IN THE SUPREME COURT OF FLORIDA

PETER VENTURA,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 71,~~795~~ 975

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On June 30, 1981, the Spring Term Grand Jury in and for Volusia County, Florida returned a two count indictment charging that PETER VENTURA, the Appellant, committed murder in the first-degree resulting in the death of Robert G. Clemente; Count II of the indictment charged PETER VENTURA with use of a firearm while committing or attempting to commit a felony. (R917).

On May 1, 1987, the Office of the Public Defender Seventh Judicial Circuit, filed a Motion to Withdraw and to appoint a Special Public Defender, citing an irreconcilable conflict of interest. (R928-945) The Appellant wrote a letter to the trial judge on March 12, 1987, alleging a conflict of interest and requesting that a Special Public Defender be appointed to represent him; the letter was attached to and incorporated in the Public Defender's Motion to Withdraw. (R929,943) Also attached to the Public Defender's Motion to Withdraw was a letter from Appellant to his Public Defender requesting that the Public Defender withdraw based on several alleged conflicts of interest

including, inter alia, an allegation that the Public Defender's Office was representing a Mr. Edward Atkins whose sentence had been reduced as a result of statements made against Appellant. (R944) On May 5, 1987, a hearing was held on the Public Defender's Motion to Withdraw and Appoint a Special Public Defender. (R1072-1088) The trial court denied the Motion to Withdraw. (R1082)

On September 17, 1987, the Appellant, pro se, filed a Demand for Speedy Trial. (R964) On October 14, 1987, the Appellant through his trial counsel, filed a Motion to Withdraw his Demand for Speedy Trial; the withdrawal of the Demand for Speedy Trial was signed by the Appellant. (R969)

On October 14, 1987, the trial court granted the Appellant's Motion to Withdraw his Demand for Speedy Trial and set the case for trial on January 11, 1988. (R970)

On January 11, 1988, the case proceeded to a jury trial before the Honorable R. Michael Hutcheson, Circuit Judge, Seventh Judicial Circuit, in and for Volusia County, Florida. (R1-916)

During the testimony of Denise Jorgenson, the trial court overruled defense counsel's objection grounded on hearsay. (R358-359) During defense counsel's cross-examination of Joseph Pike, the trial court sustained a hearsay objection raised by the prosecuting attorney. (R517) During the direct examination of Gary Eager, the trial court denied defense counsel's motion to strike on the grounds of relevancy. (R552) Over defense counsel's objection, the trial court allowed a photograph of the Appellant be admitted into evidence. (R579-586)

Following the presentation of the state's case, defense counsel moved for a judgment of acquittal, arguing that the state presented insufficient evidence to support the charge of first-degree murder or use of a firearm while committing or attempting to commit a felony. More specifically, defense counsel contended that the state offered no unimpeached testimony that the Appellant was the person named in the indictment allegedly committing the alleged crimes. (R692) Defense counsel also moved for a mistrial on the basis that the Appellant had been denied a fair trial due to a photograph of the Appellant being admitted into evidence over defense counsel's objection. (R692) The motion for a judgment of acquittal and for a mistrial were denied. (R692-694)

The defense presented no evidence and called no witnesses. Upon so announcing, defense counsel renewed his motions for mistrial and a judgment of acquittal. (R697) Both motions were again denied. (R697) The trial court refused to give defense counsel's requested instruction on circumstantial evidence. (R736-737) Over defense counsel's objection, the jury was given a "flight" instruction. (R731,734,816-817,1028)

Following deliberations, the jury returned verdicts of guilty as charged as to both counts. (R825,1039) Appellant was adjudicated guilty of both offenses. (R912-913)

On January 19, 1988, the trial court conducted a penalty phase in this cause. (R861-904) The state presented no additional witnesses at the penalty phase. (R861-884) The defense presented three witnesses in mitigation of sentence. (R861-884)

Following deliberation, the jury returned with a recommendation of death. (R904,1045) The trial court followed the jury's recommendation and entered its written findings of fact in support of the death penalty. (R1046-1050) On February 19, 1988, Appellant filed his notice of appeal. (R1059) This brief follows.

STATEMENT OF THE FACTS

On April 15, 1981, Robert Clemente left his job at Crow's Bluff at approximately 1:00 p.m. and drove into the nearby town of Deland, Florida, to meet a potential customer. (R357-358,364-365) Later that afternoon, Robert Clemente's dead body was found in a Crow's Bluff truck parked on the edge of an orange grove north of Highway 44. (R308,322-323) Robert Clemente had been beaten over the head, shot, and possibly stabbed. (R425-430) The cause of death was determined to be a bullet wound penetrating the heart. (R423) The medical examiner's testimony indicated that Mr. Clemente's suffering would have been limited to two to twelve minutes. (R431,436,438) Two sets of foot prints were found leading from the scene or in the immediate area of the scene. (R324,330-332,346-348)

The scene was processed by the Florida Department of Law Enforcement. A total of eleven latent fingerprints, five from outside the vehicle and six from inside the vehicle, were recovered from the scene. (R374) Two projectiles were recovered from the truck. (R376-377) Three projectiles were recovered from the body itself. (R425) The latent fingerprints recovered from the scene were compared with the Appellant's known fingerprints; Appellant's fingerprints were not found at the scene. (R388)

The initial investigation led the police to believe that the deceased's brother-in-law, Todd Waser, was responsible for Robert Clemente's death. (R448,558) However, subsequent

investigation verified Waser's alibi, and he was eliminated as a suspect. (R449,558)

A couple of weeks after Mr. Clemente's death, the investigation turned toward information developed by postal inspectors in the Chicago, Illinois area. (R449-451,559-560) In response thereto, Captain Carroll proceeded to the Chicago area and met with postal inspector Berger, who introduced Carroll to a Reggie Barrett (aka: Reggie Smith) and a Joseph Pike. (R450-451) Barrett and Pike implicated a Mr. Jerry Wright, Jack McDonald and the Appellant, Peter Ventura, in a contract murder of Robert Clemente. (R452-453,493-502,520-537)

According to the testimony of Joseph Pike, on May 6, 1981, Appellant and Pike met at a snack shop at Maywood, Illinois. (R498) Pike testified, that Appellant "told me at that time . . . about a crime, or scheme, that Jack McDonald had going; told me a lot of details about the crime; what they were planning to do." (R498) Pike further testified that Appellant, McDonald and a third person conspired to kill a person and collect the victim's life insurance proceeds. (R498-499) According to Pike, Appellant stated that he had "handled the extermination." (R499) While Pike initially testified that the murder was in planning stages on May 6, 1981, he later testified that "the whole thing had been completed," on May 6, 1981. (R498,500) Additionally, Pike was unable to testify where the alleged murder occurred or when the alleged murder occurred; significantly, he was not even able to testify as to what state the alleged murder occurred in. (R501)

However, defense counsel did not object to the testimony. (R498-502)

According to the testimony of Reginald Barrett, Appellant contacted him in February of 1981 and asked several questions regarding the nature of a particular life insurance policy known as "key man insurance." (R524-525) Barrett further testified that on February 24 or 25, 1981, Appellant asked him if he could provide a pistol or a gun to Appellant for a person in Atlanta. (R525) According to Barrett, he provided Appellant with a Colt 357 Magnum. (R526) During the first week of April, 1981, Barrett indicated that Appellant told him that Jack McDonald wanted him to come to Atlanta to "burn someone." (R526-527) Barrett further testified that on April 10 or 11, 1981 he received a call from Appellant from a motel in Daytona or Deland, Florida. (R527-528) According to his testimony, Mr. Barrett also received a letter from the Atlanta, Georgia area from Appellant indicating that if anything happened to Appellant that Jack McDonald would be responsible; Mr. Barrett remembered receiving the letter on May 4 or 5, 1981. (R530-532)

