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IN THE SUPREME COURT OF THE STATE OF FLORIDA

FILED
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NEWTON CARLTON SLAWSON :

appellant

vs. Case No, 75,960

STATE OF FLORIDA :

Appellee :

INITIAL BRIEF OF APPELLANT

SIMSON UNTERBERGER, ESQUIRE
Suite 707, One Mack Center
501 East Kennedy Boulevard
Tampa, Florida 33602
(813) 229-8548
Attorney for Appellant
Florida Bar Number 158800

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INTRODUCTION

For the purposes of this brief:

a. Appellant, Newton Carlton Slawson, will be referred to as "appellant."

b. Appellee, State of Florida, will be referred to as "appellee."

c. Except for pages of the trial transcript, instruments in the record on appeal will be designated within a parentheses by an "R" followed by the page number.

d. Pages of the transcript will be designated by the following within a parentheses, to wit: "R" followed by the first and last pages in the record on appeal of the Volume of the trial transcript being referred to by the abbreviation mark "Vol" followed by the volume number followed by the page within the volume being referred to.

An example of the above is (R 1230-1309, Vol 8, 1263). This is a reference to page 1263 of volume 8 of the trial transcript, which volume 8 can be found at pages 1230-1309 of the record on appeal.

STATEMENT OF THE CASE

An Indictment (R 1977-1979) was filed on April 26, 1989, charging appellant with four counts of first degree murder and one count of killing an unborn child by injuring the mother.

During the pretrial phase of the case, various motions were filed including Motion to Suppress Admissions (R 2019-2020) filed on October 18, 1989, and denied on October 30, 1989, and Motion to Suppress Evidence I (R 2025-2026) filed on October 19, 1989, and

denied on October 30, 1989.

Trial commenced on March 7, 1990, (R 1-134B, Vol La, 17-19) and preceded through to a verdict (R 2136-2138) returned on March 14, 1990, finding appellant guilty as charged of all crimes alleged in said Indictment. The penalty phase of the trial was conducted on March 15, 1990, (R 1551-1652, Vol 11 and R 1653-1729, Vol 12) which culminated in the following:

a. Jury recommendation (R 2144) upon Count I of the Indictment recommending a death sentence.

b. Jury recommendation (R 2145) upon Count II of the Indictment recommending a death sentence.

c. Jury recommendation (R 2146) upon Count III of the Indictment recommending a sentence.

d. Jury recommendation (R 2147) upon Count V of the Indictment recommending a death sentence.

Appellant's Motion for New Trial (R 2148-2150) was filed on March 20, 1990, and denied on April 19, 1990.

A sentencing hearing was conducted on April 9, 1990, before the Court (R 1730-1756, Vol 11, 1735-1755) with the Court announcing its Sentence on April 11, 1990, (R 1757-1770, Vol 14) and with the Court entering its Judgment, Order, and Sentence (R 2157-2163) also on April 11, 1990.

Subsequent to all of the foregoing, this appeal was duly initiated.

STATEMENT OF THE FACTS

For the crimes charged in the Indictment, appellant was arrested on April 11, 1989, shortly after 10:20 p.m. (R 456-638,

Vol 3, 575-578). Thereafter, shortly after midnight on April 12, 1989, appellant was interrogated by two detectives, Detectives Grossi and Bell of the Tampa Police Department (R 1847, 1850, 1864). The interrogation commenced with the officers telling appellant that they were homicide detectives investigating a homicide that occurred at 2101 North 64th Street (R 1867). Upon being so told, appellant stated "What about an attorney?" Then, Detective Bell read appellant a rights form (R 1867, 2047) by reading each right and then asking if appellant understood. Appellant responded affirmatively each time he was asked. Next, appellant signed the rights form (R 1869-1870).

Upon the occurrence of the foregoing, the interrogation proceeded for approximately forty minutes (R 1875). At the conclusion of the interrogation, Detective Bell explained to appellant about putting the interrogation on audio tape to which appellant responded by saying "What about an attorney?"

