IN THE SUPREME COURT OF FLORIDA

ELMER LEON CARROLL,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

CASE NO. 79,829

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

The defendant was charged by indictment with one count of first degree felony murder (by asphyxiation) and sexual battery on a child under 12 years old. (R 996-997) The defendant was arraigned and entered a plea of not guilty to the charges. (R 1001)

The defendant, who was initially found incompetent and was hospitalized, filed a motion to determine competency to stand trial. (R 1038-1039) According to the reports of the doctors and their testimony at the competency hearing, the defendant was psychotic. (R 1057-1077) Dr. Benson determined that this psychosis was severe enough to cause the defendant to be incompetent to stand trial. (R 1062, 1344-1349) Dr. Kirkland, who initially hospitalized the defendant because of his incompetency, opined

that the defendant was now well enough to proceed to trial. (R 1073, 1357-1366) The other two doctors also opined that the defendant was competent to stand trial. (R 1057, 1066, 1367-1387) Following the hearing, the court ruled that the defendant was competent to stand trial. (R 1081)

Defense counsel filed a motion to suppress evidence removed from the defendant at the time of his arrest, and all evidence, including DNA samples obtained from the defendant, which was the fruit of the arrest, contending that the stop of the defendant and his arrest, without probable cause, was unlawful. (R 1088-1092) Following a hearing, the trial court denied the motion to suppress. (R 1103)

The defendant also filed a motion in limine or to suppress the DNA profiling in this case, arguing that the FBI's methods of profiling, using a limited database, were not validated and, hence, not reliable. (R 1093-1095) The court initially reserved ruling on this issue, but, at trial, denied the defendant's motion, ruling the DNA evidence was admissible. (R 63-70, 74-77, 1103)

At trial, the defense presented evidence of the defendant's insanity at the time of the offense. (R 625-626, 633-783) The trial court denied the defendant's motions for judgment of acquittal and the jury found the defendant guilty as charged. (R 620-621, 784, 879-881)

The penalty phase of the trial was held three weeks later. The state presented additional evidence concerning a

fight with a beer bottle that the defendant had with his ex-girlfriend's new boyfriend. (R 888-896) Additionally, the state presented a 1980 conviction for aggravated assault and additional testimony of the medical examiner concerning whether there was pain associated with the asphyxiation and sexual battery. (R 887-888, 896-904) The doctor opined that there would be no physical pain, but fear, associated with the asphyxiation and, although the sexual battery would have been painful if the victim were conscious, there was no way of knowing if she had already lost consciousness. (R 896-904) The defense presented no additional testimony in mitigation. However, the state and defense did stipulate that the defendant had been sexually molested when he was a child. (R 914-917; Defense Exhibit No. 1) The jury recommended by a unanimous vote that the defendant be sentenced to death. (R 1281)

The Court followed the jury's recommendation and sentenced the defendant to death for the first degree murder conviction, finding three aggravating factors: (b) the defendant was previously convicted of aggravated assault in 1980 and aggravated battery in 1992; (d) the murder was committed during the course of a sexual battery; and (h) the murder was heinous, atrocious, or cruel. (R 1285-1289, 1297) The court rejected all of the statutory mitigating factors. (R 1290-1296) Specifically, the court rejected the mental mitigator of (b) under the influence of extreme mental or emotional disturbance, by recounting the trial testimony from experts that the defendant knew right

from wrong; but the court did note that some experts believed that the defendant did not know right from wrong and was psychotic and hallucinating. (R 1290-1294) In weighing this testimony, the court chose to believe the state's experts. (R 1294) Additionally, although noting that there was some testimony regarding the defendant's bizarre behavior prior to the incident, the court still rejected this factor, stating that there was no testimony that defendant was exhibiting bizarre behavioral characteristics at time of murder or sexual battery. (R 1293-1294) Similarly the trial court rejected mitigating factor (f) the capacity to appreciate criminality of conduct or to conform his conduct to the requirements of law was substantially impaired, by stating simply that although the defendant may have been emotionally disturbed, he "did know the difference of right from wrong" and was able to appreciate his criminality and conform his conduct to the requirements of the law. (R 1295) The trial court did find as a non-statutory mitigating circumstance that the defendant "does suffer from some possible mental abnormalities and has an antisocial personality." (R 1296)

The court concluded that the aggravating circumstances outweighed the mitigating factor, and sentenced the defendant to death. (R 1297) Additionally, the court imposed a consecutive life sentence with a twenty-five year minimum mandatory provision on the sexual battery count. (R 1297) The court also ordered that the sentences imposed in this case were to run consecutive to the sentence imposed on an aggravated battery conviction. (R

1297)

The defendant filed a motion for new trial, complaining of, inter alia, the introduction of evidence of the defendant's previous incarceration and character and pattern of criminal conduct; and filed an amended motion for new trial, which included an allegation of newly-discovered evidence, to-wit: a telephone call to the state attorney's office regarding the victim's step-father's alleged sale of drugs, including sales to the defendant, and the step-father's alleged use of drugs. (R 1262-1263, 1326-1327; 1338) A notice of appeal was timely filed. (R 1318) This appeal follows.

STATEMENT OF THE FACTS

On October 30, 1990, Robert Rank awoke at about 6:00 a.m., got dressed, and went to awaken his ten-year-old step-daughter, Christine McGowan. (R 304) Rank's wife, who worked nights, was still at work. (R 300) He noticed that the bedroom door, which had been open when he checked on Christine at about midnight, was pulled closed. (R 304)

Turning on the bedroom light, Rank noticed that his step-daughter was lying face down the bed, with the bedspread pulled up over her ears. (R 305) When she did not respond to his calls, he went to her bed, uncovered her, and noticed that she appeared discolored. (R 305) He turned her over and observed bleeding from between her legs. (R 305) Rank immediately went and called 911. (R 305) While on the telephone, he looked out the window and saw that his company pick-up truck was missing. (R 306) He reported to the police on the phone that the truck was missing. (R 306)

Rescue personnel and the police responded to the scene. (R 323) The police officer testified that the victim had on a pair of panties with blood in the crotch area. (R 324) Her nightgown was lying beside her, having been removed by the rescue personnel. (R 324) The victim had bruises and scratches around her neck. (R 324) The medical examiner reported that the victim died of asphyxia as a result of mechanical obstruction of her airway. (R 406) Physical evidence, the bruises and scratches to her neck, indicated strangulation, and an injury to her mouth

revealed something being placed over her mouth. (R 406, 410-411) The doctor also noted a blunt force injury to the side of the girl's head. (R 413) There also were injuries to the victim's vaginal opening and a tearing of the hymen, consistent with sexual intercourse. (R 415-416) There also was discoloration to her anal opening, indicating attempted penetration by a blunt object. (R 416)

Deborah Hiatt, who lives on Highway 50, near the entrance to Speed World, observed Rank's pick-up truck parked near the entrance to Speed World when she left for work at approximately 6:50 a.m. on October 30, 1990. (R 356-357) While travelling east on Highway 50 on her way to work, she observed a "straggly looking" man wearing a brown jacket walking east on Highway 50. (R 358) Later that morning, while at work, Ms. Hiatt heard on the radio that police were looking for the truck she had seen. (R 359) She returned home, checked the truck to see if it matched the description from the radio, and called the police. (R 359)

The police were dispatched to the scene of the truck at 8:40 a.m. (R 336) Meanwhile, Carl Young, a wildlife officer for the State of Florida, was traveling home from work on Highway 520 and observed, approximately two miles from Speed World and 1¼ miles from the intersection of Highway 520 and Highway 50, a transient-looking man walking along the road, heading in the direction of a convenience store. (R 4-7, 366-367) Proceeding onto Highway 50, at approximately 9:00 a.m., Young observed the

police near the entrance to Speed World, with their guns drawn, examining the pick-up truck. (R 8, 368-369) Thinking that they may have required assistance, Young stopped to help. (R 8-9, 368-369)

