IN THE SUPREME COURT OF FLORIDA

BRYAN JENNINGS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 62,600

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

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

BRYAN JENNINGS, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 62,600

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

In this brief, the following symbols will be used:

"R" - Record on Appeal

"A" - Appendix attached to the initial brief consisting of the findings of fact in support of the death penalty imposed after the first trial held in February of 1980 (later reversed at 413 So.2d 24).

STATEMENT OF THE CASE

BRYAN FREDERICK JENNINGS was initially charged by an indictment filed on May 16, 1979, in Brevard County. (R1042-1044) The indictment charged Jennings with the first degree premeditated murder of Rebecca Kunash, with the first degree felony-murder of Rebecca Kunash (during the course of a kidnapping with the intent to commit sexual battery), with the first degree felony-murder of Rebecca Kunash (during the course of a sexual battery), with the kidnapping of Rebecca Kunash, with three counts of capital sexual battery on Rebecca Kunash, with the burglary of the Robert Kunash dwelling with the intent to commit sexual battery or kidnapping and with an assault therein, and with the aggravated battery of Rebecca Kunash.

Following a trial in February, 1980, Jennings was convicted of all nine counts and sentenced to death. The trial judge entered his findings of fact in support thereof. (A1-7) Appellant's convictions and sentences were subsequently vacated by this Court, and the case was remanded for a new trial. (R1283-1289; Reported at 413 So.2d 24)

On June 11, 1982, the Brevard County Grand Jury reindicted Jennings on the same charges. (R1039-1041) Private counsel was appointed to represent Jennings. (R1276)

Defense counsel filed numerous pre-trial motions, including a motion to dismiss the indictment (R1260-1261), motions to suppress the defendant's statements, certain physical evidence, and photographs of the defendant (R1265-1272), and a motion for change of venue. (R1242-1243) A hearing on the various motions to suppress evidence was held on July 6, 1982. (R854-986) With the exception of a change of venue, the trial court denied all of the motions. (R1217,1233,1242-1243)

Trial by jury commenced on July 13, 1982, before the Honorable Clarence T. Johnson, Jr., Judge of the Circuit Court of the Eighteenth Judicial Circuit of Florida, in and for Brevard County. (R1) At trial certain evidence was introduced over defense counsel's objection. (R222-223,246-247,463-464,481-482,485,488-490,1169-1172,1175,1208) At the close of the state's case, Appellant's specific motion for judgment of acquittal was denied. (R516-526) This motion was renewed and again denied at the close of all of the evidence. (R550,551A)

During final closing argument by the state, the prosecutor made certain comments which prompted defense counsel to move for a mistrial. This was denied. (R604-605)

Following due deliberation, the jury returned with a verdict of not guilty as to Count VI (sexual battery) and guilty as charged as to the other eight counts. (R680-681,1156-1164)

Appellant waived his presence at the penalty phase. (R685-687) During the testimony of a state witness at the penalty phase, defense counsel made a motion for mistrial based upon the violation of a stipulation. (R265-266,693-695)

Several special jury instructions were requested by the defense for this stage of the trial. Almost all were denied. (R813,1130-1143) The jury returned with a nine to three recommendation to impose a sentence of death. (R844)

Throughout the trial and sentencing, defense counsel unsuccessfully sought to have Jennings sentenced as a mentally disordered sex offender or, in the alternative, to have him certified for a hearing on this issue. (R991-1007,1011-1012,1058,1061-1072)

The trial court adjudicated Bryan Jennings guilty on Counts I, IV, V, VII, VIII and IX. No sentence was imposed on Counts VII and IX. Jennings was sentenced to three consecutive life terms for Counts IV, V and VII. As to Count I, Jennings was sentenced to death. (R1029-1037,1047B-1047M) The judge found three aggravating factors and rejected all of the mitigating circumstances. (R1047B-1047G)

Notice of appeal was timely filed. (R1057) This appeal follows.

STATEMENT OF THE FACTS

On May 11, 1979, Robert and Patricia Kunash awakened to find that their daughter, Rebecca Kunash, age six, was missing from her bedroom. (R320-322,328-331) The bedroom window, which had been left unlocked, was open and the window screen was lying in the yard. (R327-334)

Police were summoned to the house. (R224-225,343-344,370-371) Conducting an investigation, they made a plaster cast of one footprint chosen from approximately fifty found in the sand outside of the Kunash home. (R285-286,297,306) Police also recovered latent fingerprints from the bedroom window sill. (R288) Several of the fingerprints were determined to match those of Bryan F. Jennings. (R405-408,425-428) One of the fingerprints matched that of Deputy Sheriff J. C. Hall. (R438-439) Out of the fifteen prints found, ten had no value. (R439-441) The footprint was similar in tread design to Jennings' shoes obtained from his mother. (R355-356,360,499-507).

At 2:15 p.m., the victim's nude body was discovered floating in a nearby canal by a boater. (R337-342) The police recovered the body from the water and transported it to the hospital for an autopsy. (R345) There were injuries to the facial area of the deceased's head and evidence of trauma to the head. (R236-237) At the back of the head, the skull was fractured. (R235) The medical examiner determined the cause of death to be asphyxia due to drowning. (R235)

The testimony indicated that the injuries to the head were sufficient in and of themselves to cause death. The injuries were consistent with being caused by the head striking a solid surface. (R243) The head injuries would have caused unconsciousness, followed by light coma which would gradually deepen prior to death. (R243)

The medical examiner also took swab samples from the victim's vagina, mouth and anus. (R238) A toxicologist's tests of the swabs from the vagina and mouth were positive for the presence of prostatic acid phosphatase which is found in seminal fluid, as well as other substances. (R249-253,257-258,269-282) The medical examiner opined that the acid phosphatase had been admitted into the victim's vagina prior to or immediately after death. (R242)

Bryan Jennings was in the Brevard County Jail due to his arrest on a traffic warrant from Orange County. (R867) At 1:00 a.m. on May 12, 1979, he was awakened by police and brought to an interview room for questioning concerning the girl's death. (R460-462,474-475,490) Agent Jerome Hudepohl from the Brevard County Sheriff's Department informed a still groggy Jennings of his rights and asked the defendant if he would talk with them without benefit of an attorney. (R869-875,1184-1185) Jennings hesitated and Hudepohl repeated the question. (R1185) At that point, Jennings momentarily agreed, saying he would talk but needed a few minutes to awaken fully. (R1185) Upon awakening more fully, Jennings immediately retracted his willingness to talk and told the officers that he wanted an attorney and did not want to discuss the case without one since the charge was "too heavy". (R1185) Hudepohl persisted in his questioning, asking if Bryan was fully awake and able to understand the proceedings. (R1185) Bryan stated that he was still "half asleep", but was conscious enough to realize that he did not wish to continue without an attorney. (R1185) Bryan concluded with a denial of any involvement. (R1185)

Agent Hudepohl did not stop the interview. (R893,1185) After a long pause, he told Jennings that it was his (the defendant's) right to exercise, but announced (in a lengthy soliloquy) the officers' willingness to listen to the defendant. (R1185) Agent Hudepohl indicated that they had to explain his

rights to him. (R1185) The agent told Jennings that they were giving the defendant an opportunity to talk to them and would allow Jennings to answer their questions. (R1185) However, before the defendant could avail himself of this opportunity, Agent Hudepohl explained, Jennings would first have to intelligently waive his rights. (R1185) It should be noted that after each of the agent's exhortations to confess, there was a "long pause" from Bryan by way of response. (R1185) Despite Bryan's silence and his adamant request for an attorney, the agents continued the interrogation.

