the victim (T 1022), and it would have refuted another witness' statements that they had seen Ronald wearing the watch (T 1873-74). The statement tended to show that he did not own or claim the watch because he was surprised at finding it in his suitcase.

The statement the court excluded, first of all, was not hearsay because it showed Heath's demeanor at the time he made them. It displayed his shock and surprise at seeing the watch. Heath wanted Powell to testify about her observations and what her husband said to support his defense that Kenneth had lied about Ronald's involvement in the murder of Sheridan (T 2076). There was no better evidence to show his surprise that what he said immediately after discovering the watch. There was also no evidence that what he did and said in anyway intended to

communicate the defense that he did not know the watch was among his possessions. See, Ehrhardt, Florida Evidence, Section 801.4 ("Conduct which unintentionally communicates, i.e., an unintentional assertion, is excluded from the definition of hearsay.")

Second, if Powell's statement was hearsay, it was admissible as an exception to the general prohibition against admitting hearsay. Section 90.803(3) Fla. Stat. (1989) allows hearsay statements regarding a then existing mental, emotional, or physical condition of a declarant if that condition is relevant to prove that person's state of mind or intent then or at any other relevant time.

Here, Heath's evident surprise at finding the watch tends to reveals his lack of guilty knowledge about Sheridan's murder because one who had stolen a watch as part of a robbery-murder would not normally act surprised at later finding it among his clothes.

Moreover, the response inherently shows its trustworthiness. If Heath had gotten the watch from Sheridan's body, the natural thing for him to have done was claim he had bought it from someone. Instead, he acted surprised at seeing it, indicating some confusion at how it had gotten there. The key, therefore, is whether Heath intended his statement and acts to be self-serving, not whether it was in fact self-serving. By focussing upon Heath's intent when he made the statement rather than upon its perceived effect, this court can protect the underlying rationale of the hearsay rule while

also giving the jury all the relevant evidence in a particular case.

The court also excluded the statements because it was "self-serving." Yet that rationale has lost its legal force and can no longer justify excluding such testimony. In Watkins v. State, 342 So.2d 1057 (Fla. 1st DCA 1977) the First District said that Watkins' statement to two police officers at the police station was not part of the res gestae, was self-serving, and was therefore inadmissible. While the opinion does not disclose any other facts suggesting the statement's reliability or its lack, Watkins nevertheless follows the general Florida trend that so-called "self-serving" statements are inadmissible. See, e.g. Thomas v. State, 99 Fla. 246, 126 So. 158 (Fla. 1930), Ironman v. Rhoades, 493 So.2d 1097 (Fla. 4th DCA 1986). This prohibition against self-serving statements, however, is an anachronism no longer justifiable under Florida's evidence code or philosophy concerning the admissibility of evidence.

The prohibition against admitting "self-serving" statements apparently originated at a time when a defendant could not testify in his own behalf, 6 Wigmore, On Evidence, § 1732 (Chadbourne Revision, 1976), and it implemented a policy assumption that every defendant would lie to help his cause if given the chance. Yet as Wigmore argues, if the defendant is now allowed to testify, the rationale supporting the prohibition against allowing self serving testimony no longer exists, and statements which are labelled "self-serving" should

be admitted. In short, the possibility that a statement may be self serving should go to the weight the jury gives it rather than its admissibility. See, United States v. Dimaria, 727 F.2d 265 (2d Cir. 1984) (Self serving nature of statement goes only to its weight.) Moreover, excluding testimony because it favors the defendant's case is not only anachronistic it is also illogical because all evidence offered by the defendant helps his case. Claiming that what the defendant says is self-serving is similar to the frequent defense objection that evidence proffered by the state is inadmissible because it is prejudicial.

On a constitutional level, the court's ruling implicated Heath's Sixth Amendment right to present a defense. Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). In Washington the Supreme Court briefly traced the evolution of the right to present a defense, and noted that at common law a defendant not only could not testify in his defense, but in treason cases, he could not present any witnesses in his behalf. Co-defendants, at common law, could not testify for fear that they might perjure themselves to help a co-defendant. The gradual abolition of these restrictions on a defendant to present a defense have been justified at least in part on the ground that the jury is more likely to reach a just result if it hears all competent evidence, and the weight and credibility of that evidence should be left for it to determine. Id. at 22. In other words, if the law is willing to let a defendant

testify, it is also willing to trust the common sense of the jury to give that testimony the weight it deserved.

