IN THE SUPREME COURT OF FLORIDA

DANA WILLIAMSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. 84,198

TRIAL COURT NO. 92-15642CF10A

FILED
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ON APPEAL PURSUANT TO RULE 9.030(a)(1) FROM THE JURY VERDICT AND DECISION OF THE TRIAL COURT

INITIAL BRIEF OF APPELLANT

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and

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CERTIFICATE OF INTERESTED PERSONS

Counsel for the Appellant, DANA WILLIAMSON, certifies that the following persons have or may have an interest in the outcome of this case:

1. Brian T. Cavanagh, Esq.
   (Attorney for State of Florida)

2. Hon. Richard D. Eade
   (Trial Judge)

3. Steven J. Hammer, Esq.
   (Counsel for Defendant)

4. Charles P. Johnson, Esq.
   (Counsel for Defendant)

5. Scott A. Mager, Esq.
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8. Dana Williamson
   (Appellant)

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PREFACE

In this brief, Appellant, DANA WILLIAMSON, shall be referred to as "Williamson" or "Appellant". Appellee, STATE OF FLORIDA, shall be referred to as "State" or "Appellee". References to the Record shall be identified by a parenthetical containing the letter "R" followed by the page number upon which the cited material appears. References to the Trial Transcript shall be identified by a parenthetical containing the letter "T" followed by the page number upon which the cited material appears.

APPELLANT'S STATEMENT OF THE CASE AND FACTS

This appeal arose from a murder trial which produced over 5,200 pages of transcript and record. The voluminous nature of the record below is indicative of the factual and legal complexities involved in this case.

Although numerous objections of appealable issues were made during the course of trial, this initial brief will principally address and expand upon the following issues:

1) the denial of the Appellant's Motion to Exclude Evidence of Williamson's Prior Conviction for Manslaughter.

2) the denial of the Appellant's Motion to Exclude Evidence Regarding the Defendant's Execution of a Quit Claim Deed and Divorce

Papers.

3) the failure to sever the extortion count from the trial.

4) the lack of substantial competent evidence in support of the jury's verdicts

5) the trial judges weighing of Appellant's mitigating circumstances.

6) the unconstitutionality of Florida Statutes §921.141.

On February 19, 1994, Appellant, DANA WILLIAMSON, was convicted of murder in the first degree and later sentenced to death for the 1988 killing of Donna Decker. (T:3203-04).[1] This Court has jurisdiction. See Rule 9.030(a)(1) of the Florida Rules of Appellate Procedure.

In 1988, Donna and Bob Decker resided in Davie, Florida together with their infant son, Carl. (T:577, 1012). Bob Decker owned a construction business at the time.

On the night of November 4, 1988, Bob, Carl, and Clyde Decker - Bob's father visiting from out of town, returned to their home to find Charles Panoyan (hereinafter "Panoyan") in the driveway. (T:581, 1158). Panoyan was an acquaintance and occasional employee

[1] In addition to the first degree murder count, Williamson was also convicted of fourteen (14) other counts arising from the home invasion which resulted in Ms. Decker's death. (T:3203-04).

of Decker, and was also known by the Williamson family. (T:592-93, 1022). Panoyan assisted in the construction of Decker's house and was aware of its dimensions and alarm system. Bob Decker testified that Panoyan rarely came over to his home, and that he was surprised to see him. (T:646, 1023, 1158). The Deckers greeted Panoyan on the driveway and they all went inside. (T:583, 1162, 2105). Panoyan then abruptly stated that he had to go outside to bring in some deer meat which he forgot to grab initially. (T:583, 1159). When he came back a minute later, Clyde Decker helped Panoyan put the meat in the kitchen. (T:583, 1061, 2105).

