IN THE SUPREME COURT OF FLORIDA

SAMUEL L. SMITHERS,	:	
Appellant,	:	
vs.	:	Case No. SC96690
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF TYPE USED

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PRELIMINARY STATEMENT

The record on appeal consists of two sections, a supplemental record and three volumes of exhibits. The first part, contained in volumes I and II, consists of documents filed with the clerk. References to this part of the record on appeal will be designated by volume number, followed by "R" and page number. The second part of the record on appeal is contained in volumes III through XIX and consists of transcripts from trial and sentencing. References to this part of the record on appeal will be designated by volume number, followed by "T" and page number. References to the six-volume "supplemental record" which contains mostly pretrial hearings will be designated "S" and volume number, followed by "R" or "T" as appropriate and the page number. References to the exhibits will be designated "E" and volume number, followed by "E" and page number. References to the Appendix to this brief (containing the court's sentencing order) will be designated "A" and page number.

STATEMENT OF THE CASE

A Hillsborough County grand jury returned a two-count indictment on June 12, 1996 charging Samuel Smithers, Appellant, with the first degree murders of Cristy Cowan and Denise Roach (I, R22-3). The murder of Cowan was alleged to have taken place May 28, 1996 and the murder of Roach sometime between May 12, 1996 and May 28, 1996 (I, R22).

Prior to trial, Appellant filed motions on May 21, 1998 to sever the offenses and to suppress his confession (I, R64-7). These motions were heard before Circuit Judge William Fuente on June 29, 1998 (SI-II, T4-218). The court issued an order denying the motion to suppress confession on July 22, 1998 (I, R69-73A). After hearing additional argument concerning the motion to sever on August 13, 1998 (SII, T235-71), the judge entered a written order denying severance August 24, 1998 (I, R81-5).

The case proceeded to trial before Judge Fuente and a jury. The jury was selected on December 14, 1998 (I, R122; III-IV, T5-321). Appellant's " Second Motion in Limine" (I, R112-3) seeking to exclude inflammatory photographs of the victims bodies was heard immediately following the swearing of the jury (IV, T326-48). The judge found that several of the photos were "extremely I guess shocking" (IV, T331), but nonetheless denied the motion and admitted the photos to illustrate the medical examiner's testimony (IV, T330, 339-40, 345, 348).[1]

[1]One of the photos was ordered to be cropped (IV, T340) and the State agreed to withdraw another (IV, T343).

After the State presented its case, defense counsel moved for judgment of acquittal based upon failure to prove premeditation on both counts (X, T1099). The court denied the motion (X, T1099). The sole defense witness was Appellant who testified in his own defense (X, T1104-1206). Defense counsel's renewed motion for judgment of acquittal was denied (X, T1211). The jury returned verdicts of guilty as charged on both counts (II, R164-5; XI, T1338).

Appellant filed a motion for new trial (II, R166-7) which was heard and denied by the court on January 23, 1999 (XVII, T2235-8).

Penalty phase commenced on January 22, 1999 (II, R193; XII, T1357). The State offered witness testimony from three of Appellant's co-workers at Borell Electric Company and Detective James Iverson (XII, T1361-1447). Appellant's two brothers, Robert Smithers and Alvin Smithers, his former wife, Sharon Smithers-Cole, and son, Jonathan Smithers, testified as defense witnesses (XII, T1454-1518; XIII, T1567-1616; XVI, T2050-88). Additional defense testimony came from Beatrice Green, an assistant principal, Sheriff's Detention Deputy Ray Cruz, and three mental health professionals, Drs. Frank Wood, Robert Berland and Michael Maher (XIII, T1532-40, 1544-66, 1617-82; XIV, T1694-1824; XV-XVI, T1838-2048). The State then presented three mental health professionals in rebuttal, Dr. Edward Ikeman, Dr. Donald Taylor, and Dr. Barbara Stein (XVI, T2090-2216). The jury recommended that Smithers be sentenced to death for both murders

(II, R209; XVIII, T2351).

A Spencer hearing was held on April 15 and 16, 1999 (SIII, T425-541; SVI, T759-79). The judge heard testimony from victim Cristy Cowan's father, John G. Cowan, who urged the court to sentence Smithers to life imprisonment (SVI, T765-71). He asked that the case be resolved without him having to wait years for a possible execution (SVI, T768). He also stated that he did not want the "great harm" that would be done to Jonathan Smithers and Appellant's ex-wife if Appellant were executed (SVI, T768). Cowan hoped that Appellant might come to truly repent if he were sentenced to life in prison without the possibility of parole (SVI, T768-9).

Sharon Smithers also urged the court to impose a life sentence (SVI, T771-6). She testified that Appellant had been a "wonderful husband" and devoted father to their adopted son, Jonathan (SVI, T772-4). Arguments were made by both counsel regarding the propriety of imposing a death sentence (SIII, T428-539).

Sentencing was held June 25, 1999, at which time the court read his "Sentencing Order"[2] (II, R245-61; XIX, T2362-82). As aggravating circumstances applicable to both murders, the judge found: 1) Appellant was previously convicted of a capital felony based upon the contemporaneous convictions, and 2) the homicides were especially heinous, atrocious or cruel (II, R246-50; XIX,

[2]The "Sentencing Order" is reproduced in the Appendix to this brief.

T2366-70; A2-6). A third aggravating circumstance, committed in a cold, calculated and premeditated manner, was found applicable to the murder of Cristy Cowan only (II, R250-3; XIX, T2370-3; A6-9).

In mitigation, the judge found both statutory mental mitigators (extreme emotional or mental disturbance and substantially impaired capacity) to exist (II, R254-7; XIX, T2375-8; A10-3). As section 921.141(6)(h) mitigation, the judge found eight factors: 1) good husband and father, 2) close relationship with siblings, 3) childhood physical and emotional abuse, 4) religious devotion and faithful church attendance, 5) good pretrial jail conduct and ability to act appropriately if incarcerated, 6) desire for life sentence by father of Cristy Cowan, 7) contributions to his community , and 8) confessed to crimes (II, R257-9; XIX, T2379-81; A13-5).

The court concluded that as to both homicides, the aggravating circumstances outweighed the mitigating circumstances (II, R259-60; XIX, T2381-2; A15-6). Two sentences of death were imposed (II, R260, 264-74; XIX, T2382, A16).

Appellant's notice of appeal was filed July 19, 1999 (II, R275-6). Court-appointed counsel was permitted to withdraw and the Public Defender appointed as appellate counsel on December 7, 1999 (II, R290-1). Jurisdiction lies in this Court pursuant to Article V, section 3(b)(1) of the Florida Constitution and Fla. R. App. P. 9.030(a)(1)(A)(i).

STATEMENT OF THE FACTS

A) Hearing on Motion to Suppress Confession.

At the pretrial hearing, Detectives Blake, Flair (Martinez)[3] and Metzgar testified for the State with respect to the circumstances surrounding Appellant's confessions to the two homicides. Detectives Blake and Flair went to Appellant's residence in Plant City shortly before midnight on May 28, 1999 (SI, T6-9, 39-40). At that time, the detectives knew that Smithers had been employed as a caretaker at a vacant country estate where two bodies had been found in a pond (SI, T7, 39). The heir had made a surprise visit to the property earlier in the evening and discovered Appellant cleaning blood off an axe (SI, T8-10, 38-40).

When the two detectives arrived, Appellant agreed to go with them to the Sheriff's Office for questioning (SI, T9-10, 41-2). He asked that his wife be allowed to accompany them (SI, T10, 42). During the half-hour trip to the Ybor City location, there was no conversation about the investigation (SI, T11-2, 43-4).

According to the testimony of Sharon Smithers, once they reached their destination and were walking toward the building, she asked Detective Flair, "Do we need a lawyer?" (SI, T106-7). Detective Flair replied that they didn't want to make a lawyer angry by waking one up at 12:30 a.m. and that they were simply

[3]Detective Dorothy Martinez was known by her unmarried name, Dorothy Flair, at the time of these events (SI, T6). Both names are used in the record on appeal - for consistency and clarity she will be referred to as Detective Flair in this brief.

questioning Appellant at this time (SI, T106-7). Appellant agreed that he heard this conversation, but Detectives Blake and Flair denied that it had ever occurred (SI, T26, 44; SII, T151-2).

Appellant was questioned for almost three hours before being taken back home by the detectives (SI, T74). At one point, Detective Flair was reading him Miranda rights when he asked, "Do you think that I need an attorney?" (SI, T14, 28, 46-7, 71-3). Detective Flair stated that she responded to this question with a question of her own, "Do you think you need an attorney or a lawyer?" (SI, T47, 71). Appellant replied, "No, I don't think so" (SI, T15, 28, 47). Detective Flair then reread the Miranda warnings in their entirety; Appellant waived his rights, and questioning continued (SI, T15-6, 28, 47-9, 73-4). The interview terminated when Appellant agreed to return in the morning to take a polygraph (SI, T16-7, 53-4).

Detective Herbert Metzgar conducted the polygraph examination. He testified that Appellant arrived at his office around 11:45 a.m. on May 29, 1996 (SI, T81). Smithers told Detective Metzgar that he had slept for two hours the previous night (SI, T82). Detective Metzgar gave Appellant a Miranda rights form and asked him to read and sign it (SI, T83-5). Appellant appeared to understand the form, which he signed in Detective Metzgar's presence at 11:50 a.m. (SI, T84-5, 96).

The polygraph took about half-an-hour to complete (SI, T96). Detective Metzgar testified that he told Appellant that the

results showed deception with respect to the homicides of the two women (SI, T86). Then, in the words of Detective Metzgar:

> And in Mr. Smithers' particular case I had taken a little bit of background information on him from Detective Flair. And she told me he attended church at Plant City. Generally I have a speech that I use on most folks. In Mr. Smithers case I told him, "You don't seem like a bad fellow. You haven't been in a lot of trouble in your lifetime. You're out there working and you don't appear to be the type of individual that just does nothing that makes an effort." And I knew that if he attended church -- of course, I'm a Christian and I explained to him that if he was a Christian -- and it was my belief based on the polygraph he wasn't telling the truth about this, that he might want to tell the truth about it, that that is probably the right thing to do.

(SI, T86-7). On crossexamination, Detective Metzgar maintained that he had only mentioned religious beliefs on this one occasion during the interrogation (SI, T99). There was no discussion regarding whether to consult with a lawyer (SI, T99). Within fifteen minutes after the conclusion of the polygraph test, Appellant made an incriminating statement (SI, T88-9, 98). Detective Metzgar called Detectives Flair and Blake into the room to inform them about the statement (SI, T89-90).

Interrogation continued with Detectives Flair and Blake doing the questioning (SI, T59). They did not reread Miranda warnings (SI, T59-60). Appellant continued to deny committing the homicides and "became pretty insistent" that his wife be allowed to be present during the interrogation (SI, T20, 61-2). Detective Flair went outside, spoke with Sharon Smithers, and brought her into the room to be with her husband (SI, T62).

According to Sharon Smithers, Detective Flair told her that Appellant was about to confess and the police needed her help to convince him "that that was best" (SI, T109-10). However, Detective Flair denied asking Mrs. Smithers to assist them in the interrogation (SI, T63).

Once inside the room, Sharon Smithers encouraged Appellant to "just tell the truth" to the police (SI, T64). Interrogation resumed with questions being directed to Appellant (SI, T21-2, 64-5, 91). Whenever he hesitated to respond, his wife begged him to give truthful answers to the police (SI, T23, 33, 75-6, 91-2, 101). Detective Flair admitted that she might have told Appellant, "Listen to your wife, you need to tell the truth" (SI, T76). Other than that, the detectives denied any reliance on Mrs. Smithers in obtaining Appellant's confession (SI, T22, 64-5, 92-3, 101; SII, T193-4).

Sharon Smithers contradicted the detectives' testimony. She testified that when Appellant hesitated to respond to a question, the detectives would ask her, "Talk to him and see if you can get him to answer" (SI, T127). She was saying to her husband, "Sam, come on tell the truth, be honest, let's get this over with, Baby" (SI, T129). Appellant also testified that the detectives asked his wife to assist them "a couple of times" (SII, T184). He said that he would not have made a statement if his wife had not encouraged him to confess (SII, T158).

Once Appellant admitted to killing Cristy Cowan, the detectives turned to the homicide of Denise Roach. Again, Appellant

initially denied any involvement (SI, T24, 65). "For quite some time", Sharon Smithers "encouraged" her husband to tell the truth (SI, T24, 34, 66). Eventually he admitted killing Denise Roach as well (SI, T25, 66, 93). Detective Flair stated that Sharon Smithers had come into the interrogation room between 1:10 and 1:15 and that the session concluded at 3:10 p.m. (SI, T78).

B) Hearing on Motion to Sever Offenses.