Here, the trial court assumed the jury's role by initially classifying Heath's statement as self-serving and then also assumed that the jury could not weigh it properly. Thus, rather than trusting the jury (which knew under what circumstances the statement was given) the court denied Heath an opportunity to present evidence in support of his defense. That was error, and this court should reverse Heath's judgment and sentence and remand for a new trial.

Excluding the statement also was not harmless because as mentioned in other issues Kenny Heath was the only witness to provide the crucial testimony of Ronald's involvement in the murder. The excluded statement when coupled with Powell's observation that he was "shocked and surprised" at finding the watch, supported his defense that he had nothing to do with the murder. It would have bolstered his defense and have put into greater question Kenny's credibility. This court cannot say beyond a reasonable doubt that excluding this statement would not have affected the jury's consideration of Kenny's credibility. The error was, therefore, not harmless, and this court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE VI

THE COURT ERRED IN SENTENCING RONALD HEATH TO DEATH BECAUSE HE WAS NO MORE CULPABLE OF DEATH THAN HIS BROTHER, KENNETH, WHO DID NOT RECEIVE A DEATH SENTENCE.

The court considered, in its analysis of the mitigating factors Heath presented, that the "co-defendant, Kenneth Heath, received a life sentence for the offense of murder in the first degree." (R 466-47) The court's analysis was very long, and it will be examined in greater detail below, but in short the court engaged in a proportionality review of sorts under the guise of mitigation. The problem is that under the heading of mitigation the court justified its death sentence by finding that Ronald dominated his brother. That was error because domination of a co-defendant by the defendant is not a statutorily enumerated aggravating factor, and even if it was, it was not proven beyond a reasonable doubt in this case that Ronald dominated his brother.

The law in this argument comes from simple principles that have been well settled. First, defendants who share the same level of culpability should receive equal punishment. In Slater v. State, 316 So.2d 539 (Fla. 1975) this court held that persons equally culpable for committing a murder should not receive disparate sentences. The court reduced Slater's death sentence to life in prison because the man who had actually committed the murder had pled nolo contendere and received a life sentence. "[I]t is our opinion that the imposition of the death penalty under the facts of this case would be an

unconstitutional application under Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (Fla. 1972)."

Second, the sentencing judge and jury can only consider those aggravating factors specifically listed in section 921.141(5) Fla. Stat. (1989) when it considers whether a defendant should live or die. State v. Dixon, 283 So.2d 1 (Fla. 1972). Because those aggravating factors define deathworthy crimes, the state must prove their existence in a particular case beyond a reasonable doubt. Dixon, at 9.

Finally, the sentencing court cannot use the absence of a mitigating factor to aggravate a particular murder. Lack of remorse, for example, cannot justify a death sentence. Pope v. State, 4412 So.2d 1073 (Fla. 1983). Neither can a defendant's significant history of prior criminal activity aggravate a sentence. Mikenas v. State, 367 So.2d 606 (Fla. 1983).

THIS CASE

In this case, the court identified four questions it had to answer to determine whether Ronald deserved a harsher sentence than his brother:

> 1. What was the relative degree of participation in the murder?
>
> 2. Who was the dominating influence between the brothers?
>
> 3. Who received the greater benefit from the murder and robbery?
>
> 4. Are the differences between the two great enough to justify disparate sentences? (R 467).

As to these factors, the court found respectively that:

1. The State did not prove beyond a reasonable doubt that Ronald's stabbing of the victim resulted in his death.

2. Ronald was the dominant actor in the murder/robbery.

3. The benefits of the crimes were equally distributed.

4. "But for" the domination of Ronald Heath, Kenny would not have committed the crimes. (R 467-469).

The first and third findings of the court (the lack of proof of the cause of death and the equal benefits) contribute nothing to determining if Ronald should die because they either were not established beyond a reasonable doubt or could apply to Kenny with equal force as to Ronald. If anything, the first factor would apply to Kenny with greater strength because he shot Sheridan three times, the last two shots being to the head and all three of them being causes of the victims death (T 1351-53, 1359).