Upon returning to the living room, they confronted a man with a gun wearing a mask and a straw cowboy hat. (T:583, 1061). Bob Decker at first thought that it was all a practical joke pulled by Panoyan, but soon discovered otherwise. (T:583, 1061). The Deckers were taken into the master bedroom, handcuffed, and bound. (T:584, 1167). Panoyan claimed that he was hog-tied out in the family room, but showed no marks or burns when subsequently examined by police. (T:584, 649, 659, 1171, 2345). Bob Decker testified that he caught a glimpse of Panoyan talking to the gunman. (T:1067, 1172).

Meanwhile, Donna Decker arrived home from work. (T:584). She was overpowered by the intruder and also tied up. (T:585, 1077,

1179). The record illustrates that Bob and Donna were questioned regarding the whereabouts of their money and were later forced to sign some sort of legal form. (T:603, 1062, 1084, 1087).

In the tragic events that followed, Bob, Carl, and Clyde Decker were each shot with a 22-caliber revolver. (T:587-88, 1132). Donna was stabbed to death after putting up a struggle. (T:591, 1191). However, Panoyan was released unharmed, and eventually phoned the police. (T:592, 1184). Bob, Carl, and Clyde Decker each survived the attack. (T:589, 1191).

Following the incident, Panoyan was the prime suspect. (T:613). In his statements to investigators, Panoyan never mentioned Dana Williamson. (T:613, 2173). Evidence found at the crime scene included the intruder's cowboy hat, as well as a black utility belt and handcuff key which fit the set of handcuffs used on Bob Decker. (T:610, 2694, 2697). The belt and key were found in Panoyan's truck. (T:612). None of Williamson's finger prints or blood was located at the crime scene. (T:661, 662).

In November, 1989, police received an anonymous tip that Williamson was the assailant and that Panoyan was innocent. (T:613, 2169). Prior to the tip, police had not even considered Williamson as a suspect. (T:613).

Investigators traveled up to Williamson's residence in

Norwood, Ohio, and spoke with Williamson. (T:613, 1337). When asked about the cowboy hat, Williamson stated that he had owned a hat like that. (T:664, 2783, 2696, 3026). The decision was made to arrest Appellant along with Panoyan in May 1990. (T:666, 1382, 2172).

Panoyan was eventually released on his own recognizance and he made a statement to the police claiming that Williamson was the perpetrator of the attack against the Deckers. (T:667 2138, 2212). Panoyan further alleged that he had been scared into silence by Williamson. (T:2123-24).

The trial commenced on January 24, 1994, in Broward County, Florida. Panoyan agreed to testify and became the chief witness for the State. Panoyan testified that Williamson was the gunman and had let him live because of his friendship with Williamson's father. (T:2329). He further stated that he had no involvement in the crime whatsoever and was coerced into silence due to the threats of Williamson. (T:2123-24).

The trial court, over objection from defense counsel, admitted evidence regarding Williamson's 1975 conviction for manslaughter. (T:1546, 2147). The record reveals that this evidence was apparently introduced to bolster Panoyan's claims that he had good reason to believe the threats allegedly made by Williamson to

induce his silence. The State also proffered three (3) jail house informants who were each serving time for felony convictions. (T:1537, 1915, 2487). They testified that Williamson had admitted his responsibility for the attack against the Deckers. (T:1930, 1915, 2487).

The principal evidence in this case was circumstantial in nature, and included: a) a deed executed by Williamson admitted under the pretense of showing his knowledge of legal forms; (T:1472); b) a black utility belt of the same type as the one found at the crime scene, and c) a cowboy hat found at the crime scene. (T: 2783, 3026). After a lengthy trial, the jury returned guilty verdicts on fifteen (15) of seventeen (17) counts. (T:3212-13).

During the sentencing phase, the Defendant offered in mitigation four (4) medical experts who testified that Mr. Williamson possesses an abnormal brain function. (T:3530, 3583, 3788, 3635). Further, there was significant evidence introduced regarding the severe physical and emotional abuse experienced by Williamson as a boy. (T:3661, 3666-71). The State offered aggravating factors.

At the conclusion of the sentencing phase, the jury recommended that the death sentence be imposed as to the first degree murder count.