Based upon the information supplied by Mr. Barrett and Mr. Pike, warrants were issued for the arrest of Peter Ventura and Jack McDonald. (R456-457,560-572) Appellant was arrested in Chicago, Illinois, and Jack McDonald was arrested in Daytona Beach, Florida. (R567-568) Appellant was released on bond, pending extradition from Illinois. (R570-571) Jack McDonald remained in custody in the Volusia County jail, pending the return of an indictment. (R572) According to the testimony of

Deputy Hudson, Appellant failed to appear for his extradition hearing in Illinois, and was not taken into custody again until June 11, 1986, when he was arrested in Austin, Texas. (R575) Jack McDonald was released from custody and the case against him was discharged for violation of Florida's speedy trial rule. (R572-573)

Appellant's arrest in Austin Texas was caused by information received by the Austin police department from Timothy Arview. (R677-681,684-689) According to Arview, Appellant told him that he had done a contract killing in Florida, involving a male. (R679) Arview indicated that at the time Appellant allegedly made the statement, he (Appellant) stated that the killing had occurred five years ago. (R679)

According to the testimony of Jack McDonald, McDonald, Appellant and Jerry Wright conspired to kill Mr. Clemente and collect the life insurance proceeds as a result of his death. (R628-649) McDonald testified that Appellant was the triggerman, who actually killed Mr. Clemente. (R638-641) McDonald testified that he followed Appellant and Clemente to the secluded area where Mr. Clemente's body was found. (R638-640) McDonald did not actually see the shooting and did not see Appellant with a gun. (R638-640) On direct examination, McDonald admitted to being convicted of multiple felonies. (R647-649) Mr. McDonald admitted to lying in discovery depositions, given under oath. (R665-666) Through motel, telephone, and Western Union records, the state established that Appellant was in the Volusia County

area days prior to and a day or two after Mr. Clemente's death. (R594-597,605-616)

Appellant did not testify. (R695)

SUMMARY OF ARGUMENTS

POINT I: Prior to trial Appellant requested that his court-appointed counsel be replaced; also court-appointed counsel moved to withdraw from representation of Appellant. Through pleadings and letters, the trial court was informed that there may have been a serious conflict of interest in court-appointed counsel's continued representation of Appellant. The trial court did conduct a hearing on this matter. However, the trial court's inquiry was superficial and failed to address the real problem that was lurking in the record. The court failed to ask court-appointed counsel or Appellant, or inquire in any other way as to the circumstances of court-appointed counsel's alleged representation of another defendant who had made statements against Appellant which resulted in the other defendant's sentence being reduced. Furthermore, the trial court failed to inquire into the nature and substance of Appellant's allegations regarding court-appointed counsel's alleged ineffectiveness. Therefore, Appellant was deprived a fair trial and the convictions must be reversed and the cause remanded for a new trial.

POINT 11: At the time that the trial court conducted its hearing on the issue of court-appointed counsel's substitution, the record contained material that indicated that there was an actual conflict between Appellant and another client of the Public Defender's Office. Furthermore, Appellant had lost all confidence and trust in his court-appointed counsel, and

court-appointed counsel had certified in writing that a conflict of interest existed between himself and Appellant. Clearly, there is no room in court for animosity between a criminal defendant and his counsel. This is especially true, if such animosity and hostilities are not attributable to the defendant. In the instant case, Appellant respectfully and politely asked for what the Sixth Amendment guarantees -- effective assistance of counsel. The trial court's denial of court-appointed counsel's motion to withdraw and its refusal to substitute counsel at Appellant's request, resulted in Appellant being denied effective assistance of counsel. Consequently, the convictions must be reversed and this matter remanded for a new and fair trial.

POINT 111: Throughout the course of the trial, defense counsel committed acts and omissions that fell below the accepted levels of effective assistance of counsel. The record shows that court-appointed counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Accordingly, the defendant was denied a fair trial and his convictions must be reversed and this cause must be remanded for a new trial.

POINT IV: The evidence did not support, over objection, an instruction on flight. Moreoever, the instruction as given was improper and gave undue and unfair weight to particular evidence.

POINT V: The death penalty in Florida is being arbitrarily and capriciously applied as a result of vague and nonspecific statutory language. This Court's decisions have not provided consistent results under the same or substantially similar facts. Additionally, this Court has applied the wrong standard of review concerning the presence of mitigating circumstances. Instead of consistently providing plenary review in all cases, this Court considers itself bound to an abuse of discretion standard when the jury recommends death. The death penalty statute in Florida, as applied, violates the Sixth, Eighth, and Fourteenth Amendments. The death sentences must be reversed and sentences of life imprisonment imposed.

POINT VI: It is unnecessary that a jury sentence a defendant. However, due process requires that the jury determine the defendant's .guiltor innocence of the crime for the sentence imposed. If the verdict does not include elements that define an offense, an increased sentence for that offense cannot be imposed. It is the prosecutor's burden to secure a jury verdict for all elements of the offense. Aggravating circumstances are limited to those specifically provided by statute. They actually define the crime of capital first-degree murder that is punishable by death. The aggravating circumstances thus become elements of the crime that must be found by the jury before the increased sanction of death may be lawfully imposed.

POINT I

THE TRIAL COURT ERRED IN FAILING TO CONDUCT A FULL INQUIRY INTO THE NATURE OF APPELLANT'S ALLEGATIONS OF A CONFLICT OF INTEREST AND REQUESTS TO DISCHARGE COURT-APPOINTED COUNSEL AND IN FAILING TO CONDUCT A FULL INQUIRY INTO COURT-APPOINTED COUNSEL'S MOTION TO WITHDRAW.

Where an accused voices objections to court-appointed counsel, the trial court should inquire into the reasons for dissatisfaction. Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973). The Nelson court stated:

> Where a defendant, before the commencement of trial makes it appear to the trial judge that he desires to discharge his court-appointed counsel, the trial judge, in order to protect the indigent's right to effective counsel, should make an inquiry of the defendant as to the reason for the request to discharge. If incompetency of counsel is assigned by the defendant as the reasons, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court-appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense.

Nelson, at 258-259. In Glasser v. United States, 315 U.S. 60, 71 (1942) the United States Supreme Court noted, "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . The trial court should protect the right of the accused to have the assistance of counsel." This principle of law is now well

established in the State of Florida, and indeed in the Eleventh Circuit. See Thomas v. Wainwright, 767 F.2d 738 (11th Cir. 1985); Hudson v. Rushen, 686 F.2d 826 (9th Cir. 1982); McKee v. Harris, 649 F.2d 927 (2d Cir. 1981); Smith v. State, 512 So.2d 291 (Fla. 1st DCA 1987); Parker v. State, 423 So.2d 553 (Fla. 1st DCA 1982).