Moreover, the second and fourth finding amount to the same thing: Ronald dominated Kenneth. Thus only that domination justified the disparate treatment, but by doing so the court converted the mitigating factor defined in section 921.141(6)(e) Fla. Stats. (substantial domination), which it had already rejected (R 463), into an aggravating factor to justify executing the defendant. Also, it created a nonstatutory aggravating factor, something this court has prohibited. Moreover, it found the lack of substantial domination by his brother to aggravate the sentence. Thus, the

court in this case violated this court's rulings in Dixon, Pope, and Mikenas.

Even if Ronald's domination can justify a death sentence, the court had one other difficulty. The State had not proven beyond a reasonable doubt that the defendant controlled his brother. There is of course evidence to support that finding. Ronald suggested they rob Sheridan (T 1142), and once the trio had left the car, he told his brother to get the gun. Significantly, he twice told Kenny to shoot Sheridan (T 1021, 1023) after he had kicked him four to six times (T 1093). Kenny, for his part, was a "little" afraid of his brother (T 1024). After the murder, Ronald, according to Kenny, burned Sheridan's car and told him to sign credit card receipts because he might forget how to sign Sheridan's name (T 1035).

On the other hand, abundant evidence supports the contention that Ronald, while participating in the murder, did not dominate his brother. First, Kenny did not shoot Sheridan because his brother had told him to do so. Instead, he shot him because the victim lunged at him (T 1021). Likewise, the co-defendant said he shot the victim the second and third times to eliminate him as a witness to their robbery (T 1096). Moreover, although Ronnie told Kenny to get the gun, it was Kenny who got it, announced that he was robbing Sheridan, and actually took the money and other property from the victim

(T 1088). After the pair returned to the Purple Porpoise, Kenny, on his own and without Ronald's knowledge, wanted to rob a drunk (T 1081-82).

Conveniently, all the damning facts against Ronald came from Kenny and could not be verified by other, independent evidence. This is important because much of Kenny's testimony on other points was refuted by other witnesses. For example, Kenny said he had sexual intercourse with Jennifer, the waitress at the Purple Porpoise who knew Ronald but not Kenny, the night before the murder (T 1073). She denied it (T 876, 878). She also denied using cocaine with the brothers or smoking marijuana with them, as Kenny claimed she had done (T 1071). Kenny also claimed that he, not Ronald, cut Sheridan's throat (T 1969). He also said Ronald was not with him at the time of the murder (T 1952). After his arrest Kenny told the police that he had found Sheridan's wallet (T 1116) and that his brother either had not gone with him to buy the clothes or was just "hanging around" with him when he did (T 1117, 1119). He also denied knowing Sheridan (T 1124), yet he claimed to have sold the gold jewelry taken from Sheridan to black drug dealers (T 1119).

Although Kenny claimed he was trying to protect his brother (T 1147), at some point that attitude changed because Ronnie would not lie for him (T 1982), and Kenny, red in the face, announced that he was going to "burn [Ronald's] ass."

(T 1982) Kenny also said he wanted to make his parents suffer because they had treated him like the "black sheep" of the family (T 1949-50).

Other parts of Kenny's story were not verified. He said that after the murder, the brothers carried the body further into the woods (T 1025). The pathologist, on the other hand, said the body looked as if it was dragged (T 1368), which would be consistent with Kenny's story at one time that he had killed Sheridan by himself (T 1949). Kenny also said that when he shot Sheridan, the man staggered back from the force of the blow, but the pathologist said that would not have happened, especially since the murder weapon was a .22 caliber gun (T 1372).

There is, in short, very little evidence beyond Kenny's self-interested testimony, to corroborate it, and plenty of details suggest that the defendant's brother lied on the stand. The evidence does not prove beyond every reasonable doubt Ronald dominated Kenneth, and at best it shows only that he participated in the killing.

Thus, there is no justification for the disparate sentences imposed upon the two brothers, and this court should remand with instructions to sentence Ronald Heath to life in prison without the possibility of parole for twenty-five years.

ISSUE VII

THE TRIAL COURT ERRED IN GIVING PENALTY PHASE JURY INSTRUCTIONS WHICH FAILED TO ADEQUATELY ADVISE THE JURY AS TO THE LIMITATIONS AND FINDINGS NECESSARY TO SATISFY THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE.