After discussing his rights further, the interrogator told Jennings that the decision to talk or not was the defendant's to make, but that the police were giving him the opportunity to talk. (R1185) Jennings finally broke down and told Hudepohl that he would talk, but needed a chance to clear his head first. (R1186) After using the bathroom and upon questioning from Hudepohl, the defendant indicated that he did not need his rights read to him again and that he would proceed without an attorney. (R1186)

Jennings recounted his actions of the previous night, telling the officers that he had been awake all night drinking heavily at area bars and denying going near the Kunash residence. (R1186-1189) Upon repeated interrogation, the defendant denied again and again being in or around the victim's house on the previous night. (R1189-1192)

At this point, Hudepohl showed the defendant his latent fingerprints, his shoes, and the plaster cast of the footprint. (R1192-1194) Hudepohl, now referring to Jennings as "son", told the defendant that they knew that he was at the house and had gotten the girl, but as to how and why only Bryan knew. (R1193-1194) Jennings, again denying the charges, begged the police to listen to his denials. (R1194) Agent Porter, the other officer present, replied that they would listen to whatever Jennings had to say to them. (R1194)

Bryan admitted to the agents that he had a psychological problem that involved looking into windows, but claimed that it was harmless. (R1194) He confessed that he had driven around the previous night searching for a window to look into, but said that that was the extent of his activity. (R1194)

Agent Hudepohl, relating that as a child he had done some wrong and had told lies to cover things up, urged Jennings to tell the truth so that he would not get in deeper and would feel better. (R1194-1195) Hudepohl told Jennings that the police were giving the defendant an opportunity to talk that not many people receive, and that he knew the defendant was sorry and had never intended to kill the girl. (R1195-1196)

Jennings asked for a few minutes rest, but Hudepohl continued to stress his and Agent Porter's certainty that the defendant did not intend for the incident to occur. (R1196) The defendant, fraught with remorse, finally broke down, answering that he never had any intent to kill the victim. (R1196)

The defendant related that none of it was supposed to happen, that he only was going to look into the window. (R1196) He was uncertain why the crime occurred, speculating that it may have been because he was intoxicated; that it just happened. (R1196) The defendant, having seen the window with a night-light inside, looked in and saw someone lying in bed. (R1196-1197) He told police that he took the screen off, opened the unlocked window, and pushed the curtain aside to get a better look at the girl. (R1197) The defendant only looked for a while then left in his automobile. (R1197)

Jennings related that while on his way home, he found himself back at the victim's house again, not understanding how or why he had come back. (R1197) This time, the defendant admitted, he went inside through the window, grabbed the girl and put his hand over her nose and mouth until she lost

consciousness. (R1197) After putting the victim into his car, the defendant drove to a nearby canal. (R1197) There, according to his statement, the defendant inserted his finger into the girl's vagina. (R1198) He attempted to engage in sexual intercourse, he said, but was unable to get his penis inside her. (R1198) The defendant denied engaging in oral sex. (R1198) He told police that, after attempting sexual intercourse, he threw her, unconscious, into the canal and left. (R1198)

Upon questioning by the police, the defendant said that he did not know how the victim had received the cut under her eye, speculating that she may have gotten cut the same way he had gotten scraped -- he had fallen down. (R1198) In response to Hudepohl's questions, the defendant said he did not recall hitting the girl's head. (R1198-1199) Jennings reiterated that he did not mean for the girl to die, that he did not mean for any of it to happen. (R1200)

The defendant, at the officers' request, drew several maps indicating where he had parked his automobile, where he had taken the girl, and where he had several hours later disposed of his clothing. (R1199-1200,1202-1204,1169-1171)

The defendant said that he thought he had outgrown looking into windows, not having done so for at least two years. (R1204) In concluding his statement, Jennings told the agents that he was "scared as hell" and that he guessed that now he really needed a lawyer. (R1201,1204-1205)

As a result of the statements given by Jennings in this interview, the Sheriff's Department searched the creek where Bryan had told them he had disposed of his clothing. A sweatshirt was recovered. (R467,470-472) Also, after the interrogation and based on information contained therein, the police photographed the defendant's penis, on which there was a scrape. (R478,1172,1175)

At trial, Allen Kruger testified for the state that Jennings told him that he (the defendant) had dropped the girl out of her window, picked her up by her legs, brought her up over his head and struck her head on the pavement. (R449-451) Kruger also stated that the defendant claimed to have held the girl's head under water for ten minutes, leaving her in the water for the crabs, turtles and sharks. (R452)

On cross-examination, Kruger admitted that he was currently in state prison having completed three years of his sentence. (R452-453) He first approached the authorities with his story while he was awaiting sentencing in 1979. (R453) He admitted that he failed to mention Jennings' statement during numerous previous interviews with authorities. (R453-454) Kruger denied receiving any benefits as a result of his cooperation with the state, in spite of the fact that he is currently serving his sentence at a minimum security facility. (R453-450) He finally admitted that he would volunteer information to the authorities if he thought it would benefit himself. (R459)

At trial, Bryan's aunt (with whom Bryan and his mother and sister lived) testified that he appeared extremely intoxicated and wobbly on his feet when she saw him at 5:30 a.m. on May 11, 1979. (R529-531) A companion of Bryan's on May 10, 1979, testified that Bryan had been drinking heavily, consuming more than three gallons of beer. (R539-543) Bryan was staggering and appeared to be drunk. (R542-543) Bryan's mother testified that her son also might have been under the influence of cocaine. (R750-751)

At sentencing, Doctor Michael Gutman, a court-appointed psychiatrist, testified that Bryan suffered from a long-term character and behavior disorder and was a sexually perverse individual. (R714) With this disorder and under the influence of alcohol, Bryan's flaws and an aggressive, sexually perverse

nature could be released, causing the incident of May 11, 1979. (R714-722) While Bryan was legally sane, the doctor opined, based on the consumption of alcohol and his psychological disorder, some situation occurred, the effect of which Bryan could not limit it as a normal person could. (R714-715,721-722)

Another psychiatrist and a psychologist also expounded on Bryan's mental problems. (R689-711,754-797) Dr. Elizabeth McMahon, a clinical psychologist, testified that due to the alcohol and his mental disorders Bryan's ability to control his behavior was severely impaired. (R768-775) Bryan does not have the ability to control his emotional impulses and completely lacks self-control of any sort. (R763) Both Drs. Gutman and McMahon agreed that Bryan fit the criteria set forth in the applicable mentally disordered sex offender statute. (R724,776) Testifying on behalf of the state, Dr. Wilder disagreed with the other doctors on most of the ultimate issues. (R689-711) Admittedly, his examination of Jennings was less extensive than the other doctors. (R803-806)

Other testimony elicited at the sentencing phase showed that Bryan Jennings was an illegitimate child who never knew his real father. (R735-736) His mother married an alcoholic and the family moved constantly. Jennings had a history of psychiatric problems, including voyeurism and transvestism. (R736-748) These problems went mostly untreated due to a variety of reasons, including lack of funds. (R736-737,738-739,745) One year before Bryan entered the service, he had been accepted as a patient in a mental institution, but his mother decided not to send him at the last minute. (R743-745) Testimony also revealed that Bryan was capable of helping others during a crisis and also possessed some sensitivity. (R732-733,749-750)

POINT I

THE TRIAL COURT ERRED IN ADMITTING, OVER DEFENSE COUNSEL'S OBJECTIONS, THE DEFENDANT'S CONFESSION WHERE THE STATEMENT WAS OBTAINED FOLLOWING HIS REQUEST FOR COUNSEL AND WHERE THE STATEMENT WAS NOT FREELY AND VOLUNTARILY MADE, IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

A. The Police Agents Continued The Interrogation After The Defendant Had Requested The Assistance Of Counsel Prior To Talking With Police.