SUMMARY OF THE ARGUMENT

This Court should reverse the Trial Court's decision and either a) enter an Order of Acquittal; b) grant a new trial; or c) or vacate the death sentence and remand with instructions to impose a life sentence.

In support of this assertion, the Appellant principally submits[2] that the law and record illustrate that the Trial Court committed reversible error by:

1) admitting evidence during the guilt phase regarding Appellant's prior conviction for manslaughter;

2) failing to sever the extortion count;

3) admitting evidence regarding the Appellant's execution of divorce papers and a Quit Claim Deed;

4) entering guilty verdicts not supported by substantial competent evidence/denial of Appellant's Motion for Judgment of Acquittal

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[2] The Appellant's trial counsel also argued several other grounds, which - in an abundance of caution - the appellant offers for this Court's review and consideration. The contents of the arguments are contained in the Motions as they appear in the Record:

1. Defendant's Motion to Suppress Statements, which relates to statements made by Williamson to investigators. (R-4667-4670), (T:719-727).

2. Defendant's Motion for Mistrial, regarding prosecutorial error. (T:2644-2649, 2782-2786).

(T:2899);

5) not properly weighing all the mitigating factors presented regarding Appellant's background and brain dysfunction; and

6) denying Appellant's Motion to Declare Florida Statute §921.141 Unconstitutional.

The trial court's admission into evidence of the Appellant's prior manslaughter conviction was error, as its probative value was far outweighed by the prejudicial affect it surely had on the jury. Section 90.403 of the Florida Statutes. It also does not meet the criteria for admission as articulated in Section 90.404.

Even if the evidence was admissible to prove extortion, it should not have been admitted in this case; rather, the law provides that the trial judge should have ordered a severance of the extortion count from this trial.

Additionally, the Trial Judge committed reversible error by denying Appellant's Motion in Limine to exclude evidence relating to Williamson's divorce and his execution of a Quit Claim Deed. The evidence was collateral and unrelated to the crimes charged, and therefore inadmissible. (T. 1458). Its admission was also prejudicial and misleading to the trier of fact. Further, the relevance of this wholly collateral material is not easily discernable.

A review of the transcript and record below displayed that the trial judge should have granted the Appellant's Motion for a Judgment of Acquittal. There was no physical evidence (i.e., fingerprints, blood evidence) that placed Williamson at the crime scene. The State's case hinged on the testimony of Panoyan, which is marked by inconsistencies and contradictions.

Even if the conviction was appropriate, the law supports reduction of the death sentence to life, in light of the mitigating factors put forth by four experts, which included that the appellant had brain damage and relevant childhood problems. Consequently, this Court should vacate the death sentence and remand with instructions to impose a life sentence if the conviction for first degree murder is affirmed.

Additionally, the Appellant urges this Court to find Florida Statutes §921.141, which addresses sentencing, as unconstitutionally vague and ambiguous. Thus, the Defendant's death sentence should be vacated.

ARGUMENT

A. THE ADMISSION OF A THIRTEEN YEAR-OLD CONVICTION WAS ERROR

The Defendant asserts that the State's use of a thirteen year-old unrelated conviction for manslaughter was reversible error. (T:3474).

The State offered this evidence in direct examination of Panoyan and a jail house informant. (T:1546, 2147). The defendant's timely objections were overruled.

The following references were made to the Appellant's prior conviction:

> Well, Mr. Panoyan knew about his (Williamson's) past. He knew that Williamson had killed before and he would have no problem killing again. He killed a four year old kid with a baseball bat.[3] (T:1546-47) (Testimony of Patrick O'Brian).

> He is a person that killed a baby. Stomped it to death and beat this other one so bad that it was brain dead. (T:2147) (testimony of Charles Panoyan).

The trial judge opined that this testimony was relevant to Count XVII - Extortion, based upon Panoyan's claim that he was scared into silence by Williamson's alleged threats. (T: 2123-24).