Before trial Heath filed a Motion to Declare Section 921.141 Florida Statutes Unconstitutional (R 76-77). The court, after hearing a brief argument on the motion denied it (T 2480-81). Doing so was reversible error even though the court did not find this aggravating factor applicable in this case. It is error because it instructed the jury that they could consider, as an aggravating factor, whether the murder was especially heinous, atrocious, and cruel (T 2363). The court's error arose from the inadequate jury instruction it gave on the heinous, atrocious or cruel aggravating circumstance. The trial court used the standard penalty phase jury instructions and instructed on the aggravating circumstances provided for in Section 921.141(5)(h) Florida Statutes as follows:

> The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious, or cruel.

(R 2181). Additionally, the court defined the terms "heinous", "atrocious" and "cruel" as follows:

> "Heinous" means extremely wicked or shockingly evil.
>
> "Atrocious" means outrageously wicked and vile.
>
> "Cruel" means designed to inflict a high degree of pain, utter indifference to, or

> enjoyment of, the suffering of others, pitiless.

Although this explanation of the aggravating circumstance was taken from this Court's decision in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), it is inadequate to guide and limit the jury's sentencing function. The instructions given are unconstitutionally vague because they fail to inform the jury of the findings necessary to support the aggravating circumstance and a sentence of death. Amends. VIII, XIV U.S. Const.; Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (Fla. 1988); Shell v. Mississippi, 498 U.S. ___, 111 S.Ct. ___, 112 L.Ed.2d 1 (Fla. 1990).

In Maynard, the Supreme Court held that Oklahoma's "especially, heinous, atrocious or cruel" aggravating circumstance was unconstitutionally vague under the Eighth Amendment. The Court concluded that language of the circumstance failed to apprise the jury of the findings it must make to impose a death sentence. The jury was left with unchannelled discretion in reaching its sentencing decision. Relying on Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 998 (Fla. 1980), the Court affirmed the decision of the Tenth Circuit Court of Appeals invalidating the death sentence.

> We think the Court of Appeals was quite right in holding that Godfrey controls this case. First, the language of the Oklahoma aggravating circumstance at issue -- "especially heinous, atrocious, or cruel" -- gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in Godfrey. The State's contention that the addition of the word

> "especially" somehow guides the jury's discretion, even if the term "heinous," does not, is untenable. To say that something is "especially heinous" merely suggests that the jurors should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is "especially heinous." Godfrey, supra, at 428-429, 64 L.Ed.2d 398, 100 S.Ct. 1759. Likewise in Godfrey the addition of "outrageously or wantonly" to the term "vile" did not limit the overbreadth of the aggravating factor.

100 L.Ed.2d at 382.

Florida's "especially heinous, atrocious or cruel" aggravating circumstance is identical to Oklahoma's and suffers the same fatal flaw. Although this Court has attempted to narrow the class of cases to which the factor applies, e.g., Brown v. State, 526 So.2d 903, 906-907 (Fla. 1988); State v. Dixon, 283 So.2d at 9., the jury was not adequately instructed on the limitations imposed via this Court's opinions. The instructions, as given, could have led the jurors to "believe that every unjustified, intentional taking of human life is `especially heinous'." Maynard, 100 L.Ed.2d at 382. Ronald Heath's jury was left with no guidance, resulting in their unchannelled discretion to determine the applicability of the aggravating circumstance.

In Shell v. Mississippi, the state court instructed the jury on Mississippi's heinous, atrocious or cruel aggravating circumstance using precisely the same wording as the trial judge used in this case. The Mississippi court told the jury the same definitions of "heinous", "atrocious" and "cruel" as

the trial judge told Heath's jury. 112 L.Ed.2d at 4, Marshall, J., concurring. The Supreme Court remanded to the trial court stating, "Although the trial court in this case used a limiting instruction to define the `especially heinous, atrocious, or cruel' factor, that instruction is not constitutionally sufficient." 112 L.Ed.2d at 4. Since the definitions employed here are precisely the same as the ones used in Shell, the instructions to Heath's jury were likewise constitutionally inadequate.

Proper jury instructions were critical in the penalty phase of Heath's trial. The defendant was entitled to have a jury's recommendation based upon proper guidance from the court concerning the applicability of the aggravating circumstances. The deficient instructions deprived him of his rights as guaranteed by the Eighth and Fourteenth Amendments. This Court must reverse his death sentence.