On May 12, 1979, at 1:00 a.m., Bryan Jennings was awakened by police for the purpose of obtaining a statement from him. (R869,1185) After being advised of his rights, Jennings requested to speak with an attorney prior to submitting to the custodial interrogation. (R1185) After a pause during which the agents were undoubtedly contemplating their interrogation strategy, the police ignored Bryan's request and talked to him concerning their desire to hear his side of the story. (R1185-1186) Upon continued discussion and without counsel having been made available to Jennings, the police obtained from him a "waiver" of his right to an attorney and a tape-recorded statement. (R1185-1186) The agents also admitted that, following the interrogation, they obtained photographs of Jennings. (R892) The agents admitted that these were obtained following yet another request for an attorney. (R926-927) The admission into evidence of this statement properly objected to by defense counsel (R464-465,479,481-482,485,488-490,500-501), violated the defendant's rights under the Fifth Amendment (right against self-incrimination), Sixth Amendment (right to counsel), and Fourteenth Amendments to the United States Constitution, and

Article I, Section 9 (right against self-incrimination) and Section 16 (right to counsel) of the Florida Constitution.

In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court held that where a defendant is undergoing custodial interrogation and he indicates his desire to exercise his right to consult with an attorney, interrogation must cease. The Court prohibited any further elicitation of information without the benefit of counsel:

> If the individual states that he wants an attorney, the interrogation must cease until an attorney is present... If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent. Miranda v. Arizona, 384 U.S. at 474.

Later cases have not abandoned that view. In Michigan v. Mosely, 423 U.S. 96 (1975), the Court noted that Miranda had distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and had required that interrogation cease until an attorney was present only if the individual stated that he wanted counsel. Michigan v. Mosley, 423 U.S. at 104, n. 10. In Fare v. Michael C., 442 U.S. 707,719 (1979), the Court referred to Miranda's "rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease." And, in Rhode Island v. Innis, 446 U.S. 291, 298 (1980), a case where a suspect in custody had invoked his Miranda right to counsel, the United States Supreme Court again referred to the "undisputed right under Miranda to remain silent" and to be free of interrogation "until he had consulted with a lawyer." The recent case of Edwards v. Arizona, 451 U.S. 477, (1981), amplifies these views.

In the instant case, Jennings exercised his right to counsel prior to interrogation. However, in violation of the above-cited cases, interrogation

did not cease. Rather, the officers continued discussing the defendant's rights and told Jennings that they really wanted to hear his side of the story. The confession which was obtained following the continued interrogation was constitutionally inadmissible. Edwards v. Arizona, supra. See also Brewer v. Williams, 430 U.S. 387 (1977); Cason v. State, 373 So.2d 372 (Fla. 2d DCA 1979); Singleton v. State, 344 So.2d 911 (Fla. 2d DCA 1977), cert. denied, 354 So.2d 986 (Fla. 1977).

After a request for an attorney, a subsequent waiver will not be deemed valid simply from the fact that a confession was given or a waiver signed. United States v. Massey, 550 F.2d 300, 307-308 (5th Cir. 1977). The record must show that an accused was specifically offered counsel but intelligently and undertandingly rejected that offer. Anything less is not a waiver. United States v. Massey, supra, at 308. The court in Buehler v. State, 381 So.2d 746, 750 (Fla. 4th DCA 1980), similarly held that where a defendant has indicated his desire for an attorney prior to questioning, the state must produce "evidence beyond a defendant's responses to a subsequent police-initiated conversation" to demonstrate a voluntary waiver.

As the United States Supreme Court has recently held in Edwards v. Arizona, supra at 484-485:

> Second, although we have held that after initially being advised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation,... the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; 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. [footnote omitted] We further hold that an accused, such as Edwards, having expressed his desire to deal

> with the 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.

See also Brewer v. Williams, supra, wherein the court held that a valid waiver of counsel rights should not be inferred from the mere response by the accused to overt or more subtle forms of interrogation or other efforts to elicit incriminating information.

In the case sub judice, the record fails to show a valid waiver of counsel. The police never ceased the interrogation; they failed to cut off questioning and to specifically offer him counsel. They did not wait until counsel had been contacted or until the defendant reinitiated the desire to speak with them without an attorney as is required by Edwards v. Arizona, supra. Jennings had requested counsel following a formal rights statement, but had not received any indication of when that request would be honored. He was continually explained his rights in form only, without any substance to back them up. If the police had already ignored his request for counsel, why should he have ever expected one to be afforded him? The defendant's "waiver" was invalid; a finding of a knowing and intelligent waiver of the right to an attorney without the opportunity to have consulted with counsel pursuant to his request is impossible:

> Where there is a request for an attorney prior to any questioning, as in this case, a finding of knowing and intelligent waiver of the right to an attorney is impossible. As the quoted passages from the [Miranda] decision suggest, the suspect has an absolute right to delay interrogation by requesting counsel. If such request is disregarded and the questioning proceeds, any statement taken thereafter cannot be a result of waiver but must be presumed a product of compulsion,

subtle or otherwise. United States v. Priest, 409 F.2d 491, 493 (5th Cir. 1969).

Close scrutiny of the transcript of the tape as well as careful listening only strengthens Appellant's argument. After awakening somewhat, Jennings decided after a "long pause" for reflection that he did not wish to talk without an attorney. (R1185) Hudephol asked if he were awake and understood his rights. Jennings admitted to still being "half asleep" but was awake enough to know that he did not wish to continue without counsel. (R1185) Not once, but twice did Jennings make his wishes known. When the agents refused to break off the interrogation, Jennings concluded his portion of the exchange with a simple denial of the crime. (R1185) The agents again persisted in their "explanation" of his rights, apparently wanting him to invoke his request for counsel for a third time. (R1185) Jennings failed to do so, probably thinking that the agents understood his desire to break off the interview and receive legal advice. The agents' request to hear Jennings' invocation of his constitutional rights met with another "long pause" in lieu of a response. (R1185) The agents persisted once more before, after yet another "long pause", Jennings relented and agreed to talk without counsel. (R1185-1186) Jennings undoubtedly realized that the police had no intention of honoring his rights. At the suppression hearing, Agent Hudepohl admitted that he continued the interrogation despite Jennings requests. (R906) No one ever offered to secure counsel for Jennings, in spite of the fact that the agents knew attorneys with the Office of the Public Defender were available even at that late hour. (R900,926) Even at the conclusion of the interrogation and statement, the police obtained further evidence from Jennings after yet another request for counsel. (R892,926-927)

Appellant is aware that this Court addressed this very issue during its review of the first trial. Jennings v. State, 413 So.2d 24 (Fla. 1982). However, additional information was revealed during the second trial which

greatly supports this contention on appeal. Even absent such new evidence, Appellant would urge this Court to revisit its earlier decision. Jennings' oral statements, procured from him after a request for counsel, but prior to such counsel were unconstitutionally obtained. The judgments and sentences, based on a trial in which the statement was introduced must be reversed and a new trial awarded.

B. The Defendant's Statement Was Induced By A Set Of Circumstances Designed For The Sole Purpose Of Overcoming The Defendant's Will.

After agreeing to talk to the police in the absence of an attorney, (see Point II A, supra) Jennings still denied any involvement in the incident. (R1186-1192) It was only after the interrogators resorted to psychologically coercive techniques, that Bryan broke down and told the officers that he had committed the acts. This form of interrogation did not produce a voluntary confession; hence, the statement must be excluded.