Through pleadings and letters, in the instant case Appellant voiced loud objections to proceeding with representation from his court-appointed counsel. (R928-957) Appellant informed the court by letter that he distrusted his court-appointed attorney, that his court-appointed attorney had failed to file any motions in his behalf, that his court-appointed attorney had lied to him, and that Appellant had found it impossible to openly discuss matters with his court-appointed attorney that were crucial to his defense. (R943) Also through pleadings, the court was made aware of a letter that Appellant wrote to his court-appointed attorney wherein he voices a deep distrust for the attorney. (R944-945) Most significantly Appellant pointed out in his letter that another client of the Public Defender's Office had made statements against Appellant and thereby reduced his (the other client's) sentence. (R944) On March 20, 1987, the trial court responded to the defendant's written requests and refused to discharge the Public Defender and appointed substitute counsel. (R942) Court-appointed counsel filed a Motion to Withdraw and Appoint a Special Public Defender. (R928-929)

On May 5, 1987, a hearing was held on the Public Defender's Motion to Withdraw. (R1072-1088) Therein, the Assistant Public Defender emphasized he was unable to maintain a proper attorney-client relationship; defense counsel further indicated to the trial court that it would be absolutely impossible for him to represent Mr. Ventura further in the proceedings. (R1076,1078-1079)

Appellant indicated to the court that he continued to desire to discharge his court-appointed attorney. (R1076) Appellant also complained of the many delays in his case. (R1079-1080)

The trial court made no further inquiry of Appellant. (R1074-1088) Most importantly, the court failed to inquire to any degree regarding the Appellant's allegation that court-appointed counsel's office helped reduce another defendant's sentence because that defendant made statements against Appellant. (R944,1074-1088) The trial court made a superficial inquiry into Appellant's complaints regarding the questionable effectiveness of his counsel's assistance. (R1073-1088)

The record suggests strongly that there was an actual conflict of interest. (R944) If an ambiguity exists in the record at this stage, it is because the trial court failed to conduct an adequate inquiry into the question of effective assistance of counsel at the trial level. Accordingly, the Appellant's convictions must be reversed, his sentences must be vacated and this matter must be remanded for a new trial.

POINT II

THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S REQUEST TO DISCHARGE HIS COURT-APPOINTED COUNSEL AND IN DENYING COURT-APPOINTED COUNSEL'S MOTION TO WITHDRAW, WHERE AN ACTUAL CONFLICT OF INTEREST EXISTED AND WHERE GIVEN THE TOTALITY OF THE CIRCUMSTANCES IT WAS IMPRACTICAL AND UNREALISTIC TO EXPECT TRIAL COUNSEL TO RENDER EFFECTIVE ASSISTANCE.

A personal conflict between an accused and his court-appointed counsel which results in a lack of counsel's effectiveness should be given significant weight in determining whether or not court-appointed counsel should be replaced with substitute counsel. Donald v. State, 166 So.2d 453 (Fla. 2d DCA 1964). A defendant's general loss of confidence or trust in his counsel, standing alone is not sufficient for substitution of counsel; however, such a loss of confidence or trust taken together with other circumstances adversely affecting effective assistance of counsel may warrant a substitution of counsel in order to avoid an ineffective assistance of counsel. See Hutchins'v. Garrison, 724 F.2d 1425, 1430-31 (4th Cir. 1983). Moreover, an accused may be entitled to substitute counsel where there is a conflict of interest between the accused and his current court-appointed counsel. Parker v. State, 304 So.2d 478 (Fla. 1st DCA 1974). Also, substitute counsel should be appointed for indigent defendant's where representation of one indigent works to the detriment of representation of the other indigent. Foster v. State, 387 So.2d 344 (Fla. 1980). In Cuyler v. Sullivan, 446 U.S. 335 (1980), the court held that failure of retained counsel to

provide adequate representation free of conflicting interest rendered the trial so fundamentally unfair as to violate the Sixth Amendment, made applicable to the States through the Fourteenth Amendment. Cuyler, at 343-44. When counsel is confronted with an actual conflict of interest, prejudice must be presumed; prejudice is presumed where conflict is shown. Holloway v. Arkansas, 435 U.S. 475 (1978); Strickland v. Washington, 466 U.S. 668 (1984). The Sixth Amendment contemplates legal representation that is effective and unimpaired by the existence of conflicting interests of two persons being represented by a single attorney. Foster v. State, 387 So.2d 334, 335 (Fla. 1980); Baker v. State, 202 So.2d 563 (Fla. 1967).

In the instant case, the record reveals actual conflict in correspondence which was incorporated and made a part of both Appellant's pleadings and court-appointed counsel's pleadings. The Appellant stated:

> I've meet [sic] with your investigator three times. First time he introduced Himself and told me to keep my mouth shut. Second time, He acted in you [sic] behalf and brought me a continuance to sign, along with some facts pertaining to Mr. Edward Atkins an Informat [sic] (Because of the fact that the Public Defender's Office helped in Reducing [sic] his Sentence in Half, because of a Statement he made against my case, I now feel and Do believe that we have a conflict of Interest.)

(R944) Since there was evidence of actual conflict in the record, the trial court should have granted the Motion to Withdraw and appointed Appellant a substitute counsel. Consequently,

Appellant's convictions must be reversed and his sentences must be vacated.

Assuming arguendo that there is not actual conflict established in the record, the totality of the circumstances require that trial counsel should have been allowed to withdraw and Appellant should have been given the benefit of a substitute counsel. The situation that trial counsel found himself in on May **5, 1987,** at the hearing on his Motion to Withdraw, is similar to a post-conviction relief hearing, pursuant to Fla.R.Crim.P. **3.850.** It is well established, that in such post conviction proceedings the defendant is entitled to substitute counsel to argue the ineffective assistance issue. Adams v. State, **380** So.2d **421** (Fla. **1980).** However, it must kept in mind that courts have not looked favorably on indigent defendants who would seem predisposed to hire and fire court-appointed trial counsel at their whims. Accordingly, it is clear that indigent defendants are not entitled to appointed counsel of their choice. Id.

In certain circumstances, however, the interests of justice and judicial economy would best be served by a balancing test which would weight the interests of the defendant being provided with substitute counsel against the interest of the smooth efficient administration of justice. The case at bar is a perfect example of a case where such a balancing test would have saved hundreds of hours of court time and thousands of dollars of tax payers money. This record does not show an indigent defendant who is belligerent and disrespectful toward our system of justice. At every stage he was well mannered, respectful

and cooperative. There is nothing in the record to suggest that the Appellant in requesting that his court-appointed counsel be discharged was trying to unduly delay prosecution of the case or otherwise in any manner trying to disrupt the administration of justice. To the contrary, the record shows the Appellant to be a patient and cooperative person. He was delivered to the Volusia County Jail in June of 1986, and did not commence jury trial until January of 1988. (R1,685) Appellant did not lodge a complaint until he had been in custody for over nine months. At that time, due to unfortunate circumstances, Appellant apparently felt compelled to request that the trial court discharge his court-appointed attorney. (R942-945) Considering the totality of the circumstances in this cause, it is clear that the trial court should have substituted counsel as requested by both Appellant and court-appointed counsel. The trial court having failed to do so, Appellant was deprived of his right to effective assistance of counsel.

> As this Court has previously noted, We find the find the language in Section 27.53 (3) clearly and unambiguously requires the trial court to appoint other counsel not affiliated with the public defender's office upon certification by the public defender that adverse defendants cannot be represented by him or his staff without conflict of interest.

Babb v. Edwards, 412 So.2d 859, 862 (Fla. 1982).

Accordingly Appellant's convictions must be reversed, his sentences must be vacated and this cause should be remanded for a new trial.

POINT III

APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR TRIAL AS GUARANTEED BY THE UNITED STATES AND FLORIDA CONSTITUTIONS; ACCORDINGLY, APPELLANT IS ENTITLED TO A NEW TRIAL.

The Sixth Amendment right to counsel exists in order to ensure the fundamental right to a fair trial. The criteria to be used to evaluate a claim of ineffective assistance of counsel was established by this Court in Knight v. State, 394 So.2d 997 (Fla. 1981), and most recently in Downs v. State, 453 So.2d 1102 (Fla. 1984).