ISSUE VIII

THE TRIAL COURT ERRED IN SENTENCING HEATH AS AN HABITUAL OFFENDER ON THE ROBBERY CONVICTION SINCE THAT OFFENSE IS A FIRST DEGREE FELONY PUNISHABLE BY LIFE AND NOT COVERED BY THE HABITUAL OFFENDER STATUTE.

The trial court sentenced Heath as an habitual offender for his conviction for robbery with a firearm (T 2515-16), a first degree felony punishable by life imprisonment. Secs. 810.02(2)(a), 812.13(2)(a), Fla. Stats. Heath should not have been sentenced as an habitual offender on that conviction since Section 775.084 Florida Statutes makes no provision for enhancing penalties for first degree felonies punishable by life or life felonies. Gholston v. State, 16 FLW 46 (Fla. 1st DCA 1990); Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990); Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990), but, see, Tucker v. State, 16 FLW 822 (Fla. 5th DCA 1991). The habitual offender sentencing for robbery and burglary convictions must be reversed.

ISSUE IX

SECTION 775.084, FLORIDA STATUTES (1988), IS IMPERMISSIBLY INEQUITABLE, IRRATIONAL, AND VAGUE, IN VIOLATION OF ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The trial court applied the habitual offender statute, Section 775.084, Florida Statutes (1988), in sentencing Heath to an extended term in prison for the robbery convictions (T 2516). Heath is aware that district courts have upheld the constitutionality of this habitual offender statute. See, Arnold v. State, 566 So.2d 37 (Fla. 2d DCA 1990); Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990); Roberts v. State, 559 So.2d 289 (Fla. 4th DCA) dismissed, 564 So.2d 488 (Fla. 1990); King v. State, 557 So.2d 899 (Fla. 5th DCA), rev. den. 564 So.2d 1086 (Fla. 1990). This Court has not addressed the constitutionality of the statute which is facially invalid for several reasons: the statute violates the equal protection clause because it creates classifications which are unreasonable and irrational; it violates due process because, although it has a legitimate purpose, the means selected to achieve this purpose are unreasonable, arbitrary and capricious; it is void for vagueness because, by its terms, it is impossible to tell who initiates the process for enhanced sentencing, to whom the statute should be applied, and what criteria should be applied to invoke its provisions. Heath's sentences imposed pursuant to this statute must be reversed.

Section 775.084, Florida Statutes (1988) creates two classes of defendants, habitual felony offenders and habitual violent felony offenders, and allows for substantial increases in penalties for those who qualify as members of the classes. The statute provides in pertinent part:

> (a) "Habitual felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in this section, if its finds that:
>
> 1. The defendant has previously been convicted of two or more felonies in this state.
>
> 2. The felony for which the defendant is to be sentenced was committed within 5 years of the date of the conviction of the last prior felony or other qualified offense of which he was convicted, or within 5 years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later;
>
> 3. The defendant has not received a pardon for any felony or other qualified offense that is necessary for the operation of this section; and
>
> 4. A conviction of a felony or other qualified offense necessary to the operation of this section has not been set aside in any post-conviction proceeding.

Sec. 775.084(1)(a), Fla. Stat. (1988).

The procedure for declaring a defendant a habitual felony offender is delineated in subsections (3) and (4), as follows:

> (3) In a separate proceeding, the court shall determine if the defendant is a habitual felony offender . . . . The procedure shall be as follows:

(a) The court shall obtain and consider a presentence investigation prior to the imposition of a sentence as a habitual felony offender . . . .

(b) Written notice shall be served on the defendant and his attorney a sufficient time prior to the entry of a plea or prior to the imposition of sentence so as to allow the preparation of a submission on behalf of the defendant.

(c) Except as provided in paragraph (a), all evidence presented shall be presented in open court with full rights of confrontation, cross-examination, and representation by counsel.

(d) Each of the findings required as the basis for such sentence shall be found to exist by a preponderance of the evidence and shall be appealable to the extent normally applicable to similar findings.

* * *

(4)(a) The court, in conformity with the procedure established in subsection (3), shall sentence the habitual felony offender as follows:

* * *

1. In the case of a felony of the first degree, for life.

2. In the case of a felony of the second degree, for a term of years not exceeding 30.

* * *

(c) If the court decides that imposition of sentence under this section is not necessary for the protection of the public, sentence shall be imposed without regard to this section. At any time when it appears to the court that the defendant is a habitual felony offender . . ., the court shall make that determination as provided in subsection (3).