The indictment charged that the homicide of Cristy Cowan took place May 28, 1996 and that Denise Roach had been killed sometime between May 12, 1996 and May 28, 1996 (I, R22-3; SI, T196). The State argued that these separate offenses showed numerous similarities: 1) both victims were prostitutes working in the same area; 2) both were killed in the garage of the Whitehurst property and dumped in the same pond; 3) both had been strangled and bludgeoned with tools; and 4) the witnesses would be the same for both cases (SII, T197-201). The State further contended that the offenses were episodic although they occurred up to two weeks apart (SII, T204, 259, 269). Defense counsel denied that the offenses were episodic in nature and stated that severance was necessary to achieve a fair determination of guilt or innocence (SII, T205).

The court took the motion under advisement and heard additional argument on August 13, 1998 (SII, T206, 235-71). The judge recognized that joinder of offenses was a different matter

than whether Williams Rule evidence could be produced at separate trials (SII, T247, 262, 268). The State urged that the offenses not be severed because evidence of the other homicide was necessary in each case to rebut Appellant's statements about how the women came to be on the property (SII, T243-6). Also, if the offenses were severed, it might appear to the jury that Smithers had been interrogated for an extended period of time before he confessed to the homicide of Denise Roach (SII, T247-9).

The court issued an order on August 24, 1998 denying Appellant's motion to sever offenses (I, R81-5). He found that the two homicides "are connected acts or transactions in an episodic sense" (I, R82). He also observed that evidence of each homicide would be relevant and admissible in the trial of the other under §90.404(2), Fla. Stat. (1995) (I, R82-3).

C) Trial - Guilt or Innocence Phase.

On May 28, 1999, Marion Whitehurst, a kindergarten teacher, drove to inspect property which had belonged to her late mother and was now up for sale (V, T388, 392-3, 406). The property. located off U.S. Highway 92 in Plant City, consisted of 27 acres with a house and outbuildings (V, T388-92). The purpose of the visit was to see whether the lawnmowing had been done and because she "had an uneasy feeling" (V, T405).

When Ms. Whitehurst arrived at the site around 7:00 p.m.,

she was surprised to see Samuel Smithers, Appellant, standing near the garage (V, T406-7). Smithers had been employed to mow the property for about a year (V, T394-6). However, he had mowed the lawn and picked up his check only two days previously (V, T401). As Ms. Whitehurst approached him, she noticed that he was washing off an axe (V, T408).

Smithers explained that he had been taking down some tree limbs that had been struck by lightning (V, T410-1). As Whitehurst returned to her car, Appellant went into the garage area and said that he would remain to clean up some blood (V, T412-3). Whitehurst observed a large pool of blood with what looked like Dorito chips surrounding it (V, T414). Smithers said that "something must have killed a squirrel in here" (V, T414-5). Whitehurst also observed drag marks in the sand which she characterized as "bigger than a squirrel" (V, T415). She told Smithers that she appreciated his taking care of her mother's property and drove away (V, T416-7).

Although Smithers' demeanor was "very normal acting and casual", Whitehurst was upset and "knew that something had been killed at the property" (V, T417). After telephoning her brother-in-law who lived in North Carolina, she called the Sheriff's Office and arranged to meet a deputy near the property (V, T417-9). She told the deputy her suspicion that animals were being poached (V, T421).

Patrol deputy Scott Skolnik of the Hillsborough County Sheriff's Office responded to the call about 8:00 p.m. (V, T438-

9). He met Whitehurst at a Presto convenience store and they proceeded to the property (V, T440-5). Whitehurst pointed out water on the garage floor and drag marks on the ground (V, T446). Deputy Skolnik followed the drag marks to the pond and discovered a human body floating face down (V, T423-4, 448).

Divers from the Underwater Recovery Team in the Sheriff's Office arrived after it was already dark (V, T462). They put a small inflatable boat into the pond and rowed out to the body (V, T467-70). Later, they discovered another body floating in the pond (V, T472-3). Divers Sergeant Greco and Detective Johnson proceeded to recover the bodies (V, T474-8, 489-94).

The bodies were identified by stipulation as those of Cristy Elizabeth Cowan and Denise Roach, the victims charged in the two-count indictment (I, R22-3; VII, T687-8). Hillsborough County Associate Medical Examiner, Dr. Laura Hair, went to the crime scene and saw the bodies after they had been removed from the water (VII, T688-9). She then performed autopsies on them the next day at her office (VII, T691-2).

With respect to the victim Cristy Cowan, Dr. Hair observed that she had not been dead for more than several hours because the body was not decomposed (VII, T698). There was a foam cone around her mouth which suggested that she might have drowned (VII, T701-2). On the other hand, other causes of death can also cause a foam cone and Dr. Hair did not list drowning on the death certificate (VII, T703, 750-1). Also, the person could already be dead and the foam caused by trapped air escaping from the

lungs (VII, T763).

An injury around Cowan's eye was caused by blunt impact, consistent with a piece of wood or tree limb (VII, T706). A five inch superficial laceration under the lip could have been inflicted by a hoe or a glancing blow from an axe (VII, T706-8). On the other side of her mouth, a blunt impact injury broke the jawbone and several teeth (VII, T708-9). The top of Cowan's head showed what Dr. Hair described as a chop wound which penetrated the skull and went to the superficial portion of the brain (VII, T711-2). This wound was caused by a sharp object, possibly an axe (VII, T712). A similar chop wound behind the left ear could also have been inflicted by an axe (VII, T713).

When Dr. Hair dissected the victim's neck, she saw injuries consistent with manual strangulation (VII, T716). Although the hyoid bone was not fractured, there was hemorrhage around the neck muscles and petechia in one of her eyes (VII, T717). Dr. Hair gave her opinion that strangulation combined with chop wounds to the head was the cause of death (VII, T717). If she had evidence that the victim was alive after being placed in the pond, Dr. Hair would have listed drowning as another potential cause of Cowan's death (VII, T721-2).

With respect to the victim Denise Roach, Dr. Hair observed that the body was quite decomposed and that she must have been in the pond seven to ten days (VII, T722-3). This inhibited Dr. Hair's identification of injuries, but she was still able to determine a cause of death (VII, T725). She noticed two one-inch

slits in Roach's clothing which could have been caused by a knife or other sharp instrument (VII, T726-8). There was extensive fracturing of the face caused by multiple blunt impact wounds which were inflicted with great force (VII, T731-3). Roach also had a skull fracture which could have been caused by either a blunt object or by having the back of her head pushed against a hard surface (VII, T733-5). Additionally, there were sixteen puncture wounds - eleven which went through the skull (VII, T735-6). These wounds were square and probably caused by some type of tool (VII, T737-9). However, no tool or weapon consistent with these puncture wounds was ever produced (VII, T754).

An examination of Roach's neck area showed that the hyoid bone was fractured (VII, T739-40). This is most commonly seen in cases of manual strangulation (VII, T740). Dr. Hair's concluded that Roach died from "the combined effects of stab wounds and blunt impact to the head with skull fractures and manual strangulation" (VII, T746).

Witness Bonnie Kruse had known both of the dead women. She testified that she had been a prostitute for eleven years, living for six years at the Luxury Motel on East Hillsborough Avenue in Tampa (VIII, T910, 912). She knew Cristy Cowan and Denise Roach because they were also prostitutes who had been previous tenants at the Luxury Motel (VIII, T913-4, 917-9).

When Appellant was arrested for their homicides, his photo appeared on television news (VIII, T924-5). Bonnie Kruse saw him and realized that she had "dated" him before at the Luxury Motel

(VIII, T925). She remembered him in particular because he asked her to leave her room and ride with him to Seffner (VIII, T926-7). He offered her extra money, but she refused (VIII, T927). She testified that Appellant drove a dark colored pickup truck with a "Bad Boys Club" decal on the rear (VIII, T929).

On crossexamination, Kruse admitted that she had used crack cocaine for eleven years (VIII, T940). At the time of the homicides, she "smoked crack every day all day" (VIII, T947). Cowan and Roach as well as the other prostitutes in that area were also addicted to crack cocaine (VIII, T914, 916, 922, 947). Numerous pimps and drug dealers also frequented the East Hillsborough Avenue area (VIII, T935, 937-40). Kruse agreed that these "gentlemen" were "very violent individuals" (VIII, T940).

Another prostitute, Sharon Sheppard, testified that she was a close friend of the victim Cristy Cowan for seven years (IX, T983-4). On the day that Cowan was killed, the witness saw her around 9:00 a.m. at the Luxury Motel with her boyfriend "Flavor" (IX, T984-6). Later in the middle of the afternoon, Sheppard saw Cowan at the Budget Motel (IX, T987). Cowan was high and very tired, but she wanted to go back on the street to get money for more drugs (IX, T987-8). Sheppard gave her $10 and a Trojan condom (IX, T988). That was the last time the witness saw Cowan (IX, T989).

Sheppard identified the black sandals in evidence as belonging to her (VI, T588-9, 616-7; IX, T986). She had let Cristy Cowan borrow them (IX, T987). When a detective

interviewed her after the homicide, Sheppard gave him a condom out of the same box as the one she had given to Cowan (IX, T989-90).

Detective John King testified that he received a condom wrapper from Ms. Sheppard which he placed into evidence (IX, T992-4). A similar condom wrapper was found in the downstairs bedroom of the house on the property where the victims were found floating in the pond (VI, T523, 549-50, 612-3; XI, T1284). A semen stain on a rug in the bedroom was subjected to DNA analysis (VII, T831-3). FDLE crime laboratory analyst Melissa Suddeth testified that the DNA profile indicated that two individuals had mixed fluids in that stain (VII, T833-4). Cristy Cowan was excluded as a contributor to the stain; however, Smithers and Denise Roach could not be excluded (VII, T836, 838-9).

A videotape from the security camera at the Presto convenience store on Highway 92 was played for the jury (V, T498-501). Taken on the date of the Cristy Cowan homicide, the video depicted Appellant and Cowan as they entered and left the store together (EIII, E253-8).

Photographs were taken of Appellant's 1991 Mitsubishi Mighty Max pickup truck and items impounded from it (VI, T587; IX, T966-8). Clothing and other items from Appellant's garage were seized (VI, T584-5). The interior of the Whitehurst house was processed for latent fingerprints (VI, T625, 633). None of the eleven prints of comparative value were matched to either Denise Roach or Cristy Cowan (VI, T634-5). One latent lifted from the cold

water tap of the kitchen sink was identified as having been made by Appellant (VI, T636-7, 641). Despite using extraordinary scientific techniques, crime lab analysts were unable to find any additional fingerprints which could be identified to either the accused or the victims (VI, T645-55).

Detective Dorothy Flair (Martinez) testified about the incriminating statements Smithers ultimately gave during interrogation. Regarding the homicide of Cristy Cowan, Appellant stated that he was coming home from work when he saw a small car stopped beside the interstate (IX, T1040). He stopped to assist the woman driver and drove her to a convenience store on Highway 92 to get gas (IX, T1040-1). They went into the store and purchased soft drinks (IX, T1041).

Once back in Appellant's truck, the woman demanded money from him, threatening to accuse him of rape if he didn't give her $50 (IX, T1041-2). He told her that he would get the money for her and drove to the Whitehurst property (IX, T1042). The argument about money continued and Appellant showed the woman that he only had $22 or $23 in his wallet (IX, T1042-3). The two then drove to a Shell gasoline station where Appellant telephoned his wife to tell her that he would be late getting home (IX, T1043). Appellant told the woman that he was making arrangements to get the money (IX, T1043). Then they returned to the Whitehurst property (IX, T1043-4).

Back at the Whitehurst property, Appellant again tried to give the woman what money he had (IX, T1044). She refused and

threw a Coca Cola drink at him (IX, T1044). They were standing in the garage when Appellant saw an axe nearby (IX, T1045). He picked it up and struck her in the head (IX, T1045-6). She fell down unconscious and Appellant dragged her by the feet to the pond (IX, T1046). Then he threw her into the water (IX, T1046).

Appellant went back to the garage where he rinsed off the axe (IX, T1046). About this time, Ms. Whitehurst arrived (IX, T1046). During the time that Ms. Whitehurst was on the premises, Appellant could hear the woman in the pond "hollering and making noises"[4] (IX, T1047). When Ms. Whitehurst left, Appellant went back to the pond with a hoe and struck the woman in the head to shut her up (IX, T1047-9). He also threw some tree limbs at her (IX, T1048-9).

Later in the interrogation, Appellant admitted involvement in the slaying of Denise Roach (IX, T1050, 1052). According to Detective Flair, Appellant said that he was at the Whitehurst property on May 7 mowing the lawn when Roach approached him (IX, T1052-3). Because Roach startled him, he picked up a tree limb and hit her on the arm with it (IX, T1053). Then she invited him into the house where they talked for awhile before he returned to mowing the lawn (IX, T1054). Roach claimed that she had permission to stay at the house (IX, T1055). Appellant attempted

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[4]Ms. Whitehurst was asked if she had heard any sounds while she was on the property. She replied that she hadn't (V, T416, 427). She also said that she had no hearing problem (V, T427). When Appellant testified, he denied having told the police that Cowan was "hollering" after she had been thrown into the pond (X, T1200-2).

to contact Ms. Whitehurst to find out if this was true, but Ms. Whitehurst was out of town (IX, T1055).