The interrogation elicited an incriminating statement from appellant. Appellant's Motion to Suppress Admissions (R 2019-2020) by which he sought to suppress the incriminating statement was denied on October 30, 1989. The statement which incriminated appellant in all offenses charged in the Indictment was admitted into evidence at appellant's trial (R 753-951, Vol 5, 768-772).

Appellant's defense to the first degree murder charges contained in the Indictment was intoxication, that is, at the time of the offenses he was intoxicated by alcohol and/or cocaine to the extent that he could not premeditate a homicide. To substantiate this defense, appellant called the following witnesses at trial, to

wit:

a. Dr. Michael Scott Mahes, a psychiatrist who opined that, at the time of the murders, appellant was so acutely intoxicated on cocaine and alcohol that he lacked the capacity to premeditate, consciously think about, reflect, and take the actions of shooting and killing a human being (R. 952-1099, Vol 6, 961, 962).

b. Dr. Sidney J. Merin, a psychologist who opined that, at the time of the murders, appellant lacked the ability to form a premeditated intent to kill because of cocaine intoxication (R. 753-951, Vol 5, 881-882).

In rebuttal to evidence presented by appellant to support his intaxication defense, appellee presented Dr. Stanton Samenow, a psychologist who testified on direct examination about his participation in a study and his conclusions therefrom, to wit: that it is virtually impossible to reconstruct the mental state of a defendant in a criminal case after the fact because often times the facts related to the well-meaning professional are different from the true facts, that persons found not guilty by reason of insanity were not insane at all, and that insanity defenses were a charade by which the proponents thereof were able to calculatingly avoid prison (R 1100-1229, Vol 7, 1201-1204). As a result of this testimony, Dr. Samenow further testified on direct examination that, despite being provided with copies of appellant's letters, medical reports pertaining to appellant, crime scene diagrams, police reports, and the depositions and files pertaining to appellant of Doctors Maher and Merin, he was unable to form an

opinion about appellant's ability to form a specific intent to kill at the time of the crime because no defendant's mental state at the time of the commission of a crime can be validly or reliably reconstructed after the facts (R 1100-1229, Vol 7, 1204-1211). On cross examination, the following occurred between appellant's counsel and Dr. Samenow.

> Q. Is it fair to say that your basic position is that mental health defenses are a sham?
>
> A. I'm hesitating at the words "mental health defenses." I would say that the insanity defense and the, um, impairment defense is essentially a charade.

As noted above, appellant presented the testimony of Dr. Michael Scott Maher, a psychiatrist, who at the outset of his direct examination, opined that cocaine and alcohol intoxication rendered appellant unable to premeditate a killing at the time of the homicide (R 952-1099, Vol 6, 961-962). Having rendered the opinion, Dr. Maher continued on direct examination to testify about the bases and data underlying his opinion. While so testifying, appellee interposed an objection, stating the reasons therefor, and appellant's counsel responded with his reasons why the objections should be overruled (R 952-1099, Vol 6, 1001-1003). The following then transpired:

> THE COURT: All right. But, I don't want him -- all this rambling. He is kind of rambling around. He needs to stop rambling and he needs to get right to what he is talking about. What is there in the deposition that he used, how it is applied and tell the jury that. There is a lot of rambling. so, I'll overrule the objection, but with that caveat.
>
> MR. DONERLY: Answer the question.
>
> THE COURT: Stop rambling, doctor, and testify what it was that you got out of the deposition that you thought was significant and how you reached the opinion that you

have testified to.

The foregoing occurred in the presence of the jury.

During his aforementioned testimony, in describing information upon which he based his opinion as to appellant's intoxication at the time of the murders with which he was charged, Dr. Maher testified about appellant's statements and admissions to him concerning his (appellant's) prior use of illegal drugs, including cocaine and marijuana (R 952-1099, Vol 6, 988, 995, 1000, 1001, 1009). During the penalty phase of appellant's trial, Dr. Robert Berland opined regarding the mitigating circumstances which are the subjects of Chapter 921.141(6)(b) and (f) Florida Statutes and as a component of the bases of his opinion he too testified to appellant's statements and admissions as to his (appellant's) prior use of illegal drugs like cocaine and marijuana (R 1653-1729, Vol 12, 1667, 1668).