Ten minutes after the police arrived, Hiatt approached Young and the officers and indicated that she had called about the truck. (R 10, 360, 369) Responding to Young's questions, she indicated that she had not seen anyone in the truck, but reported a "scruffy-looking" man wearing a brown jacket, whom she had seen "in the vicinity," although it was about a mile from the truck. (R 10, 360, 363, 369) Young believed that the man he had seen on Highway 520 matched this general description, so he immediately left the scene to drive back to the location on Highway 520. (R 10-11, 360, 369-370)

Young once again observed the defendant walking alongside the roadway and pulled off of the road behind him. (R 11, 370) The wildlife officer called out to the defendant, who kept walking as if he had not heard Young. (R 12-13, 370, 375-376) Young drew his weapon and, at gunpoint, ordered the defendant to stop, place his hands on his head, and lie spread-eagle on the ground. (R 12-13, 370-371) The defendant looked around, saw the wildlife officer, and complied with the orders. (R 13, 370-371) Meanwhile, the police arrived at the scene and the defendant was "detained." (R 13, 340, 371) Young patted the defendant's pants pockets, and feeling something hard, pulled out a box cutter from his hip pocket and a set of keys and some pennies from his left

front pocket. (R 13-14, 371) Young had the police radio the officer at the scene of the truck and determined that a numbered tag on the keys matched the number of the pick-up truck. (R 14-15, 342, 371-372) The police then handcuffed the defendant and advised him of his rights. (R 343, 373)

At trial Deputy McDaniel, one of the arresting officers, in response to the state's questions, told the jury that the defendant had no reaction to being stopped. "He had nothing to say. He didn't ask why we stopped him." (R 344) The defendant's motion for mistrial, on the grounds that this was a comment on the defendant's post-arrest silence, was denied. (R 344) On redirect, the state attorney asked the deputy again about the defendant's demeanor and again the deputy responded, "He showed no emotion at all and it was unusual that he didn't even question at the time--" (R 349) The defendant's second motion for mistrial was again denied. (R 350)

It was discovered that the defendant was a resident of The Lighthouse Mission, which was located next door to the Rank home. (R 293-295) Later, police located two witnesses who observed the defendant and the victim's pick-up truck at a 7-11 convenience store on the morning following the killing. (R 312-317, 327-332)

A serologist testified that stains recovered from the victim matched her step-father's and the defendant's blood types, something that 36 percent of the male population would also match. (R 487-488, 491-492, 492-493) She testified that no blood

was found on the defendant's undershorts. (R 494) A hair and fiber examiner testified that hairs recovered from the victim and her clothing were consistent with those of the defendant. (R 558) The expert also testified, however, that several hair samples did not match those of the defendant. (R 563-565) The FBI expert testified, over the defendant's renewed objections, that the DNA samples obtained from the stains matched those of the defendant, but that there was some overlapping between samples of the defendant and the victim. (R 586, 603) The two samples which were uninterpretable were those comparing the vaginal swab of the victim with the blood sample of the defendant. (R 603-604) Additionally, he opined that, based upon the FBI's database, the chance of a random match of those samples which he could match was one in 50,000. (R 592-593) Some of the comparisons had a difference between them of two percent, which is within the permitted error range the FBI allows (plus or minus 2.5 percent), but which is outside of the permitted error range of other laboratories (plus or minus 1.5 percent). (R 601-602)

At trial, the defense presented a psychologist, Dr. Elizabeth McMann, who testified that the defendant was extremely disorganized and was experiencing both auditory and visual hallucinations two days after the offense. (R 650-654) The psychologist and a psychiatrist, Dr. Jeffrey Danziger, both testified that the defendant was psychotic at the time, out of touch with reality. (R 654-655, 678) The psychiatrist also testified concerning the defendant's visual and auditory halluci-

nations and indicated that the defendant was schizophrenic and suffering from alcohol and drug abuse. (R 670, 674) His father had abused him as a child. (R 671) In the psychiatrist's opinion, the defendant was insane at the time of the offense, that is, he was not able to tell right from wrong and, within a reasonable degree of certainty, was not responsible for his actions. (R 675)

During the state's cross-examination of Dr. Danziger the state was permitted to question the doctor in front of the jury about the defendant's previous incarceration; additionally the state questioned him about previous allegations regarding the defendant sexually abusing children. (R 681-696, 723-726, 731-734) The state also asked the doctor that if the defendant were suffering from schizophrenia, when would it be in remission? "Do you," Assistant State Attorney Jeffrey Ashton inquired, "have an opinion whether the defendant would desire to have sex with young children?" (R 736-738) The defendant's objection to this question was sustained, but the motions for mistrial were denied. (R 738, 760, 784)

Another psychiatrist, Dr. Edward Benson, also testified for the defense that the defendant was experiencing hallucinations. (R 747-748) He testified that the defendant was confused about who his defense attorney was, that he was not sure that it was really Mr. Taylor [the defense lawyer]. (R 755) Dr. Benson diagnosed the defendant during his first visit as suffering from delusions which were interfering with his contact with external

reality. (R 754) At his second visit with the defendant, Dr. Benson diagnosed the defendant as suffering from paranoid schizophrenia, with a previous history of substance abuse, and having a borderline intelligence quotient of 79. (R 758) Dr. Benson found the defendant to be actively psychotic at the time of the crime, therefore not knowing what he was doing or its consequences. (R 759)

The defense also presented the testimony of two bar waitresses who testified that the defendant was acting very bizarre on the evening preceding the crime. They observed the defendant talking to his jacket, a mirror in the bar, and the juke box, saying that he was going to burn in Hell and that Satan and the devil were not myths. (R 634-636, 640-642) One waitress also saw the defendant crying. (R 636)

The state rebutted this testimony with two psychiatrists. One was unable to determine whether the defendant was sane or insane at the time of the offense, believing that he was malingering, although admitting that there may have been moments, such as when Dr. McMann interviewed him, where he was not malingering. (R 510, 514-515, 526) He simply had no opinion as to the defendant's mental condition at the time of the offense. (R 534) Another state psychiatrist testified that the defendant did know right from wrong although he was schizophrenic and delusional and was probably intoxicated at the time of the offense. (R 794) He also verified that the defendant was psychotic and had a history of alcohol abuse. (R 789) Dr. Kirkland also testified that

initially he opined that the defendant was incompetent to stand trial and therefore committed him to a mental hospital. (R 790) Mr. Carroll, he opined, also suffers from an antisocial personality disorder and regularly had difficulty conforming his behavior to what society expects. (R 792)

SUMMARY OF ARGUMENT

Point I. The trial court erroneously denied the defendant's motion to suppress evidence seized following an illegal arrest or detention of the defendant. There was no probable cause to arrest the defendant based solely on the insufficient general description of a scruffy-looking man wearing a brown jacket, where the defendant was about two miles away from the abandoned truck and was doing nothing illegal or to arouse suspicion when the wildlife officer observed him.

Point II. During the prosecutor's questioning of a state's witness, that witness commented on the defendant's silence at the time of his arrest. This testimony infringes on the defendant's constitutional right to remain silent. The trial court should have granted the motions for mistrial.

Point III. The trial court erred in allowing into evidence that the defendant was in prison almost continuously for the past ten years, that the defendant had been accused of committing sexual acts with children on two previous occasions, and the question of whether the defendant was a pedophile and would desire to have sex with young children. All these items are totally irrelevant to any material fact in issue in this case. The defendant's motion for mistrial should have been granted.

Point IV. The trial court erroneously allowed evidence of the FBI's DNA comparison testing and their statistical probabilities of a random match, where the state failed to show that

the FBI testing and statistical results have been accepted as accurate. Further, the court would not permit the defendant to question the expert about jurisdictions where the FBI's DNA test results were ruled inadmissible. Additionally, the court erred in refusing a continuance so that the defense could contact DNA experts to show that the FBI test results were not reliable and accepted.