Roach remained at the house and was still there when Appellant returned on May 13 (IX, T1055-6). Appellant asked her to leave and she refused (IX, T1056). They were arguing in the garage when Roach hit him in the arm (IX, T1056). Appellant responded by punching her in the face and telling her that he was going to call the police (IX, T1056). Roach then picked up a planter and threw it against Appellant's truck, causing a "dinger" (IX, T1056). Enraged, Appellant shoved her against the wall (IX, T1057-8). A piece of wood fell down, landing on her face and rendering her unconscious (IX, T1058).

Appellant said that he started to do CPR but stopped because "she didn't deserve to have the CPR" (IX, T1058-9). He left her bleeding on the garage floor, not knowing whether or not she was dead (IX, T1059, 1064). The following day, Appellant returned and put Roach's body in the pond (IX, T1059, 1061). He cleaned up the house (IX, T1061-2). He also tried to clean up the blood spatter on the garage walls with a mop and a bucket of water (IX, T1065-6).

Detective Flair further testified that Appellant said he next went to the Whitehurst property on May 24 (IX, T1066). A strong odor was present (IX, T1066). When Appellant threw Cowan's body in the pond on May 28, he saw Roach's body floating there (IX, T1067). He "got sick as a dog" and left (IX, T1068). Appellant denied that there had been any sexual activity between

himself and the two women (IX, T1068).

Appellant testified that he had fabricated his statement to the detectives because he was afraid to tell them the truth (X, T1126). He said that the story really began when he was maintenance supervisor and a deacon at the First Baptist Church in Plant City (X, T1106). As part of his duties at the church, he was assigned to supervise a woman named Mimi who was doing community services hours as a condition of her probation (X, T1106, 1134-5). Because Mimi had not been able to complete the requisite number of hours, she offered to have sex with Appellant if he would alter the records to show that she had satisfied her obligation (X, T1107, 1135-6). Appellant acknowledged that he engaged in sexual activity with Mimi on two occasions (X, T1107-8, 1136-46).

Sometime later, a man who knew Appellant from working at Tampa Shipyard approached him (X, T1108-10, 1152). The man knew that Appellant was a caretaker at the country estate and proposed to give him money if he would allow a drug ring to use the property (X, T1108-9, 1152). When Appellant balked, the man produced a photograph of Mimi with Appellant and threatened to expose him if Appellant didn't cooperate (X, T1108-9, 1147, 1152-4).

Appellant did not recognize this person, but agreed to let him use the property (X, T1110). About one week later, the man telephoned and Appellant unlocked the gate of the Whitehurst property on the next day so that a drug "drop-off" could take

place (X, T1111). Several cars went into the driveway and left within 20-30 minutes (X, T1111-2). There were subsequent times when Appellant also unlocked the gate and remained nearby while the others conducted their transactions near the house (X, T1111-2, 1132). Appellant testified that if he didn't see anything, he didn't believe that he would "get involved" (X, T1112).

On a later occasion, a person in one of the vehicles asked him to go up to the house (X, T1112, 1160). Appellant did so and helped load some boxes from one vehicle into another (X, T1112-3, 1156, 1160). Appellant didn't really see what was in the boxes, but suspected that they contained drugs (X, T1113, 1156). Denise Roach was present during the loading and got into an argument with the ringleader (X, T1113, 1159-60). The ringleader (the same man who had enlisted Appellant's help) proceeded to hit Roach in the head with a hatchet (X, T1113-4, 1160-1). She stumbled into the garage and was killed while Appellant watched (X, T1114, 1161-2).

Appellant further testified that the drug ringleader threw the hatchet back into the trunk of his car (X, T1115). Then he started to hit Appellant with a tire tool (X, T1115-6). He ordered Appellant to put Roach's body into the pond (X, T1116). Smithers couldn't lift the body, but he dragged it to the pond (X, T1116, 1165). This explained why the footprints in evidence matched his shoes (X, T1116, 1165). Afterwards, the ringleader gave Appellant an extra $400 and threatened to kill Mrs. Smithers and their son if he didn't keep quiet (X, T1117, 1168).

A week and a half later, the ringleader called Appellant at home to schedule another drop (X, T1117, 1167). Appellant said no, but the ringleader told him he "was part of it" and couldn't refuse (X, T1117, 1168). Appellant opened the gate as scheduled and the ringleader ordered him to come with them to the garage (X, T1118). The first truck had marijuana plants on it and packaging materials (X, T1119, 1156). Appellant saw a black male come out of the Whitehurst house with Cristy Cowan (X, T1119, 1168). The man told Appellant to straighten out the bedroom, which he did (X, T1119, 1169-70). When Appellant came out of the house, the man "shoved" money into his hand, saying, "We have another accident here. You know what to do" (X, T1120, 1170). As the drug gang drove away, Appellant saw Cowan's body in the garage (X, T1120, 1170). He knew that his job was to drag the body to the same pond (X, T1120, 1174-5). As Appellant was cleaning up the garage area, Ms. Whitehurst arrived on the property (X, T1121, 1176).

Smithers next testified about the circumstances surrounding his statement to the police. He said that he feared that his wife and son would be in jeopardy from the drug ring if he didn't assume responsibility for the killings (X, T1125-7, 1192). Because the drug ringleader knew where he lived, Smithers was afraid to tell the police what he knew (X, T1126-7, 1186). Since he didn't know the name of the drug ringleader, he really couldn't assist the police in finding him (X, T1125-6, 1192). What he told the detectives was simply a made-up story that

didn't mention the others' involvement (X, T1126, 1193-5, 1203-6). He denied planning or participating in the homicides of Denise Roach and Cristy Cowan, but admitted dragging their bodies to the pond (X, T1127-8, 1193-8).

D) Trial - Penalty Phase.

Dewey Silver, Thomas Potts and David Naylor worked with Appellant at Borrell Electric (XII, T1362-3, 1386, 1408). Smithers had been a permanent electrician's helper at Borrell since October 1995 (XII, T1364, 1371, 1409). He was described by one supervisor as "quiet, laid back, never caused any problems" (XII, T1366). None of the witnesses who worked with him had ever seen Smithers have an irrational outburst or exhibit aggressive behavior (XII, T1366-7, 1390, 1410-1). He never received any written reprimands for conduct on the job (XII, T1368, 1392). He did have a minor accident with the company truck where he was apparently at fault (XII, T1375-6, 1390).

Appellant seemed a little strange in that "he did not come across as a typical construction worker" (XII, T1380-2). He didn't use foul language; nor was he loud or abrasive (XII, 1382-3, 1401, 1406, 1411, 1417). His foreman at the Equifax project said that he appeared to be religious and "didn't like swearing" (XII, T1389, 1401). The journeyman electrician, David Naylor, who worked closely with Appellant even described him as "kind of like a model citizen" (XII, T1410). Smithers was deacon of a

church and past president of a little league (XII, T1410).

Appellant told Naylor that he had purchased a 22 acre farm in Plant City (XII, T1413-4, 1421-2). He also claimed to have played the organ during the wedding of one of the Culverhouse children (XII, T1425). Naylor testified that he was surprised to learn that these stories were delusional, or at least, not true (XII, T1426-7, 1431).

On May 28, 1996, Appellant's time card showed that he punched in at 5:36 a.m. and clocked out at 5:23 p.m. (XII, T1394).

The State also presented testimony from Detective James Iverson (XII, T1433-47). Iverson stated that he was assigned to drive and time the distance between Appellant's workplace at Equifax and the scene of the homicide (XII, T1434). He went along Hillsborough Avenue in Tampa where Cristy Cowan was allegedly picked up and stopped at the convenience store where Smithers and Cowan were seen together on the videotape (XII, T1435). Noting that Appellant had clocked out at 5:23, Detective Iverson waited until 5:25 before he drove out of the Equifax parking lot (XII, T1436).

At 5:50 p.m., Detective Iverson had covered 20.7 miles and was in the vicinity of the Luxury Motel (XII, T1439-40). He did not stop, but continued onto Interstate 4; exiting at Forbes Road near the convenience store (XII, T1440-2). It was 6:10 when he arrived at that location (XII, T1442). Iverson waited for five minutes at the store before proceeding to the crime scene where

his arrival time at the gate was 6:17 (XII, T1443-4).

The detective was then shown the photos in evidence from the convenience store videotape (XII, T1445). The time displayed in the photos was 18:19, or 6:19 p.m. (XII, T1445-6). The total mileage for Detective Iverson's trip was 35.7 miles (XII, T1447).

Defense witnesses included Robert Smithers and Alvin Smithers, Appellant's brothers. They testified primarily about Appellant's childhood as the youngest of four boys raised in a small two bedroom house in a suburb of Chattanooga, Tennessee (XII, T1455-6; XIII, T1572). The father worked nights as a lower level supervisor at the telephone company and was a heavy drinker (XII, T1457-8, 1460; XIII, T1569-70). He was physically abusive to the mother (XII, T1458, 1460-1, XIII, T1571-2).

The mother was religious to the point of fanaticism (XII, T1462, 1492; XIII, T1571-3). She took the boys to church during the week as well as on Sunday (XII, T1462). No playing cards or dice were allowed in the house (XII, T1462, 1493; XIII, T1595). Movies were also forbidden (XII, T1462). The mother conducted nightly devotions which were supposed to be religious learning experiences (XII, T1463; XIII, T1575). However, she would lose control of herself and scream at the boys (XII, T1463-5; XIII, T1575). She would also beat them with a belt, not for any reason other than to beat the devil out of them (XII, T1463-6, 1494; XIII, T1573-5, 1600-2). As the youngest, Sam was the most upset by his mother's behavior (XII, T1467; XII, T1581-2). Sometimes he would not cry, but just stare off into space during the

whippings (XIII, T1574, 1576, 1584). By today's standards, it would be considered child abuse rather than religion (XII, T1471-2; XIII, T1586, 1590, 1603).

As a child, Samuel Smithers was quiet and seemed a little slower than his brothers (XII, T1468-9). He didn't have many friends (XIII, T1579-80). Unless he was flagrantly provoked, he would not get angry (XII, T1470-1). He wet the bed almost into his teen years and his mother would humiliate him (XII, T1473-4). Appellant had several incidents where he received severe injuries. As a toddler, he climbed out of his crib at a church nursery and fell on his head onto a tile floor (XII, T1469, 1499; XIII, T1592). As a teenager, he had to be pulled out of a car which exploded or caught on fire (XII, T1475, 1500). When he later worked at a gas station, he was knocked out with the butt of a gun during a robbery (XII, T1483, 1500; XIII, T1592).

Appellant was married after high school to the only girl he ever dated, Sharon (XII, T1476). They adopted a son, Jonathan (XII, T1477-8). Smithers was never abusive to his wife or child (XII, T; XIII, T1583-4).

Around 1980, Smithers was a volunteer fireman at the Eastridge Fire Department and active in the local church (XII, T1480, 1510). One Wednesday night, a fire broke out in the church and Smithers was instrumental in putting it out (XII, T1480). He received praise and recognition in the media for his efforts (XII, T1480-1; XIII, T1587-8). More fires took place at the church (XII, T1481, 1511). Appellant was always there when

they started and was always first to come to the rescue and put them out (XII, T1481). Although he initially got more praise, people became suspicious and Smithers eventually confessed to starting the fires (XII, T1481-2). He was convicted for these arsons (XII, T1506, 1516).

As an adult, Smithers has difficulty reading and a minor speech impediment (XII, T1486; XIII, T1593). His mathematical abilities are much higher than his verbal skills (XII, T1486-7; XIII, T1593). He was able to finish high school and get an Associates college degree (XII, T1502; XIII, T1593).

Jonathan Smithers, Appellant's 21-year-old adopted son testified that he was in college and a good enough baseball player that he was drafted by the Red Sox (XII, T1609). He said that his father never raised his voice or lost his temper with him and that he had never been beaten (XIII, T1610-1, 1613). His father helped him with his math homework (XIII, T1611). Appellant also practiced baseball with him and served as his little league coach for two years (XIII, T1612).

Jonathan described his father as "a little awkward socially" (XIII, T1614). There were times when he would stare into space and it would be difficult to get his attention (XIII, T1615). Jonathan said that Appellant "cared so much about me and my mom he would do anything for us" (XIII, T1616).

Beatrice Green, an assistant principal at a Plant City elementary school testified that Appellant was an active volunteer in PTA fund raising events (XIII, T1532-5). He also

assisted on some field trips (XIII, T1535). He tried to be helpful and gave generously of his time (XIII, T1534-5, 1538).