The United States Supreme Court, in Strickland v. Washington, 466 U.S. 668 (1984) addressed a claim of actual ineffective assistance of counsel in a case going to trial. In an exhaustive opinion, the United States Supreme Court set forth the basis of a claim for ineffective assistance of counsel. The analysis was specifically approved by this Court in Downs v. State, supra.

In a claim for ineffective assistance of counsel the defendant must show and identify the specific acts or omissions upon which the claim is based; he must show the specific act or omission was a substantial and serious deficiency measurably below that of competent counsel and that the deficiency was so substantial as to probably have effected the outcome of the proceedings. In summary, the defendant must affirmatively prove prejudice. Strickland v. Washington, supra, at 687-688.

Moreover, ineffective assistance of counsel is usually a collateral matter which should be addressed through a motion for post-conviction relief, pursuant to Fla.R.Crim.P. 3.850. See Knight v. State, supra. However, the question of the adequacy of representation may be raised for the first time on direct appeal if the facts giving rise to such a claim are apparent on the face of the record, or conflict of interest or prejudice to the defendant is shown. Stewart v. State, 420 So.2d 862, 864 (Fla. 1982). The following are specific acts or omissions of trial counsel which appear in the record and which constitute ineffective assistance of counsel:

1. During the general voir dire defense counsel revealed to the jury that Appellant had criminal convictions. (R104-107) While it is necessary to question jurors on their attitudes toward convicted felons, it is not necessary for a defense attorney to reveal during the jury selection stage that his client has a criminal record. It is quite an elementary and simple matter for the question to be couched in general terms and not in specific terms. Predictably, several jurors expressed that they would hold prejudice against the defendant for having prior convictions. (R105-109) The whole matter caused quite a stir in the jury selection process. (R104-109) The trial court sua sponte gave the jury what amounts to a special instruction regarding prior convictions. (R109-112) Indeed, one of the jurors noted, "MR. ADAMS: I was under the impression that that should not have been introduced in the proceedings." (R112) Notwithstanding the extremely prejudicial attention that defense

counsel's question focused on his client's prior convictions, trial counsel repeated the question later in his voir dire examination. (R126,245-247) Additionally, defense counsel did not strike those jurors who indicated that they may be prejudice toward his client because of the client's prior felony convictions. (R105-107,281-282) Finally, defense counsel's actions in revealing to the potential jurors that his client had felony convictions is especially difficult to understand in light of the fact that his client did not testify in his own behalf. (R695)

2. Defense counsel failed to challenge for cause or to exercise available peremptory challenges in regard to Ms. Kirby or Ms. Dixon, who both indicated that they would likely vote for the penalty of death, if there were a conviction for first-degree premeditated murder. (R161-163) In regard to Ms. Kirby, defense counsel asked the following question: "And if you felt that the mitigators outweighed the aggravators would it be pragmatic to recommend life?'' Ms. Kirby answered: "No I don't think so.'' (R161) The following question was asked of Ms. Dixon by the prosecutor:

> At the close of this case if the defendant is found guilty of first-degree murder, I plan to ask the jury to electrocute the defendant.
>
> Would you be reluctant to recommend death even though you say you believe in the death penalty if the state presents sufficient aggravating factors and sufficient mitigating factors to outweigh those aggravating factors? (R163)

Ms. Dixon's answer was an unequivocal "No". (R163) Defense counsel failed to ask any follow up questions which may have shed

additional light on the attitudes and predispositions of Ms. Kirby and Ms. Dixon. **(R161-163)** During the individual voir dire Ms. Burdick indicated that she may have some difficulty with the death penalty. **(R173-175)** Defense counsel failed to make any effort under Witherspoon to rehabilitate this juror, even though the record indicates that she may have not been so opposed to the death penalty as to prevent her from being fair on the issue of guilt. **(R173-175)** Indeed defense counsel summarily stipulated to there being cause to challenge Ms. Burdick. **(R181)** Mr. Hopkins also indicated that he had some reservations regarding the death penalty that may interfere with his ability to be fair and impartial. **(R138-144)** Both the prosecutor and the judge had some question in their minds as to whether Mr. Hopkins would be subject to challenge for cause. **(R182-183)** However, defense counsel affirmatively indicated that he had no objection to Mr. Hopkins being challenged for cause. **(R182)**

3. Defense counsel failed to object to hearsay testimony of Denise Jorgenson. **(R365)**

4. Defense counsel also failed to object to the hearsay testimony of the medical examiner. **(R431)**

5. Defense counsel failed to object to the hearsay testimony of Lieutenant Edward Carroll. **(R455-453,455-456)** Making matters worse, defense counsel repeated some of the hearsay testimony in cross-examination. **(R460-461)**

6. Defense counsel failed to object to hearsay testimony of Edward Berger. **(R465,471,1477)** Also during the testimony of Inspector Berger, Berger was allowed to give irrelevant

hearsay testimony that improperly bolstered the credibility of a key state witness -- without objection. (R479) Jack McDonald was at one time a co-defendant and was the state's key witness in this matter. (R628-677) Berger testified well before McDonald took the stand. (R464,628) Nevertheless, without objection, McDonald's credibility was strongly bolstered by Berger's testimony that McDonald was not being offered any special favors and that his (McDonald's) motivation for testifying was because he was dying of cancer and wanted to clear his conscience. (R479)

7. Astonishingly, during cross-examination of Inspector Berger, defense counsel brought out evidence that his client was involved in other serious federal crimes involving millions of dollars. (R481,479) The prosecutor, during his direct examination of Inspector Berger, was very careful not to elicit testimony regarding Mr. Ventura's involvement in other crimes. Obviously, the prosecutor's motivation was to avoid a mistrial for introducing inadmissible evidence of collateral crimes. The prejudice that defense counsel caused to Appellant is obvious. Defense counsel continued to ask questions that called for hearsay testimony that damaged and prejudiced the jury against his client. (R483,490)

8. Defense counsel failed to object to the testimony of Joseph Pike regarding the defendant's involvement in collateral, irrelevant crimes. (R496-497) Defense counsel also failed to object on the grounds of relevancy to Mr. Pike's testimony that Appellant and McDonald were planning to commit crimes on or after May 6, 1981. (R498-499) It should be noted that the Appellant

was on trial for offenses that allegedly occurred on April 15, 1981. (R917) Furthermore, without objection, Mr. Pike testified that Mr. Ventura, Appellant, had told him that he (Ventura) was involved in a conspiracy to commit murder with Jack McDonald and others; however, Mr. Pike was not able to testify as to the time or the place of the conspiracy or the murder. (R499-501) Pike could not testify as to the time or the place of the alleged murder. (R501)

9. Defense counsel failed to object to a key leading question propounded to Reginald Barrett. (R524) The prosecutor asked: ". . . did you ever have an occasion to talk to Mr. Ventura about a homicide that occurred in Florida?" Barrett answered: "We talked. He did not specifically say that -- I don't know how to phrase it." (R524) The crucial part of this leading question is that it establishes that the homicide was in Florida. The questioning of Mr. Barrett reveals that he was not sure about the time or place of the homicide that he was talking about. (R524-528) Defense counsel also failed to object to the irrelevant testimony of Mr. Barrett that he (Appellant) was asked by Jack McDonald to come to Atlanta to "burn someone." (R527)

10. Defense counsel failed to timely object to the irrelevant hearsay testimony of Gary Eager. (R548-550,552)

11. Defense counsel failed to object to the hearsay testimony of Deputy David Hudson. (R558,560-561,566,568,575)

12. Defense counsel failed to object to the hearsay testimony of Charles French, where a proper predicate for the business records exception to the hearsay rule was not established.