Point V. The trial court erred in making its findings of fact in support of the death sentence where the findings were insufficient, where the court failed to consider appropriate mitigating factors, where the court erroneously found an inappropriate aggravating circumstance, and where a comparison to other capital cases reveals that the only appropriate sentence in the instant case is a life sentence.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED FOLLOWING HIS ILLEGAL ARREST WHERE PROBABLE CAUSE TO ARREST HIM WAS LACKING, IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 12, FLORIDA CONSTITUTION.

The defendant was arrested at gunpoint while innocently walking along a public roadway two miles from the abandoned pick-up truck based solely on a witness's statement to police that she had seen a "scruffy-looking" man wearing a brown jacket in the vicinity (one mile away) of the truck. (R 10) Such a generalized description does not provide the probable cause necessary to arrest the defendant at gunpoint and conduct a search incident to that custodial detention.

Article I, Section 12 of the Florida Constitution provides that the right of citizens to be secure in their persons against unreasonable searches and seizures shall not be violated and that no search and seizure will occur absent probable cause. See also Amend. IV, U.S. Const. While a person may be searched incident to a lawful arrest [see Chimel v. California, 395 U.S. 752 (1969)], no arrest shall occur without a warrant or absent probable cause. D'Agostino v. State, 310 So.2d 12 (Fla. 1975); §901.15, Fla. Stat. (1991).

That the defendant was not "arrested" here cannot be seriously maintained. The detention of the defendant at gunpoint and by ordering the defendant to the ground, after which a full

search was conducted, certainly amounts to more than a mere encounter or an investigatory stop. See London v. State, 540 So.2d 211, 213 (Fla. 2d DCA 1989); Dunaway v. New York, 442 U.S. 200 (1979). While an officer may temporarily stop an individual for a very limited investigatory stop on less than probable cause, as outlined in Terry v. Ohio, 392 U.S. 1 (1968), it must be considerably less intrusive than a seizure of the person, such as occurred here. It was evident that the defendant, lying on the ground at gunpoint, was not free to leave but was being restrained against his will. London v. State, supra; Dunaway v. New York, supra. Therefore, probable cause to believe that the defendant committed a felony must have existed prior to the seizure to justify the detention and commit such an intrusion. See also D'Agostino v. State, supra.

As stated in D'Agostino:

> The probable cause required for a warrantless arrest has been compared to a magistrate's assessment of "probable cause" for a search or arrest warrant to issue. Whiteley v. Warden, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971) rejected application of any lesser standard by a court reviewing a police assessment at the scene of probable cause for such a warrantless arrest as here. Whiteley also involved an arrest by an officer acting on a BOLO and reiterated the necessity of facts in the officer's possession to support the probable cause necessary for making the arrest and then the search. See Collins v. State [65 So.2d 61 (Fla.1953)] supra.
>
> It is settled that in order to make a valid arrest probable cause must exist prior thereto. Moreover, a BOLO alert does not in and of itself constitute adequate probable cause for an arrest,

> absent some supporting factual data in the possession of the arresting officer prior to making the arrest, which would support a finding of probable cause. See Whiteley v. Warden, supra. Clearly the information in the BOLO did not contain sufficient and actual data as the basis for probable cause for making an arrest or search. The arresting officer must be possessed of information prior to the arrest which would constitute the required probable cause to justify the arrest being made.

Id. at 15. See also Smith v. State, 389 So.2d 654 (Fla. 2d DCA 1980).

The probable cause standard for a law enforcement officer to make a legal arrest is whether the officer has reasonable grounds to believe that **the person** has committed a felony. Blanco v. State, 452 So.2d 520 (Fla. 1984); State v. Joseph, 593 So.2d 594, 595 (Fla. 3d DCA 1992). While a **detailed** description provided by a witness, coupled with proximity in time and place to the scene of the crime, can furnish probable cause to make an arrest [see State v. Gavin, 594 So.2d 345 (Fla. 2d DCA 1992); State v. Joseph, supra], such was lacking in the instant case. A mere general description, such as that given here of a "scruffy-looking man in a brown jacket" who was no longer in the immediate vicinity two hours after the truck was first seen, cannot suffice to provide probable cause to arrest the defendant and search him.

In D'Agostino v. State, supra, a general description was given by witnesses to the burglary that the perpetrator had "bare legs, and white socks and shoes." The defendant, who apparently fit this general description, was stopped, arrested,

and searched, with the search revealing the stolen jewelry. This Court indicated that this general description was "too flimsy" upon which to base probable cause.

> To allow it would permit a game of "blind man's bluff" and if the person caught turns out to have stolen property, then, contrary to all legal principles, this could be allowed to relate back as a reason for the arrest and search. To be sure, discovery here of apparently stolen goods upon a search would make it appear that some crime had perhaps been committed, but it would also lay a dangerous predicate for the arrest, search and seizure of innocent citizens which our Constitution and laws have jealously guarded through the years. Such a "hit and miss" approach to arrests cannot be permitted.

D'Agostino v. State, supra at 16. See also United States v. Fisher, 702 F.2d 372 (2d Cir. 1983); Commonwealth v. Jackson, 331 A.2d 189 (Pa. 1975). Cf. 1 LaFave, Search and Seizure, §3.4(c), at 737-745 (2d ed. 1987).

Similarly, in London v. State, supra, the court ruled that a general description fell short of establishing the requisite probable cause for an arrest. In London, a police officer received a report that a black male, armed with a handgun, and wearing a mask had just robbed a sandwich shop. On the way to the scene six minutes after the robbery, the officer observed an older white Oldsmobile Cutlass occupied by two blacks which was travelling in a direction away from the scene. This was the only traffic the officer observed on his way to the robbery scene. Upon arrival at the scene, a witness told the officer that he had seen a white vehicle parked across from the sandwich shop which

later pulled off at a high rate of speed in the direction the officer had observed the Oldsmobile driving. The officer, convinced that the car he had seen was the same one described by the witness, issued a BOLO for the vehicle. A short time later another officer observed a car fitting the description with two black males inside. It was the only car on the road at the time and the driver appeared suspicious, making eye contact with the officer, then quickly averting his eyes. She stopped the car and arrested the occupants, who confessed to the crime. In suppressing the confession, the court ruled that "a vague description will not justify law enforcement in stopping, much less arresting, every individual or vehicle which might possibly meet that description." London v. State, 540 So.2d at 213. See also Smith v. State, supra, wherein the court noted that the description of the robber as being a black male, 6'3" tall, weighing 180 pounds with a beard, was "so generalized that, standing alone, it could not have provided probable cause for the arrest" two hours after the crime (but that coupled with the very specific description of the vehicle the robber was driving, there was probable cause to arrest). Smith v. State, 389 So.2d at 655, n. 1.

Therefore, the probable cause necessary for the arrest was lacking based solely on this generalized description. Even if the actions here amounted only to an investigatory stop, a general description, as indicated above in London v. State, supra, will not provide a particularized reasonable suspicion to stop the defendant and search for weapons. See also State v.

Hetland, 366 So.2d 831 (Fla. 2d DCA 1979), **approved** 387 So.2d 963 (Fla. 1980); Bristol v. State, 584 So.2d 1086 (Fla. 2d DCA 1991).

Finally, there is no adequate showing of probable cause for the officer to believe that the defendant was armed. The pat-down revealed only a hard flat object in the defendant's hip pocket, which, when the officer removed it, turned out to be a box cutter. The officer then reached into the defendant's left front pocket removing all of its contents, to-wit: some change and the keys. If the officer is allowed to remove these innocuous items, then any intrusive search and seizure following a limited pat-down for weapons will be lawful and the protections discussed in Terry v. Ohio, will be meaningless. Dunn v. State, 382 So.2d 727 (Fla. 2d DCA 1980), **approved in** Doctor v. State, 596 So.2d 442 (Fla. 1992).