Green further said that Appellant and his wife never spoke harshly to each other (XIII, T1536). They had a caring relationship and were very supportive of their son's activities (XIII, T1536-7). Although there was "an [aura] about him that was a little bit different", Smithers had the school's best interest at heart and "put forth a lot more effort and energy than a lot of parents of children in the school" (XIII, T1537-8).

Deputy Sheriff Ray Cruz testified that he was in charge of a pod at the Orient Road Jail which housed 64 inmates (XIII, T1545-6). Appellant was one of these inmates (XIII, T1546). Although pretrial detainees facing first degree murder charges are not usually allowed to be trustees, Smithers served as a trustee for two years (XIII, T1547-8). He was a model inmate who took care of his responsibilities (XIII, T1550-2). He never argued with anybody (XIII, T1551).

Deputy Cruz gave his opinion that Appellant would maintain good conduct in prison if given a life sentence (XIII, T1552). He would not be a danger to other inmates (XIII, T1552). Smithers' reputation among all the deputies at the jail was that of a model inmate (XIII, T1555-7). He showed an unusual amount of self-control (XIII, T1561-2).

Three mental health professionals testified for the defense. Dr. Frank Wood was offered as an expert in neuropsychology and PET scans (XIII, T1637). He evaluated a PET scan that was

performed on Appellant's brain and considered additional medical and psychological records (XIII, T1623-4). Dr. Wood testified that the physician, Dr. Geer, who actually performed the PET scan wrote in his report that there were abnormal regions in Appellant's brain (XIII, T1645, 1647). This could have resulted from stroke, head trauma, or degenerative disease such as Alzheimer's or Huntington's (XIII, T1645, 1681). Dr. Geer recommended that an MRI scan be performed to determine the cause of the brain abnormality (XIII, T1645-6).

When the MRI was performed, the result was entirely normal (XIII, T1656, 1667). Dr. Wood concluded that this meant that the PET scan abnormality was due to a region of Appellant's brain not functioning at a normal level (XIII, T1656). This is seen with temporal lobe epilepsy or especially where there has been a head injury (XIII, T1656-7). In short, the PET scan was corroborative of significant brain damage (XIII, T1658-9). Dr. Wood said that he thought that Appellant probably suffered head trauma before he entered school based upon the history that was related to him (XII, T1681-2).

Dr. Robert Berland, a board certified forensic psychologist, testified that he administered two diagnostic tests to Smithers, the MMPI and the WAIS (XIV, T1697, 1704-5). The MMPI results showed that Appellant was attempting to hide mental illness as much as he could (XIV, T1723-5). Despite this effort, the scales which show delusional paranoid thinking and schizophrenia were elevated beyond the normal cutoff (XIV, T1723, 1730). The test

profile showed psychotic disturbance where brain injury was probably a factor (XIV, T1727-8).

Dr. Berland said that the WAIS test was originally used to measure intelligence but currently its primary use is to diagnose brain injury (XIV, T1732). The eleven different subtests each measure a different intellectual skill so that a researcher can determine whether the subject's entire brain is functioning at the same level or whether some parts are impaired (XIV, T1732-3). In Appellant's case, his performance on the various subtests ranged from IQ levels of 151 to 94 (XIV, T1734). A difference of more than ten IQ points between the subtests is a reliable indicator of brain injury (XIV, T1734-5). Dr. Berland stated that the left hemisphere of Smithers brain was more damaged than the right side, but impairment from brain injury was present in both hemispheres (XIV, T1735).

Dr. Berland also conducted clinical interviews where he learned that Appellant had suffered some severe head trauma when he was very young (XIV, T1738, 1744-5). Another incident of significant head injury occurred when Smithers was 27 and hit in the head during a robbery of the gas station where he was employed (XIV, T1749). This incident was confirmed by medical records showing a broken facial bone and symptoms associated with brain injury (XIV, T1749-51, 1765-6, 1786-7). A third incident happened about one year before the homicides when Appellant was in an accident and had to be pulled out of his vehicle (XIV, T1752). This appeared to have affected Appellant's mental state

(XIV, T1752-3).

Appellant also admitted to some psychotic symptoms, including hallucinations and delusions (XIV, T1738-44). His ex-wife, Sharon Cole, also recounted instances where Appellant's behavior was consistent with hallucinations and delusional paranoid beliefs (XIV, T1747-8). He struggled to function and appear to the outside world as normal (XIV, T1748-9).

Dr. Berland concluded that Smithers had a chronic mental illness, caused in part by brain injury (XIV, T1754). At the time of the homicides, he was suffering from an extreme mental or emotional disturbance (XIV, T1755-6, 1822-3). He also had a substantial impairment in his ability to conform his conduct to the requirements of law (XIV, T1756, 1822-3). He was suffering from brain damage (XIV, T1823). On the positive side, Smithers showed ability to have a good family relationship (XIV, T1823-4). He also could adapt to incarceration and would not be a danger to others (XIV, T1824).

Psychiatrist Michael Maher testified that he reviewed police reports, depositions and guilt phase trial testimony in addition to conducting ten hours of clinical psychiatric interviews with Smithers (XV, T1841). He met with family members and consulted with the other doctors who performed testing (XV, T1842). Testing which he administered included the MMPI 2, the Wisconsin Card Sort test and the Ray Complex Figure test (XV, T1844).

On the MMPI 2, Smithers had elevated scores on the 6, 7 and 8 scales (XV, T1851). Dr. Maher explained that this indicated "a

pattern of very disturbed thinking and judgment that is associated with some paranoid thinking" (XV, T1855). At times, Smithers "might be out of touch with reality" (XV, T1855). When Dr. Maher reviewed the results Dr. Berland got on the MMPI 1, he noted that the profiles were very similar (XV, T1858). The tests were conducted about one year apart and suggested that the conclusions drawn from them would be valid (XV, T1858-9).

Dr. Maher also agreed with Dr. Berland's assessment that the difference of about 20 points between Smithers verbal IQ and his performance IQ might indicate abnormal brain functioning or brain injury (XV, T1860-2). Smithers scored well on the Ray Complex Figure Test which showed that he processes visual and spatial information capably (XV, T1862-3). However, on the Wisconsin Card Sort Test, Smithers showed an abnormal persistence to give the same incorrect response instead of trying to figure out the correct response (XV, T1863-4). When Dr. Maher interviewed Appellant, he observed that Smithers used a "tremendous amount" of psychological denial (XV, T1866-8). There was a "consistent vagueness" to Appellant's responses to questions which suggested that he was "out of touch with reality to some extent", although not "completely psychotic" (XV, T1872-4).

Dr. Maher next examined the MRI testing and the PET scan (XV, T1877-9). While the MRI was "essentially normal", the PET scan was "clearly and strikingly abnormal" (XV, T1880). The "absolutely unambiguous malfunction in Mr. Smithers brain" suggested a diagnosis of temporal lobe disease (XV, T1881-3).

Dr. Maher stated his opinion that Smithers had a dissociative disorder, a recognized mental illness sometimes manifested as a split personality (XV, T1885-6, 1892, 1926). This disorder is related to temporal lobe disorder which affects a person's capacity to remain connected with the outside world (XV, T1887-8).

Dr. Maher found support for his diagnosis in Smithers' ability to be a good husband and father, yet commit the homicides (XV, T1888). Also, co-workers would be unlikely to notice the symptom of what Dr. Maher termed "zoning out" or being temporarily out of touch with reality (XV, T1888-90).

In Dr. Maher's opinion, Appellant suffered from an extreme mental or emotional disturbance at the time of the homicides (XV, T1892). He was substantially impaired in his ability to conform his conduct to the requirements of law (XV, T1892). Appellant also had a decreased ability to appreciate the criminality of his conduct (XV, T1893-4).

Dr. Maher explained that while his opinion overlapped with Dr. Berland's in most aspects, he had not found sufficient information to make a diagnosis of psychosis (XV, T1895-6). Smithers' history of head injuries supported a finding, consistent with the PET scan, of significant brain injury (XV, T1897-1902). Dr. Maher stated that the beatings inflicted by Appellant's mother were connected with the development of dissociative disorder (XV, T1902-6).

Regarding the homicides themselves, Dr. Maher said it was

his opinion that Appellant had solicited prostitutes on several occasions in the Hillsborough Avenue area for a period of weeks or months before the killings (XV, T1914). Because he was not comfortable with leaving his truck parked in these motel locations where anyone might see it, he asked the girls to ride with him to a more hidden location (XV, T1915). According to the statements Smithers made to the police and Dr. Maher, verbal arguments took place in the garage area before the killings (XV, T1915, 1918-9). Afterwards, Appellant dragged the bodies to the pond and threw them into it (XV, T1916, 1919).

Dr. Maher concluded that Smithers was suffering from dissociative episodes where he was significantly out of touch with reality during both homicides (XV, T1916). Although he was able to recognize that his actions were wrong (as shown by his attempt to hide the bodies), he did not understand the full significance of his conduct (XV, T1916-7). Rather than cold and calculated, the killings were impulsive actions taken by a man in the midst of a dissociative episode who was overwhelmed (XV, T1917).

Dr. Maher found it significant that both victims were described by other prostitutes as very aggressive and irritable, typical behavior for crack cocaine users (XV, T1918-20). Such behavior contributed to the stress Appellant was feeling at the time (XV, T1920-1). The fact that a second homicide under similar circumstances took place was probably because Smithers disconnected from the first incident and denied the dangerous

provocations inherent in his interactions with prostitutes (XV, T1921-2). Dr. Maher said, "Mr. Smithers does not learn well by experience. He's likely to have felt and believed that it was a horrible thing and it could never happen again." (XV, T1921).

On crossexamination, Dr. Maher was asked whether Smithers' high score on scale 4 of the MMPI 2 indicated that he had antisocial personality disorder (XV, T2022-3). The witness explained that a result on one scale would be insufficient to make a diagnosis (XVI, T2044-6). In particular, Smithers' positive long term relationship with his wife and son would preclude a diagnosis of antisocial personality disorder (XVI, T2045-7). When asked whether it was possible that Smithers was having an auditory hallucination when he claimed to have heard Cristy Cowan calling out from the pond despite Marion Whitehurst's assertion that she heard nothing, Dr. Maher agreed that Appellant might have been hallucinating (XVI, T2035-6).

Sharon Smithers Cole was the final penalty phase defense witness. She testified that she first met Appellant when she was twelve years old and he was fifteen (XVI, T2051). He was the only man that she dated, and they married when she was seventeen (XVI, T2053). The marriage lasted twenty-three and one-half years (XVI, T2051).

During that time, Appellant was never abusive; in fact, he never raised his voice to her (XVI, T2053-4). His mother was extremely religious and very strict (XVI, T2056). She whipped him regularly with a belt, even through his high school years

(XVI, T2057-8). Appellant seemed a little slow in some respects, particularly with respect to reading and speaking (XVI, T2059, 2080-1). He worried about not being able to measure up to the standards of her family and always tried to make himself look a little better than he really was (XVI, T2064-5). When he learned that he and Sharon would not be able to have their own children, the couple adopted Jonathan and he tried to be the best father possible (XVI, T2065-7, 2070-3). When Jonathan developed an ambition to be a professional baseball player, Appellant spent a lot of time practicing with him (XVI, T2078-9).

Appellant's former wife further testified that about one year before his arrest, Appellant was in a traffic accident (XVI, T2074-5). He had headaches and was groggy for about two weeks because of a head injury suffered in the wreck (XVI, T2075). Afterwards, his behavior changed somewhat in that he would watch TV late at night (XVI, T2077). He would settle into a "dense stare" where it was very difficult to get his attention (XVI, T2077-8). After Appellant's arrest for these homicides, Sharon asked him during a jail visit how a person with such a gentle nature could have committed such brutal killings (XVI, T2084). Appellant replied, "It was like I was sitting back watching someone else do it. I couldn't stop him from doing it" (XVI, T2084).

As rebuttal witnesses, the State presented a radiologist, Dr. Edward Ikeman, and two psychiatrists, Drs. Donald Taylor and Barbara Stein. Dr. Ikeman testified that the PET scan photos

that he reviewed were insufficient for him to diagnose whether Appellant's brain was functioning properly (XVI, T2112-4).

Dr. Taylor stated that he interviewed Appellant for three hours and reviewed documentary records pertaining to him and the homicides (XVI, T2119). He formed an opinion that Appellant had a learning disability which impaired his ability to read (XVI, T2120, 2123). Appellant also had two characteristics of antisocial personality disorder[5] (XVI, T2122-4). While agreeing that Appellant had suffered head injuries, Dr. Taylor gave his opinion that they didn't cause brain damage (XVI, T2124-7). He said that Appellant was not psychotic and noted that Smithers was not receiving antipsychotic medication while he was in jail awaiting trial (XVI, T2127-30). Similarly he disputed the diagnosis of dissociative disorder, saying that purposeful behavior is not usually associated with it (XVI, T2131-2). He concluded that he diagnosed Smithers as having "personality disorder not otherwise specified with antisocial and narcissistic traits" (XVI, T2132).