Appellant contends on various grounds that the admission of his prior conviction constitutes error, and denied him the right to a fair trial. These grounds include:

> a) the prejudicial impact of the conviction as applied to support the extortion count outweighs its probative value, and

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[3] In addition to being overly prejudicial, the reference to the baseball bat may even have been erroneous. During the sentencing phase, when the manslaughter was discussed in depth, there was no reference to the baseball bat. (T:3466, 3476, 3487).

b) the use of the thirteen year-old conviction is violative of the "Williams Rule."

A. The prejudicial value of the thirteen year-old manslaughter conviction outweighs any probative value.

Appellant submits that the State's use of an unrelated conviction for manslaughter was so inflammatory that a fair trial was made impossible. See Fla. Stat. §90.403: Henry v. State, 574 So. 2d 73, 75 (Fla. 1991).

Section 90.403 of the Florida Statutes provides:

> 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.

This Court has taken great pains to articulate the need for careful consideration of the obvious prejudicial effect such evidence has on a jury. As this Court in State v. Price, 491 So. 2d 536 (Fla. 1986), stated in disallowing - on the basis of its prejudicial value - otherwise admissible evidence:

> Care must be taken, however, not to allow the introduction of unduly prejudicial evidence simply because the evidence is admissible under a different rule.

Id. at 537. See also Jackson v. State, 451 So. 458, 461 (Fla. 1984) ("where evidence has no relevancy except as to the character and propensity of the defendant to commit the crime charged, it must be

verdict, then the error is by definition harmful"). See also State v. Lee, 531 So. 2d 133, 136 (Fla. 1988) (same).

b. The use of the thirteen year-old conviction is violative of the "Williams Rule."

The Williams Rule dictates that similar fact evidence of other crimes, wrongs or acts is admissible when relevant to prove a material fact and issue, such as proof of motive, opportunity intent, preparation, plan, knowledge, identity, or absence of mistake. See Williams v. State, 110 So. 2d 654 (Fla. 1959) (codified through section 90.404). However, the evidence is inadmissible when it is used to show bad character or propensity. Id. Fla. Stat. §90.404(2). See also Holland v. State, 636 So. 2d 1289, 1293 (Fla. 1994).

The State placed great emphasis on its use of the prior conviction, which bore no relation to the crime charged in the case at bar. The intent, therefore, could not be but to show the bad character or propensity of the Appellant. Thus, the creative use of the collateral evidence of a thirteen year-old conviction constituted harmful error, and this Court should reverse and remand for a new trial. This Court's decision in State v. Lee, 531 So. 2d 133 (Fla. 1988) is instructive in this regard.

In State v. Lee, 531 So.2d 133 (Fla. 1988), the Defendant was charged with kidnaping, sexual battery and robbery while armed with a hand gun. At trial, the State introduced evidence that the Defendant had robbed a bank while armed with a hand gun on the *same day* as the charged offense. This court, in disallowing the use of the evidence, stated:

> In the present case, the improper collateral evidence was given undue emphasis by the state and was made a focal point of the trial. [footnote reference omitted] We agree with the district court that the opening and closing arguments of the state attorney lead to the inescapable conclusion that the prosecutor was asking the jury to find Lee guilty, at least in part, because he was an evil man intent on committing the crime. The state has failed to meet the burden under *DiGuilio*. Because of the emphasis placed on the improper collateral crime evidence, we are unable to say beyond a reasonable doubt that the testimony presented regarding Lee's participation in a bank robbery several hours after committing the offenses under review had no impact on the verdict. The district court correctly reversed the conviction and remanded for a new trial . . .

Id. at 137-38.

Notwithstanding the State's contention that the evidence went to the "state of mind" of its star witness, Charles Panoyan, the use of a thirteen year-old conviction was violated the spirit and

intent of the Williams rule. This Court should therefore reverse and remand for a new trial.[5]

B. THE TRIAL COURT ERRED IN FAILING TO SEVER THE EXTORTION COUNT FROM THE TRIAL.

Even if this Court finds that evidence of Appellant's prior conviction for manslaughter was properly admitted to prove the extortion count, the Appellant alternatively posits that it was reversible error for the trial court to fail to sever the extortion count from the trial.