In connection with the penalty phase of appellant's trial, appellant submitted defense requested special penalty phase instructions numbers three through eight (R 2130-2135), all of which were denied.

SUMMARY OF THE ARGUMENTS

ISSUE I

WHETHER EXPERT TESTIMONY TO THE EFFECT THAT A DEFENSE IS A CHARADE IS PROPER

The purpose of expert testimony is to make clear obscure facts so that they will be understood by the trier of fact. Such a purpose is not served by expert testimony that a recognized legal defense to a crime is a charade.

ISSUE II

WHETHER CUSTODIAL INTERROGATION MUST CEASE UPON A SUSPECT'S SAYING, "WHAT ABOUT AN ATTORNEY?" BEFORE BEING GIVEN HIS MIRANDA WARNINGS.

All questioning of a suspect must cease when he is in custody and about to be interrogated about a crime and states, "What about an attorney?" before commencement of any aspect of the interrogation, including the giving of Miranda warnings.

ISSUE III

WHETHER THE HELPLESSNESS, DEFENSELESSNESS OR AGE OF VICTIMS OF PRIOR CAPITAL FELONIES OF WHICH CONVICTED IS VALID AGGRAVATING CIRCUMSTANCE UNDER CHAPTER **921.141** FLORIDA STATUTES

The helplessness, defenselessness, and age of victims of prior capital felonies of which an accused was convicted are not circumstances to be considered for sentencing purposes in accordance with **921.141** Florida Statutes.

ISSUE IV

WHETHER THE MITIGATING CIRCUMSTANCES OUTWEIGHED THE AGGRAVATING CIRCUMSTANCE INSOFAR AS THE MURDERS OF GERALD, GLENDON, AND JENNIFER WOOD ARE CONCERNED.

The two statutory and non-statutory mitigating circumstances found by the trial court outweigh both numerically and qualitatively the one aggravating circumstance found by the trial court pertaining to the murders of Gerald, Glendon, and Jennifer Wood.

ISSUE V

WHETHER THE USE OF ILLEGAL DRUGS NEGATES THE MITIGATING CIRCUMSTANCE OF NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

Evidence of conduct which is not criminal cannot negate the

mitigating circumstance of Chapter 921.141(6)(a) Florida Statutes, to wit: "The defendant has no significant history of prior criminal activity."

ISSUE VI

WHETHER IT WAS ERROR TO DENY APPELLANT'S REQUESTED SPECIAL PENALTY PHASE INSTRUCTIONS NUMBERS 3 THROUGH 8.

The trial court erred in its denial of appellant's requested special penalty phase instructions numbers 3 through 8.

ARGUMENT UPON ISSUE I

It is unquestioned that first degree murder is a specific intent crime. It is undisputed that intoxication is a valid offense to a specific intent crime. State v. Arroyo, 564 So. 2d 1153 (Fla. 4th DCA 1990); Gardner v. State, 480 So. 2d 91 (Fla. 1985). The essence of the defense is that intoxication rendered the accused unable to form a specific intent. Shaw v. State, 228 So. 2d 619 (Fla. 2d DCA 1969).

In the case at hand, Dr. Stanton Samenow testified for appellee as an expert witness. The purpose of expert testimony has been variously described as follows:

a. Expert testimony is generally admissible when the facts to be determined are obscure, and can be made clear only by and through the opinion of persons skilled in relation to the subject matter of the inquiry. Miller v. Tropical Gables Corp., 99 So. 2d 589 (Fla. 3d DCA 1958).

b. The theory of allowing evidence of an expert witness to be received by the triers of fact is to understand and determine an issue of fact. Wright v. State, 348 So. 2d 26 (Fla. 1st DCA

1977).

