IN THE SUPREME COURT OF FLORIDA

TROY MERCK, JR.,

Appellant,

vs.

Case No. 83,063

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The state's brief will be referred to by use of the symbol "S". Other references are as denoted in appellant's initial brief.

This reply brief is directed to Issues I-B and II. As to the remaining points on appeal, appellant will rely on his initial brief.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE.

B. The Judge Should Not Have Found or Instructed the Jury on the "Especially Heinous, Atrocious, or Cruel" Aggravating Factor, in View of the Suddenness of the Assault and the Intoxication of Both Appellant and the Victim.

While the state quotes the trial court's comment in her sentencing order to the effect that the knife blade was twisted (S20), the state ignores appellant's showing that this observation is simply not supported by the evidence (see appellant's initial brief, p.52-53,n.22). The medical examiner testified that the angle of the wound was such that the knife might have been twisted or the victim might have moved (T638-39). His observations were "consistent with either one of those" possibilities (T639). Nor did Neil Thomas testify that appellant told him he had twisted the knife (see T752). In addition to the other reasons, the trial court's heavy reliance on an unsubstantiated predicate "fact" renders her finding of HAC invalid.

The state's reliance on Whitton v. State, 649 So. 2d 861 (Fla. 1994) is misplaced. In Whitton, the victim was beaten to death in an attack which lasted about thirty minutes, and the evidence indicated that the head wounds which would have caused unconsciousness came late in the attack. In addition, while the victim in Whitton had a high blood alcohol level, the medical examiner testified that

his tolerance and adrenaline reaction could have diminished the effect of the alcohol. This Court in Whitton contrasted Elam v. State, 636 So. 2d 1312 (Fla. 1994), in which the "especially heinous, atrocious, or cruel" aggravating factor was held improper, where the medical examiner testified that the attack took place in a period of a minute or less. Although the victim in Elam was bludgeoned with a brick and had defensive wounds, "[t]here was no prolonged suffering or anticipation of death." 636 So. 2d at 1314.

The instant case is much closer to Elam than Whitton. Here, the trial judge was initially unsure whether the evidence even warranted a jury instruction on HAC, because of the suddenness and short duration of the attack (T1341-42). Although she ultimately decided to give the instruction anyway (T1355), she again noted in her sentencing order that "[t]he entire incident occurred quickly" (R2131). See Santos v. State, 591 So. 2d 160, 163 (Fla. 1991). In contrast to Whitton (where the victim "was sufficiently aware of his impending death to put up a tremendous resistance" for nearly half an hour, 649 So. 2d at 866), a state witness in the instant case described the victim as having a look of confusion and not putting up a fight (T724).[1] While it is true, as the state points out, that death did not occur instantaneously, the medical examiner testified that the fatal wound to the neck would have caused unconsciousness within two to five minutes, and death within five to ten minutes (T640,649). To warrant a finding of the statutory

[1] The testimony came from Richard Holton, the only eyewitness who had not been drinking. No prosecution witness described anything other than a sudden attack of short duration.

aggravating factor, a killing must be especially heinous, atrocious, or cruel as compared to the norm of capital homicides. Teffeteller v. State, 439 So. 2d 840, 846 (Fla. 1983) (emphasis in opinion).[2] Here, the evidence established a swift, unprovoked attack, in the parking lot of a nightclub at closing time, by an intoxicated defendant upon an intoxicated victim. According to the medical examiner, the victim had a "significantly elevated [blood alcohol] level", and while he would still have been able to experience some pain, his capacity to feel pain would have been diminished (T645-46). Unlike the victim in Whitton, there was no evidence that he had built up any "tolerance" for alcohol; and the suddenness and short duration of the attack negated the possibility of an "adrenaline reaction" which might have diminished the effect of the alcohol.