Upon learning that the State planned to introduce evidence of the prior conviction of Appellant for manslaughter to prove the extortion count, defense counsel indicated that severance should be afforded. (T:1505). This was not done.

Florida Rule of Criminal Procedure 3.152 (a)(2) provides that where two or more charges of related offenses are joined in a single indictment or information, the court, upon a proper motion before or during trial, shall grant a severance of such charges,

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[5] The State provided a notice of the intent to rely upon Williams Rule evidence, but failed to properly specify the purpose for its use of the previous conviction. (R-4573).

It is also significant to note that, while the trial judge commented that there was no Williams Rule present, he actually based his ruling in part on Williams Rule criteria. T:1506.

where it is necessary to achieve a fair determination of the defendant's guilt or innocence of each offense. See also Chapman v. State, 639 So.2d 682 (Fla. 2d DCA 1994)(reversed in part for failure to sever charges); Orr v. State, 380 So.2d 1185 (Fla. 5th DCA 1980) (even where admission of evidence was not harmless, severance of firearm possession count from grand theft count was required to promote fair determination of defendant's guilt or innocence).

The appellant argued: "If the jury hears about this prior conviction that they otherwise would not hear about because it has no bearing on this case, it's going to have such a prejudicial value that this defendant cannot have a fair trial." (T:1498). The trial judge's response also supports that the extortion count should have been severed:

> You might be right if there was no charge of extortion and if the state didn't have the burden of proving their good grounds. If supposedly the jury wants to believe the statement of the alleged victim was in fear of this defendant for a number of reasons, you're probably right the prejudice outweighs the probative value. It might outweigh the probative value on other counts.

(T:1498).

The trial judge's offer to give a curative or cautionary instruction to the jury on the purposes for which they could

consider this evidence does not change the Defendant's legal right to severance based on the facts of this case. (T:1507, 1508, 1509). See, e.g., Wright v. State, 586 So.2d 1024 (Fla. 1991)(trial court's refusal to sever charge of murder from other counts was reversible error); Garcia v. State, 568 So.2d 896 (Fla. 1990)(was an abuse of discretion for trial court to deny severance); Thomas v. State, 440 So.2d 581 (Fla. 1983)(failure to sever charge prevented defendant from receiving a fair trial on other charges).

This Court's decision in State v. Vazquez, 419 So.2d 1088 (Fla. 1982), is also supportive. In Vasquez, the defendant was charged with first degree murder and possession of a weapon by a convicted felon. The state introduced evidence of Vasquez's prior conviction for robbery. On appeal, this Court held that severance was necessary to prevent the prior conviction from prejudicing the defendant's right to a fair determination on the murder charge. Id. at 1090.

This Court's decision in Ellis v. State, 622 So.2d 991 (Fla. 1993), is also instructive in this regard. In Ellis, this Court held that even if joinder is proper, a defendant is entitled to have separate trials upon showing that severance is necessary to achieve a fair determination of guilt or innocence of each offense. See also Crossley v. State, 596 So.2d 896 (Fla. 1991)(evidence that

the defendant may also have committed another crime can have the effect of tipping the scale).

The extreme prejudicial impact of the subject evidence - whether or not the extortion count was interrelated to the murder count - made severance of the extortion count necessary and appropriate.

Therefore, this Court should reverse the conviction and remand for a new trial.

C. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE RELATING TO APPELLANT'S EXECUTION OF DIVORCE PAPERS AND A QUIT CLAIM DEED.

At trial, Bob Decker testified that he was forced to put his signature on a form of some kind. (T:1062, 1084, 1087). Armed with this information, the State filed notice of its intent to introduce documents executed by the Appellant in the way of a Quit Claim Deed and divorce papers. (T:154). The Appellant filed a Motion in Limine to exclude this prejudicial evidence, but it was denied. This was error.

The form signed by the Deckers was never recovered. The Quit Claim Deed prepared by Williamson was unrelated to the form signed by the Deckers, and therefore not relevant as a material issue.