Dr. Samenow's opinion that mental impairment defenses, of which intoxication is one, are a charade, does not conform to the purpose of expert testimony since it does not assist in an understanding of any factual issue. In fact, such an opinion is really a commentary on the validity of the law which is outside the realm of expert testimony. Because intoxication as a defense is the law in Florida as demonstrated above, Dr. Samenow's opinion on its validity or invalidity provided no assistance in deciding any fact probative of appellant's guilt or innocence of the specific intent offenses for which he was tried. Thus, it was error for this testimony to have been admitted into evidence and to have been allowed to stand as evidence.

Appellant recognizes that Dr. Samenow's testimony to the effect that mental impairment defenses are a charade was unobjected to by appellant at trial and was the subject of no motions to strike and/or for some curative or corrective instruction. However, appellant claims that the allowance of this testimony constitutes fundamental error which may be considered on this appeal.

In order for error to be fundamental, so that it may be urged on appeal though not reserved below, the error must be tantamount to a denial of due process. Williams v. State, 400 So. 2d 542 (Fla. 3d DCA 1981). In this context, due process refers to a fair trial. Williams v. State, supra,; State v. Jones, 377 So. 2d 1163 (Fla. 1979). Such error, in order to render a trial unfair, must go to the foundation of the case, Sanford v. Rubin, 237 So. 2d 134

(Fla. 1970) or negate a claim or defense, Carter v. State, 469 So. 2d 194 (Fla. 2d DCA 1985).

On the fundamental error issue now under discussion, appellant finds Caster v. State, supra, instructive. In Carter v. State, supra, the court gave an instruction to the jury that incorrectly stated the law and necessarily mislead the jury with the effect of negating the defendant's only defense. On appeal, the giving of instruction was treated as fundamental error. In the case at hand, Dr. Samenow's testimony about mental impairment defenses being charades was like the instruction given in Carter v. State, supra, in that it negated appellant's/defendant's only defense. Dr. Samenow's opinion in this regard went unrebutted and thus stood alone to the effect that if accepted by the jury, all of appellant's efforts to establish his intoxication defense were negated by the Samenow view that such was a charade.

As a result of the preceding, the admission of the testimony of Dr. Samenow here under attack was error of a fundamental nature and requires the granting of a new trial for appellant.

ARGUMENT UPON ISSUE II

In Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed. 2d 378 (1981), the United States Supreme Court, after first reminding its readers of the following teaching from Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), to wit:

> If the accused indicates that he wishes to remain silent, "the interrogation must cease." If he requests counsel, "the interrogation must cease until an attorney is present."

proceeded on to announce the following rule:

> "...and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police - initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards having expressed his desire to deal with police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him unless the accused himself initiates further communication, exchanges, or conversations with the police."

In the case at hand, appellant was advised by police officers that they were investigating a homicide which had occurred at a specific location. Upon being so advised, appellant said "What about an attorney?" One of the officers then read appellant his Miranda warnings to each one of which appellant stated his understanding and that at the conclusian of which appellant signed the form from which the rights were read. Thereafter, the incriminating statement admitted into evidence at appellant's trial was elicited by the officers from appellant. Based on Edwards v. Arizona, supra, appellant's position is that:

a. Once he said, "What about an attorney?" the police officers should have proceeded no further with him including reading to him his Miranda rights and at the conclusion of the reading of each right asking him if he understood the right, and

b. No efforts to secure any statements or admissions from appellant of any type or kind could have been resumed until an attorney was present.

Appellant anticipates that appellee will respond to his assertions in this regard by relying on two lines of cases. The first line is typified by State v. Evans, 462 So. 2d 596 (Fla. 5th DCA 1985) and Henderson v. State, 463 So. 2d 196 (Fla. 1985).