The conduct of police is one of the most important factors in determining the voluntariness of a confession. Ashcraft v. Tennessee, 322 I.S. 143 (1944). A confession is not admissible if it was "extracted by any sort of threats or violence [or] obtained by any direct or implied promises, however slight [or] by the exertion of any improper influence." Bram v. United States, 168 U.S. 532, 542-543 (1897). See also Lawton v. State, 13 So.2d 211 (Fla. 1943); Fullard v. State, 352 So.2d 1271 (Fla. 1st DCA 1977); Fillinger v. State, 349 So.2d 714 (Fla. 2d DCA 1977); M.D.B. v. State, 311 So.2d 399 (Fla. 4th DCA 1974). This Court has held that a confession should be excluded if the interrogators attempt to delude a prisoner as to his true position or if they attempt to exert an improper influence over his mind. Frazier v. State, 107 So.2d 16 (Fla. 1958); Harrison v. State, 152 Fla. 86, 12 So.2d 307 (1943).

The interrogation of Bryan Jennings by the Brevard Sheriff's Agents is an example of psychological coercion as an artform. Every technique employed by Agents Hudepohl and Porter was specifically designed to convince the defendant that it was in his best interest to confess. Hudepohl maximized to the defendant the evidence which they had against him, telling Jennings that they had more than enough evidence to charge him now with first degree murder. (R1195) But, the agents continued, there was something inside the defendant worth talking about; something that Jennings could benefit from by telling them. (R1194-1195) Agents Hudepohl and Porter, now referring to the defendant as "son", displayed mock sympathy to his plight, telling him that they knew he was sorry, that he never intended to cause the victim's death, and implicitly suggested that by confessing to them, he would be able to reveal his side of the story to his benefit. (R1193-1196) They suggested that this was a golden opportunity that not many people were afforded, "son." (R1195)

At the suppression hearing, the agents both admitted that they had lied to Jennings when they agreed with each other that they had talked earlier in the day about the defendant not intending to kill the girl. (R902-903,924) Hudepohl stated that this was merely a technique that he used during interrogations. (R902-903) Porter testified that he and Hudepohl had a "rapport" during interrogations of this sort. (R923-924) Agent Hudepohl even confessed that "everything that I done in that interrogation room... [was] for the purpose of..." getting Jennings to talk. (R904)

The totality of circumstances presented by the instant case are similar to those described in Brewer v. State, 386 So.2d 232 (Fla. 1980), in which this Court held the confession to be involuntary. In Brewer, the defendant was the prime suspect in the murder of Mrs. Tsuyako Thomas. During his two hour interrogation the police maximized to Brewer the evidence they had against

him. They told Brewer that they had enough evidence to get him convicted of first degree murder. Only by confessing did he have a chance of convincing the jury that he was sorry. Id. at 233-234. In Brewer, as in the case at bar, police led the defendant to believe that his confession would aid him in getting his side of the story known, and, by showing that he was remorseful, might aid in the sentence ultimately imposed.

The Supreme Court of the United States' decision in Bram v. United States, supra, mandates the conclusion that the confession herein was compelled. The evil condemned in Bram was the act of misleading the accused into believing that if he confessed his punishment would be less severe. Thus the hope of mitigation in Bram was thought coercive enough to render a confession compelled. In maximizing the benefits of confessing while minimizing the deficiencies, the police in the instant case misled Jennings as to his true position. Frazier, supra. In holding out a specific benefit by confessing, the police procured a confession, but they did so by methods which function irrespective of truth. Townsend v. Sain, 372 U.S. 293 (1962); Fillinger v. State, supra; State v. Chorpenning, 294 So.2d 54 (Fla. 2d DCA 1974).

The deceiving and psychologically coercive techniques utilized here violate the very spirit of the Miranda decision and the Fifth Amendment to the United State Constitution. The confession was involuntary and must be suppressed. This Court must reverse the defendant's judgments and sentences and remand for a new trial.

POINT II

THE TRIAL COURT ERRED IN ADMITTING, OVER DEFENSE COUNSEL'S OBJECTIONS, EVIDENCE WHICH WAS OBTAINED AS A DIRECT RESULT OF THE DEFENDANT'S INVOLUNTARY CONFESSION, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

During the defendant's confession and immediately afterward and as a direct result of the confession, police obtained from the defendant hand-drawn maps of the scene, photos of the defendant's penis (which evidenced a small abrasion), and a sweatshirt which police found in the area where defendant had claimed he disposed of his clothing. Additionally, it was information obtained during the confession which led investigators to retrieve the defendant's shoes from his home. (R303-305,355-356,362-363,365,463-465,470-472,476-478,481-482,485,487-490,500-501) This evidence was admitted into evidence at the defendant's trial.

As argued in Point I, supra, the defendant's confession was unconstitutionally obtained. The above-mentioned evidence, obtained as a direct result of the tainted confession must be suppressed as a "fruit of the poisonous tree." Wong Sun v. United States, 371 U.S. 471 (1963).

Since the defendant's convictions were based on inadmissible evidence, the judgments and sentences must be reversed and the case remanded for retrial without the illegally obtained items.

POINT III

IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW THE TRIAL COURT ERRED IN DENYING THE MOTIONS FOR A JUDGMENT OF ACQUITTAL AND FOR A NEW TRIAL ON COUNT I WHERE THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO ESTABLISH PREMEDITATION.

The defendant in the instant case was charged with three separate counts of first degree murder for the death of Rebecca Kunash: Count I was for premeditated murder, Count II was for felony-murder committed during the course of a kidnapping with the intent to commit sexual battery, and Count III was for felony-murder committed during the course of a sexual battery. (R1039-1041) Defense counsel twice moved for a judgment of acquittal on Count I on the basis that the state had failed to prove a premeditated intent to kill. (R516-519,550) The court denied the motion and allowed the case to go to the jury on all three counts of first degree murder of the one victim. (R526,551A) The jury found the defendant guilty of all three counts of first degree murder, but the trial court adjudicated the defendant guilty only on Count I. (R680,683,1031-1032,1035,1037) The court erred in denying the motion for judgment of acquittal as to the premeditated count and in adjudicating the defendant thereon.

For a killing to constitute premeditated murder in the first degree, it must be established by the state, not only that the accused committed an act resulting in death, but that before the commission of the act he had formed a definite purpose to take life, and had deliberated on his purpose for a sufficient time to be conscious of a well-defined purpose and intention to kill. Purkhiser v. State, 210 So.2d 448 (Fla. 1968); Hines v. State, 227 So.2d 334

(Fla. 1st DCA 1969). Premeditated murder in the first degree demands this specific intent; where the evidence does not establish this element, a judgment of guilt must be reversed. Brooks v. State, 158 Fla. 184, 28 So.2d 261 (1946); Taylor v. State, 158 Fla. 122, 22 So.2d 639 (1945); Douglas v. State, 152 Fla. 63, 10 So.2d 731 (1942); §782.04(1)(a), Fla. Stat. In the instant case, it is clear that the defendant possessed no specific intentions to kill the victim.

Although it is not a complete defense, voluntary intoxication is available to negate the specific intent of premeditation such that first degree murder is not proven. Cirack v. State, 201 So.2d 706 (1967). This is clearly present in the instant case. The facts sub judice can be distinguished from those in Stone v. State, 378 So.2d 765 (1979). In Stone, supra, many witnesses saw the Defendant at various times shortly after the homicide and on each occasion he seemed normal and not intoxicated.