In conclusion, the police lacked probable cause to arrest the defendant and even lacked reasonable founded suspicion to stop him and search for weapons two hours later and two miles from the scene based solely upon the generalized vague description of a scruffy-looking man in a brown jacket somewhere in the vicinity (a mile away) of the truck. Further, there existed no reasonable belief that the keys and change in the defendant's front pocket could be a weapon to justify the further intrusion and seizure. The keys and any and all evidence seized from the defendant's person, including the hair and blood samples and the DNA tests must be suppressed as fruits of the poisonous tree. Wong Sun v. United States, 371 U.S. 471 (1963).

POINT II.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTIONS FOR MISTRIAL FOLLOWING TWO COMMENTS ON HIS POST-ARREST SILENCE, IN VIOLATION OF THE DEFENDANT'S RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

The privilege against self-incrimination is protected by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Florida Constitution. It is well-established that reference to the post-arrest silence of a defendant is a violation of that privilege against self-incrimination. In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court of the United States specifically held that it was error for a prosecutor to refer to a defendant's silence in the face of police interrogation:

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.

384 U.S. at 468, n. 37 (citations omitted).

Florida courts have often utilized this language to reverse convictions based on improper comments on a defendant's silence. See, e.g., Bennett v. State, 316 So.2d 41 (Fla. 1975). Any testimony which is "fairly susceptible" of being interpreted by the jury as a comment on the right of silence is prohibited. State v. Kinchen, 490 So.2d 21 (Fla. 1985); Trafficante v. State,

92 So.2d 811 (Fla. 1957).

Here, the prosecutor elicited comments by one of the arresting officers that was fairly susceptible of such an interpretation. The officer indicated that, upon holding the defendant at gunpoint, he "had almost no reaction at all. He didn't ask why we stopped him." (R 344) And later, even after an objection had been sustained to this comment, the officer further testified, "He showed no emotion at all and it was unusual that he didn't even question at the time --" (R 349) Despite sustaining the objections, the defendant's motions for mistrial were denied. (R 344, 349, 620-621) The jury could well have taken this silence as an indication of guilt, since the average juror may believe that at such moment an accused who felt himself innocent would have protested the stop and the arrest and would have questioned the officers about it. See Carr v. State, 561 So.2d 617, 619 (Fla. 5th DCA 1990); Breniser v. State, 267 So.2d 23, 24 (Fla. 4th DCA 1972); Walker v. United States, 404 F.2d 900 (5th Cir. 1968).

Thus, it was improper to elicit this testimony. The trial court should have granted the motions for mistrial. Reversal is warranted.

POINT III.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO ELICIT TESTIMONY THAT THE DEFENDANT HAD PREVIOUSLY BEEN IMPRISONED AND HAD BEEN ACCUSED OF COMMITTING SEXUAL ACTS WITH CHILDREN AND WHETHER THE DEFENDANT WOULD DESIRE TO HAVE SEX WITH YOUNG CHILDREN, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

The state was permitted, after an extensive proffer and over the defendant's objection, to question the defense psychiatrist as to whether he was aware of the fact that while the defendant had previously been imprisoned over the previous ten years he had only been observed to exhibit psychotic symptoms on one occasion, and that, when he had been accused of committing sexual acts with children on two previous occasions, he claimed that he had blacked out and did not remember the incidents and used his alcohol abuse as an excuse for his unacceptable behavior. (R 681-696, 723-726, 731-734) Further, the state questioned the doctor as to when the defendant's schizophrenia would be in remission and whether the defendant would desire to have sex with young children. (R 736-738) The state contended that it was relevant to show the jury that the defendant was a pedophile. (R 737) The defendant's objection to this last question was sustained, but the motion for mistrial was denied. (R 738, 760, 784) The denial of the mistrial and the allowance of the evidence of other crimes of the defendant shows nothing more than propensity of the defendant to commit crimes against children. Its introduction was reversible error.

Section 90.404(2)(a), Florida Statutes (1991), provides that similar fact evidence of other crimes, wrongs, or acts is admissible only "when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, **but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.**" (emphasis added) See also Williams v. State, 110 So.2d 654 (Fla. 1959).

> Our view of the proper rule simply is that **relevant** evidence will not be excluded merely because it relates to similar facts which point to the commission of a separate crime. . . . [E]vidence revealing other crimes is admissible **if** it casts light upon the character of the act under investigation by showing motive, intent, absence of mistake, common scheme, identity or a system or general pattern of criminality so that the evidence of the prior offenses **would have a relevant or material bearing on some essential aspect of the offense being tried.**
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> * * *
>
> In view of our analysis of the precedents and for the future guidance of the bench and bar, the rule which we have applied in affirming this conviction simply is that evidence of any facts **relevant to a material fact in issue except where the sole relevancy is character or propensity of the accused** is admissible unless precluded by some specific exception or rule of exclusion. This rule we hold applies to **relevant** similar fact evidence illustrated by that in the case at bar even though it points to the commission of another crime. The matter of relevancy should be carefully and cautiously considered by the trial judge.

Id. at 662 (emphasis added). See also Stano v. State, 473 So.2d 1282 (Fla. 1985) (to be relevant and admissible, evidence must tend to prove a fact in issue, and burden is on the party seeking admittance to demonstrate relevance).

The fact that the defendant was in prison almost continuously for the past ten years, that the defendant had been accused of committing sexual acts with children on two previous occasions, and whether the defendant was a pedophile and would desire to have sex with young children, are all totally irrelevant to any material fact in issue in this case. None of these matters are relevant in any way to the issue at trial, whether the defendant was sane or insane at the time of the offense.

It is error for a witness to testify concerning a defendant's arrest for unrelated crimes, which the gratuitous reference to spending most of the last ten years in prison was. Wilding v. State, 427 So.2d 1069 (Fla. 2d DCA 1983). So, too, was the extraneous mention of accusations of sexual acts with children.

The evidence of the collateral crime must be clearly and substantially relevant to the case being tried, which it was not in the instant case. As the court announced in Headrick v. State, 240 So.2d 203 (Fla. 2d DCA 1970):

> This is not to say that by our holding here we mean to lay down an abstract concept that in all cases similar fact evidence is admissible, merely because it had some degree of relevancy, however slight, to the facts in issue being tried. If the asserted relevance is illusory, fancied, suppositious, or

> unsubstantial, the extraneous evidence should not be admitted because the inherent danger to the defendant on trial before a jury is too acute to allow his fate to rest upon such a slender thread of admissibility.

Headrick v. State, 240 So.2d at 205. Here, the relevancy advanced by the state, to test the basis of the defense psychiatrist's opinion, is "illusory, fancied, suppositious, [and] unsubstantial." It was nothing but an excuse to tell the jury of other crimes or sexual allegations against the defendant.

The matters were not relevant to prove any material issue at trial. Instead, the trial court should have carefully analyzed the prior offenses and accusations beyond the mere assertion offered by the state before they were admitted into evidence lest the trial of fact devolve into a battle of innuendo, showing only character, disposition and reputation. United States v. San Martin, 505 F.2d 918 (5th Cir. 1974) (interpreting the similar federal rule). The other acts or crimes were not relevant to the material issues framed in the instant case. The court's ruling allowing these items and the denial of the motions for mistrial must be reversed.

Even if there was some slight relevance of these other actions, the evidence still should not be admitted at trial since its probative value would be substantially outweighed by the prejudicial effect it would have on the jury, showing propensity to commit crimes. Similar fact evidence, even if it has some arguable relevance should be excluded if "the danger of unfair prejudice substantially outweigh[s] its probative value." Henry

v. State, 574 So.2d 73, 75 (Fla. 1991). See also Bryan v. State, 533 So.2d 744 (Fla. 1988); Amoros v. State, 531 So.2d 1256, 1260 (Fla. 1988). This is precisely the law set forth in Section 90.403, Florida Statutes (1991), which must also be examined in a Williams rule situation.