The circumstances of this case show that the killing, while senseless, was not set apart from the norm of capital homicides to warrant a finding that it was "especially heinous, atrocious, or cruel." Elam; Santos; Teffeteller; Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989); Demps v. State, 395 So. 2d 501 (Fla. 1981); Green v. State, 641 So. 2d 391, 395-96 (Fla. 1994). Application to these facts would render the aggravating circumstance unconstitutionally overbroad. See e.g. Godfrey v. Georgia, 446 U.S. 420

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[2] In Teffeteller, this Court said that where the cause of death was a single sudden shot from a shotgun, "[t]he fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies."

(1980); Maynard v. Cartwright, 486 U.S. 356 (1988). Since only one (tainted) aggravating factor remains,[3] and because there is substantial mitigation, appellant's death sentence is disproportionate and should be reversed for imposition of a sentence of life imprisonment. See DeAngelo v. State, 616 So. 2d 440, 434-44 (Fla. 1993); White v. State, 616 So. 2d 21, 16 (Fla. 1993).

[3] Both the jury's recommendation of death, and the weight given to the "prior violent felony" aggravator by the trial judge, were prejudicially affected by the introduction (before the jury) and the express consideration (by the judge) of the incident in which Fawn Chastain was shot and wounded. This resulted in a juvenile adjudication of delinquency rather than a criminal conviction; therefore, it was neither admissible evidence nor proper aggravation under Fla.Stat. §921.141(5)(b). See Issue II, infra.

ISSUE II

APPELLANT'S DEATH SENTENCE IS INVALID BECAUSE THE JURY HEARD AND THE TRIAL COURT EXPRESSLY CONSIDERED HIGHLY PREJUDICIAL TESTIMONY WHICH DID NOT RELATE TO ANY STATUTORY AGGRAVATING CIRCUMSTANCE.

Preservation (Defense)

Notwithstanding the fact that the trial judge below rejected the prosecution's waiver argument and found the issue to be preserved (R2533-34), the state contends that it was not (S29). For numerous reasons, the state is wrong.

The purpose of the contemporaneous objection rule is to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal. Castor v. State, 365 So. 2d 701, 703 (Fla. 1978); Williams v. State, 414 So. 2d 509, 511 (Fla. 1982). In other words, the trial judge must be given the opportunity to correct her own errors. Castor, at 704; Rivers v. State, 307 So. 2d 826, 828 (Fla. 1st DCA), cert.den. 316 So. 2d 285 (Fla. 1975). See Williams v. State, 619 So. 2d 487, 492 (Fla. 1st DCA 1993) (where trial judge acknowledged that defendant's objection had been made and noted, appellate court would not rule that the issue was not preserved for review; "to do so would be plainly contrary to the purpose underlying the requirement for contempora-

neous objections before the trial court, i.e., to fully advise the trial court of the ground of the objection").[4]

In the instant case, when the prosecutor moved to introduce the judgment and sentence arising from the Fawn Chastain incident, along with two other adjudications of delinquency from North Carolina (T1301-04, R2048-2050), defense counsel said, "Judge, these look to me like juvenile convictions", and the prosecutor acknowledged that that was true (T1304-05). Defense counsel objected to the state's use of juvenile adjudications to support an aggravating factor, and the trial judge agreed with the defense that a juvenile adjudication is not a criminal conviction under Florida law (T1305-07). She ruled the North Carolina adjudications inadmissible, but denied appellant's motion for mistrial based on the jury's having heard Fawn Chastain's testimony (T1306-11,1350-51). When defense counsel asked for a curative instruction, the judge replied "I can't think of any way to cure that one" (T1308).