(R494-597) Furthermore, defense counsel failed to cross-examine Mr. French on his inability to identify Appellant as the person who actually stayed at the Boulevard Motel in Deland, during the crucial time period. (R595-597)

13. Defense counsel failed to object on the grounds of a lack of proper predicate for the business records exception to the hearsay rule, during the testimony of William Thomas Plains. (R599-604) Defense counsel also failed to object to William Thomas Plains' testimony on the grounds of relevancy and failed to cross-examine Mr. Plains regarding his inability to identify Appellant as the person who actually registered at the motel during the dates in question. (R599-604)

14. Defense counsel failed to object to the testimony of Mary B. Moss on the grounds that the state failed to establish a proper predicate for the business exception to the hearsay rule. (R605-611) Furthermore, defense counsel failed to cross-examine Ms. Moss regarding her inability to identify Appellant as the person who received the money order in Deland, Florida on the crucial date. (R611)

15. Defense counsel failed to object to the testimony of Janice Rowe on the grounds that the state failed to establish a proper predicate for the admission of hearsay pursuant to the business records exception. (R612-616) Additionally, defense counsel failed to cross-examine Ms. Rowe regarding her inability to identify Appellant as the person who stayed at the Days Inn in Daytona Beach, Florida during the crucial time period. (R612-616)

16. Defense counsel failed to object to the irrelevant testimony of Jack McDonald regarding collateral crimes involving Appellant. (R630)

17. During his cross-examination of Mr. McDonald, defense counsel again brought out evidence regarding other crimes committed by Appellant. (R651)

18. Defense counsel failed to object on relevancy grounds to the testimony of Timothy Arview that Appellant had made a statement to him that Appellant had participated in the contract murder of a male in Florida in **1981.** (R679-680)

19. Defense counsel failed to object to the hearsay testimony of Juan Gonzales. (R686-688)

As this Court noted in Downs v. State, at **1107,** "A claim of ineffective assistance of counsel is extraordinary and should be made only when the facts warrant it. It is not a claim that is appropriate in every case. It should be the exception rather than the rule." Appellant has raised this issue only after careful consideration and only because ineffective assistance of counsel appears on the record, itself. It is unthinkable that Appellant could have received a fair trial in view of the jury knowing that he had prior felony convictions and in view of the evidence of Appellant's involvement in other, unrelated, crimes. Other than the testimony of Jack McDonald, the co-defendant, the testimony of other crimes and Appellant's prior felony convictions were probably the most damaging evidence that the jury heard.

In Gordon v. State, 469 So.2d 795 (Fla. 4th DCA 1985), the defendant raised ineffective assistance of counsel for the first time on appeal. Therein, the court found that the defendant had established from the face of the record that he had received ineffective assistance of counsel. Gordon v. State, at 797-798. The court reversed and remanded, after finding that defense counsel had filed a witness list with nineteen alibi witnesses two days before trial, that defense counsel had allowed a prejudiced juror to remain on the case, and that defense counsel had failed to object during the course of the trial 104 times where there were improper questions or improper comments by the prosecutor.

The instant case is similar. The record shows that court-appointed counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Accordingly, Appellant's convictions must be reversed.

POINT IV

THE TRIAL COURT ERRED IN GIVING AN INSTRUCTION ON FLIGHT WHERE THE EVIDENCE DID NOT CLEARLY SHOW THAT THE DEFENDANT INTENDED TO AVOID DETECTION OR APPREHENSION OR WHERE THE FLIGHT INSTRUCTION ITSELF UNDULY INFLUENCED THE JURY TO THINK THAT THE DEFENDANT WAS GUILTY SIMPLY BECAUSE HE FLED.

Florida courts, have ruled that a jury can be instructed on flight, when "the evidence clearly establishes that an accused fled the vicinity of a crime or did anything indicating an intent to avoid detection or capture." Shively v. State, 474 So.2d 352, 353 (Fla. 5th DCA 1985). For the instruction to be proper, the circumstances must clearly indicate a sense of fear, or of guilt or to avoid arrest. Williams v. State, 268 So.2d 566 (Fla. 3d DCA 1972). However, where the circumstances of leaving stand alone and are not more consistent with guilt than with innocence, the instruction should not be given. Proffitt v. State, 315 So.2d 461, 465 (Fla.1975) See also Harrison v. State, 104 So.2d 391 (Fla. 1st DCA 1958).

In Bundy v. State, 471 So.2d 9, 20-21 (Fla. 1985), this Court listed the criteria in favor of and against the admission of flight evidence and giving of a jury instruction thereon. Bundy noted that flight evidence is inadmissible and a jury instruction improper where the particular facts of the case tend to detract from the probative value of such flight evidence. The factors to be considered in determining whether the instruction is proper are:

> 1) If the suspect was unaware at the time of the flight that he was the

> suspect of a criminal investigation for the particular crime charged; 2) Where there were not clear indications that the defendant had in fact fled; or, 3) Where there was a significant time delay from the commission of the time to the time of flight . . . (citations omitted) Id. at 21.

In the instant case, all of these defects are present and render the instruction improper. There was no evidence that Appellant knew that he was a suspect in the case; to the contrary the evidence was initially, that another individual, the deceased brother-in-law, was the suspect. (R558) The evidence clearly showed Appellant lived in Maywood, Illinois. (R520-521) The evidence also shows that on June 4, 1981, Volusia County deputies proceeded to Illinois to effect the arrest of Appellant. (R567) While it is true that Appellant failed to appear for an extradition hering in Illinois, his failure to appear at that hearing did not occur until August 18, 1981 -- four months after the commission of the crime. (R571)

The facts do not clearly indicate a sentence of fear or guilt on Appellant's part. The flight instruction was therefore improper in this case.

Even if the instruction was properly supported by the evidence, the particular instruction given here was improper as it was prone to unduly influence the jury to conclude that flight is evidence of guilt.

Flight is not conclusive of guilt; it is only a circumstance of guilt, to be considered by the jury under an appropriate charge in light of all the other testimony and circumstances and to be given such weight as the jury determined

it was entitled to. Shively v. State, supra; Williams v. State, 378 So.2d 902, 903 (Fla. 5th DCA 1980); Williams v. State, 268 So.2d 566 (Fla. 3d DCA 1972). A jury instruction which might be construed as a comment on the evidence or the relative weight that evidence should receive is improper. Jackson v. State, 435 So.2d 984, 985 (Fla. 4th DCA 1983). The instruction given on flight in the instant case did not state that evidence of flight is not a presumption of guilt but only a circumstance which may be considered and weighed by the jury. Rather, the instruction given essentially told the jury that flight is evidence of guilt. (R1028) The instruction could easily have been misconstrued by the jury as being a judicial comment on the evidence and the weight that the jury should give evidence. The flight instruction should not have been given; it was erroneous and misled the jury. A new trial is therefore required.

POINT V

FLORIDA'S DEATH PENALTY VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BECAUSE THE STATUTORY AGGRAVATING AND MITIGATING CIRCUMSTANCES, AS APPLIED BY TRIAL AND APPELLATE COURTS, DO NOT TRULY LIMIT THE CLASS OF PERSONS THAT ARE ELIGIBLE FOR THE DEATH PENALTY, ACCORDINGLY RENDERING THE DEATH PENALTY SUSCEPTIBLE TO UNDUE ARBITRARY AND CAPRICIOUS APPLICATION.