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

§90.403, Fla. Stat. (1991). If the evidence adduced would devolve from development of facts pertinent to the main issue of guilt or innocence into an attack on the character of the defendant, it should be excluded. Williams v. State, 117 So.2d 473 (Fla. 1960).

As the Court stated in Jackson v. State, 451 So.2d 458 (Fla. 1984):

> There is no doubt that this admission [to prior unrelated crimes] would go far to convince men of ordinary intelligence that the defendant was probably guilty of the crime charged. But, the criminal law departs from the standard of the ordinary in that it requires proof of a particular crime. Where evidence has no relevancy except as to the character and propensity of the defendant to commit the crime charged, it must be excluded.

Id. at 461. Our justice system requires that in every criminal case the elements of the offense must be established beyond a reasonable doubt without resorting to the character of the defendant or to the fact that the defendant may have a propensity to commit the particular type of offense. Peek v. State, 488

So.2d 52, 56 (Fla. 1986).

Thus, in Straight v. State, 397 So.2d 903 (Fla. 1981), this Court held that the admission of improper collateral crime evidence is "presumed harmful error because of the danger that a jury will take the bad character or propensity to commit crime thus demonstrated as evidence of guilt of the crime charged." Introducing the proposed evidence here added little to the evidence but unfair prejudice as in Bryan v. State, supra.

As the federal courts have said in construing the equivalent federal rule to Section 90.403, "[i]t is the incremental probity of the evidence that is to be balanced against its potential for undue prejudice." United States v. Beechum, 582 F.2d 898, 914 (5th Cir. 1978) (en banc). There was little if any incremental probative value to the evidence at issue, but its damning effect as a raw appeal to juror emotion and bias cannot be denied. From a legal standpoint, all of the adverse considerations set forth in Section 90.403, Florida Statutes, are clearly present here.

The trial court's ruling in the instant case improperly permitted irrelevant evidence of collateral crimes, wrongs, or acts. Even if slightly relevant, the probative value, if any, was strongly outweighed by the prejudicial effect on the jury and the confusion of issues. The trial court's ruling on this issue must be reversed.

POINT IV.

THE TRIAL COURT ERRED IN ADMITTING THE STATE'S DNA EVIDENCE SINCE THE FBI TEST AND STATISTICAL PROBABILITIES HAVE NOT BEEN SHOWN TO BE VALIDATED, RELIABLE, AND ACCEPTED; FURTHER THE COURT ERRED IN REFUSING DEFENSE THE OPPORTUNITY TO OBTAIN EVIDENCE SHOWING THE UNRELIABILITY AND IN EXCLUDING EVIDENCE THAT THE FBI DNA TESTS HAVE NOT BEEN ACCEPTED IN SOME JURISDICTIONS.

A. The Trial Court Erred in Admitting the State's DNA Evidence.

Prior to trial, defense counsel filed a motion in limine or, in the alternative, a motion to suppress the results of a forensic report prepared by the Federal Bureau of Investigation regarding DNA profiling. (R 1095-1098) Defense counsel contended that the evidence should be excluded for a variety of reasons:

> (1) The FBI's DNA methods have not been empirically validated and have not been reproduced;
>
> (2) reliability must be closely scrutinized since the testing was not developed within the scientific peer review system;
>
> (3) the FBI does not meet the minimum national standard for blind, external proficiency testing;
>
> (4) data from the FBI's own validation experiments prove the match criteria is not a reliable standard of measure;
>
> (5) the FBI lacks a reliable method for producing a numerical estimate of the probability that an observed DNA profile would match the profile from a randomly chosen individual;
>
> (6) the FBI's method for estimating the probability of a match is not generally accepted as reliable;
>
> (7) the evidence derived from DNA print profiles is not based on proven scientific principles; and

(8) the techniques used by the FBI fatally impairs the reliability of declared matches.

(R 1094-1095) In arguing the inadmissibility of the DNA evidence, defense counsel relied heavily on a decision out of the superior court of the District of Columbia, United States v. Porter. (R 1112-1237) The trial court initially reserved ruling but, on the first day of jury selection, denied defense counsel's motion and, in so doing, relied primarily on Stokes v. State, 548 So.2d 188 (Fla. 1989); Andrews v. State, 533 So.2d 841 (Fla. 5th DCA 1988); and Correll v. State, 523 So.2d 562 (Fla. 1988). (R 74-77) At trial, Agent Jack Quill of the FBI testified over defense's renewed objections that a vaginal swab from the victim matched the DNA profile of the defendant. (R 586) Quill estimated that the probability of finding someone else in a random population that had a genetic profile that matched both the defendant and the vaginal swab was approximately one in fifty thousand from the Caucasian race. Those odds would drop to one in fifteen thousand if the race were Hispanic. (R 592-93)

When the reliability of scientific testing methods is at issue, the proper predicate to establish that reliability must be laid prior to the admission of the results. Ramirez v. State, 542 So.2d 352 (Fla. 1989). If the reliability of a test's results is recognized and accepted among scientists, admitting those results is within a trial court's discretion. Stevens v. State, 419 So.2d 1058 (Fla. 1982). When this type of evidence is offered, "any inquiry into its reliability for purposes of

admissibility is only necessary when the opposing party makes a timely request for such an inquiry supported by authorities indicating that there may not be general scientific acceptance of the technique employed." Correll v. State, 523 So.2d 562, 567 (Fla. 1988). This was precisely the objection made by defense counsel below.

Defense counsel admitted a basic lack of understanding regarding DNA evidence. (R 63-70) Counsel sought further information, more time, and expert witnesses to fortify his attack on the admissibility of DNA evidence. The trial court rebuffed defense counsel at every turn. The trial court relied heavily on Andrews v. State, 533 So.2d 841 (Fla. 5th DCA 1988), in denying defense counsel's motion in limine. (R 74-77) Although the trial court also relied on Correll, the court failed to note the critical aspect of the Correll holding cited above. Defense counsel did request an inquiry into the reliability of the state's proffered DNA evidence. Defense counsel referred the trial court to an opinion from the superior court of the District of Columbia, United States v. Porter. Defense counsel even introduced the voluminous opinion and memorandum in support thereof into evidence and it is currently part of the record on appeal. (R 1112-1237) The basis of the Porter holding that excluded the government's DNA evidence rested primarily on the lack of general acceptance of the FBI's methodology for calculating the probability of a coincidental DNA match. (R 1193-1209) The court of appeal, District of Columbia, recently considered

the Porter case on appeal. The appellate court zeroed in on the persistent criticism of the population database used by the FBI to calculate the odds of a coincidental match. Since this issue was not litigated at great length at the trial level, the appellate court remanded for a hearing to determine if a consensus could be reached. United States v. Porter, 52 CrL 1297 (D.C. Cir. No. 91-CO-1277, 12/22/92).

The New Mexico court of appeal went one step further than the most recent Porter opinion and found that the FBI's DNA typing techniques have not yet gained general acceptance in the scientific community. New Mexico v. Anderson, 52 CrL 1299 (N. Mex. Ct. App. Case Number 12,899, 12/14/92). The California court of appeal agreed with the Anderson court that the FBI process for calculating the significance of DNA matches does not enjoy general acceptance in the scientific community. California v. Barney, 51 CrL 1473 (Cal. 1st DCA, Case Number A048789, etc., 8/5/92).