On crossexamination, Dr. Taylor agreed that he found it significant that the homicide victims had been using crack cocaine (XVI, T2148-9). He said that crack cocaine users would be more likely to engage in physically aggressive and threatening behavior (XVI, T2149). Dr. Taylor also said that Ms. Whitehurst's statement in her deposition that she had heard no

[5]Dr. Taylor testified, "In order to receive that diagnosis [antisocial personality disorder] you have to meet the criteria for three of those characteristics" (XVI, T2122).

screams from the pond raised the possibility that Smithers had auditory hallucinations (XVI, T2150). Although Dr. Taylor used the MMPI in civil cases "where they want a complete evaluation", he did not administer an MMPI test to Smithers (XVI, T2150-2).

Dr. Barbara Stein testified that she evaluated Appellant and concluded that he had no psychiatric disorder (XVI, T2174). Instead, he had antisocial personality traits "characterized by a person being likely to be deceptive and to lie, to have [sic] lack remorse for others" (XVI, T2174). Dr. Stein stated that she was aware that Appellant was whipped frequently by his mother (XVI, T2190-1). However, she doubted that Smithers developed a psychiatric disorder because "he wasn't in treatment" (XVI, T2191). Similarly, people with dissociative disorder "usually do come to treatment" (XVI, T2193). She also stated that she would not use a PET scan to determine if there was brain injury because people can be born with differences in metabolism in their brains (XVI, T2203).

SUMMARY OF THE ARGUMENT

Appellant's motion to sever the two homicides which were charged in the same indictment should have been granted. When two offenses are committed weeks apart and with no causal connection between the two, a defendant is entitled to severance for separate trials. Even if some collateral crime evidence would have been admitted into the separate trials, the error in denying severance was not harmless with respect to Appellant's conviction for first degree murder in the death of Denise Roach. The error is also prejudicial with respect to penalty phase because the prior conviction of a capital felony aggravating circumstance could not have been considered by the jury in the first trial, had the two offenses been tried separately.

Appellant's motion to suppress his confession should have been granted. When he inquired of the detectives regarding representation by counsel during questioning, the detectives did not provide the open and forthright answer required by Art. I, sec. 9 of the Florida Constitution. Another detective admittedly appealed to Appellant's religious convictions when urging him to confess. Miranda warnings were only read to Appellant during the first day of questioning, before he was in custody. The detectives should have readvised Appellant of his Miranda rights once custodial interrogation began on the second day. Finally, the police interrogation, conducted with assistance from Appellant's wife, produced involuntary confessions.

Appellant's counsel waived the defendant's presence during a

pretrial hearing where motions in limine were argued. Absent an express written waiver by the defendant, his presence is required at all pretrial hearings. The error was prejudicial because Appellant suffered an adverse ruling on one motion in limine which affected what evidence the State could adduce at trial.

In his sentencing order, the judge improperly found that the especially heinous, atrocious or cruel aggravating circumstance applied to the homicide of Denise Roach. While there was evidence of extensive beating and manual strangulation, there was no evidence that she was conscious during the attack. More than speculation is required to establish an aggravating factor.

The judge improperly found the cold, calculated and premeditated aggravating circumstance applicable in the homicide of Cristy Cowan. There was no proof of a careful prearranged plan to kill the victim when Appellant invited her into his truck. The homicide probably occurred during an angry confrontation over money, which negates the "cold" element of this aggravating factor. The weapons used during the attack were tools which were already present at the garage where the homicide took place. Under prior precedents of this Court, the cold, calculated and premeditated aggravating circumstance should not be approved.

A state penalty phase witness testified that Appellant's psychological character included lack of remorse. This Court has previously made it clear that lack of remorse cannot be injected by the State as evidence to be considered by the jury. The trial

judge should have granted Appellant's motion for mistrial instead of simply admonishing the witness.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SEVER THE TWO OFFENSES.

Smithers was charged with both capital homicides in separate counts of the grand jury's indictment (I, R22-3). He moved the court to sever the offenses for separate jury trials (I, R66-7). The trial court denied Appellant's motion after considering arguments and memoranda of law (I, R81-5).

The Rules of Criminal Procedure provide that separate offenses may be charged in the same indictment "when the offenses ... are based on the same act or transaction or on 2 or more connected acts or transactions". Fla. R. Crim. P. 3.150 (a). Conversely, when "2 or more offenses are improperly charged in a single indictment or information, the defendant shall have a right to a severance of the charges on timely motion". Fla. R. Crim. P. 3.152 (a)(1). Even when offenses are properly joined in a single indictment or information, the defendant is still entitled to a pretrial severance "on a showing that the severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense". Fla. R. Crim. P. 3.152 (a)(2)(A).

The standard of review applicable to severance of offenses is abuse of discretion. Crossley v. State, 596 So. 2d 447, 450 (Fla. 1992). However, when the episodes are independent and not

causally connected, the trial judge abuses his or her discretion by denying a timely motion for severance. Garcia v. State, 568 So. 2d 896, 901 (Fla. 1990).

A) The Two Homicides Were Improperly Charged in the Same Indictment Because They Were Not "Connected Acts or Transactions".

This Court, in Garcia v. State, 568 So. 2d 896 (Fla. 1990) summarized what it called "well-settled law" as follows:

> the "connected acts or transactions" requirement of rule 3.150 means that the acts joined for trial must be considered "in an episodic sense[.] [T]he rules do not warrant joinder or consolidation of criminal charges based on similar but separate episodes, separated in time, which are 'connected' only by similar circumstances and the accused's alleged guilt in both or all instances." Paul, 365 So. 2d at 1065-66. Courts may consider "the temporal and geographical association, the nature of the crimes, and the manner in which they were committed." Bundy, 455 So. 2d at 345. However, interests in practicality, efficiency, expense, convenience, and judicial economy, do not outweigh the defendant's right to a fair determination of guilt or innocence. Williams, 453 So. 2d at 825.

568 So. 2d at 899.

The paradigm for multiple separate homicides which were properly tried in a single indictment is found in Bundy v. State, 455 So. 2d 330 (Fla. 1984), cert. den., 476 U.S. 1109 (1986). There, the defendant, Ted Bundy, attacked four women (killing two) in the Chi Omega sorority house near Florida State University. About an hour later, Bundy attacked a fifth woman in

a duplex apartment only several blocks away. This Court later described the Bundy circumstances as:

> a classic example of an uninterrupted crime spree in which no significant period of respite separated the multiple crimes. As such, the crimes were connected and constituted a single uninterrupted episode.

Ellis v. State, 622 So. 2d 991, 999 (Fla. 1993).

A very similar scenario was presented in Rolling v. State, 695 So. 2d 278 (Fla. 1997), cert. den., 522 U.S. 984 (1997). This time, five college students were stabbed to death in three separate incidents occurring within 72 hours and a radius of two miles. This Court approved the trial judge's finding that these homicides were properly joined because the temporal and geographical association between the offenses, combined with the similar nature of the crimes and the manner in which they were committed, were sufficient to establish "a single prolonged episode". 695 So. 2d at 295-6.

On the other hand, in State v. Conde, 743 So. 2d 78 (Fla. 3d DCA 1999), the court found that six individual murders by strangulation which occurred during a four-month period were insufficiently connected to permit consolidation. Although all of the bodies were discovered in the Tamiami Trail area of Dade County, the fact that two to three weeks separated each of the killings was determinative.

At bar, the facts are closest to those in Conde. While both Roach and Cowan were killed similarly on the same property and their bodies were discovered in the same pond, the trial judge's

order recognized that "as many as fifteen (15) days" separated the two incidents (I, R82). The fact that both victims were prostitutes who worked the same area of Tampa does not establish the type of episodic link necessary to overcome the temporal separation.

In particular, the facts at bar are clearly distinguishable from those in Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992), cert. den., 508 U.S. 924 (1993). There, a similar gap separated the first murder from the later incident where a hired assailant attempted to murder the defendant's wife and was killed himself. This Court noted that Fotopoulos used the first murder as blackmail to coerce his confederate to assist him with the planned murder of his wife. The trial judge properly denied a severance in Fotopoulos because, as later articulated in Ellis v. State, 622 So. 2d 991 (Fla. 1993):

> it was clear that the two crimes were linked in a causal sense: One was used to induce the other. That causal link was sufficient to permit joinder, since one crime could not properly be understood without the other.

622 So. 2d at 1000.

At bar, there is no such causal link between the murders of Roach and Cowan. At most, they demonstrate a similar pattern of criminal behavior. This is not enough to justify joinder as this Court found in Ellis v. State, supra.

In Ellis, the facts showed that two black males had been found dead along U.S. Highway 1 in Jacksonville. Another had been attacked in the same area, but escaped. About three days

separated the two homicides and a period of three months separated the homicides from the attempted murder. The defendant, Ellis, was charged with participation in all three incidents which were joined for trial over his objection.

This Court found:

> each of Ellis' alleged crimes was freestanding and distinct. None was a causative link in the commission of the other crimes. It is true that Ellis' alleged crimes are similar, but this alone is insufficient to warrant joinder.

622 So. 2d at 1000.

Another case on point is Macklin v. State, 395 So. 2d 1219 (Fla. 3d DCA 1981). Macklin telephoned to have a taxicab dispatched to him. When the hack driver arrived, Macklin robbed him. Five days later, Macklin again telephoned and had a taxi dispatched to a location less than a block away. Again, the driver was robbed. Despite the strong similarities between the two offenses, the Third District held that they were improperly charged in a single information.

Accordingly, this Court should follow Ellis and Macklin and hold that Appellant should have been tried separately for the two homicides.

B) Harmless Error Analysis - Guilt or Innocence Phase.

This Court suggested in Crossley v. State, 596 So. 2d 447, 450 (Fla. 1992) that an error in joinder of offenses might be harmless if evidence of each crime were admissible in the trial of the other under section 90.404(2) of the Florida Evidence

Code. Indeed, the trial judge at bar observed in his order that "it is likely that even if severed, evidence of one homicide would be relevant and admissible in a separate trial of the other homicide, pursuant to section 90.404(2), Florida Statutes, on the issue(s) of motive, opportunity, intent, preparation, plan, or knowledge" (I, R82-3).

It would be a mistake, however, for this Court to jump to the conclusion that the error in joinder of the trials for the two homicides was harmless for this reason. In the first place, the trial judge never specifically ruled that he would have allowed evidence of the other homicide into separate trials - he merely said that it was "likely" that he would have. At all times, the judge recognized that the admissibility of collateral crime or Williams Rule evidence was a distinct question with different criteria than whether to grant a severance (SII, T247, 262, 268). For instance, the probative value of collateral crime evidence must first be weighed under section 90.403 of the evidence code against the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence before it can be admitted. Steverson v. State, 695 So. 2d 687 (Fla. 1997).

Secondly, collateral crime evidence is subject to the limitation that such evidence cannot become a "feature", rather than an incident, of the case. Steverson, 695 So. 2d at 690-1. When two crimes are joined for trial, they are necessarily "features" of each case because the prosecution presents all of

its evidence to the jury on both crimes. The court in Roark v. State, 620 So. 2d 237 (Fla. 1st DCA 1993) recognized this distinction and wrote:

> The amount of testimony which may be introduced as to the additional crime is thus limited ... No such limitation occurs when offenses are joined for trial, where all relevant evidence as to each crime being tried would be admissible. Additionally, if collateral crime evidence is introduced, the defense is entitled to have the judge read a limiting instruction. No such instruction is available in consolidated trials.

620 So. 2d at 240. The Roark court went on to reverse the convictions of sexual battery on one victim and lewd and lascivious assault on the other victim because the "additional corroborative evidence as to both victims" could have affected the jury's verdict.

At bar, it is more likely that the jury's verdict was affected with respect to the murder of Denise Roach than that of Cristy Cowan. A compelling piece of the State's evidence in the Cristy Cowan homicide was the convenience store video camera image showing Appellant and Cowan together shortly before the homicide must have occurred. No such verification of Appellant's association with Roach existed.

To be sure, the State presented DNA evidence which purported to link Appellant and Denise Roach with the crime scene. However, the DNA evidence was not particularly convincing because no sample of Roach's actual DNA was ever processed (VII, T803-5). The State had to rely on speculation that Roach's natural parents could have produced a child with the DNA characteristics found in

the stain on the bedroom rug (VII, T805-9, 838-9). With respect to Appellant's DNA, the best that State expert Melissa Suddeth could say is that Smithers "could not be excluded as a possible donor" to that stain (VII, T836). On crossexamination, Suddeth had to concede that 71 out of every 100 Caucasian individuals could also have been possible donors to the stain on the bedroom rug (VIII, T858).

There is also Appellant's statement to the police about Roach's death. As presented by Detective Flair at trial, Smithers said that Denise Roach appeared to be a trespasser on the Whitehurst estate (IX, T1052-6). When Appellant asked her to leave, she refused (IX, T1056). A verbal argument turned into a physical one (IX, T1056). When Roach threw a planter against Smithers' truck, causing a "dinger", he became enraged (IX, T1056-7). He pushed Roach against the garage wall and a piece of wood fell on her head (IX, T1057-8).