In the case at bar, the evidence established that Jennings had been drinking heavily on the night in question, consuming more than three gallons of beer. (R539-543) He was staggering and appeared to be drunk when he left a social companion early that morning. (R542-543). Jennings' aunt's testimony revealed that Bryan was still extremely intoxicated when he returned home at 5:30 a.m. (R529-531) Testimony also indicated that Jennings may have been under the influence of narcotics that night. (R750-751).

At trial, the state and the judge placed much emphasis upon Jennings' ability to perform, without detection, the acts leading up to the murder. (R550-551A) This was clearly error since it is well established that alcohol initially affects the cerebral cortex which is the brain's center of judgment, self-control and inhibition. The final area of the brain which alcohol effects is the medulla which controls the body's vital physical functions. D. Dennison, T. Prevet, & M. Affleck, Alcohol and Behavior, p. 45 (1980). Thus it is clear

that motor ability can remain relatively unaffected while the alcohol prevents the brain from forming the requisite premeditated intent.

In reviewing Appellant's convictions and sentences following his first trial [(R1283-1829) and Jennings v. State, 413 So.2d 24 (Fla. 1982)], this Court correctly pointed out that the only direct evidence of premeditation was the testimony of Kruger. (R1285) Furthermore, without even considering any evidence of intoxication, this Court pointed out that the facts coupled with the evidence of Jennings' unstable mental condition could result in a conviction of less than first-degree murder. Jennings, supra, at 26.

In addition to the unrefuted testimony establishing intoxication, testimony of the majority of the experts during the penalty phase revealed that Bryan suffered from a long-term psychological disorder, which, when he was under the influence of alcohol, could cause his flaws and an aggressive, sexually perverse nature to be released. (R714,721,729-730,732,759-761,768,775,795) Their testimony established that Bryan was not able to control his behavior. Thus the defendant was not completely in control of the situation which just happened without his specific intent. (R635-637) The element of premeditation is lacking.[1]

Additionally, the defendant's confession, introduced by the state shows a lack of specific intent. Jennings told police that he never possessed any intention to commit murder; the events just happened. (R1196) Drs. Gutman and McMahon also agreed that Bryan did not intend to kill the girl. The

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1/ Expert testimony on mental disorders and the effect of intoxication can be used to show the lack of specific intent required for first degree murder based on deliberate premeditation. Hughes v. Matthews, 576 F.2d 1250 (7th Cir. 1978); Cirack v. State, 201 So.2d 706 (Fla. 1967); Commonwealth v. Gould, 405 N.E. 2d 927 (Mass. 1980).

situation developed to the point that he was unable to stop the sequence of events. (R720-721,732,772-773) The defendant left the house of the victim intending to go home, but on his way home, he ended up back at the Kunash residence. (R1197) The defendant was unable to understand how or why this happened. (R1197) Surely, this negates the element of premeditation, which was therefore not proven beyond a reasonable doubt. In fact, the interrogating police officers did not believe that specific intent was present, either, for they told the defendant that they did not think that he intended to kill the victim. (R1196)

The specific intent required to establish premeditation is lacking in the instant case. The trial court's denial of the motions resulted in a deprivation of Appellant's constitutional rights to due process of law guaranteed him by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Constitution of the State of Florida.

POINT IV

APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN THE TRIAL COURT FAILED TO GRANT A MOTION FOR MISTRIAL MADE AS A RESULT OF IMPROPER ARGUMENT BY THE PROSECUTOR AT THE GUILT PHASE.

During final closing argument by the state attorney, the following was said:

> His rights, his right to use the telephone. Weigh that against Rebecca Kunash's rights. They cease to exist. They have been snuffed out, stamped out, turned out, not by an accident, not by something that could have been helped, by the cold calculated conscious acts of Bryan Jennings. (R596)

The trial court eventually allowed defense counsel to move for a mistrial before summarily denying it. (R603-605) Appellant maintained at trial and now contends on appeal that the prosecutor's argument constituted a comment on the accused's exercise of his constitutional rights, mistated the law, and was designed to mislead and inflame the jury. The result was a denial of Appellant's constitutional rights to due process of law and a fair trial. Amend. V, VI and XIV, U.S. Const.; Art. I, Sec. 9, Fla. Const.

It is a well settled rule that a prosecutor must refrain from making arguments that are inflammatory and abusive. Collins v. State, 180 So.2d 340 (Fla. 1965). Once it is established that a prosecutor's remark is offensive, this Court in Pait v. State, 112 So.2d 380 385 (Fla. 1959) emphasized that, "[t]he only safe rule appears to be that unless this court can determine from the record that the conduct or improper remarks of the prosecutor did not prejudice the accused, the judgment must be reversed." Such an inflammatory comment is violative of an accused's fundamental right to a fair trial, free of argument condemned. Pait, supra.

The trial court has the discretion to control the conduct of counsel throughout the trial. See Murray v. State, 154 Fla. 683, 18 So.2d 782 (1944). Additionally, the prosecuting attorney has a duty to refrain from conduct which might affect an accused's right to a fair and impartial trial. The trial judge must ensure that this duty is not breached. Tribue v. State, 106 So.2d 630 (Fla. 2d DCA 1958).

In Washington v. State, 86 Fla. 533, 542, 98 So. 605, 609 (1923); the Court spoke of the high standards which are expected of a prosecutor. The prosecutor is a sworn officer of the government with the great duty imposed on him of preserving intact all the great sanctions and traditions of law:

> It matters not how guilty a defendant in his opinion may be, it is his duty under oath to see that no conviction takes place except in strict conformity to law. His primary considerations should be to develop the evidence for the guidance of the court and jury, and not to consider himself merely as attorney of record for the state, struggling for a verdict.

The Supreme Court of the United States has observed that the average jury has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, the Court noted, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. Berger v. United States, 295 U.S. 78,88 (1935).

The remarks by the prosecutor in the case sub judice were totally irrelevant and inflamatory. Despite the obvious appeal that such an argument would have for a jury, the rights of the victim have absolutely nothing whatsoever to do with the rights of an accused. This argument was made for the sole purpose of misleading and inflaming the jury. Additionally, the prosecutor's comment on Appellant's exercise of his constitutional rights might also be

construed as impermissable. See Bennett v. State, 316 So.2d 41 (Fla. 1975).

Furthermore, there is no way to determine what effect a prosecutorial comment such as the one sub judice may have had on the jury. The remark so fundamentally tainted Appellant's right to a fair trial so as to warrant a new trial. See Davis v. State, 214 So.2d 41 (Fla. 3d DCA 1968). There is nothing in the record from which an appellate court can tell whether the offensive argument contributed to the conviction. Chavez v. State, 215 So.2d 750 (Fla. 2d DCA 1968).

The error resulted in a denial of Appellant's constitutional rights to due process and a fair trial guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 of the Florida Constitution. Accordingly, reversal is required.

POINT V

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THREE PHOTOGRAPHS OF THE SIX YEAR OLD VICTIM WHICH HAD THE EFFECT OF INFLAMING THE JURY THEREBY DENYING APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Three photographs of the victim were introduced at trial over defense objection. (R222-223,247,1182-1183) One of the photographs depicted the girl lying on the river bank after being pulled from the river. The photograph clearly depicted a large blob of foam which had drained from the victim's nostrils. (R235,1183) This photograph was purportedly introduced for identification purposes despite defense counsel's apparent willingness to stipulate on this issue. (R218-223) The other two photographs were offered to illustrate the pathologist's testimony regarding the trauma to the victim's vagina. (R237-238,243-247)

The initial test for the admissibility of photographic evidence is one of relevance. Straight v. State, 397 So.2d 903 (Fla. 1981); Bauldree v. State, 284 So.2d 196 (Fla. 1973); Young v. State, 234 So.2d 341 (Fla. 1970). However, even "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice." Section 90.403, Fla. Stat. (1981). Thus, even though technically relevant, before photographs can be admitted into evidence, "the trial judge in the first instance and this Court on appeal must determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury." Leach v. State, 132 So.2d 329, 332 (Fla. 1961).