These cases are easily distinguishable from appellant's case. In State v. Evans, the defendant was arrested for burglary, given his Miranda rights and invoked his right to counsel. Two months later, the defendant sought to talk with the police who responded to his request, read him his Miranda rights, which the defendant waived, and proceeded to interrogate and elicit from defendant incriminating statements. The suppression of the defendant's confession at trial was reversed on appeal on the theory that, though he had initially invoked his right to counsel, he thereafter waived it by voluntarily initiating contact with law enforcement and then waiving his Miranda rights, including his right to counsel. Of the same ilk is Henderson v. State, wherein the defendant, after invoking his right to counsel, thereafter advised that he was willing to talk and did so after being given and waiving his Miranda rights. The denial of the defendant's Motion to Suppress his confession was affirmed on appeal on the theory that even though interrogation must cease upon an accused invocation of the right to counsel, there is nothing to prevent the accused from changing his mind, volunteering further information and waiving his right to counsel after being given a further opportunity to invoke it. State v. Evans and Henderson v. State are factually similar in that both involve an initial invocation of the right to counsel resulting in a ceasing of interrogation followed by the accused's act of voluntarily (re)initiating contact and thereafter waiving the right to counsel after being advised of it. It is this factual similarity which distinguishes those cases from appellant's, for in appellant's case after invoking his right

to counsel, he did not initiate any further contact or conversation, voluntarily or otherwise, with his interrogators. Thus, the waivers of an accused's right to counsel found in State v. Evans and Henderson v. State cannot be found to exist in appellant's case, and appellant's case is governed by the following elaboration upon the Edwards v. Arizona rule, to wit:

> We concluded that reinterrogation may only occur if "the accused himself initiates further communication, exchanges, or conversations with the police." Ibid. Thus, the prophylactic protections that the Miranda warnings provide to counteract the "inherently compelling pressures" of custodial interrogation and to "permit a full opportunity to exercise the privilege against self incrimination," 384 U.S. at 467, 86 S.Ct. at 1624, are implemented by the application of the Edwards corollary that if a suspect believes that he is not capable of undergoing such questioning without advice of counsel, then it is presumed that any subsequent waiver that has come at the authorities behest, and not at the suspect's own instigation, is itself the product of the "inherently compelling pressures" and not the purely voluntary choice of the suspect. Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed. 2d 704 (1988).

The second line of cases is grounded in Cannady v. State, 427 So. 2d 723 (Fla. 1983) in which, according to the defendant's interrogator, the following occurred:

a. Defendant was read his Miranda warnings which ostensibly were waived at that time.

b. Interrogation proceeded during which the defendant kept crying and said "I think I should call my lawyer."

c. Upon speaking the aforequoted words, the interrogation ceased and a telephone was placed in front of the defendant who continued to cry and kept saying, "I didn't mean to kill that man; it wasn't supposed to happen that way."

d. After several minutes, the interrogator asked the

defendant if he wanted to talk about it, to which the defendant responded affirmatively.

The defendant's efforts to suppress his inculpatory statements failed upon the following rationale.

> While expressing a desire to speak to an attorney which presumably indicates a wish not to answer any more questions, appellant was also readily confessing his guilt by repeatedly saying he did not mean to kill the man, thereby indicating a desire to continue talking to the police without the benefit af an attorney's presence. When a person expresses both a desire for counsel and a desire to continue the interview without counsel, further inquiry is limited to clarifying the suspect's wishes... Here, Officer McKelthen's asking appellant if he wanted to talk about it was meant to clarify appellant's wishes and was not meant to evoke an incriminating response. Therefore, this question did not amount to an interragation under Miranda. Rhode Island v. Ennis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed. 297 (1980); Barfield v. State, 402 So. 2d 377 (Fla. 1981). By answering the question in the affirmative, appellant seemed to indicate that his earlier statement was not a request for counseling.

In Aycock v. State, 528 So. 2d 1223 (Fla. 2d DCA 1988), the Cannadv rationale was utilized to sustain the denial of a motion to suppress a confession in the following scenario. While under arrest, defendant was read his Miranda rights. The defendant agreed to be questioned but then stated as follows.