Smithers left Roach bleeding and unconscious on the garage floor (IX, T1059, 1064). The next day, he returned and discovered that Roach was dead (IX, T1059, 1064). Appellant dragged her body to the pond and threw it in (IX, T1059).

On this evidence, a reasonable jury could well have found Smithers guilty of a lesser offense than first degree murder in the death of Denise Roach. Indeed, a jury hearing only the evidence that would be admitted in a separate trial might have given more credibility to Appellant's trial testimony.

If we assume that the trial judge would have allowed some

Williams Rule collateral crime evidence into a separate trial for the homicide of Denise Roach, we would expect that the testimony and evidence regarding the discovery of both bodies in the pond would be admitted. Evidence that both victims were prostitutes who frequented the same area of Tampa would also be admitted. Probably a certain amount of evidence about the similar nature of the injuries inflicted on both victims would be admissible. However, proper limitation of the collateral crime evidence should exclude prejudicial items relating only to the Cowan homicide such as the convenience store video images and Appellant's separate statement to the police concerning Cowan's murder.

Under this outline, the State cannot meet its burden of proof under State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). This Court has long recognized that the danger of joining two offenses for trial is that "evidence adduced on one charge will ... be misused to dispel doubts on the other, and so effect a mutual contamination of the jury's consideration of each distinct charge". Paul v. State, 365 So. 2d 1063, 1066 (Fla. 1st DCA 1979) (J. Smith, dissenting), adopted as majority opinion, Paul v. State, 385 So. 2d 1371 (Fla. 1980). Surely Appellant's jury actually considered corroborative evidence on the Cristy Cowan homicide when they found him guilty of first degree murder in the death of Denise Roach. Second degree murder or even acquittal would have been a possible verdict if the jury's deliberations concerned only the evidence which would have been adduced in a

separate trial. Therefore, the error in joining the offenses is not harmless under either DiGuilio or Sullivan v. Louisiana, 508 U.S. 275 (1993). A new trial should be granted to Appellant on the Denise Roach homicide.

C) Harmless Error Analysis - Penalty Phase.

While spillover evidence from each of the homicides undoubtedly affected the penalty recommendation for the other, the most obvious demonstration that the error in joinder was not harmless is the jury's consideration and the court's finding of the aggravating factor "previously convicted of another capital felony"[6] as to both homicides (A2-3). This is perfectly proper when a defendant is convicted at the same trial of two first degree murders. Pardo v. State, 563 So. 2d 77 (Fla. 1990); Correll v. State, 523 So. 2d 562 (Fla. 1988). However, had Smithers been separately tried and convicted for the two homicides, the section 5(b) aggravating circumstance would have only applied in the second penalty trial.

The question then becomes: if one of Smithers' death sentences is tainted by erroneous consideration of the prior conviction of a capital felony aggravating factor, which one is it and what remedy should be granted? If this Court grants Appellant a new trial as to the murder of Denise Roach as requested in section B) supra, then it is clear that the section (b) aggravating factor would no longer be supported in the Cowan

[6]§921.141(5)(b), Fla. Stat. (1995).

murder either. As in Long v. State, 529 So. 2d 286 (Fla. 1988), use of an improperly admitted conviction for murder in a penalty trial is sufficient to taint the jury's penalty recommendation. Accord, Johnson v. Mississippi, 486 U.S. 578 (1988). If Smithers is granted a new trial for the Denise Roach homicide, he must also receive a new penalty trial for the Cristy Cowan homicide.

If this Court declines to reverse Appellant's conviction for the murder of Denise Roach, there should still be a new penalty trial in one of the cases because misjoinder of the offenses caused an extra aggravating circumstance to be weighed by the jury as to one victim. This cannot be harmless error for either death sentence because striking the prior conviction of a capital crime aggravating factor from the Denise Roach homicide leaves only a single aggravating circumstance, HAC,[7] to be weighed against significant mitigation. Subtracting the prior conviction of a capital felony aggravating factor from the Cristy Cowan homicide leaves two aggravating circumstances, HAC and CCP,[8] to be weighed against significant mitigation.

If a new penalty trial is held on only one of the homicides, which should it be? It would be wrong to allow the State to elect which should have a new penalty proceeding and which would have application of the section 5(b) aggravating circumstance approved. Florida law has always condemned undeserved windfalls

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[7]Appellant challenges the finding of this aggravator as well in Issue III, infra.

[8]Appellant challenges the CCP finding in Issue IV, infra.

which allow a defendant to benefit from error. See e.g., Evans v. Singletary, 737 So. 2d 505 (Fla. 1999). Since the State decided to charge the two separate homicides in the same indictment and opposed Appellant's motion to sever the offenses, they should not be the beneficiary when this Court holds that joinder was improper. The State is as equally bound by procedural rules as the defense, Cannady v. State, 620 So. 2d 167 (Fla. 1993), and should likewise suffer the consequences when it commits error.

On the other hand, the State would probably object to allowing Appellant to choose which case receives the new penalty trial. Logic should dictate the outcome.

When defendants have been convicted of two or more offenses at a single trial, this Court has described the multiple convictions as contemporaneous. Of course, it is also evident that the clerk generally reads the jury verdicts in numerical sequence - i.e. the verdict on the first count is read first. Consequently, it could be said that in a two-count indictment, the first count is the first conviction and the second count is the subsequent one.

At bar, the clerk followed this general practice and announced the verdict in count one before the verdict in count two (XI, T1338). If this makes count one the prior conviction, it is the only prior conviction available as an aggravating circumstance in the penalty proceedings. It cannot be applied to the penalty recommendation on count one (Cristy Cowan), but only

to the penalty recommendation on count two (Denise Roach).

Therefore, it is the penalty proceeding in the Cristy Cowan homicide which was tainted under this reasoning. The section 5(b) aggravating circumstance is not available to the State for this homicide and the jury should not have considered it. If this Court does not vacate Appellant's conviction and sentence for the murder of Denise Roach, a new penalty trial before a new jury must be ordered nonetheless on count one, the Cristy Cowan homicide.

ISSUE II

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS HIS CONFESSION.

There were four major violations committed by law enforcement when persuading Appellant to give confessions to the two homicides. First, an adequate answer was not given to Appellant's inquiry concerning representation by counsel. Second, Detective Metzgar used improper inducement by appealing to Smithers' religious beliefs when urging him to confess. Next, Miranda warnings were read to Appellant only on the first night when he was not in custody. Renewed warnings should have been read to him before custodial interrogation began on the second day. Finally, conducting a police interrogation with the assistance of Appellant's wife induced confessions which were not voluntary.

Review of the voluntariness of a confession and the validity of a waiver of Miranda rights requires an examination of the totality of the circumstances surrounding the confession. Traylor v. State, 596 So. 2d 957, 964 (Fla. 1992); Ramirez v. State, 739 So. 2d 568 (Fla. 1999), cert. den., __ U.S. __, 120 S. Ct. 970, 145 L. Ed. 2d 841 (2000). A trial judge's ruling on a motion to suppress confession presents mixed questions of fact and law for the reviewing court. Ramirez; Rosenquist v. State, 769 So. 2d 1051 (Fla. 2d DCA 2000). While the trial court's factual findings are entitled to deference, the appellate court reviews application of the law to the facts by a de novo

standard. Rosenquist, 769 So. 2d at 1052; Hines v. State, 737 So. 2d 1182 (Fla. 1st DCA 1999).

A) Appellant's Inquiry About a Lawyer.

In his order denying Appellant's motion to suppress his confession, the trial judge recited the facts surrounding the police questioning of Appellant in the early morning hours of May 29, 1996 (I, R69-73). The judge found:

> During this time, the Defendant asked "do you think I need a lawyer?" Det. Flair-Martinez responded "do you think you need one?" The Defendant responded "no, I don't think so."

(I, R70). This exchange is basically in accord with the testimony of Detectives Flair and Blake. Detective Flair testified that Appellant's question "Do I need a lawyer?" came when she started to read him Miranda warnings (SI, T46-7, 71).

In Almeida v. State, 737 So. 2d 520 (Fla. 1999), cert. den., 120 S.Ct. 1221 (2000), this Court reversed the defendant's conviction because the detective who took his confession failed to answer an inquiry "what good is an attorney going to do" in a straightforward manner. The Almeida court wrote:

> Article I, section 9, Florida Constitution, requires that whenever a suspect's rights are clearly raised in the interrogation room -- whether by police or the suspect -- officers must pursue the matter in an open and forthright manner. In such a situation, gamesmanship of any sort by the officers is forbidden.

737 So. 2d at 526.

At bar, Detective Flair certainly engaged in gamesmanship

when she answered Appellant's question about needing a lawyer with a clever question of her own. Smithers was clearly seeking information about his right to counsel in order to make an informed decision about whether he should waive it. Detective Flair's lack of effort to provide a simple explanation to Appellant's question "places in doubt the knowing and intelligent nature of any waiver". Almeida, 737 So. 2d at 525.

Because the trial judge entered his order denying Smithers' motion on July 22, 1998, (I, R73), he did not have the benefit of this Court's decision in Almeida. Nor could he have anticipated its extension by the Fourth District in Glatzmayer v. State, 754 So. 2d 71 (Fla. 4th DCA 2000) to a situation where the defendant asked the police officers whether they "thought he should have an attorney". The police answered this question, almost identical to the one at bar, by telling the defendant that it was a decision he would have to make for himself. The Fourth District held that the ensuing confession should have been suppressed on authority of Almeida. A question of great public importance was certified and this Court granted review (Case No. SC00-602, review granted July 18, 2000).

At bar, Detective Flair should at least have told Appellant that having counsel was a decision he had the right to make for himself. A suspect would likely interpret Detective Flair's question, "Do you think that you need an attorney?" as insinuating that if the suspect thought he needed counsel he must be guilty. She did not explain that questioning would cease and

an attorney provided for him if Smithers chose to invoke his right to counsel. Although the trial judge did not apparently credit Sharon Smithers' testimony that Detective Flair said something about not wanting to make an attorney upset by calling in the early morning hours (SI, T106-7)[9], it is abundantly clear that Appellant was improperly discouraged from making an informed decision concerning his right to counsel.

Accordingly, even if this Court disapproves the Fourth District's decision in Glatzmayer, the police conduct at bar was more egregious and clearly in violation of the principles set forth in Almeida and Traylor.

B) Appeal to Religious Convictions as an Inducement to Confess.

Detective Metzgar testified that he had been informed that Smithers attended church in Plant City (SI, T86)[10]. When the polygraph examination showed deception, Detective Metzgar told Smithers that he had not been telling the truth and suggested that "if he was a Christian ... he might want to tell the truth about it, that that is probably the right thing to do" (SI, T87). Soon afterwards, Smithers admitted an encounter with the homicide victim Cristy Cowan (SI, T88-9). Detective Metzgar then turned the interrogation over to Detectives Flair and Blake (SI, T89-

[9]Detective Flair denied discussing the need for an attorney with Sharon Smithers (SI, T68).

[10]In fact, Smithers was a deacon at this church (X, T1106).

90).

This Court has characterized the so-called "Christian burial technique" as a "blatantly coercive and deceptive ploy" when used in police interrogation. Roman v. State, 475 So. 2d 1228 (Fla. 1985), cert. den., 475 U.S. 1090 (1986). Accord, Hudson v. State, 538 So. 2d 829 (Fla. 1989). At bar, the bodies had already been located, so the ploy was modified. Nonetheless, it included a blatant appeal to Smithers' religious nature and lecture by Detective Metzgar that a good Christian would confess.

When presented with a similar police interrogation which used religion to induce a confession, the court in Carley v. State, 739 So. 2d 1046 (Miss. App. 1999) wrote:

> Exhortations to tell the truth and adhere to religious teachings are the equivalent of inducements which render a statement inadmissible.

739 So. 2d at 1050. Noting that the defendant (like Smithers) had previously maintained his innocence, the Carley court held that the police overreaching procured an involuntary confession.

This Court should further observe that Detective Metzgar apparently considered his psychological deceptions to be simply tricks of the trade. For instance, he prefaced his explanation of the interaction with Smithers with the disclosure, "I have a speech that I use on most folks" (SI, T87). He targeted Smithers' religious beliefs as a vulnerability which could be exploited to induce a confession. If Detective Metzgar's conduct is not to be rewarded, Smithers' confession must be suppressed.

C) Need for Renewed Miranda Warnings.

The only time that Smithers was read Miranda warnings was immediately following his question about whether he needed a lawyer. This was on the first night of questioning at a time when he was not yet in custody. When Appellant returned the following day for the polygraph, Detective Metzgar gave him a written Miranda rights form which Smithers was instructed to read and sign before the examination began (SI, T83-4). Smithers himself testified that he signed the form without fully reading or understanding it (SII, T156; EI, 4).