In Andrews v. State, 533 So.2d 841 (Fla. 5th DCA 1988), **review denied**, 542 So.2d 1332 (Fla. 1989), the district court made a comprehensive survey and analysis of DNA testing evidence and concluded that evidence derived from DNA print identification appears based on proven scientific principles. It is important to note that the Andrews court dealt with DNA print identification evidence prepared and interpreted by a private laboratory, Lifecodes. Andrews, 533 So.2d at 843. The DNA evidence introduced at the defendant's trial was prepared and interpreted by

the FBI, whose population database is the subject of attack and criticism by courts in California, New Mexico, and the District of Columbia. It was this particular aspect of the FBI's testing procedures and calculations that defense counsel attacked below. Counsel furnished the trial court with the voluminous memorandum of law that excluded the government's DNA evidence in Porter I. This mammoth opinion from a District of Columbia trial court was certainly authority enough to require an inquiry by the defendant's trial court into the reliability of the state's evidence. Correll v. State, 523 So.2d 562, 567 (Fla. 1988). Unlike the recent case of Robinson v. State, 17 FLW S389 (Fla. June 25, 1992), the defendant's trial counsel did produce evidence that questioned the general scientific acceptance of the FBI's testing procedure. The trial court abused its discretion in admitting the government's DNA evidence without further inquiry into its reliability. This resulted in a denial of Elmer Carroll's constitutional right to due process of law and to a fair trial. Amends. V, VI, and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const. The resulting death sentence is constitutionally infirm. Amends. VIII and XIV, U.S. Const.; Art. I, § 17, Fla. Const.

B. The Trial Court Erred In Restricting Appellant's Voir Dire Of The State Expert.

The state attempted to qualify John Quill, a supervisory special agent of the Federal Bureau of Investigation, as an expert witness in the area of DNA profiling. (R 570-573) After the trial court denied the defendant's motion in limine and

stated his intention to allow the witness to testify, defense counsel began to voir dire the witness.

> Q: Agent Quill, you say that you've testified in cases where the courts have admitted DNA and you have testified in cases concerning the admissibility of DNA; isn't that right?
>
> A: Yes, that is correct.
>
> Q: And you're presently located in Washington, in the District of Columbia in the J. Edgar Hoover Building; is that correct?
>
> A: That's correct.
>
> Q: Isn't it a fact that the F.B.I. uses certain database upon which to come to these probabilities for this profiling?
>
> A: Yes, that is correct.
>
> Q: Isn't it a fact, that in the District of Columbia, that the database utilized by the F.B.I. was deemed to be inadmissible?
>
> MR. ASHTON [Prosecutor]: Objection, Your Honor, not relevant to this.
>
> THE COURT: Sustained.
>
> MR. ASHTON: I move to strike, jury be admonished to disregard.
>
> THE COURT: Motion to strike will be granted. Ladies and gentlemen of the jury, you are hereby instructed to disregard the last question.

(R 574-575) The trial court then qualified Agent Quill as an expert witness over the defendant's previous objection. (R 575-576)

The trial court's restriction of the defendant's voir dire of this critical state witness violates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and

Article I, Sections 9 and 16 of the Florida Constitution. The defendant was attempting to elicit testimony concerning United States v. Porter, the case the defendant used to argue the inadmissibility of DNA evidence prior to trial (R 63-70, 74-77), and made a part of the record on appeal. (R 1112-1237) The opinion of the superior court of the District of Columbia denied the government's motions to admit DNA evidence in numerous consolidated cases. (R 1112-1114) The attached memorandum of law concludes that the government had failed to demonstrate general acceptance of the FBI's methodology for calculating the probability of a coincidental match and thus, ruled the DNA evidence inadmissible. (R 1208-1209)[1] Therefore, at the time of the defendant's trial, it was abundantly clear that DNA evidence was inadmissible in District of Columbia courts, Agent Quill's home jurisdiction. The jury was never apprised of this fact. Appellant submits that the excluded information was extremely pertinent to the jury's consideration of both the admissibility of DNA evidence and Agent Quill's qualifications as an expert in the field.

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[1] Recently the court of appeals, District of Columbia, noted that the FBI's methodology, if properly carried out, is generally accepted by the scientific community as reliable; and therefore, admissible under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). However, the majority noted a "substantial controversy" surrounding the FBI's methods which tended to yield an overly impressive statistical likelihood of a coincidental match. Accordingly, the court remanded for another hearing to determine whether the FBI's scientists and their detractors could agree on a figure that all parties accepted as reliable. United States v. Porter, 52 CrL 1297 (D.C. Cir. No. 91-CO-1277, 12/22/92).

The right of a criminal defendant to cross-examine adverse witnesses is derived from the Sixth Amendment and its due process right to confront one's accusers. A person accused of a crime has an absolute right to full and fair cross-examination. Coco v. State, 62 So.2d 892 (Fla. 1953). A limitation on this right is especially critical in a capital case. Coxwell v. State, 361 So.2d 148 (Fla. 1978). The right to cross-examination includes as its essential ingredient the right to impeach one's accusers by showing bias, impartiality, and by discrediting the witness. Davis v. Alaska, 415 U.S. 308 (1974).

The trial court's ruling undoubtedly left the jury with the impression that DNA evidence was routinely accepted in all of this country's courts, and that Agent Quill's qualifications as an expert and the FBI database on which his conclusions were based were impeccable, unquestioned, and above reproach. (R 571-575) The jury's impression could not be further from the truth. As this Court is well aware, there is a raging debate in courts across the country concerning the admissibility of DNA evidence and the conclusions to be drawn therefrom.

While the defendant was restricted in his exploration of the inadmissibility of DNA evidence in the District of Columbia, the state was allowed to present evidence of the admissibility of DNA evidence in courts around the world.

> I believe the first testimony given in any court was in the English court system in 1985. It was an English case. A gentlemen by the name of Alex Jeffrey was the molecular biologist who first offered pinioned testimony. They have a different legal system than

> ours, of course, but that was the first time DNA testimony was used in a forensic setting.
>
> It has since been accepted here in the United States. The FBI started offering testimony in 1989. Commercial companies had been offering testimony, I believe it was as far back as '87 and '88 . . . .

(R 581) Agent Quill then proceeded to testify that the State of Florida was the first to accept DNA testimony. (R 581-582)

The lack of even-handedness is apparent in the trial court's admission of the state's testimony that DNA evidence has been readily admitted in Florida, yet exclude testimony that similar evidence has been excluded in another jurisdiction. The trial court's ruling was simply not fair. Agent Quill's familiarity with the history of DNA's admissibility in Florida is obviously no greater than his knowledge of DNA's inadmissibility in the District of Columbia. The jury's perception of the acceptability of DNA evidence in court proceedings was therefore skewed. The trial court's limitation of the defense's questioning of Agent Quill violated Elmer Carroll's constitutional right to a fair trial.

C. The Trial Court Erred In Denying Appellant's Motion For Continuance Where Counsel Was Clearly Unprepared To Challenge The Admissibility Or The Reliability Of The State's DNA Evidence.

The day before jury selection began, the trial court began consideration of defense's motion in limine regarding DNA evidence. (See Section A, supra.) The state objected to the defendant arguing the inadmissibility of the evidence without presenting evidence challenging the reliability of the evidence.

(R 63) Defense then moved for a continuance for that very purpose.

> . . . I move for a continuance in order to be able to provide the court with evidence. I need at least two experts and we have a hearing. That should last several weeks. I am not prepared. I've not been able to prepare to bring witnesses to this court. I am a sole practitioner. I have talked to people but this case is monumental. If Mr. Ashton wants evidence, I agree we should have it.
>
> I will state to the court that I have not had the time to develop the evidence to attack the DNA.
>
> * * *
>
> I would like to be able to offer evidence ... I have not been able to do it, Judge, I can't. This case requires probably two lawyers. They have got two lawyers. I can't -- I can't do it. I've talked to experts. I've talked to experts, one of them who apparently offered affidavits in this Porter case.
>
> There's been so much publicity about DNA ... and I question whether or not ... Mr. Carroll is going to get a fair trial without me presenting these experts that can say, yeah, there's a real problem with DNA ... This database is what I need to see; that an expert needs to see. There's a very real possibility that an error could have been made. That's what I'm saying. I'm doing the best I can in order to present this.

(R 63-65) Defense counsel conceded that he deposed the state's FBI expert, but contended that he was unable to obtain information concerning the FBI's database.

> I have talked to some experts. They say we need that information. I can't get it, not now in the time I have allotted to get it, I couldn't get it.