The jury returned a death recommendation. Subsequently, in its sentencing memorandum and in its argument to the trial judge, the state reasserted its contention that the juvenile adjudication

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[4] See also Dinkins v. State, 566 So. 2d 859, 860 (Fla. 1st DCA), rev.den. 576 So. 2d 286 (Fla. 1990), which states:

> While counsel's statements might otherwise be insufficient to preserve the issue for appeal, the trial court's response indicates that the statements were understood to be an objection. We will therefore treat this issue as being preserved for appellate review. [Citations omitted].

could be considered in aggravation (R2141-43, 2524-45, 2552-54). While the prosecutor asserted that there were "absolutely no cases on point" (R2532, see R2525, 2534), he called the court's attention to Campbell v. State, 571 So. 2d 415, 418 (Fla. 1990) (R2142-43, 2524-25, 2544). The judge, pointing out that the language in Campbell was ambiguous, said she would not rely on it (R2524-25, 2544-45). Defense counsel responded that a juvenile adjudication is not a "conviction" as needed to establish the statutory aggravator (R2526, 2537-39, 2543-44); that therefore the state was improperly relying on nonstatutory aggravation (R2543-45, 2573-75); and that penal statutes must be strictly construed (R2538, 2544).

The prosecutor also argued that, although the defense objected to the introduction of the juvenile adjudication when the state submitted it, it had waived the issue by failing to move in limine to preclude Fawn Chastain's testimony. The trial judge rejected the state's contention on this point, saying "I truly thought at that time that the child had been certified. And I don't know whether the defense thought it, but I know they were surprised. That's my gut reaction that this was a juvenile. I don't think there was any strategy of luring the state into a position" (R2533-34).

The judge reserved ruling on the merits (R2545). Prior to sentencing, the defense called the court's attention to Jones v. State, 440 So. 2d 570, 578-79 (Fla. 1983), characterizing the trial judge's reference to the defendant's juvenile record as nonstatutory aggravation (R2573-75). Nevertheless, the trial judge ruled in favor of the state, and in her sentencing order specifically found

the adjudication of delinquency for the shooting of Fawn Chastain to be "a proper aggravating factor under F.S. 921.141(5)(b)" (R2130-31).

Plainly the objections here were more than sufficient to make the trial judge aware of the legal basis for the claim of error, and to preserve the issue for intelligent review.

In addition, however, it is worth noting that the improper consideration and finding of a legally unauthorized aggravating circumstance is an error so fundamental that it would be necessary and appropriate for this Court to reach the merits even if the objections detailed above had not been made. See Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990), in which this Court reversed a death sentence and remanded for a new penalty phase before a new jury, where the jury heard evidence of the defendant's violation of community control as an aggravating factor, and the judge considered it as an aggravator in his sentencing order. Since community control was not included in the then-applicable statute,[5] and since "[p]enal statutes must be strictly construed in favor of the one against whom a penalty is to be imposed," this was found to be an improper nonstatutory aggravating circumstance. [As indicated in Justice McDonald's dissenting opinion, defense counsel did not make any objection to consideration of community

[5] It has since been amended. Fla. Stat. §921.141(5)(a).

control as a nonstatutory aggravating circumstance, but merely objected to introduction of the conditions of community control].[6]

Moreover, this Court has never refused, on "contemporaneous objection" grounds, to consider on direct appeal the legal or factual invalidity of an aggravating circumstance. [Nor do any of the three cases cited by the state support such a conclusion].[7] To the contrary, Florida's capital sentencing statute mandates careful review to ensure the reliability and proportionality of any decision to impose the ultimate penalty. In Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla 1988), this Court, after observing that the legislature intended the death penalty to be imposed only for the most aggravated of crimes, quoted Justice Stewart's concurring opinion in Furman:[8]

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique,

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[6]

> In this case the state sought to put into evidence the conditions of Trotter's community control to show that he was in fact incarcerated for the purpose of subsection 921,141(5)-(a). Defense counsel objected. When the state's purpose was explained, defense counsel responded: "I think you've already proved that." [footnote omitted].

Trotter v. State, 576 So. 2d at 695 (McDonald, J., dissenting).

[7] Nixon v. State, 572 So. 2d 1336 (Fla. 1990), Lindsey v. State, 636 So. 2d 1327 (Fla. 1994), and Mordenti v. State, 630 So. 2d 1080 (Fla. 1994).

[8] Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

> finally, in its absolute renunciation of all that is embodied in our concept of humanity.