Divorce papers executed by Williamson also were very prejudicial of no substantive value to the trier of fact. This

evidence was introduced under the guise of showing Williamson's knowledge of legal forms in an effort to prove that Appellant had forced the Deckers to sign the form. (T:154). Apparently, in 1989 or 1990,[6] Williamson divorced his wife Cassandra without her knowledge, and remained living with her. (T:1458).

Admission of the divorce papers only served to inflame the jury and further collaterally impugn the Appellant's character, and as such, should not have been referenced or admitted. See cases cited above, and Rigdon v. State, 633 So.2d 1128 (Fla. 1st DCA 1994)(even if marginally relevant, testimony regarding defendants "discontrol" as a result of alcohol consumption could have been excluded as confusing); Page v. Zordan, 564 So.2d 500 (Fla. 2d DCA 1990)(evidence that defendant owned pornographic magazines, was a peeping tom, and suffered from a sexual dysfunction, was overly prejudicial and irrelevant). Notwithstanding the trial judge's decision to admit this evidence - because the Defendant theoretically could show that he was without knowledge of legal forms, (T:157) - reversal and remand is proper. See cases cited on pp. 11-13 of the Initial Brief. See also Pausch v. State, 596 So.2d

[6] The record does not clearly establish the year of the Williamson's divorce.

1216 (Fla. 2d DCA 1992)(officer's comments misleading, confusing, prejudicial, and fundamentally undermined Defendant's trial).

D. THE JURY'S VERDICT IS NOT SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

The record does not contain substantial competent evidence to support the jury verdict. This Court should therefore reverse.

The record does not reflect that the gun used in the crime was ever found. There is no fingerprint evidence, nor blood evidence, nor any DNA evidence linking the Appellant to the crime. (T:1660, 3035). The hat found at the scene was not shown to be the Appellant's. (T:1482). The utility belt allegedly used in the crime was actually found in Panoyan's truck. (T:1424). The record also reveals that the "utility belt" allegedly used did not belong to the Appellant. (T:1464,1467). This circumstantial evidence does not rise to the level of substantial competent evidence. Accord Crump v. State, 622 So.2d 963 (Fla. 1993)(where State's entire case rests upon circumstantial evidence, evidence must be inconsistent with any reasonable hypothesis of innocence); Fowler v. State, 492 So. 2d 1344 (Fla. 1st DCA 1986) (quoting Mayo v. State, 71 So. 2d 899, 904 (Fla. 1954) ("Evidence which leaves one with nothing stronger than a suspicion that the defendant committed the crime is not sufficient to sustain a conviction").

The "direct" testimony came from the man who was originally the prime and only suspect, Charles Panoyan, and from three convicted felons. Respectfully, the State's case is so replete with inconsistency that it cannot be said without reasonable doubt to rise to the level of substantial competence sufficient to support imposition of the death penalty upon the Appellant.

The apparent inconsistencies include:

1) Panoyan claimed to have been hog-tied, but later showed no rope burns or abrasions. (T:2360, 1171).

2) Panoyan repeatedly told police that he did not know the gunman. (T:613, 1852)

3) Panoyan testified that he was in great fear of Williamson yet Bob Decker witnessed the two of them in court talking and laughing together. (T:648).

4) Panoyan claims that he immediately phoned the police from the pay phone minutes away from the crime scene, yet the call was placed long after the 911 call was recorded from Donna Decker (long after Panoyan had left). (T:651, 1183, 1184, 1848).

5) The gunman did his best to kill the whole Decker family, but somehow permitted Panoyan to walk out unscathed. (T:648).

6) The gunman was aware that the Decker's had an alarm system and he know that they had a safe. (T:1062, 1064, 1167-68).

7) Bob Decker witnessed the gunman whispering something to Panoyan. (T:1067).

8) Panoyan worked on Decker's home and was aware of the alarm system. (T:1023).