(R 67) Defense counsel was aware in September, 1991, that DNA

evidence existed. (R 67) However, defense counsel pointed out that the pendency of a competency motion delayed his investigation of this issue.

> . . . I will state to the court as an officer of the court, that we needed to have the competency hearing before we went to Washington to take the DNA expert because I was court appointed. I didn't have any authorization to run off to Washington to start taking the DNA expert ... There was a real issue as to his competency.

(R 68) Defense counsel reiterated his need for a continuance "in order to be able to explore this DNA question in more detail." (R 69) The trial court denied the motion for continuance and jury selection commenced the following day. (R 69-70)

In Hill v. State, 535 So.2d 354 (Fla. 5th DCA 1988), the district court held that a continuance should have been granted where the defense was allowed, for the first time, to interview and depose witnesses about DNA testing results the day before trial. The denial of that motion for continuance was error because fairness, state and federal constitutional due process rights, and the Florida Rules of Criminal Procedure require that witnesses be disclosed and made available to a defendant in a criminal case in sufficient time to permit a reasonable investigation regarding the proposed testimony. Hill, 535 So.2d at 355. "This is especially true in a case where innovative scientific evidence is the subject." Id. In Robinson v. State, supra, defense counsel deposed the DNA laboratory's employees one week before trial, received a copy of the lab report the day before trial, and the DNA witnesses testified on

the third and fourth days of trial. Robinson's motion for continuance to "talk with someone else about DNA testing" was denied immediately prior to trial. This Court distinguished Hill, since Robinson knew that the surviving victim would identify him as the rapist, and also knew for months that DNA testing was being performed. Based on the facts, this Court found no abuse of discretion in the trial court's refusal of a continuance.

However, in the instant case, the record is clear that defense counsel lacked important information about the FBI's database that was critical in attacking the admissibility of the evidence. This apparently was through no fault of his own. Defense counsel was a court-appointed, sole practitioner handling a capital case with complex, innovative, scientific evidence. (R 63) While defense counsel apparently did confer with at least one other DNA expert (R 65, 67), his lack of information regarding the FBI's database was fatal to his investigation. (R 67) As counsel pointed out, a close issue prior to trial was the defendant's competence to proceed. (R 68) Until that determinative issue was resolved, the court-appointed counsel for an indigent defendant had no authority to travel to Washington, D.C. to investigate the admissibility of DNA evidence. (R 68) Under the circumstances, it is abundantly clear that defense counsel was ill-prepared to contest the admissibility of the critical DNA evidence.

Accordingly, it is clear that the trial court abused

its discretion in denying the motion for continuance. Amends. V, VI, and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const. Reversal for a new trial is warranted.

POINT V.

THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT INCLUDED AN IMPROPER AGGRAVATING CIRCUMSTANCE, EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, AND FAILED TO PROPERLY FIND THAT THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §17 OF THE FLORIDA CONSTITUTION.

The sentence of death imposed upon Elmer Carroll must be vacated. The trial court found an improper aggravating circumstance, failed to consider (or gave only little weight to) highly relevant and appropriate mitigating circumstances, and improperly found that the aggravating circumstances outweighed the mitigating factors. These errors render Carroll's death sentence unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution.

A. The Trial Judge Considered The Inappropriate Aggravating Circumstance Of Heinous, Atrocious, Or Cruel.

It is well established that aggravating circumstances must be proven beyond a reasonable doubt by competent, substantial evidence. Martin v. State, 420 So.2d 583 (Fla. 1982); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). The state has failed in this burden with regard to at least one of the aggravating circumstances found by the trial court, that of heinous, atrocious, or cruel. The court's findings of fact, based in part on

matters not proven by substantial, competent evidence beyond a reasonable doubt, and on erroneous findings, do not support this circumstance and cannot provide the basis for the sentence of death.

This Court has defined the aggravating circumstance of heinous, atrocious, or cruel in State v. Dixon, supra at 9:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

Recognizing that all murders are heinous, Tedder v. State, 322 So.2d 980, 910 (Fla. 1975), this Court further defined its interpretation of the legislature's intent that the aggravating circumstance only apply to crime **especially** heinous, atrocious, or cruel.

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily tortuous to the victim.

State v. Dixon, supra at 9.

As this Court has stated in Santos v. State, 591 So.2d 160, 163 (Fla. 1991), and Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990), this factor is appropriate only in torturous murders which exhibit a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another. See, e.g., Douglas v. State, 575 So.2d 165, 166 (Fla. 1991)

(torture-murder involving heinous acts extending over four hours). The present murder happened too quickly with no substantial suggestion that Carroll **intended** to inflict a high degree of pain or otherwise torture the victim. Accordingly, the trial court erred in finding this factor to be present.

While this Court has upheld this factor numerous times in cases involving strangulation, those cases involved facts specifically showing that the victims were acutely aware of their impending deaths. See, e.g., Hildwin v. State, 531 So.2d 124 (Fla. 1988); Thompkins v. State, 502 So.2d 415, 421 (Fla. 1986). Here, however, the victim was smothered (as evidenced by an abrasion to the inside of her lip, caused by her mouth being pushed into her teeth) and strangled (as evidenced by bruising to the throat) as she lay in her bed. Since the crime occurred during the night, it is likely that the victim was asleep when the attack commenced. There is no evidence, therefore, that she was awake and aware when the attack occurred, and, although death was not instantaneous, unconsciousness (if she was awake initially) would have occurred quickly and, as the medical examiner testified, she would have experienced no pain from the asphyxiation. (R 899) The court erroneously cites the medical examiner's testimony to support the finding that she was conscious during the painful sexual battery. (R 1308) However, the medical examiner specifically stated during the penalty phase that he never indicated that the victim was conscious at that time. (R 903-904) Dr. Hegert said that she could, in fact, have been

unconscious, but he had "no way of knowing" one way or the other. (R 904)

Thus, there is no competent, substantial evidence showing this aggravating factor. It should, therefore, be stricken. Additionally, the defense objected to the jury instruction which the court read the jury on this aggravating factor. (R 921, 953-954, 957-958) The reading of a vague instruction on this aggravating factor has been held to require a new penalty phase. Espinosa v. Florida, ___ U.S. ___; 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). While more detailed than the instruction given in Espinosa, this aggravating factor and the definition given it by the jury instruction which the trial court read is unconstitutionally vague. See Maynard v. Cartwright, 486 U.S. 356 (1988). The case must therefore be remanded for a new penalty phase without this factor being considered.

B. Mitigating Factors, Both Statutory and Non-Statutory, Are Present Which Outweigh Any Appropriate Aggravating Factors.

In Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court has reiterated the correct standard and analysis which a trial court must apply in considering mitigating circumstances presented by the defendant. In Campbell, the Court quoted from prior federal and Florida decisions to remind courts that the sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. See Eddings v. Oklahoma, 455 U.S. 104, 114-115 (1982); Rogers v. State, 511 So.2d 526 (Fla. 1987).

Where evidence exists to reasonably support a mitigating factor (either statutory or non-statutory), the court must find as mitigating that factor. Although, the Court said, the relative weight given each factor is for the sentencer to decide, once a factor is reasonably established, it cannot be dismissed as having no weight as a mitigating circumstance. Campbell, supra. For a trial court's weighing process and its sentencing order to be sustained, that weighing process must be detailed in the findings of fact and must be supported by the evidence.

It is submitted that the trial court's sentencing order here totally fails to meet this standard necessitated by the capital sentencing scheme. The trial court applied the wrong standard, glossed over the statutory and non-statutory mitigating factors, and improperly rejected them.