This Court then wrote:

> It is with this background that we must examine the proportionality and appropriateness of each sentence of death issued in this state. A high degree of certainty in procedural fairness as well as substantive proportionality must be maintained in order to insure that the death penalty is administered evenhandedly.

Fitzpatrick v. State, supra, 527 So. 2d at 811.

See e.g. LeDuc v. State, 365 So. 2d 149, 150 (Fla. 1978). ("Even though LeDuc's counsel has not challenged the legal sufficiency of [his] convictions and sentences on any basis, we are obligated by law and rule of this Court to ascertain whether they are proper"); Goode v. State, 365 So. 2d 381, 384 (Fla. 1978)("Even though defendant admits his guilt and even though he expressed a desire to be executed, this Court must, nevertheless, examine the record to be sure that the imposition of the death sentence complies with all of the standards set by the Constitution, the Legislature and the courts"); Davis v. State, 461 So. 2d 67, 71 (Fla. 1984) ("Section 921.141 . . . directs this Court to review both the conviction and sentence in a death case, and we will do so here on our own motion"; this Court then proceeded to consider the aggravating circumstances found by the trial court and struck one of them, even though appellate counsel had made a tactical decision not to challenge them).

Preservation (State)

In the penalty proceedings below, the state argued vociferously that the shooting of Fawn Chastain which resulted in a juvenile adjudication of delinquency was admissible in aggravation (T1305; R2141-43, 2524-45. 2552-54). The state ultimately persuaded the trial judge to find the juvenile adjudication as an aggravating factor under Fla. Stat. §921.141(5)(b) (R2130-31). Now, for the first time on appeal, the state tries a backup theory, suggesting that it was admissible as rebuttal of mitigation (S29-30,37). This theory is both meritless and unpreserved. As recognized in Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993), "Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State."[9]

The argument below was largely directed to the question of whether an adjudication of delinquency is a "conviction" as required by the (5)(b) aggravating circumstance. As recognized in Walton v. State, 547 So. 2d 622, 625 (Fla. 1989), the standard of admissibility for rebuttal evidence is different:

> . . . Walton claims that the state can only rebut a defendant's evidence of no significant history of prior criminal activity with evidence of convictions. We disagree. Once a defendant claims that this mitigating circumstance is applicable, the state may rebut this

[9] The Court in Cannady accordingly rejected the state's request for a remand for resentencing based on an aggravating factor which the state asserted on appeal, but which was never submitted to either the jury or the judge below.

claim with direct evidence of criminal activity.[10]

In the instant case, appellant has never claimed that that mitigating factor was applicable; nor was the jury instructed on it. As far as being used as rebuttal of the "age" mitigating factor -- in addition to the dispositive fact that the state did not introduce it for that purpose below -- it simply does not rebut appellant's age. Nothing in the testimony of Fawn Chastain or Agent Hess shows "unusual mental or emotional maturity" on appellant's part. See Ellis v. State, 622 So. 2d 991, 1001 (Fla. 1993). In fact, the record shows just the opposite.[11] If the prosecution had in any way indicated an intent to use the adjudication of delinquency which arose from this incident to rebut appellant's age as a mitigator, defense counsel could have objected on relevancy grounds, and also on the ground that its very limited (if any) probative value was greatly outweighed by its prejudicial impact.

The trial judge in her sentencing order found the adjudication of delinquency to be a "conviction", and considered the shooting of Fawn Chastain as an aggravating factor (R2130-31), as the prosecutor persuaded her to do. The state should not be heard to change its theory on appeal. Cannady.

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[10] Similarly, in Fitzpatrick v. State, 437 So. 2d 1072, 1078 (Fla. 1983) and Quince v. State, 414 So. 2d 185, 188 (Fla. 1982), the defense claimed that the "no significant history" mitigator was applicable. Therefore, their juvenile records were properly considered to dispel that claim.

[11] See the presentence investigation report (R2249, A through I) and appellant's initial brief, p.44-46.