Here the probative value of the photographs was slight. The picture offered for "identification" purposes was not a scene that the witness had even

viewed. (R221-223) Furthermore, it is somewhat suprising that the witness could be sure of the identification, since the girl's face is so obscured by foam oozing from her nostrils. (R1183)

Likewise, the damage to the victim's vagina was well documented through the pathologist's testimony. (R237-238,242) The pictures fail to illustrate the facts as well as the testimony does. (R1182) They added nothing and were "so shocking in nature", see, Alford v. State, 307 So.2d 433, 440 (Fla. 1975), that admission into evidence was erroneous since the probative value was outweighed by the prejudicial effect. Appellant is entitled to a new trial not tainted by this prejudicial, inflammatory evidence. Amend.V, VI and XIV, U.S. Const.; Art. I, Sec. 9 and 16, Fla. Const.

POINT VI

THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR MISTRIAL AT THE PENALTY PHASE FOLLOWING PREJUDICIAL TESTIMONY OF A STATE WITNESS WHICH RESULTED IN A DENIAL OF APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The state and the defense both stipulated that the defense would not rely upon the mitigating circumstance of no prior significant criminal history. (R265-266,10470) As a result the state agreed not to introduce any evidence to rebut any anticipated evidence on this issue. (R265-266) However, during the testimony of Dr. Wilder, a psychiatrist testifying for the state at the penalty phase, the prosecutor asked the doctor about Jennings' history which was used in the evaluation. (R692-693) The doctor replied:

> He allegedly had committed a number of crimes while in the service, attacking people, robbing people and doing things of that kind, and in addition to the one for which he was being charged at the time. (R693)

At the bench conference that occurred after this remark, defense counsel moved for a mistrial specifically stating the proper grounds. (R693-694) The prosecutor said that he was unaware that the witness was going to testify as to these damaging facts. (R694) The trial court implicitly denied the motion for mistrial, instead, striking the testimony and giving a cautionary jury instruction. (R694-695)

Appellant contends on appeal that the instruction was wholly inadequate to overcome the extreme prejudice caused by the testimony. The testimony clearly constituted reversible error and the motion for mistrial should have been granted. See Maggard v. State, 399 So.2d 973 (Fla. 1981).

The testimony appears to be especially damaging when one scrutinizes the nature of the defendant's "alleged" history. (R693) The acts involved violent crimes which Jennings only "allegedly" committed. The prejudice is manifest. The jury got the impression that Jennings has a propensity to and a history of committing violent crimes. The testimony constituted no less than character assination. See Stewart v. State, 51 So.2d 494 (Fla. 1951).

The "curative" instruction undoubtedly only drew greater attention to the defendant's bad character. It would be ludicrous to assume that the doctor's comments had no part in the jury's nine to three recommendation to impose the extreme penalty. A new sentencing hearing must be ordered to guarantee Appellant his constitutional rights to due process and a fair trial. Amend. V, VI and XIV, U.S. Const.; Art. I, Sec. 9 and 16, Fla. Const.

POINT VII

APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY THE COURT'S REFUSAL TO GRANT HIS REQUEST FOR SPECIAL JURY INSTRUCTIONS AT THE PENALTY PHASE.

Defense counsel filed numerous written requests for special jury instructions at the penalty phase. (R1130-1143) All of the instructions had a basis in the cited case law, and several were not adequately covered by the standard instructions. (R1133,1135-1137) Over objection, the trial court denied (both orally and in writing) all but a portion of one of the requested instructions. (R813,1130-1143) The jury was instructed on each of the statutory factors in the language of the statute. (R836-840)

Due process of law applies "with no less force at the penalty phase of a trial in a capital case" than at the guilt determining phase of any criminal trial. Presnell v. Georgia, 439 U.S. 14, 16-17 (1978). Amendment IV, U.S. Constitution.

The need for adequate instructions to be given to a jury to guide its recommendation in capital cases was expressly noted by the Court in Gregg v. Georgia, 428 U.S. 153, 192-193 (1976):

> The idea that a jury should be given guidance in its decisionmaking is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. See Gasoline Products Co. v. Camplin Refining Co., 283 U.S. 494, 498, 75 L.Ed. 1188, 51 S.Ct. 513 (1931); Fed.Rul.Civ.Proc. 51. When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

The information received by Appellant's jury in the form of instructions on the law to be followed in making a penalty recommendation was far from adequate to avoid the infirmities in this death sentence that inhered in death sentences imposed under the pre-Furman statute. Furman v. Georgia, 408 U.S. 238 (1972). Appellant's death sentence rests in part on the jury's recommendation to the trial judge that the death penalty be imposed. (R844,1047B) LeDuc v. State, 365 So.2d 149 (Fla. 1978).

In Godfrey v. Georgia, 446 U.S. 420, 428-429 (1980), the Supreme Court vacated a death sentence imposed under Georgia's statute that rested upon an aggravating factor almost identical to Florida's Section 921.141(5)(h). The Court said:

> In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was "outrageously or wantonly vile, horrible and inhuman." There is nothing in these few words standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms. In fact, the jury's interpretation of § (b)(7) can only be the subject of sheer speculation.

Two of Appellant's requested instructions dealt directly with the aggravating factor set forth in 921.14(5)(h). (R1135-1136) The instructions specifically defined the circumstance as set forth in the case law. In State v. Dixon, 283 So.2d 1, 9, this Court defined the aggravating circumstance of heinous, atrocious and cruel as follows:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies-the conscienceless or pitiless crime which is unnessarily torturous to the victim.

This Court indicated in State v. Dixon, 283 So.2d 1, at 8 (Fla. 1973), that a definition of the aggravating circumstance of "heinous, atrocious or cruel" was necessary because:

> To a layman, no capital crime might appear to be less than heinous . . . .

The instructions should have been given as requested. The jury, having no definition, was left to speculate as to the meaning of that factor.

Another requested instruction correctly stated the law as to the weighing process between the aggravating and mitigating factors. (R1137) This process is obviously crucial in determining a jury's recommendaiton. State v. Dixon, supra at 10.

Although this Court has held that a jury recommendation for life imprisonment is not binding, it is entitled to great weight. Tedder v. State, 322 So.2d 908 (Fla. 1975); LaMadline v. State, 303 So.2d 17 (Fla. 1974). Thus errors of such magnitude as the failure to define the aggravating circumstances and the weighing process of aggravating against mitigating in the instructions to the jury at the penalty phase of Appellant's trial requires either reduction of the sentence to life imprisonment or no less than that a new penalty recommendation be obtained. In Messer v. State, 330 So.2d 137, 142 (Fla. 1976), the Court stated:

> It is clear that the Legislature in the enactment of Section 921.141, Florida Statutes, sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part. The validity of the jury's recommendation is directly related to the information it receives to form a foundation for such recommendation.

Accordingly, this Court should reduce the sentence or remand to the trial court with instructions that a new penalty recommendation be obtained. The trial court's error violated Appellant's constitutional rights. Amend. V, VI, VII and XIV, U.S. Const.; Art. I, Sec. 9, Fla. Const.