> Since I'm so far from home and there's no attorney here that's gonna come talk to me, I might as well cooperate while I'm here instead of upsetting y'all so I decided to just - or long as my attorney down yonder gets a copy.

After making this quoted statement, the defendant was again given his Miranda rights and to the following right read to him, to wit: "You have the right to talk to a lawyer now and have him present while you're being questioned." He responded that he understoad and signed a waiver form. On these facts, Florida's Second District Court of Appeal stated that:

> Whether or not defendant's above-quoted statement constituted a sufficient, though equivocal, request for counsel, we conclude that he thereafter effectively waived the right to counsel upon receiving a Miranda warning a third time and signing the written waiver. A similar situation existed in Cannady v. State, 427 So. 2d 723 (Fla. 1983). In that the case, the defendant had said to a police officer, "I think I should call my lawyer." Id. at 728. Simultaneously, however, defendant "was also readily confessing his guilt." Id. Cannady stated, "when a person expresses both a desire for counsel and a desire to continue the interview without counsel, further inquiry is limited to clarifying the suspect's wishes." ...Under Cannady, then the trial court in the case at hand did not err in denying defendant's motion to suppress because: (1)the officer's statement that defendant could have an attorney present at the time served to correct defendant's misapprehension and was no less proper than the questioning in Cannady which simply served to clarify the defendant's wishes in that case.

Lons v. State, 517 So. 2d 664 (Fla. 1987) is the last case in the Cannady line. In it the defendant waived his Miranda rights and spoke freely to his interrogators. However, a point was reached during the interrogation when, in response to a question posed by one of his interrogators, the defendant said that he preferred not to answer the question and that "I think I might need an attorney." Interrogation did not cease but continued. The denial of the suppression of defendant's incriminating statements made after his speaking of the above quoted words was reversed on appeal because:

> Since Edwards, however, we have not accepted this view and have characterized similar statements as equivocal which permit an investigating official to continue questioning for the sole purpose of clarifying the equivocal request. In so holding, we made clear that, until clarified, this is the limit of the permitted inquiry. ...the statement "I think I might need an attorney" was, in our view, equivocal but it did put the police officers on notice that the only permissible further questioning would be questions attempting to clarify Long's request for counsel. The record is clear, however, that the investigating officers did not attempt to clarify the equivocal request for counsel but continued to interrogate Long to obtain the eventual

confession.

Common to Cannadv v. State, Aycock v. State, and Long v. State is an equivocal waiver or invocation of the right to counsel, to wit: the simultaneous expression of a desire for counsel and a desire that interrogation proceed permitting at that point a continuation of interrogation but only for the purpose of clarifying the desire for counsel. If the clarification results in a waiver of counsel, the interrogation about the crime under investigation may continue. However, the rules announced in the cases in this line do not apply to appellant's case, because when appellant said, "What about an attorney." he was not in the midst of interrogation and therefore was only expressing a desire for counsel, not a desire to be interrogated.

For the reasons set forth herein, appellant's Motion to Suppress Admission should have been granted on the basis of the above quoted rule from Edwards v. Arizona, supra, and because none of the exceptions referred to herein are applicable.

ARGUMENT UPON ISSUE III

In sentencing Appellant to death upon the four first degree murders of which he was convicted, the trial court prepared a Judgment, Order, and Sentence as per Chapter 921.141(3) Florida Statutes. As per said Judgment, Order, and Sentence, the trial court found as follows:

a. As to the murders of Gerald, Glendon, and Jennifer Wood - one aggravating circumstance, to wit: prior conviction of another capital felony, Chapter 921.141(5)(b) Florida Statutes; two statutory mitigating circumstances, to wit: that these murders

occurred while appellant was under the influence of extreme mental or emotional disturbance, Chapter 921.141(6)(b) Florida Statutes, and that the murders were committed when appellant's capacity to appreciate the criminality of his conduct or to conform it to the requirements of law was substantially impaired, Chapter 921.141(6)(f) Florida Statutes; and two non-statutory mitigating circumstances, to wit: that appellant was abused as a child and that appellant was capable of acts of kindness and being friendly.

b. As to the murder of Peggy Wood - two statutory aggravating circumstances, to wit: the one referred to in a. above and that the murder was especially heinous, atrocious, or cruel, Chapter 921.141(5)(h) Florida Statutes; and the statutory and non-statutory mitigating circumstances referred to in a. above.