Arbitrary and capricious imposition of the death penalty occurs when the sentencer is afforded too much discretion. It was in response to the condemnation of arbitrary and capricious imposition of the death penalty in Furman v. Georgia, **408** U.S. **238** (1972) that the Florida Legislature enacted death penalty legislation in body and statutorily defined aggravating circumstances that must exist and outweigh mitigating circumstances before the death penalty is authorized. The aggravating-mitigating circumstance requirement passed constitutional tests in Proffitt v. Florida, **428** U.S. **242 (1976).** Proffitt explained why consideration of specific aggravating/mitigating circumstances prior to authorization of imposition of the death penalty affords sufficient protection against arbitrariness and capriciousness:

> This conclusion rested, of course, on the fundamental requirement that each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of Furman itself. For a system "could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur." **428** U.S. at **196, n.46, 49** L.Ed.2d **859, 96** S.Ct. **2909.** To avoid this

> constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Zant v. Stephens, 462 U.S. 862, 877 (1983)(footnote omitted). The aggravating circumstances must be sufficiently definite to provide consistent application, and aggravating circumstances that are too subjective and non-specific to be applied even-handedly are unconstitutional. * Godfrey v. Georgia, 446 U.S. 420 (1980)(aggravating circumstance of "substantial history" of "serious assaultive history" too subjective).

Florida's death penalty system utilizes ten statutory aggravating circumstances. It is respectfully submitted that when the ten circumstances are considered in pari materia the class of first-degree murderers who are eligible for the death penalty is not sufficiently restricted to preclude capriciousness and arbitrariness in the imposition of the death penalty. Too much unbridled discretion is being afforded the sentencer and the appellate courts when the sentence is reviewed.

The aggravating circumstances used in Florida are replete with highly subjective language:

> (5) AGGRAVATING CIRCUMSTANCES - Aggravating circumstances shall be limited to the following:
> (a) The capital felony was committed by a person under sentence of imprisonment.
> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.
(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
(f) The capital felony was committed for pecuniary gain
(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
(h) The capital felony was especially heinous, atrocious, or cruel.
(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.

§921.141(5), Fla.Stat. (1987). The statutes provide no definition of the subjective terms found in either the aggravating or mitigating circumstances, so the courts and the juries are left to fend for themselves insofar as determining when the factors exist.

The facial constitutionality of Florida's death penalty statute was determined in 1976 by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 253 (1976). The Court ruled that the statutes and procedures were being constitutionally applied at that time. Id at 927. Of the 21 death penalty cases reviewed at the time Proffitt, this Court had reversed 7. It is

respectfully submitted that more meaningful statistics now exist and that that the definitions of the statutory aggravating and mitigating circumstances have since proved to be too broad to comport with constitutional requirements of specificity and consistency in application, and that the vagaries of unbridled discretion denounced in Furman v. Georgia, 408 U.S. 238 (1972) have returned in full force.

In State v. Dixon, 283 So.2d 1 (Fla. 1973), which is perhaps the one most important Florida case relied on by the United States Supreme Court in Proffitt, this Court rejected the contention that the statutory aggravating and mitigating circumstances were impermissibly vague, stating, "review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under circumstances in another case." Dixon at 10. Indeed, this language is specifically cited by the United States Supreme Court in approving the death penalty system in Florida. Proffitt at 251.

It is respectfully submitted that this Court has failed to consistently apply the statutory aggravating and mitigating circumstances. This Court has rendered decisions that are diametrically opposed to others containing virtually the same material facts. These decisions cannot be reconciled. Time and again this Court is belatedly acknowledging that previously approved aggravating circumstances were in fact improperly applied. It is critical that the statutory aggravating circumstances be sufficiently specific so as to afford consistent application by the this Court, which in turn provides guidance

to the trial courts. This simply has not happened. The vacillation by this Court not only fails to provide sufficient guidance to the trial courts, it also demonstrates that the aggravating circumstances are too susceptible to interpretation to afford unerring application in the face of compelling facts. It is not just the application of a single vague factor that is the problem. Rather, it is the recurring corrections in the application of most of the aggravating circumstances that signals fatal inspecificity.

By way of example, in Raulerson v. State, 358 So.2d 826 (Fla. 1978) this Court approved the trial court's finding of a murder committed in an especially heinous, atrocious or cruel manner. After resentencing was ordered by the federal court for the middle district of Florida, Raulerson v. Wainwright, 408 F.Supp.381 (M.D. Fla. 1980), this Court struck the finding, after reviewing ~~the same~~ facts, stating, "We have held that killings similar to this one were not heinous, atrocious, and cruel. (citations omitted).'' Raulerson v. State, 420 So.2d 567,571 (Fla. 1982).

Similarly, this Court has recently receded from a prior holding it made in King v. State, 390 So.2d 315 (Fla. 1980), where this Court affirmed the trial court's finding of the defendant having created a great risk of death or serious harm to others when he set fire to his house. King was granted a resentencing by the Eleventh Circuit Court of Appeal due to ineffectiveness of trial counsel during the sentencing proceeding. King v. Strickland, 748 F.2d 1462 (11th Cir. 1984),

cert denied, 471 U.S. 1016 (1985). On direct appeal to this court following resentencing, this Court, again reviewing the same facts, struck the aggravating circumstance that it had previously approved in 1980, stating:

> On his original appeal, this Court affirmed the trial court's finding this aggravating factor and stated that "when the Appellant intentionally set fire to the house, he should have reasonably foreseen that the blaze would pose a great risk to the neighbors, as well as the firefighters and the police who responded to the call." 390 So.2d at 320. Upon reconsideration we find that this aggravating factor should be invalidated. In Kampff v. State, 371 So.2d 1007, 1009 (Fla. 1979), we stated:"'great risk' means not a mere possibility, but a likelihood or great probability." Furthermore, we have also said that "a person may not be condemned for what might have occurred." White v. State, 403 So.2d 331, 337 (Fla. 1981) cert. denied, 463 U.S. 1229 (1983). Only the victim was in the house when King set it on fire. That two firefighters suffered smoke inhalation and that the fire caused considerable damage to the house does not justify finding that this aggravating factor has been established. This case is a far cry from one where this factor can properly be found. E.g., Welty v. State, 402 So.2d 1159 (Fla. 1981)(setting fire to condominium when six elderly people were asleep in other units qualified as great risk of death to many persons).

King v. State, 12 FLW 502, 505 (Fla. Sept. 24, 1987). If the King case "is a far cry from one where the factor could be properly be found", how did that factor get approved in the first case? How many trial courts have relied on the King decision rendered in 1980 that established the wrong standard for this aggravating circumstance? Further, how is it that this Court

overlooked the Kampff decision upon which it now relies when that case was decided a year prior to King?

This Court's vacillation in its dealings with the statutory aggravating circumstances can not help but breed confusion to those seeking to consistently apply the aggravating circumstances. For instance, in Caruthers v. State, **465** So.2d **496** (Fla. **1985)** this Court disallowed a finding of a cold, calculated and premeditated murder where a robber shot a store clerk three times. This Court stated "the cold, calculated and premeditated factor applies to a manner of killing characterized by heightened premeditation beyond that required to establish premeditated murder." Caruthers at **498** (emphasis added). Eight pages later, in the next reported decision, this Court approved the same factor, stating "this factor focuses more on the perpetrator's state of mind than on the method of killing. Johnson v. State, **465** So.2d **499, 507** (Fla. **1985)** (emphasis added). Then in Provenzano v. State, **497** So.2d **1177** (Fla. **1986),** this Court reverted back to the prior standard stating **". . .** as the statute indicates, if the murder was committed in a manner that was cold and calculated, the aggravating circumstance of heightened premeditation is applicable." Provenzano at **1183.** How are the trial courts to know which standard applies? Is it the defendant's state of mind or is it the manner in which the crime was committed?