Recidivist statutes are not new in Florida. In fact, enhanced penalty provisions have been implemented and sanctioned for over sixty years. See Chapter 12022, Acts of 1927, and Cross v. State, 96 Fla. 768, 119 So. 380 (1928). In Cross, the Supreme Court upheld the enhanced penalty provisions for habitual offenders in Chapter 12022 against attacks that the law constituted cruel and unusual punishment and violated both equal protection and due process. The Court noted the genesis of recidivist statutes in other states and rejected the cruel and unusual punishment challenge, finding a consensus that punishment for habitual offenders should be made to fit the criminal as well as the crime. The Court reasoned that:

> In prescribing punishment for such offenders it is both competent and just to take into consideration not only the nature of the crime for which the punishment is to be imposed, but also the incorrigibility and depravity of the accused as demonstrated by previous convictions. ... 'Surely when one by his conduct has indicated that he is a recidivist, there is no reason for saying that society may not protect itself from his future ravages.'

119 So. at 386, quoting, State v. Dowden, 137 Iowa 573, 115 N.W. 211. As the above quote states, the need to protect society was the primary consideration of habitual offender sentencing. Accord, Reynolds v. Cochran, 138 So.2d 500, 502 (Fla. 1962) (recidivist statutes are designed to protect society from the continuing activities of habitual offenders).

In finding that the defendant was not denied equal protection, the Cross Court ruled that the equal protection clause under the Fourteenth Amendment,

> requires that no different degree or higher punishment shall be imposed on one than is imposed on all for like offenses, . . . And the State may undoubtedly provide that persons who have been convicted of crime may suffer severer punishment for subsequent offenses than for a first offense against the law, and that a different punishment for the same offense may be inflicted under particular circumstances, provided it is dealt out to all alike who are similarly situated.

119 So. at 387. In contrast, the statute here fails the equal protection standards because all who are similarly situated are not being subjected to the enhanced penalty provisions. Furthermore, the statute invites arbitrariness because it does not provide any criteria for determining who, among those who qualify, will receive the enhanced penalties.

A state's enforcement of its criminal laws must comply with the principles of substantial equality and fair procedure that are embodied in the Fourteenth Amendment to the United States Constitution. McCoy v. Court of Appeals, 486 U.S. ___, 100 L.Ed.2d 440 (1988). The equal protection clause of the Fourteenth Amendment requires, at a minimum, that a statutory classification be rationally related to a legitimate governmental purpose. Clark v. Jeter, 486 U.S. ___, 100 L.Ed.2d 465 (1988). "To be constitutionally permissible, a classification must apply equally and uniformly to all persons within the class and bear a reasonable and just relationship to

a legitimate state objective." State v. Leicht, 402 So.2d 1153, 1155 (Fla. 1981); Haber v. State, 396 So.2d 707 (Fla. 1981).

The same idea of fundamental fairness is required by the due process clauses of the federal and Florida constitutions. Substantive due process requires not only that a statute be for a legitimate purpose, but also that "the means selected shall have a reasonable and substantial relation to the object sought to be attained and shall not be unreasonable, arbitrary, or capricious." State v. Saiez, 489 So.2d 1125, 1128 (Fla. 1986).

Due process also requires that a criminal statute not be overly vague.

> The question presented by a vagueness challenge, . . ., is whether the language of the statute is sufficiently clear to provide a definite warning of what conduct will be deemed a violation; that is, whether ordinary people will understand what the statute requires or forbids, measured by common understanding and practice.

State v. Bussey, 463 So.2d 1141, 1144 (Fla. 1985). A separate function of the void for vagueness doctrine is "to curb the discretion afforded to law enforcement officers and administrative officials in initiating criminal prosecutions." Powell v. State, 508 So.2d 1307, 1309 (Fla. 1st DCA 1987).

The habitual offender statute violates the constitutional provisions cited above in that the classifications it creates are neither equitable nor rational. The statute allows anyone with two prior felony convictions in the State of Florida, one of which was committed within the last five years, to be

classified an "habitual felony offender". Not only is an increased statutory maximum applied when sentencing this individual, but the sentencing guidelines no longer apply. Sec. 775.084(4), Fla. Stat. (1988). The guidelines also increase punishment based on prior criminal record, and the statute sets up no objective factors or method to determine who should be "habitualized" and who should be sentenced pursuant to the guidelines. The statute also fails to explain who decides whether an individual should come under its classification -- the prosecutor or the court.