Having found aggravating and mitigating circumstances as aforesaid, the trial court then stated in its Judgment, Order, and Sentence as follows:

> The Court finds that though the Aggravating Circumstances fall into only two statutory categories, the fact that one of those categories includes the Defendants conviction of four First Degree Murders including the murder of two helpless and defenseless young children, would be sufficient in itself to justify and warrant the imposition of the death penalty as to each capital felony.

Putting aside the trial court's confusion as to how many statutory aggravating circumstances it applied to the murders of Gerald, Glendon, and Jennifer Wood, the problem, of course, is with the trial court's reference to "two helpless and defenseless young children." By this reference, the trial injected into its sentence a non-statutory aggravating circumstance, to wit: the prior conviction of a capital felony was of a capital felony whose

victims were helpless and defenseless young children. Appellant is unable to discover any authority for the proposition that the weight to be accorded the aggravating circumstance contained in Chapter 921.141(5)(b) Florida Statutes is somehow increased, or that the circumstance is somehow enhanced by the helplessness, defenselessness or age of the victims of the prior capital felony. And, the only authority which one can find is that non-statutory aggravating circumstances are not to be utilized in determining the sentence of one convicted of a capital crime. Walton v. State, 547 So. 2d 622 (Fla. 1989) and Elledge v. State, 346 So. 2d 998 (Fla. 1977).

In view of the preceding, it is clear that the trial court utilized a non-statutory aggravating circumstance in deciding to impase death sentences upon appellant.

ARGUMENT UPON ISSUE IV

In sentencing appellant to death upon the four first degree murders of which he was convicted, the trial court prepared a Judgment, Order, and Sentence as per Chapter 921.141(3) Florida Statutes. As per said Judgment, Order, and Sentence, the Court found as follows with regard to the murders of Gerald, Glendon, and Jennifer Wood.

a. One statutory aggravating circumstance, to wit: prior conviction of another capitol felony, Chapter 921.141(5)(b) Florida Statutes.

b. Two statutory mitigating circumstances, to wit: that these murders occurred while appellant was under the influence of extreme mental or emotional disturbance, Chapter 921.141(6)(b) Florida

Statutes, and that the murders were committed when appellant's capacity to appreciate the criminality of his conduct or to conform it to the requirements of law was substantially impaired, Chapter 921.141(6)(f) Florida Statutes.

c. Two non-statutory mitigating circumstances, to wit: that appellant was abused as a child and that appellant was capable of acts of kindness and being friendly.

With regard to the statutory aggravating circumstance referred to in a. above, it consists of and refers solely to the other capital felonies of which appellant was convicted in this case.

In view of the preceding, the situation with which the trial court was confronted, insofar as the murders of Gerald, Glendon and Jennifer Wood were concerned, was one aggravating circumstance a raid against four mitigating circumstances, two statutory and two non-statutory. While appellant recognizes that the propriety of a sentence imposed as per Chapter 921.141 Florida Statutes is not a function of merely tabulating aggravating versus mitigating circumstances, Hargrave v. State, 366 So. 2d 1 (Fla. 1978), cert denied 444 U.S. 912, 100 S.Ct. 239, rehearing denied 444 U.S. 985, 100 S.Ct. 493, the fact remains that the quantity of mitigating circumstances as to these three murders exceeds the quantity of aggravating circumstances three-fold. And, since the one aggravating circumstance is merely the convictions of the balance of the capital felonies with which appellant was charged and not some factors specifically related to the offenses, appellant claims that the quality of the mitigating circumstances, going as they do to substantive facets of appellant's mental condition and past

character and conduct, outweigh the aggravating circumstance. Accordingly, as to these three murders, appellant claims that it was error for the trial court to have imposed a death penalty upon him.