Further, this Court is suspiciously selective in applying the second prong of the cold calculated or premeditated, without any pretense of moral or legal justification. In Cannady

v. State, 427 So.2d 723 (Fla. 1983), this Court disapproved the finding of a cold, calculated or premeditated murder because, according to the defendant, the victim rushed at him before he was shot five times. "During his confession appellant explained that he shot Carrier because Carrier jumped at him. These statements establish that appellant had at least a pretense of a moral or legal justification, protecting his own life." Cannady at 730. Yet in Provenzano v. State, 497 So.2d 1177 (Fla. 1986) this Court approved that aggravating factor and rejected a claim that the fact that the victim (a courtroom bailiff) was firing a pistol at the defendant when the victim was shot did not afford at least a pretense of moral justification.

In Hardwick v. State, 461 So.2d 79 (Fla. 1984) this Court approved utilization of a violent felony committed by a defendant upon a murder victim contemporaneous with the crime of murder to establish a prior conviction for a violent felony. "Where the evidence supports a finding of premeditated murder or where the violent felony is not a necessarily included element of felony murder, we cannot say that the separate acts of violence on one victim are less revealing of the violent propensities of the perpetrator than contemporaneous acts of violence on separate victims. We find no error here." Hardwick at 81. However, this Court has now receded from Hardwick. Patterson v. State, 513 So.2d 1257 (Fla. 1983). If these aggravating circumstances are so clear, how are they being so consistently misapplied?

Yet another aberration concerns the trial court's use and this Court's review of lack of remorse by a defendant. In

Pope v. State, 441 So.2d 1073 (Fla. 1983) this Court held:

> [H]enceforth lack of remorse should have no place in the consideration of aggravating factors. Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor.

Pope at 1078 (emphasis added). Thus, the only way for a sentencer to even refer to remorse would seem to be an acknowledgement that it exists as a non-statutory mitigating factor, in that it would be virtually impossible for a trial judge to address every possible non-statutory mitigating circumstance and affirmatively state that it does not exist. Yet, when a sentencing order refers to an absence of remorse as a non-existent mitigating circumstance in a particular case, this Court will sometimes acknowledge the impropriety, as in Patterson, supra, and at other times determine that an acknowledgement of lack of a mitigating factor is not the same thing as using that same factor in aggravation. See Echols v. State, 484 So.2d 568, 575 (Fla. 1985)(not improper to use no remorse to negate mitigation). The reasoning is but a semantical distinction without a meaning.

As previously noted, this Court rejected the contention that the aggravating circumstances are impermissibly vague, stating "review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under circumstances in another case." Dixon at 10. The foregoing examples cannot rationally be reconciled with that guarantee and they demonstrate that this Court needs to reconsider whether the statutory aggravating circumstances are sufficiently objective so

as to comport with constitutionally required consistency and specificity in imposition of the death penalty. These patent inconsistencies in application of the aggravating circumstances show that the tail is now wagging the dog.

Furthermore, Appellant feels constrained to point out that the guarantee of consistency between the same penalty for the same facts in different cases is suspect on at least three bases over and above vagueness, those being limited exposure by this Court to other murder cases, the use of an improper standard to review the presence of mitigating circumstances, and a presumption of propriety of the death penalty in the presence of one aggravating circumstance and no mitigating circumstance. More specifically, this Court does not have the benefit of the facts and circumstances of other murder cases in which the death penalty was not imposed other than by review of such cases on a discretionary basis pursuant to certified questions or decisions in express and direct conflict with other decisions. In that respect the spectrum through which this Court views the facts determining the proportionality of imposition of the death penalty is geared solely to first-degree murder cases in which the death penalty was actually imposed, rather than the wider range of facts of other murder cases wherein the lesser sanction is imposed by the trial court. Because the perception of this Court is as a matter of procedure unduly restricted an adequate proportionality analysis of first-degree murder cases cannot be performed.

Further, the guarantee of consistency is suspect because this Court at times considers itself bound to an abuse of discretion standard insofar as determining the presence ~~vel~~ non of mitigating circumstances, but at other times embarks upon a plenary review of the record to discern the existence of either statutory or non-statutory mitigating circumstances. The election of this Court not to provide plenary review in all cases effectively defeats the guarantee of consistent application of the death penalty. A trial court's finding of the non-existence of a mitigating circumstance is not entitled to the weight that this Court is affording it, and by not providing plenary review of the presence of mitigating circumstances when a death recommendation comes from the jury this Court is shirking its duty to provide a truly accurate proportional analysis.

It is respectfully submitted that a trial court's error in failing to recognize and consider relevant mitigating evidence contained in the record instead of being condoned by this Court as an act of discretion, should be corrected by this Court when the uncontroverted presence of such mitigating evidence is pointed out on appeal. The failure of a trial judge to acknowledge as valid reasons for mitigation uncontroverted facts which were recognized in other cases (of which he may be and probably is unaware) as valid reasons for mitigation clearly results in arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments. Facts that constitute a reason to mitigate a sentence in one case must also constitute a reason to mitigate a sentence in another

case if the death penalty is to receive the promised consistent application. This Court has specifically recognized this premise in the death penalty context:

> We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same.

Slater v. State, 316 So.2d 539, 542 (Fla. 1975). If an appellate court exercises tunnel vision in myopically accepting the trial court's finding of no mitigating circumstances when there is a recommendation of death from the jury, how can it justify taking the blinders off when there is a jury recommendation for life imprisonment? See Pope v. State, 441 So.2d 1073,1076 (Fla. 1983).

At diverse times this Court acknowledges that mitigating evidence is present in the record. Specifically, this Court has held that the trial judge is in as good a position as is the jury to apply the aggravating and mitigating circumstances, in that "the trial judge does not consider the facts anew. In sentencing a defendant, a judge lists reasons to support a finding in regard to mitigating or aggravating factors." Provenzano at 1185. Thus, this Court is in an even better position than is the trial judge to ***find and*** consistently apply aggravating and mitigating circumstances. Indeed, this Court is in a better position to recognize what constitutes valid non-statutory mitigating circumstances that should have been considered by the trial court, but were not, simply because this Court

reviews all the cases, whereas the trial judge only presides over a limited few. If appellate courts will provide plenary review to determine for themselves the voluntariness of a statement, which involves a quasi-factual determination, certainly that same degree of scrutiny and participation must apply to a matter as grave as imposition of the death sentence. See Miller v. Fenton, 474 U.S 104, 88 L.Ed.2d 405, 106 S.Ct. 445 (1985)(rejection of "presumption of correctness" as an issue of fact as to whether confession was voluntarily given). Again, it is stressed that for the death penalty to be constitutionally applied the "discretion" to impose that penalty must be kept at a minimum. Similarly, the discretion of an appellate court in affirming death penalties must be minimized. By allowing the trial judge such unbridled discretion in determining mitigating circumstances and in failing to perform an adequate independent analysis of the existence of mitigating circumstances, this Court is renegging on its promise of consistent application of the death penalty.

For these reasons it is respectfully submitted that, as now applied, the statutes governing imposition of the death penalty in Florida are impermissibly vague and are otherwise subject to unfair and discriminatory application. The arbitrary and capricious application violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 1, Sections 9, 16 and 22 of the Florida Constitution. Accordingly, the death penalty must be vacated and a sentence of life imprisonment imposed.

POINT VI

THE DEATH PENALTY WAS IMPOSED IN CONTRAVENTION OF THE RIGHTS TO DUE PROCESS AND A JURY TRIAL GUARANTEED BY THE CONSTITUTION OF FLORIDA AND THE UNITED STATES, IN THAT IN RENDERING ITS VERDICT THE JURY DID NOT CONSIDER THE ELEMENTS THAT STATUTORILY DEFINE THE CRIME FOR WHICH THE DEATH PENALTY MAY BE IMPOSED.