POINT VIII

APPELLANT WAS DENIED DUE PROCESS OF LAW AND A FAIR TRIAL BY AN IMPARTIAL JURY WHEN THE TRIAL COURT INSTRUCTED THE JURY THAT SEVEN OR MORE OF THEIR NUMBER WERE REQUIRED TO RETURN A SENTENCING RECOMMENDATION.

Without objection, the trial court instructed the jury that they could not return with a recommendation on sentencing unless seven or more were in agreement. (R840) This error deprived Appellant of due process in the penalty phase of his trial which resulted in a death recommendation by the sentencing jury.

Section 921.141(3), Florida Statutes, specifies that a "majority" recommendation of the jury for life or death can be overridden by the trial court. The statute does not state what will happen in the event of a tie vote.

Appellant does not here contest the validity of the sentencing proceeding because the jury's recommendation can be less than unanimous. This Court has addressed and rejected that issue in Fleming v. State, 374 So.2d 954 (Fla. 1979); Alvord v. State, 322 So.2d 533 (Fla. 1975); and Watson v. State, 190 So.2d 161 (Fla. 1966). In Watson, the defendants were convicted of rape under Section 794.01, Florida Statutes (1966), which crime was punishable by death "unless a majority of the jury in their verdict recommended mercy." The jury returned a six to six vote on the issue of mercy, and the death sentence was imposed. In addition to the unanimity argument, the defendants argued on appeal that the trial court's charge to the jury resulted in less than a majority of the jury sentencing them to death. This Court did not address that issue.

Appellant contends that a tie vote should result in an advisory verdict that no recommendation can be made. Section 921.141(2), Florida Statutes, however, seems to preclude such a "hung jury" situation by stating that an advisory sentence "shall be returned by the jury." Thus, the cases holding that an instruction on the right to a "hung jury" is not required, are inapplicable. See White v. State, 121 Fla. 128 (1935); Roberts v. State, 90 Fla. 779, 107 So. 242 (1925). The only constitutionally reasonable alternative under this statutory scheme is to construe a six to six vote in favor of the defendant. A "majority" is defined as "the number greater than half of any total." Black's Law Dictionary (1979). A six to six vote does not result in a recommendation for death anymore than for life under the statutory sentencing structure which requires a majority recommendation.

This Court has recognized the validity of Appellant's claim herein and changed the language of the standard jury instruction to read:

> If a majority of the jury determine that (defendant) should be sentenced to death, your advisory sentence will be:
>
> > A majority of the jury, by a vote of ___ advise and recommend to the court that it impose the death penalty upon (defendant).
>
> On the other hand, if by six or more votes the jury determines that (defendant) should not be sentenced to death, your advisory sentence will be:
>
> > The jury advises and recommends to the court that it impose a sentence of life imprisonment upon (defendant) without possibility of parole for 25 years.
>
> Fla.Std.Jury Instr. (Crim.) pp.81-82 (1981). (emphasis added.)

This standard jury instruction was read at Appellant's trial. (R918) However, the trial court, immediately after reading the above, gave as a parting instruction:

> You will now retire to consider your recommendation. When seven or more of you are in agreement as to what sentence should be recommended to the Court, that form of the recommendation should be signed by your foreman and returned to the Court. (R840) (emphasis added.)

This instruction deprived Appellant of the life recommendation benefit of a tie vote situation. Since it was the last instruction that they heard, it is very likely that the jury gave it primary consideration. Granted, this language appears in the standard jury instruction but, as argued above, the language is wrong. The old instruction also contained the language:

> The law requires that seven or more members of the jury agree upon any recommendation advising either the death penalty or life imprisonment.
>
> Fla.Std.Jury Instr. (Crim.) p.80 (1975). (Emphasis added.)

This language, however, has been omitted in the new standard jury instructions, as a proper indication that a six to six vote would result in an acceptable life recommendation. Since the law does not require a majority verdict, the court should not have so instructed the jury. Moreover, the current instruction is internally inconsistent when it informs the jury that six or more votes can result in a recommendation of life and then informs the jury that the form cannot be signed until "seven or more are in agreement."

This latter instruction, given in Appellant's case, is tantamount to an "Allen" charge [Allen v. United States, 164 U.S. 492 (1896)] before the jury indicates any difficulty in its deliberations. This is an incorrect use of jury instructions. See Kozakoff v. State, 323 So.2d 28 (Fla. 4th DCA 1975) and cases cited therein. The instruction also deprived Appellant of a fair sentencing

recommendation in accordance with the statutory procedures. It is entirely possible that the jurors decided that no tie vote was allowed and that some jurors surrendered honest convictions and beliefs so that they could return some recommendation. As noted in Bell v. State, 311 So.2d 179 (Fla. 1st DCA 1975):

> An impediment to the exercise by a juror of a free and independent judgment is inconsistent with the mandate of Article I, Section 16, Constitution of the State of Florida, that the verdict of the jury must be impartial.
>
> Id. at 181.

Appellant is entitled to a new and fair hearing wherein the jury's sentencing recommendation will not be unconstitutionally infected with such partiality. Amend. V, VI, VIII, and XIV, U.S. Const.; Art. I, Sec. 9 and 16, Fla. Const.

POINT IX

THE TRIAL COURT ERRED IN FAILING TO CERTIFY THE DEFENDANT AS A MENTALLY DISORDERED SEX OFFENDER.

Both before and after the trial, Appellant's counsel sought to have Jennings certified as a mentally disordered sex offender (MDSO). (R991-1008,1011-1012,1061-1072) The trial court denied the request, even refusing to certify the defendant for a hearing under the statute. (R991-1008,1011-1012,1058) Appellant's defense counsel used, and the trial court considered, the reports of the psychologist and psychiatrists at the previous trial, as well as the testimony of the experts at the penalty phase. (R993,1003,1066-1071) Both Doctors Gutman and McMahon agreed that Jennings who had a long term character and behavior disorder of a sexually perverse nature, fit the statutory criteria of a mentally disordered sex offender. (R724-725,776,1068,1071) Another psychiatrist also agreed with this conclusion. (R1072) Dr. Wilder, who testified for the state at the penalty phase, indicated that Jennings did not fit the criteria of the statute. (R699-701) However, Wilder admitted that he had little respect for the MDSO Act in effect during 1979. (R705) The doctor also revealed his general ignorance about the statute (R702-705), and was of the opinion that murderers were not within the purview of the legislature's intent regarding MDSO's. (R701)

The instant crimes were committed in May 1979, prior to the 1979 amendment to Chapter 917, which took effect July 1, 1979. The defendant, therefore, was entitled to have the law as it existed in the 1977 MDSO statute applied to his case. See Durbin v. State, 385 So.2d 172, 175 (Fla. 4th DCA 1980); Strachen v. State, 380 So.2d 487 (Fla. 3d DCA 1980); Article X, Section

9, Florida Constitution. See also Weaver v. Graham, 450 U.S. 24 (1981); Whatley v. State, 46 Fla. 145, 35 So. 80 (1903); Castle v. State, 305 So.2d 794 (Fla. 4th DCA 1975).

Under the pre-1979 statute, it was a matter within the sound discretion of the court to certify the defendant and hold a special hearing on the defendant's mental status. §917.14, Fla. Stat. (1977). If at the special hearing it is determined that the person is a mentally disordered sex offender, the statute directs that the court "shall commit the defendant" for treatment. §917.19, Fla. Stat. (1977). This Court has held that Chapter 917 is equally applicable in capital cases. LeDuc v. State, 365 So.2d 149 (Fla. 1978); Huckaby v. State, 343 So.2d 29, 32-33 (Fla. 1977).