A defendant is entitled to Miranda warnings before he is taken into police custody for interrogation. Traylor v. State, 596 So. 2d 957, 966 (Fla. 1992) (relying on Art. I, sec. 9, Fla. Const.). Whether a suspect is police custody is determined by whether a reasonable person in the suspect's situation "would believe that his or her freedom of action was curtailed to a degree associated with actual arrest". Ramirez v. State, 739 So. 2d 568, 573 (Fla. 1999), cert. den, 120 S. Ct. 970 (2000).

At bar, the earliest point where Smithers could be said to have been in custody was once he admitted to Detective Metzgar that he had contact with the victim Cristy Cowan. Detective Metzgar certainly considered this admission to be a critical point because he immediately informed Detectives Flair and Blake. The question is whether Detectives Flair and Blake should have readvised Appellant of his Miranda rights prior to further interrogation.

In Wyrick v. Fields, 459 U.S. 42 (1982), the Court rejected the lower court's creation of a per se rule that new Miranda warnings were required before a suspect could be questioned about the results of a polygraph examination. On the other hand, the totality of the circumstances may require renewed warnings after a failed polygraph examination. See, Henry v. Dees, 658 F. 2d 406 (5th Cir. 1981); United States v. Gillyard, 726 F. 2d 1426 (9th Cir. 1984).

At bar, the circumstances are most like those in Gillyard. In the first place, the police suggested that Smithers take the polygraph and he merely consented. This is like Gillyard, but unlike Fields, where the defendant requested it. Secondly, Smithers (like Gillyard) was not represented by counsel while Fields was. Finally, the post-examination interrogation of Smithers was not just a continuation by the same detective who had administered the polygraph as in Wyrick v. Fields. Rather, as in Gillyard, two new detectives conducted the interrogation after Detective Metzgar informed them about Appellant's admission.

At the time that Smithers was interrogated by Detectives Flair and Blake following the failed polygraph examination, he had not had Miranda rights read to him in nearly twelve hours. He had only slept for about two hours between sessions (SI, T82). Even if his earlier waiver of rights was not vitiated by Detective Flair's response to his question about needing a lawyer, renewed warnings should have been given once the

interrogation became custodial in nature. The written waiver of rights which Smithers gave before the polygraph examination was insufficient. The most that Detective Metzgar could say was that Appellant appeared to read both forms (consent to polygraph and waiver of rights) and that he signed them (SI, T83-4). Indeed, the trial judge found in his order that the detective "did not read either form to him [Smithers]" (I, R71). Under the circumstances, the trial court should have ruled that Smithers had not voluntarily waived his Miranda rights; or that any prior voluntary waiver did not extend to the custodial interrogation conducted by Detectives Flair and Blake where Smithers confessed to the two homicides.

D) Sharon Smithers' Presence During the Interrogation.

The trial court's order considered the role played by Appellant's wife during the custodial interrogation, but found the circumstances at bar sufficiently similar to those in Lowe v. State, 650 So. 2d 969 (Fla. 1994) to make Appellant's confession admissible. However, the judge's order sets forth a crucial distinction between the testimony of Sharon Smithers and that of the detectives without making a clear finding of which was credible:

> Mrs. Smithers also testified that she urged the Defendant to be truthful, and that the detectives told her what to ask him. The detectives deny that they used her to interrogate him.

(I, R72).

Certainly if the detectives "told" Sharon Smithers to participate actively in the interrogation by "[telling] her what to ask [her husband]", she could be considered a police agent using psychological pressures to induce Appellant's confession. She testified on the prosecutor's crossexamination:

> Q. Now, once you go into the room it was your testimony that they're asking you to ask him the questions, correct?
>
> A. They ask him some questions and he would hush up, and they would say, "Talk to him and see if you can get him to answer." And I would ask him what they asked, yes.
>
> Q. Now, let me get this straight. They were asking questions , and he wouldn't say anything else, and they would turn to you and say, "Please talk to him"?
>
> A. Yes.
>
> Q. "Get him to tell the truth or get him to answer"?
>
> A. Yes.
>
> Q. And then you would convince him to answer, correct?
>
> A. Yes.
>
> Q. Now, they were not asking you to direct the examination then, they were not directing the questions to you like, "Mrs. Smithers, ask him did he have coffee this morning"?
>
> A. Yes, they were, in a way.
>
> Q. And who was the one that was doing this?
>
> A. Both Dorothy Flair and [Blake] was in there.

(SI, T127-8).

* * * *

> A. She would ask -- like I said, ask him a question, then ask me, "Can you get him to answer the question?" And I would say -- you know, whatever the question was I would say to him, "Sam, come on tell the truth, be honest, let's get this over with, Baby." And then he would start and he would answer the question sometimes, sometimes he would shrug his shoulders.
>
> Q. And this is how the entire interrogation proceeded?
>
> A. While I was in there, yes.
>
> Q. By them asking you to intercede on their behalf to answer the questions?
>
> A. Some of the questions he would go ahead and answer for them, and some of them they would use me to get to him.

(SI, T129-30).

The testimony of the detectives was quite different on how the interrogation was conducted. Detective Flair admitted only that she might have said, "Listen to your wife, you need to tell the truth" (SI, T76). The detective denied ever directing Sharon Smithers to say anything to her husband during the interrogation (SI, T75, 77).

Because the trial judge's findings of fact do not resolve the issue of whether the police directed Sharon Smithers' participation in the interrogation, we cannot be certain whether the right rule of law was applied to the facts. The case which the trial judge relied upon, Lowe v. State, 650 So. 2d 969 (Fla. 1994), is distinguishable because the police allowed the suspect's girlfriend to speak with him alone in the interrogation room. The police did not ask Lowe's girlfriend to assist them;

nor did they interrogate Lowe in her presence. Similarly, the United States Supreme Court decision in Arizona v. Mauro, 481 U.S. 520 (1987) rests upon the conclusion that there was no police interrogation (or its functional equivalent) when the suspect's wife was allowed to speak with him in the presence of an officer.

At bar, it is evident that police interrogation continued with Mrs. Smithers in the interrogation room. All witnesses testified that she played a role in urging her husband to confess. The issue in dispute is whether the police directed or encouraged Sharon Smithers to help them pry answers from her husband. On this issue, the trial judge made no finding as to whether Detective Flair or Sharon Smithers was more credible.

This Court should now establish a bright-line rule under Art. I, sec. 9 of the Florida Constitution that the police may not interrogate a suspect when a close family member is present and assisting their efforts. A confession under such circumstances cannot be considered voluntary. Alternatively, this Court should hold that a review of the totality of the circumstances at bar shows that Appellant's confession to the two homicides should have been suppressed by the trial judge.

ISSUE III

FUNDAMENTAL ERROR OCCURRED WHEN DEFENSE COUNSEL WAIVED APPELLANT'S PRESENCE FOR A PRETRIAL HEARING WHERE A DEFENSE MOTION IN LIMINE WAS HEARD AND DENIED.

At the pretrial hearing held December 7, 1998, the following transpired:

> THE COURT: All right. Is Smithers here?
>
> MR. HERNANDEZ: Yes, judge.
>
> THE COURT: You waive his presence or would you like him out?
>
> MR. HERNANDEZ: I would like him out.
>
> THE COURT: We need Mr. Egger's client out and we need Mr. Smithers out.
>
> MR. HERNANDEZ: If it's going to be a big deal I waive his presence. Judge, to expedite matters, this is something I don't have a problem waving [sic] Mr. Smithers' presence on.
>
> THE COURT: Go ahead.

(SIII, T346). Defense counsel then argued his "Motion in Limine" (I, R110-1) and his "Second Motion in Limine" (I, R112-3). Although the judge reserved ruling on the "Second Motion in Limine" (SIII, T347), he denied the "Motion in Limine" which sought to bar evidence that Appellant consorted with prostitutes (SIII, T347-50).

Fla. R. Crim. P. 3.180(a) provides in pertinent part:

> (a) **Presence of Defendant.** In all prosecutions for crime the defendant shall be present:
> * * * * *

> (3) at any pretrial conference, unless waived by the defendant in writing;

This Rule was construed by this Court in Pomeranz v. State, 703 So. 2d 465 (Fla. 1997) to require the defendant's presence unless an express written waiver by the defendant was filed. Allowing an oral waiver of the defendant's presence by defense counsel is error. 703 So. 2d at 471. Accord, Kearse v. State, 770 So. 2d 1119 (Fla. 2000).

At bar, Appellant's absence from the December 7, 1998 pretrial hearing was not harmless error. Unlike the situations in Pomeranz and Kearse, Smithers never had a meaningful opportunity to be heard through counsel on his "Motion in Limine" because it was heard and decided by the judge in his absence.[11] Fundamental fairness requires that a defendant be allowed to participate when the court makes a ruling which determines what evidence will be admissible before the jury. The case at bar must be distinguished from Garcia v. State, 492 So. 2d 360 (Fla. 1986) because Smithers actually suffered an adverse ruling by the court in his absence.

Accordingly, Appellant should now receive new trials on both homicides.

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[11]Because the court reserved ruling on his "Second Motion in Limine", the error with respect to this motion did not prejudice Appellant because he was present when the court later ruled. See, Pomeranz; Kearse.

ISSUE IV

THE SENTENCING JUDGE ERRED BY FINDING THAT THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE APPLIED TO THE HOMICIDE OF DENISE ROACH.

In his sentencing order, the judge found that the especially heinous, atrocious or cruel aggravating circumstance [§921.141(5)(h), Fla. Stat. (1995)] applied to both homicides (II, R247-50, see Appendix). Appellant does not contest applying this factor to the homicide of Cristy Cowan; however, it was improperly found with respect to the homicide of Denise Roach. A trial court's finding of the HAC aggravator is reviewed under the substantial competent evidence standard. Mansfield v. State, 758 So. 2d 636 (Fla. 2000).

The judge began his discussion of HAC with the observation that this Court has consistently held that a prima facie case for this aggravating factor is established when a conscious victim is strangled. Orme v. State, 677 So. 2d 258 (Fla. 1996); Blackwood v. State, 25 Fla. L. Weekly S1148 (Fla. December 21, 2000). Dr. Hair, the medical examiner, found that Denise Roach's hyoid bone was fractured (VII, T739-40). She further testified that manual strangulation is almost always the cause of a hyoid bone fracture (VII, T742-3). However, there was no evidence from which anyone could tell whether Denise Roach was conscious when she was strangled.

This is important because this Court recognized in DeAngelo v. State, 616 So. 2d 440 (Fla. 1993) that conflicting evidence on

whether the victim was conscious during the strangulation thwarts proof of HAC as an aggravating circumstance. Similarly, in Rhodes v. State, 547 So. 2d 1201 (Fla. 1989), evidence that the victim may have been drunk or semiconscious at the time she was killed by strangulation led this Court to declare that HAC had not been proven beyond a reasonable doubt. Rhodes is particularly relevant at bar because there was testimony that Denise Roach had a drug problem with crack cocaine (VIII, T922, 947). She may well have been high on crack cocaine at the time she was killed. In short, manual strangulation cannot be used to support the HAC aggravating factor under the circumstances at bar because Denise Roach may well have been unconscious or semiconscious when strangulation occurred.

Turning to the balance of the judge's finding re. HAC, his order reads:

> Denise Roach was killed several days before her decomposed body was found on May 28, 1996, and that the cause of her death was blunt trauma to her face, back of her head, and top of her head, including sixteen (16) puncture wounds to her skull, and manual strangulation. Medical Examiner Hair opined that the trauma was consistent with her being punched in the face by a fist, and with forceful contact of her head with a hard wall, and that the puncture wounds were consistent with a screw driver having penetrated her skull and brain.

(II, R248, see Appendix).

This Court has approved findings of HAC in cases where the victim was beaten to death. See e.g., Whitton v. State, 649 So. 2d 861 (Fla. 1994); Guzman v. State, 721 So. 2d 1155 (Fla. 1998).

On the other hand, where there was evidence that the victim may have been rendered unconscious by the initial blow and was therefore unaware of impending death, the HAC aggravating circumstance has been disapproved. Zakrzewski v. State, 717 So. 2d 488 (Fla. 1998). HAC has also been found inapplicable when "the attack took place in a very short period of time ('could have been less than a minute, maybe even half a minute'), the defendant [sic] was unconscious at the end of this period, and never regained consciousness". Elam v. State, 636 So. 2d 1312, 1314 (Fla. 1994).

One of the factors which distinguishes beating deaths to which the HAC aggravating circumstance is applicable from those where it is not is whether the victim underwent prolonged suffering or anticipation of death. Compare, Elam, supra. with Lawrence v. State, 698 So. 2d 1219 (Fla. 1997) (victim was heard pleading for his life and was alive when a mop handle was shoved down his throat). Another significant detail which may distinguish the cases is presence or absence of defensive wounds. See, Beasley v. State, 25 Fla. L. Weekly S915 (Fla. October 26, 2000); Mahn v. State, 714 So. 2d 391 (Fla. 1998) ("Although initially asleep when attacked, Anthony's defensive wounds demonstrate he awoke during the attack and attempted to fend off further stabbings.").