ARGUMENT **UPON ISSUE V**

In sentencing appellant to death upon the four first degree murders of which he was convicted, the trial court prepared a Judgment, Order, and Sentence as per Chapter 921.141(3) Florida Statutes. As per said Judgment, Order, and Sentence, the trial court negated the mitigating circumstance of no significant history of prior criminal activity, Chapter 921.141(6)(a) Florida Statutes, as follows:

> While the evidence demonstrated that the Defendant had only a prior conviction for driving while under the influence, the evidence also **showed** from the defendant's own admissions and statements made by him to Drs. Maher and Berland, that he had used illegal drugs, especially cocaine and marijuana, habitually for many year (R 2160).

For two reasons, the trial court's reliance on said admissions and statements is misplaced.

First, said admissions and statements were elicited:

a. From Dr. Maher who testified as an expert in support of appellant's intoxication defense -

b. From Dr. Berland who testified as an expert as to appellant being under the influence of extreme mental or emotional disturbance and the substantial impairment of appellant's capacity to appreciate the criminality of his conduct or to conform it to the requirements of law -

as facts or data upon which their respective opinions were based. Chapter **90.704** Florida Statutes. Thus, said admissions and

statements were not substantive evidence and were not admitted into evidence on the truth of their contents but strictly as one of many bases of expert opinion. Secondly, use of illegal drugs is not a crime under Florida law. Thus, it was error for the trial court to negate a lack of significant history of prior criminal activity by citing activity which was not criminal.

But for the error which is the subject of this argument, the number of statutory mitigating circumstance in appellant's case would be three instead of the two cited in said Judgment, Order, and Sentence with the following result, to wit: as to the murders of Gerald and Glendon and Jennifer Wood, the aggravating circumstance as per Chapter 921.141(5)(b) Florida Statutes would be arrayed against three statutory mitigating circumstances, to wit: the ones contained in Chapter 921.141(6)(a)(b) and (f) Florida Statutes and the two non-statutory aggravating circumstances of appellant having been abused as a child and being capable of acts of kindness and being friendly. Accordingly, when appellant's case is viewed in this perspective, it is clear that the mitigating circumstances both vastly exceeded numerically and qualitatively the aggravating circumstances so that the sentences far these murders should have been life imprisonment and not death.

ARGUMENT UPON ISSUE VI

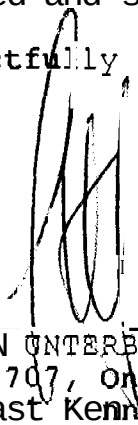
Appellant will not belabor his position with regard to Issue VI. He recognizes that the current state of the law does not support his position. However, he is fearful that if he does not place this matter in this brief, he might be accused of waiving his position if there later be a change in the law towards his

position.

CONCLUSION

For all the **reasons** set forth in this brief, appellant's conviction and sentence should be reversed and set aside.

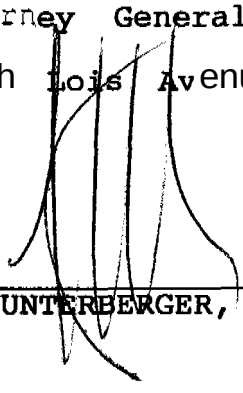
Respectfully submitted,



SIMSON UNTERBERGER, ESQUIRE
Suite 707, One Mack Center
501 East Kennedy Boulevard
Tampa, Florida 33602
(813) 229-8548
Attorney for Appellant
Florida Bar Number 158800

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail, this 30th day of **October,** 1991, to Robert Krauss, Esquire, Assistant Attorney **General, Florida** Department of Legal Affairs, 2002 North **Lois Av**enue, Tampa, Florida.



SIMSON UNTERBERGER, ESQUIRE