Because the statute provides no objective criteria for who should be sentenced as an habitual offender, the prosecutor has unfettered discretion in determining when to seek an enhanced habitual felony offender sentence. Consequently, the statute may be applied in a totally arbitrary and inequitable manner. Under the statute, two defendants with identical or similar criminal records will be treated totally differently. As an habitual offender, one will suffer an extended term of imprisonment and loss of basic gain-time. The other defendant will be sentenced under the guidelines, within the recommended range and with full gain-time eligibility. The prosecutorial discretion in seeking habitual offender sentencing thus violates both equal protection and due process, because the statute will not be applied equally and uniformly to all persons who qualify as members of the class.

Furthermore, the statute is unconstitutionally vague because it does not curb the prosecutor's discretion in

pursuing habitual felony offender sentencing, nor does it inform the court how to decide whether actually to impose a habitual offender sentence.

The 1988 amendment to Section 775.084 also eliminated the requirement that the court find enhanced sentencing necessary for the protection of the public. Compare, Sec. 775.084(3), Fla. Stat. (1988), with Sec. 775.084(3), Fla. Stat. (1987). Nevertheless, the statute retains the provision that if the court decides sentencing under the statute is not necessary for the protection of the public, a sentence shall be imposed without regard to the statute. Sec. 775.084(4)(c), Fla. Stat. (1988). Further adding to the confusion, in the same paragraph that appears to make application of habitual offender sentencing optional, other language suggests that habitual offender sentencing is mandatory. The second sentence of Section 775.084(4)(c) reads:

> At any time when it appears to the court that the defendant is a habitual felony offender or a habitual violent felony offender, the court shall make that determination as provided in subsection (3).

In other words, it is not clear whether the trial court must impose a sentence under the statute if the defendant has two or more felony convictions in the state, for which he has not been pardoned, and the offense charged was committed within five years of the last conviction or the defendant's release from prison or other commitment; or whether the trial court may impose an enhanced sentence if the court finds it is necessary

for the protection of the public, and the defendant otherwise qualifies for habitual felony offender classification. In this regard, the statute is unconstitutionally vague as "persons of common intelligence must necessarily guess at its meaning and differ as to its application." Powell v. State, supra, at 1309-1310; Marrs v. State, 413 So.2d 774, 775 (Fla. 1st DCA 1982).

If the statute is mandatory, it is unreasonable, arbitrary and capricious. The prosecutor has absolute discretion in seeking habitual felony offender sentencing, but the court has no discretion in imposing an enhanced sentence on an habitual felony offender. It is well settled that it is "within the province of the trial court to fix by sentence the punishment within the limits prescribed by statute." Brown v. State, 13 So.2d 458, 461 (Fla. 1943). See also, State v. Benitez, 395 So.2d 514 (Fla. 1984). Under the statute, the trial court's discretion is usurped by the state attorney, who has total discretion in seeking habitual offender sentencing, whereas the court must then impose an enhanced sentence if the defendant so qualifies.

The statute also fails to bear a reasonable and just relationship to a legitimate state interest. While the statute may appear to be aimed at the most dangerous criminals, by its very terms it excludes the most serious crimes. A defendant cannot be sentenced as an habitual felony offender if his offense is classified as a first degree felony punishable by

life, a life felony, or a capital offense. Sec. 775.084(4)(a), Fla. Stat. (1988).

While the state can legitimately and rationally increase the penalties of those who continually violate the law, Cross v. State, supra, it is imperative that the means for doing so be reasonably related to the state's purpose and that the law be applied equally and uniformly. For the foregoing reasons, appellant contends that the amended habitual felony offender statute, Section 775.084, Florida Statutes (1988), should be declared unconstitutional on its face.

CONCLUSION

Based upon the arguments presented above, Ronald Heath respectfully asks this court to either reverse the trial court's judgment and sentence and remand for a new trial, reverse for a new sentencing hearing before a jury, or reverse the trial court's sentence and remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Carolyn Snurkowski, Assistant Public Defender, The Capitol, Tallahassee, Florida; and a copy has been mailed to appellant, RONALD HEATH, #065145, Florida State Prison, Post Office Box 747, Starke, Florida 32091, on this 15TH day of August, 1991.

DAVID A. DAVIS