At bar, Appellant's statement to the police described an altercation where Roach hit his arm and he responded by punching her in the face (IX, T1056). She threw a planter against the

fender of Smithers' truck which enraged him to the point that he shoved her against the wall (IX, T1057-8). The medical examiner confirmed that Roach suffered a skull fracture which could have been caused by having the back of her head smashed against a hard wall (VII, T734-5). According to Appellant, Roach was unconscious after she hit the wall and a piece of lumber fell on her face (IX, T1057-8).

This scenario describes a short violent quarrel rather than the prolonged suffering and awareness of death associated with homicides which qualify for the HAC aggravating circumstance. Also important is the fact that the medical examiner did not find that any of Roach's wounds were defensive in nature.

Missing from Appellant's account of the homicide is an explanation for the sixteen puncture wounds in Roach's head which the medical examiner said were probably caused by some type of tool (VII, T736-8). However, it is not only possible, but likely that these wounds were inflicted after Roach became unconscious. Acts which occur after the victim becomes unconscious or dies cannot be considered in support of the HAC aggravating factor. Jackson v. State, 451 So. 2d 458 (Fla. 1984); Jones v. State, 569 So. 2d 1234 (Fla. 1990).

In Brown v. State, 644 So. 2d 52 (Fla. 1994) the victim's body was badly decomposed and the only evidence which supported the HAC aggravator was three stab wounds, none of which would have been immediately fatal. The Brown court wrote:

> This evidence standing alone is insufficient to show beyond a reasonable doubt that this

> was a "conscienceless or pitiless crime which is unnecessarily torturous to the victim".

At bar, Roach's decomposed body may also have prevented the medical examiner from determining whether Roach was alive or conscious when the massive beating and strangulation occurred. This is what distinguishes the case at bar from others where HAC was proved such as Taylor v. State, 630 So. 2d 1038 (Fla. 1993), cert. den., 513 U.S. 832 (1994).

More than speculation is needed to prove aggravating circumstances. Knight v. State, 746 So. 2d 423, 435 (Fla. 1998). Neither may the trial court draw "'logical inferences' to support a finding of a particular aggravating circumstance when the State has not met its burden". Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993), citing Clark v. State, 443 So. 2d 973, 976 (Fla. 1983), cert. den., 467 U.S. 1210 (1984). The sentencing judge at bar relied upon an unwarranted assumption that Roach was alive and conscious when these injuries were inflicted upon her. If so, her death was truly torturous. However, absent any proof by the State that she remained conscious after having her head banged against the wall, there is insufficient evidence to establish the HAC aggravating circumstance.

Striking one aggravating factor leaves the sentence of death supported by a single aggravator to be weighed against substantial mitigation. Accordingly, the error in finding HAC cannot be held harmless. If this Court does not grant the new trial Appellant requested in Issue I and II as to the homicide of Denise Roach, the case must at least be remanded to the trial

court for the judge to reweigh the proven aggravating and mitigating circumstances.

ISSUE V

THE SENTENCING JUDGE ERRED BY FINDING THAT THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE APPLIED TO THE HOMICIDE OF CRISTY COWAN.

In his written sentencing order, the judge recited the four specific elements of the cold, calculated and premeditated aggravating circumstance as set forth by this Court in Jackson v. State, 704 So. 2d 500 (Fla. 1997) (II, R251-2, see Appendix). These are:

1. The killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold).

2. The defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated).

3. The defendant exhibited heightened premeditation (premeditated).

4. The defendant had no pretense of moral or legal justification.

Jackson v. State, 704 So. 2d 500, 504 (Fla. 1997); Walls v. State, 641 So. 2d 381 (Fla. 1994), cert. den., 513 U.S. 1130 (1995); Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994). All of these elements must be proved beyond a reasonable doubt to establish the CCP aggravating circumstance.

This Court reviews the record "to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence

supports its finding". Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997). When proof of an aggravating circumstance is solely circumstantial, "the circumstantial evidence must be inconsistent with any reasonable hypothesis which might negate the aggravating factor". Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992).

At bar, Appellant's statement to the police explained his presence with Cristy Cowan at the convenience store as arising from his offer to help her when her car became disabled along the highway (IX, T1040-1). Appellant said that she demanded $50 and threatened to accuse him of rape if he didn't give her the money (IX, T1041-2). He told her to ride in his truck to the Whitehurst property, where he would get the money (IX, T1042). When they arrived, Appellant showed Cowan that he had only $22 or $23 in his wallet (IX, T1042-3). After much argument, Cowan threw the drink from the convenience store at Appellant (IX, T1044). They were standing in the garage when Smithers saw an axe nearby (IX, T1045). He picked it up and hit her twice in the head (IX, T1045-6). Then he dragged her body by the feet down to the pond and threw her in (IX, T1046). He was rinsing the blood off the axe when Marion Whitehurst drove up (IX, T1046).

This synopsis of events negates the cold, calculated and premeditated aggravating circumstance. First, the homicide was not cold because it took place during an angry confrontation about money. Secondly, it was not calculated because there was no careful, prearranged plan to kill Cowan before the incident began. Finally, although there was sufficient evidence for the

jury to find simple premeditation, the CCP factor requires "heightened premeditation".

The State's penalty phase testimony from Detective Iverson established at most that Appellant drove directly from his workplace to the Hillsborough Avenue location where prostitutes were to be found, picked up Cristy Cowan and drove directly to the convenience store on Forbes Road near Interstate 4. Since the time displayed on the convenience store videotape was 18:19 and Marion Whitehurst encountered Smithers on her property around 7:00 p.m., the events leading up to the homicide and the homicide itself transpired in a fairly short period of time. This suggests that Appellant planned to pick up a prostitute and take her to the Whitehurst property from the time that he left work on May 28, 1996. However, it falls short of proof that Appellant had planned the homicide before it occurred.

The facts at bar are similar to those in Gore v. State, 599 So. 2d 978 (Fla.), cert. den., 506 U.S. 1003 (1992). There, the defendant persuaded a woman to drive him to a party, and then home. At some point, he forced her to accompany him to an isolated location where she was killed under unknown circumstances. This Court rejected applying the CCP aggravating circumstance because the murder might have been the result of a "sexual assault that got out of hand, or that Roark attempted to escape from Gore, perhaps during a sexual assault, and he spontaneously caught and killed her". 599 So. 2d at 987.

At bar, it is possible that Cristy Cowan would not have been

killed had she agreed to accept what money Appellant had in his wallet, instead of starting a loud confrontation. The secluded location in itself is insufficient proof that Smithers had a calculated intent to kill her.

Also significant is the fact that the murder weapon (axe) was present at the scene of the argument. This Court has previously pointed to use of a weapon already at the homicide scene as evidence that the murder was not cold, calculated and premeditated. See, Mahn v. State, 714 So. 2d 391, 398 (Fla. 1998) (attacks carried out in haphazard manner with "hastily obtained weapons of opportunity"); Geralds v. State, 674 So. 2d 96, 104 (Fla. 1996) (murder weapon was knife from the kitchen "rather than one brought to the scene").

The facts found by the sentencing judge with respect to the CCP aggravating circumstance were:

> When Samuel Smithers drove Cristy Cowan to the property, he knew that he had killed Denise Roach; he knew that her body was still on the property; he knew that he had only $26.00 on his person to pay for sex; he locked the gate behind him after he drove onto the property.

(II, R252, see Appendix). Plainly, the judge surmised that Appellant's prior killing of Denise Roach on the property meant that Smithers must have intended the same fate for Cowan even before the argument over money took place. This was error because as this Court wrote in Power v. State, 605 So. 2d 856, 864 (Fla. 1992), cert. den., 507 U.S. 1037 (1993):

> even if it were permissible for a judge to rely on the circumstances of pervious crimes

> to support the finding of an aggravating factor, such evidence, standing alone, can never establish, beyond a reasonable doubt, that the murder at issue was so aggravated.

Accord, Finney v. State, 660 So. 2d 674 (Fla. 1995).

In Randall v. State, 760 So. 2d 892 (Fla. 2000) the defendant was accused of two counts of premeditated murder in the strangling deaths of two women on separate occasions. There was evidence that Randall received sexual gratification from choking women during intercourse and that other women he had choked during sexual activity did not die. This Court held that premeditation was not proved in the death of either of the two victims and Randall's convictions were reduced to second degree murder.

At bar, the judge found simple premeditation with respect to the death of the first victim (Denise Roach) but inferred that Smithers planned a repeat performance with Cristy Cowan. Had this type of inference been applied in Randall, the defendant would have had his conviction upheld for premeditated murder in the death of the second victim. The lesson of Randall is that similar events may take place twice. The defendant does not necessarily learn from his mistakes. He can repeat his pattern of behavior without necessarily intending the second incident to have the same result.

Even more on point is Crump v. State, 622 So. 2d 963 (Fla. 1993). Collateral crime evidence admitted in the defendant's trial showed that he engaged in a pattern of picking up prostitutes, binding them and strangling them, then discarding

their nude bodies near cemeteries. The trial judge noted in his sentencing order that Crump possessed a restraining device when he invited the victim into his truck. 622 So. 2d at 972, n.4. Yet this Court struck the finding of the CCP aggravating circumstance because the State "did not prove beyond a reasonable doubt that Crump had a careful prearranged plan to kill the victim before inviting her into his truck". 622 So. 2d at 972.

Similarly, at bar there is no proof that Smithers planned to kill Cristy Cowan before he invited her into his truck. We simply do not know whether Smithers took other prostitutes to the Whitehurst property and released them unharmed. We don't know what would have happened had Cristy Cowan walked away with what money Appellant had offered to give her. The prior death of Denise Roach on the Whitehurst property during an altercation with Appellant is insufficient to prove that Cristy Cowan's killing was cold, calculated and premeditated.

ISSUE VI

THE TRIAL JUDGE ERRED BY FAILING TO DECLARE A MISTRIAL DURING PENALTY PHASE WHEN ONE OF THE STATE'S WITNESSES INTRODUCED LACK OF REMORSE AS A CONSIDERATION.

State witness Barbara Stein, a forensic psychiatrist, testified regarding her psychiatric diagnosis of Appellant:

> Q. And what psychiatric diagnosis did you make on Mr. Smithers?
>
> A. Well there really is not a psychiatric diagnosis because there is not a psychiatric disorder. Mr. Smithers based on all the evidence in the case that I reviewed has what we call antisocial personality traits. Those are personality traits that are characterized by a person being likely to be deceptive and to lie, to have [sic] lack remorse for others, to be what we call --

(XVI, T2174). At this point, defense counsel objected and moved for mistrial based upon interjecting Appellant's alleged lack of remorse as a factor for the jury's consideration (XVI, T2174-5). The trial judge removed the jury and admonished the witness to refrain from the subject of remorse (XVI, T2176-8). The judge denied Appellant's motion for mistrial (XVI, T2178).

In Jones v. State, 569 So. 2d 1234 (Fla. 1990), the State called a penalty phase witness to testify that the defendant showed no remorse. On appeal, this Court wrote:

> This Court has repeatedly stated that lack of remorse has no place in the consideration of aggravating circumstances. Robinson v. State, 520 So. 2d 1, 6 (Fla. 1988); Pope, 441 So. 2d at 1078; McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982). We emphatically held in Pope that lack of remorse should have no place in the

> consideration of aggravating factors. Pope, 441 So. 2d at 1078. We again urge the state to refrain from injecting an issue that this Court has unequivocally determined to be inapplicable, causing us to vacate sentences in the past.

569 So. 2d at 1240. The Jones court ordered a new penalty trial before a new jury for this and other errors committed in the penalty phase.

At bar, Appellant was similarly prejudiced before the penalty jury. Because the trial court did not declare a mistrial, this Court should now vacate Smithers' death sentences and order new penalty trials for both homicides.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Samuel L. Smithers, Appellant, respectfully requests this Court to grant him relief as follows:

As to Issue I - A new trial as to guilt or innocence in the homicide of Denise Roach (Count 2) and a new penalty trial in the homicide of Cristy Cowan (Count 1).

As to Issue II - Suppression of Appellant's confession and retrial on both offenses.

As to Issue III - Retrial on both offenses.

As to Issue IV - Vacation of the sentence of death imposed for the homicide of Denise Roach and reweighing of the proper aggravating and mitigating circumstances by the trial judge.

As to Issue V - Vacation of the sentence of death imposed for the homicide of Cristy Cowan and reweighing of the proper aggravating and mitigating circumstances by the trial judge.

As to Issue VI - Vacation of both death sentences and new penalty trials before new juries on both offenses.

APPENDIX

PAGE NO.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of May, 2002.

CERTIFICATION OF FONT SIZE

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