9) Bob Decker testified that Panoyan would rarely come to his home, yet he happened to be their the same night and time that this crime took place. (T:1044,1158).

10) According to Panoyan, he went to Decker's home to deliver deer meat, but went inside without it, and upon getting it he returned with the gunman. (T:2328).

11) The Decker's were taken into the bedroom and tied up, but Panoyan remained in the living room. (T:1167, 1170).

12) Decker saw a station wagon as he came home that night. The Defendant did not own such a car. (T:1043, 1483).

13) Decker described the gunman as a large man, but Appellant is diminutive in size. (T:645, 1025).

14) Decker told the police that he thought he knew the perpetrator. (T:652).

The Record does not reveal substantial competent evidence sufficient to justify the guilty verdict and sentence of death. Therefore this Court should reverse (and/or remand for entry of a judgment of acquittal).

E. THE APPELLANT'S MITIGATING CIRCUMSTANCES MANDATE THAT HIS DEATH SENTENCE BE VACATED.

While a trial judge is awarded great latitude in weighing a defendant's mitigating circumstances during sentencing, his

findings nevertheless must be supported by substantial competent evidence. See, e.g., Campbell v. State, 571 So.2d 415 (Fla. 1990).

The record illustrates that sufficient weight was not properly given to a) Appellant's brain dysfunction and b) evidence of Appellant's dysfunctional upbringing. The trial judge failed to properly weigh Appellant's statutory mitigators which dealt with mental capacity.

During sentencing phase, four medical experts testified that Appellant suffers from an organic brain dysfunction. (T: 3530, 3583, 3788, 3635). The Trial judge repeatedly requested that the experts provide some proof that Appellant's brain disorder directly caused him to commit the crimes. The law provides that aggravating circumstances must be proven beyond a reasonable doubt, but mitigating circumstances do not share such a high burden. See Fla.Std.Jury Instr. (Crim) at 81.

In Larkins v. State, 20 Fla. L. Weekly S228 (5/11/95), this Court appeared to give some weight to testimony that Larkin's brain dysfunction constitutes a mitigating circumstance.[7] The record also reveals the Appellant experienced an abusive upbringing at the

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[7] The court reversed the defendant's death sentence, however, on the grounds that the trial judge failed to make specific findings as to mitigating factors on the record.

hands of his parents, which included routine beatings, deprivation of food and clothing, and other severe punishments.

Further, Appellant asserts that the above referenced mitigating factors establish that his death sentence should be reversed, or at least remanded for further consideration consistent with the mitigating factors as alleged.

F. FLORIDA STATUTE §921.141 IS UNCONSTITUTIONAL, AS IT IS VAGUE AND OVERBROAD.

Florida Statute §921.141 is unconstitutional on its face and application, and therefore violative of the Eighth, Fifth, and Fourteenth Amendments to the United States Constitution and Article I, §9 and 17 of the Florida Constitution, due to its vagueness and overbreadth.[8]

Consequently, Appellant's death sentence should be reversed.

CONCLUSION

Respectfully, the trial court erred in either or all of the following grounds: in permitting the State to use evidence of Appellant's prior conviction for manslaughter, in failing to sever the extortion count from the trial if the conviction was

[8] The constitutionality of Florida Statute 921.141 has been upheld in general. The statute however is unconstitutional as applied to the facts of this case.

admissible, and/or in admitting collateral evidence in the form of a Quit Claim Deed and divorce papers. Alternatively, the record illustrates that the guilty verdicts rendered are not supported by substantial competent evidence.

Finally, Appellant's death sentence should be reversed due to the mitigating circumstances presented, and the unconstitutionality of Florida Statutes §921.141. Accordingly, for the reasons stated herein, this Court should reverse this case for a new trial, enter a judgment of acquittal, or vacate the death sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was provided by U.S. Mail to: CELIA TERENZIO, Esq., Office of the Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401-2203; DANA WILLIAMSON, Florida State Prison, Stark, Florida.

DATED this 12th day of June, 1995

By: Robert E. Hoelzer

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