The court erroneously rejected the finding of "under the influence of extreme mental or emotional disturbance," §921.141 (b), Fla. Stat. (1991), and "impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law," §921.141 (f), Fla. Stat. (1991), in large part on the basis of testimony indicating the defendant was sane at the time of the offense. (R 1310-1312, 1313) In doing so, the court clearly applied the wrong standard. In Ferguson v. State, 417 So.2d 631 (Fla. 1982), this Court remanded the case for resentencing because the trial judge had applied the wrong standard in determining the applicability of the mental mitigating factors. This Court noted:

> The sentencing judge here, just as in Mines [v. State, 390 So.2d 332 (Fla. 1980)], misconceived the standard to be applied in assessing the existence of mitigating factors (b) and (f). From reading his sentencing order we can draw no other conclusion but that the judge applied the test for insanity. He then referred to the M'Naughten Rule which is the traditional rule in this state for determination of sanity at the time of the offense. It is clear from Mines that the classic insanity test is not the appropriate standard for judging the applicability of mitigating circumstances under section 921.141 (6), Florida Statutes.

Ferguson, supra at 638.

It is also clear that, while the mental health experts disagreed on whether the defendant was competent to stand trial and whether he was insane or not, all of them indicated that the defendant did suffer from a mental illness. They all indicated that he was psychotic, if not all the time, then at least during various times when he was observed. (R 650-655, 1057-1077, 1344-1349) Specifically, Dr. Elizabeth McMann testified that the defendant was extremely disorganized and was experiencing both auditory and visual hallucinations two days after the offense. (R 650-654) She and psychiatrist Dr. Jeffrey Danziger both testified that the defendant was psychotic at the time, out of touch with reality. (R 654-655, 678) Danziger also testified concerning the defendant's visual and auditory hallucinations and indicated that the defendant was schizophrenic and suffering from alcohol and drug abuse. (R 670, 674) His father had abused him as a child. (R 671) In Danziger's opinion, the defendant, due to his mental illnesses, was not responsible for his actions. (R

675) Another psychiatrist, Dr. Edward Benson, also testified that the defendant was experiencing hallucinations. (R 747-748) Carroll was confused about who his defense attorney was, that he was not sure that it was really Mr. Taylor [the defense lawyer]. (R 755) The doctor diagnosed the defendant as suffering from delusions which were interfering with his contact with external reality (R 754), as suffering from paranoid schizophrenia, with a previous history of substance abuse, and having a borderline intelligence quotient of 79. (R 758) Dr. Benson found the defendant to be actively psychotic at the time of the crime, therefore not knowing what he was doing or its consequences. (R 759)

Two bar waitresses, who observed the defendant on the evening just prior to the crimes, indicated that he was acting very bizarre, talking to his jacket, a mirror in the bar, and the juke box, saying that he was going to burn in Hell and that Satan and the devil were not myths. (R 634-636, 640-642) One waitress also saw the defendant crying. (R 636)

Even the state's two psychiatrists did not rebut these diagnoses. One was unable to determine whether the defendant was sane or insane at the time of the offense (due to the defendant having no recollection of the events, having blacked out), but admitted that there may have been moments, such as when Dr. McMann interviewed him, where he was not malingering and was, in fact, psychotic. (R 510, 514-515, 526) He simply had no opinion as to the defendant's mental condition at the time of the of-

fense, contrary to the trial court's findings of fact. (R 534) Another state psychiatrist testified that, while the defendant did know right from wrong, he was schizophrenic and delusional and was probably intoxicated at the time of the offense. (R 794) He also verified that the defendant was psychotic and had a history of alcohol abuse. (R 789) Dr. Kirkland also testified that initially he opined that the defendant was incompetent to stand trial and therefore committed him to a mental hospital. (R 790) Mr. Carroll, the state doctor opined, also suffers from an antisocial personality disorder and **regularly had difficulty conforming his behavior to what society expects.** (R 792)

This evidence clearly establishes the presence of the two statutory mental mitigating circumstances, which should militate against a death sentence in favor of life. Santos v. State, supra; Klokoc v. State, 589 So.2d 219 (Fla. 1991); Campbell v. State, supra; Farinas v. State, 569 So.2d 425 (Fla. 1990). It appears that the trial court's sentencing order does make brief mention of the defendant's mental problems as nonstatutory mitigation, but the order does not specifically address all of the factors and does not indicate what weight these factors should have.

In addition, there also was evidence suggesting that Santos lived in an abusive environment as a child and was sexually assaulted, which would constitute valid nonstatutory miti-

gating factors.[2] Carter v. State, 560 So.2d 1166 (Fla. 1990); Brown v. State, 526 So.2d 903 (Fla. 1988). The defendant also presented evidence of chronic alcohol and drug abuse which was uncontroverted and which psychiatrists noted may have contributed to the incident. See Songer v. State, 544 So.2d 1010 (Fla. 1989); Kampff v. State, 371 So.2d 1007 (Fla. 1979). See also Nibert v. State, 574 So.2d 1059 (Fla. 1990) (wherein the Court specifically held that the defendant's alcoholism and drinking at the time of the killing support a finding of extreme disturbance and substantial impairment); Smalley v. State, 546 So.2d 720 (Fla. 1989); Masterson v. State, 516 So.2d 256 (Fla. 1987); Feud v. State, 512 So.2d 176 (Fla. 1976); Ross v. State, 474 So.2d 1170 (Fla. 1989); Norris v State, 429 So.2d 688 (Fla. 1983). There was evidence also presented that the defendant has a below normal intelligence, which is a factor in mitigation. See Downs v. State, 574 So.2d 1095 (Fla. 1991); Morris v. State, 557 So.2d 27 (Fla. 1990); Neary v. State, 384 So.2d 881 (Fla. 1981); Minks v. State, 336 So.2d 1142 (Fla. 1976).

Mitigating evidence must at least be weighed in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence. Hardwick v. State, 521 So.2d 1071, 1076 (Fla.

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[2]The state filed a motion for the court to amend its sentencing order, recognizing that the trial court, although mentioning these uncontroverted facts in its written findings, failed to weigh them in the sentencing determination in violation of Campbell v. State, supra. (R 1316-1317) The trial court did not further amend its findings as the state had requested.

1988). See also Campbell v. State, supra; Rogers v. State, supra. As this Court stated in Santos v. State, 591 So.2d at 164:

> The requirements announced in Rogers and continued in Campbell were underscored by the recent opinion of the United States Supreme Court in Parker v. Dugger, ___ U.S. ___, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991). There, the majority stated that it was not bound by this Court's erroneous statement that no mitigating factors existed. Delving deeply into the record, the Parker Court found substantial, uncontroverted mitigating evidence. Based on this finding, the Parker Court then reversed and remanded for a new consideration that more fully weighs the available mitigating evidence. Clearly, the United States Supreme Court is prepared to conduct its own review of the record to determine whether mitigating evidence has been improperly ignored.
>
> Based on the record at hand, we are not convinced that the trial court below adhered to the procedure required by Rogers and Campbell and reaffirmed in Parker.

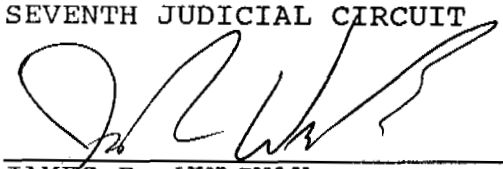
Here, too, it does not appear that the trial court properly adhered to these correct procedures. When the trial court follows the formula set out in Campbell v. State, supra, it is without doubt that the only possible conclusion is that the state cannot support a sentence of death. The proper mitigating factors clearly outweigh the appropriate aggravating factors. The punishment must be reduced to life imprisonment, or, at least, sent back to the trial court for a new consideration that more fully weighs the available mitigating evidence.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the appellant requests that this Honorable Court reverse the judgment and sentence of death and, as to Points I, II, III, and VI, reverse the judgments and sentences and remand for a new trial, and, as to Point IV, vacate the death sentence remand for imposition of a life sentence.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to: Mr. Richard Martell, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050; and to Mr. Elmer L. Carroll, No. B-835908, P.O. Box 747, Starke, FL 32091, this 11th day of March, 1993.

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