Campbell

The state's misuse of Campbell v. State, 571 So. 2d 415, 418 (Fla. 1990) is remarkable. The state asserts that "[t]his Court has previously considered and rejected appellant's contention" in Campbell (S30, see S6, 30-31, 37), when it knows full well that Campbell did not involve an adjudication of delinquency, and that the issue was neither raised, argued, nor decided in Campbell.[12] Appellant filed with his initial brief a motion to take judicial notice, pursuant to Fla. Stat. §90.202(6) and Glendale Fed. S & L. v. State Dept. of Ins., 485 So. 2d 1321, 1323 n.1 (Fla. 1st DCA 1986), of the sentencing order in James Bernard Campbell v. State, (Florida Supreme Court case no. 72,622; Circuit Court (Eleventh Circuit) case no. 86-38693), and the Judgment in State v. James Bernard Campbell (case no. CT CR 83-238 in the Circuit Court of the Tenth Judicial Circuit in and for Hardee County). These court documents show that in 1984 Campbell pled nolo contendere in the Circuit Court to battery on a law enforcement officer as charged in the Information, and was sentenced to five years probation; and (2) that this felony conviction -- along with an attempted first degree murder conviction contemporaneous with the capital homicide -- were the sole predicate offenses for the finding of the "prior violent felony" aggravating factor in Campbell's capital trial and appeal.

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[12] Even the trial prosecutor asserted that there were "absolutely no cases on point" (R2532, see R2525, 2534). When he called the trial judge's attention to Campbell (arguing it as persuasive rather than controlling authority), the judge pointed out that its language was ambiguous and said she would not rely on it (R2142-43, 2524-25, 2544-45).

The state made no objection [see Cannady v. State, supra, 620 So. 2d at 170], and on January 23, 1995, this Court granted appellant's motion to take judicial notice. Therefore, the record conclusively shows that the issue which this Court summarily rejected in Campbell involved the use in aggravation of an adult felony conviction of a juvenile defendant; not a juvenile adjudication of delinquency.

Ignoring all of this, the state says in its brief:

> If appellant is now seeking a belated rehearing of the Campbell decision, he is untimely. If appellant is contending that Campbell was incorrectly decided, appellee disagrees and, in any event, the law of the case doctrine would preclude such an attack. See Brunner Enterprises v. Department of Revenue, 452 So. 2d 550 (Fla. 1984).

(S31)

To the contrary, appellant is not seeking a belated rehearing of Campbell, nor does he claim it was incorrectly decided. In showing that it involved a felony conviction rather than an adjudication of delinquency, undersigned counsel was simply trying to dissuade the state from asserting Campbell as authority for a proposition which was not in fact before the Court in that case. See Glendale Federal, 485 So. 2d at 1323, n.1. Obviously, he underestimated the state's tenacity. In any event, as this Court stated in U.S. Concrete Pipe Co. v. Bould, 437 So. 2d 1061, 1063 (Fla. 1983), "[t]he doctrine of law of the case is limited to rulings on

questions of law actually presented and considered on a former appeal."[13]

The Merits

Appellant will rely on his initial brief, but would repeat that the state's reliance on the sentencing guidelines and Hadley v. State, 546 So. 2d 769 (Fla. 3d DCA 1989) (S34-35) is misplaced, since the guidelines contain express legislative authorization to score juvenile dispositions which are the "equivalent" of convictions. See appellant's initial brief, p. 62, n.30. In the absence of such authorization in the death penalty statute, Fla. Stat. §39.053(4) -- which clearly and unambiguously states that an

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[13] In addition, the "law of the case" doctrine is plainly inapplicable because it applies only to further proceedings in the same case. See Strazzulla v. Hendrick, 177 so. 2d 1 (Fla. 1965); Padovano, Florida Appellate Practice, §14.12. Nor is the principle of "stare decisis" of help to the state, since it "does not apply to any question not raised and considered in the former case." Florida Jur. 2d, Courts and Judges, §146; see Twyman v. Roell, 123 Fla. 2d, 166 So. 215 (1936); City of Miami v. Stegeman, 158 So. 2d 583 (Fla. 3d DCA 1963). As further summarized in Florida Jur. 2d, Courts and Judges, §143:

> Since the mandate of stare decisis is to let that which has been decided stand undisturbed, it is important to ascertain just what has been decided so that under the doctrine it is no longer an open question. For a prior decision to control a subsequent case, the first requirement is that the prior decision be in point, that is, that it shall have been decided on substantially the same facts, and that the issues presented by the latter case shall have been raised, considered, and determined in the former one. [Footnotes omitted].

adjudication of delinquency shall not be deemed a conviction -- controls.

Harm

Again, appellant will rely primarily on his initial brief (p. 65-69). However, it is necessary to address the state's apparent misconception that Jones v. State, 440 So. 2d 570 (Fla. 1983) "authorizes" trial judges to recite findings of nonstatutory aggravation "as surplusage" (see S30-31, n.11; 32-33, n.12; 37). To the contrary, Jones is properly understood as a "harmless error" case, since it recognized that Jones' juvenile record constituted nonstatutory aggravation, and it is settled law that the introduction before the jury or consideration by the judge of nonstatutory aggravation is error.[14] A capital sentencing error cannot be found "harmless" unless the state can meet the burden of showing beyond a reasonable doubt that it could not have affected the weighing process, either as to the jury's recommendation or the sentence imposed by the court. See Long v. State, 529 S. 2d 286, 293 (Fla. 1988); Dougan v. State, 470 So. 2d 697, 701 (Fla. 1985); see generally State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). In Jones, this burden was met. In the instant case it clearly was not met. [Instead, the very fact that the state fought so hard below

[14] See e.g. Provence v. State, 337 So. 2d 783, 786 (Fla. 1976); Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977); Perry v. State, 395 So. 2d 170, 174-75 (Fla. 1980); Odom v. State, 403 So. 2d 936, 942 (Fla. 1981); Dougan v. State, 470 So. 2d 697, 701 (Fla. 1985); Trawick v. State, 473 So. 2d 1235, 1240 (Fla. 1985); Colina v. State, 570 So. 2d 929, 932-33 (Fla. 1990); Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990).

to convince the trial judge to find the adjudication of delinquency for the Chastain shooting in aggravation belies its present claim on appeal that it couldn't have made any difference. See Gunn v. State, 78 Fla. 599, 83 So. 511 (1919)].

In Jones, the trial court's mention of nonstatutory aggravating factors was characterized as "surplusage" which could not have affected the sentence imposed, where (1) there were three independent valid aggravators; (2) the judge "expressly asserted in the sentenc[ing] order that the nonstatutory aggravating circumstances were mentioned merely in addition to the already established statutory aggravating factors"; and (3) there were no mitigating circumstances.

In the instant case, there was substantial mitigating evidence including appellant's age of nineteen; the abuse and rejection he encountered throughout his childhood; his history of emotional disturbance, physical illness, and learning disability; and his intoxication at the time of the offense. And far from merely "mentioning" it, the trial court expressly stated in her sentencing order that appellant's adjudication of delinquency for the shooting of Fawn Chastain is "a proper aggravating factor under F.S. 921.141(5)(b)" (R2131). The judge recognized in her order that no one was physically injured in the convenience store robberies in March, 1989 (R2130); the Chastain shooting was the only prior incident which involved that kind of violence (which was described in detail to the jury by Ms. Chastain herself and by Agent Hess). See Long, 529 So. 2d at 293; Rhodes v. State, 547 So. 2d 1201, 1204-05

(Fla. 1989). In short, the instant case is nothing like Jones; here the evidence of the Chastain shooting and the resulting adjudication of delinquency was used as powerful (though legally unauthorized) aggravation, not "surplusage." The error was patently harmful both as to the jury recommendation and the sentence.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant respectfully requests the relief set forth at p. 89 of the initial brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Assistant Attorney General Robert J. Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 28th day of April, 1995.

Respectfully submitted,

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