The issue here is whether in rendering its verdict or in making its sentencing recommendation the jury determined the existence of substantive, statutory elements that define the crimes in Florida for which the death penalty may be imposed. Jury sentencing is not the issue.

Two penalties are not available when a person is convicted of first-degree murder. Rather, a sentence of life imprisonment with no eligibility for parole for 25 years is the only sanction necessarily available when the jury renders its verdict. A crime for which the death penalty may be imposed is sui generis, and it is defined exclusively through the statutory aggravating circumstances set forth in Section 921.141(5), Florida Statutes. Without at least one of these statutory elements being present the death penalty cannot be imposed. These elements thus define the crime punishable by the death penalty. As such, the aggravating circumstances must be determined by the jury.

This Court has recognized, as a requirement of Due Process, the necessity for a factual determination to be made by the jury to authorize imposition of a more serious sanction based on factual elements of a crime. State v. Overfelt, 457 So.2d 1385

(Fla. 1984). As stated by the Third District Court of Appeal, "It is axiomatic that a verdict which does not find everything that is necessary to enable the court to render judgment cannot support the judgment." Streeter v. State, 416 So.2d 1203, 1206 (Fla. 3d DCA 1982).

All aggravating circumstances in the capital context must be proved beyond a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla. 1980). This is acknowledgment of their importance as elements of the crime. In re Winship, 397 U.S. 358 (1970). The aggravating circumstances substantively define the crime of capital first-degree murder, that is, the crime of first-degree murder punishable by death.

> The aggravating circumstances of Section 921.141(6), Florida Statutes actually define those crimes, when read in conjunction with Florida Statutes 782.04(2) * * * to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury.

State v. Dixon, 283 So.2d 1,9 (Fla. 1973)(emphasis added). This theme has consistently been adhered to by this Court, and correctly so.

> In contending that the capital felony sentencing law regulates practice and Procedure, appellant relies upon Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), and Lee v. State, 294 So.2d 305 (Fla. 1974). The critical issue in those cases was the legality of applying Florida's new death penalty law to persons who had committed a murder before the law had taken effect. In holding that the law could be applied to such persons, the United States Supreme Court and this Court referred to the

> changes in the law as procedural. Those references concerned the manner in which defendants who had committed murder before the new law took effect should be sentenced. They were not meant to be used as shibboleths for deciding whether the new law violates article V, section 2(a) of the Florida Constitution by regulating the practice and procedure in the Florida Courts. By delineating the circumstances in which the death penalty may be imposed, the legislature has not invaded this Court's prerogative of adopting rules of practice and procedure. We find that the provisions of section 921.141 are matters of substantive law insofar as they define those capital felonies which the legislature finds deserving of the death penalty. The appellant's contention that the statute improperly attempts to regulate practice and procedure is without merit. [Citations omitted.]

Vaught v. State, 410 So.2d 147, 149 (Fla. 1982)(emphasis added).

The Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the substantive elements of the crime. Patterson v. New York, 432 U.S. 197, 210 (1977). A conviction of first degree murder, even first-degree premeditated murder, as held by this Court, does not contain an aggravating circumstance. If, as repeatedly held by this Court, the aggravating circumstances effectively "define" the crime for which the death penalty can be imposed, it is incumbent on the state to secure jury findings of these substantive elements. Overfelt, supra; Perkins v. Mayo, 92 So.2d 641 (Fla. 1957); Harris v. State, 53 Fla. 37, 43 So. 311 (1907); Streeter v. State, 416 So.2d 1203 (Fla. 3d DCA 1982); Duncan v. Louisiana, 391 U.S. 145 (1965).

> The guarantees of jury trial in the Federal and State Constitutions reflect

> a profound judgment about the way in which law should be enforced and administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to a higher voice of authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the compliant, biased, or eccentric judge.

Duncan at **155-156** (emphasis added).

The increased reliability needed for Constitutional requirements of Due Process in the capital penalty context militates heavily toward a procedure whereby the jury provides as much protection against arbitrariness as is possible. The United States Supreme Court has held that jury imposition of sentence is not constitutionally mandated. Spaziano v. Florida, **468** U.S. **447** 104 S.Ct. **3154,** 82 L.Ed.2d **340 (1984).** This is not to say, however, that the jury must not determine the elements of the offense that serve to increase the sentence that may be imposed on the defendant. See McMillan v. Pennsylvania, **477** U.S. __ **, 106** S.Ct. **2411, 91** L.Ed.2d **67 (1986).**

This issue was addressed in Provenzano v. State, **497** So.2d **1177** (Fla. **1986).** In Provenzano this Court said:

> Appellant's contention that the sixth amendment right to a jury trial is violated by Florida's death penalty procedure because the trial court determines the facts anew after the jury issues its recommendation is without

> merit. The United States Supreme Court recently recognized the validity of the trial judge's power to impose the death sentence. Spaziano v. State, **468** U.S. **447, 104** S.Ct. **3154, 82** L.Ed.2d **340 (1984).** Further, the trial judge does not consider the facts anew. In sentencing a defendant, a judge lists reasons to support a finding in regard to mitigating or aggravating circumstances. These reasons are taken from all the evidence in the case and any further evidence presented at the time of sentencing. Moreover, the sentence of death is not unconstitutional as applied.

Provenzano at **1185.** Though identifying the basic issue, this Court's discussion is couched in terms of the Fifth Amendment proscription against double jeopardy. The citation to Spaziano supports the conclusion that the trial judge has the power to impose a death sentence over a jury recommendation of life and that jury sentencing is not constitutionally required, but Hildwin does not here contest the trial judge's power to impose the death penalty over a jury recommendation of life; neither does he contend that the jury must sentence the defendant. Rather, it is respectfully submitted that the protections afforded the defendant by a jury trial are such that the defendant has Sixth Amendment right to jury determination of the presence of statutory aggravating circumstances. Significantly, the United States Supreme Court in Spaziano expressly noted that such grounds were not being argued by counsel in that case; Spaziano at **458.**

The same fundamental reasoning used by this Court in State v. Overfelt, **457** So.2d **1385** (Fla. **1984)** must apply here. Each statute on its face does not require that the jury determine

the factual basis required to impose the more severe sanction but, as acknowledged by this Court in Overfelt, the constitution requires that such facts be determined by the jury: ". . . it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode." Overfelt at 1387. Procedural due process is not a static concept, but instead a dynamic process of evolution.

> For all its consequence "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." (Citation omitted). Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter v. Dept. of Social Services, 452 U.S. 18, 24-25, 101 S.Ct. 2153, 68 L.Ed.2d 640, 648 (1981).

In light of the far ranging consequences that this holding entails, this Court may wish to limit recognition of this right to those cases in the "direct appeal" posture pursuant to Griffin v. Kentucky, __U.S.__, 40 Cr.L. 3169 (1987). However, the sheer force of logic and precedent mandates that such recognition is necessary. Accordingly, this Court should reverse the death sentence and remand with directions that a life sentence be imposed.

CONCLUSION

Based upon the foregoing reasons and authorities, argument and policies, Appellant respectfully requests that this Honorable Court grant the following relief:

As to Points I through IV, reverse the convictions and sentences and remand for a new trial;

As to Points V and VI, declare Florida's death penalty statute unconstitutional and remand for the imposition of a life sentence.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, fourth floor, Daytona Beach, Florida 32014 and to Mr. Peter Ventura, #110277, P.O. Box 747, Starke, Fla. 32091 on this 12th day of September 1988.

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