It is unclear whether, in the instant case, the penalty phase hearing was supposed to double as the special hearing intended by Sections 917.14 and 917.19, Florida Statutes (1977). The court obviously considered the psychiatric testimony presented at the penalty phase. (R1003) If the penalty phase hearing was supposed to double as the MDSO hearing, then the court violated the mandatory provisions of Section 917.19, and the court erred (or at least abused its' discretion) in failing to declare the defendant an MDSO, since the testimony was overwhelming that the defendant clearly was a mentally disordered sex offender. Hendricks v. State, 360 So.2d 1119, 1124-1125 (Fla. 3d DCA 1978); Cook v. State, 357 So.2d 462 (Fla. 2d DCA 1978). See also Huckaby v. State, supra at 33. If, on the other hand, the penalty hearing was not to double as the MDSO hearing, then the trial court abused his discretion in not following the provisions of Section 917.14 and ordering a special hearing, since the defendant made a strong and unrebutted showing through the testimony of the experts that he met the qualifications of a mentally disordered sex offender. Durbin v. State, 385

So.2d 172 (Fla. 4th DCA 1980); Gerardo v. State, 383 So.2d 1122 (Fla. 2d DCA 1980); Hendricks v. State, supra; Rosier v. State, 374 So.2d 1041 (Fla. 2d DCA 1979); Donaldson v. State, 371 So.2d 1073 (Fla. 3d DCA 1979).

The trial court thus erred in failing to declare the defendant to be a mentally disordered sex offender. This violated Appellant's constitutional rights of due process. Amend. V, VI and XIV, U.S. Const.; Art. I, Sec. 9 and 16, Fla. Const. The sentencing proceedings should have been stayed and the defendant committed to the Department of Health and Rehabilitative Services for treatment. Following such treatment, the defendant could then be brought back for a new sentencing hearing. O'Steen v. State, 366 So.2d 844 (Fla. 1st DCA 1979). The sentences must be vacated. See Gonsovowski v. State, 350 So.2d 19 (Fla. 2d DCA 1977).

POINT X

THE SENTENCE OF DEATH IMPOSED UPON APPELLANT IS NOT JUSTIFIED IN THAT IT IS BASED UPON INAPPROPRIATE AGGRAVATING CIRCUMSTANCES, ADDITIONAL MITIGATING CIRCUMSTANCES SHOULD HAVE BEEN FOUND, AND THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES.

Following presentation of evidence at the penalty phase, the jury returned an advisory recommendation that the death penalty be imposed. (R844) On September 8, 1982, Judge Johnson entered his written findings of fact in support of the imposition of the death penalty. (R1047B-1047G) In imposing the death penalty, the trial court found three aggravating circumstances: (1) that the murder was commited in the course of a burglary, sexual battery and kidnapping; (2) that the murder was especially heinous, atrocious and cruel; and (3) that the murder was committed in a cold, calculated and premeditated manner. (R1047C-1047D) The court further found that no mitigating circumstances were present. (R1047D-1047F)

The death sentence imposed upon Bryan Jennings must be vacated. The trial court found improper aggravating circumstances and failed to consider relevant mitigating factors. A proper weighing of all the factors must result in a life sentence.

A. The Trial Court Erred In Finding The Inappropriate Aggravating Circumstance Of Heinous, Atrocious, And Cruel To Support The Imposition Of The Death Penalty.

This Court has defined "heinous, atrocious, and cruel" in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) as such:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and,

> that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

Recognizing that all murders are heinous, in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this Court further refined its interpretation of the legislature's intent that this aggravating circumstance only apply to crimes especially heinous, atrocious and cruel. In light of this, the facts enumerated by the trial court do not support the finding of this factor.

The fact that the victim was a small child and prior to death had been subjected to rape does not necessarily support a finding of this aggravating factor. In Purdy v. State, 343 So.2d 4 (Fla. 1977), this Court reversed the imposition of the death penalty despite a finding by the trial court that the rape of a six year old child was especially heinous, atrocious and cruel. As this Court noted, the act of rape is always so reprehensible as to cause outrage, but without more, the mere act of rape is not especially heinous atrocious and cruel. Accord Shue v. State, 366 So.2d 387 (Fla. 1978).

From the moment of the initial abduction, the victim was unconscious. (R243,255-256,451,1197-1198) Being unconscious, the victim's feelings and sensations were affected such that there was no cognizance of pain. (R242-243,255-256) This fact was strangely overlooked in the trial court's findings of fact. (R1047C-1047D) Although the cause of death was drowning, the medical examiner further testified that death would have resulted from the head injuries inflicted prior to drowning. (R243) Therefore, the murder was not "unnecessarily torturous to the victim" as is required by Dixon, supra and Tedder, supra.

It is the duty of this Court to review the case in light of other decisions and determine whether or not the punishment is too great. State v. Dixon, supra at 10; McCaskill v. State, 344 So.2d 1276, 1278-1279 (Fla. 1977).

A comparison to other cases wherein this Court has reduced death sentences to life imprisonment reveals that the instant crime was no more shocking than the norm of capital felonies.

In Halliwell v. State, 323 So.2d 557 (Fla. 1975), the defendant beat the victim's skull with lethal blows from a 19-inch breaker bar and then continued beating, bruising, and cutting the victim's body with the metal bar after the first fatal injuries to the brain. The Halliwell crime is surely more brutal than that of the instant case, yet this Court found in Halliwell's conduct "nothing more shocking in the actual killing than in a majority of murder cases reviewed by this Court." Halliwell, 323 So.2d at 561.

Similarly, the cases of Burch v. State, 343 So.2d 831 (Fla. 1977) (36 stab wounds during frenzied attack); Chambers v. State, 339 So.2d 204 (Fla. 1976) (severely beat girlfriend to death -- victim bruised over her entire head and legs, had a deep gash under her left ear; her face was unrecognizable, and she had several internal injuries); and Jones v. State, 332 So.2d 615 (Fla. 1976) (38 "significant" lacerations on rape victim), involve similar or more gruesome killings. In each of these cases, however, this Court has vacated the death sentences. The Appellant's death sentence must likewise be vacated. Were the impositions of life sentences in these and other similar or more heinous cases to be ignored, Florida's death penalty statute could not be upheld under the requirements of Proffitt v. Florida, 428 U.S. 242 (1976), and Furman v. Georgia, 408 U.S. 238 (1972). See also Godfrey v. Georgia, 446 U.S. 420 (1980).

Even if this Court does find sufficient factual basis for the aggravating factor of heinous, atrocious and cruel, the finding is still improper because the judge failed to consider and weigh the fact that at the time these acts were committed, Appellant was acting under the influence of extreme mental and emotional disturbance which prevented him from exercising the ability to

conform his actions to the requirements of the law. (See argument, Section D, infra) This Court has recognized the causal relationship between these aggravating and mitigating circumstances in Huckaby v. State, 343 So.2d 29 (Fla. 1977) and in Miller v. State, 373 So.2d 882 (Fla. 1979).

In Huckaby v. State, supra at 34, this Court held that although the aggravating and mitigating circumstances were equal in number, the mitigating circumstances (which had not been found by the trial judge) must outweigh those in aggravation because the heinous nature of the crime was the direct consequence of the defendant's mental problems. Similarly, in Miller v. State, supra at 886, this Court again noted that the heinous nature of the offense resulted from the defendant's mental impairment. See also Jones v. State, 332 So.2d 615, 619 (Fla. 1976).

Since the evidence failed to show that the murder in the instant case was especially heinous, atrocious and cruel under the Dixon, supra and Tedder, supra standards, the court's finding should be stricken.

B. The Trial Court Violated Appellant's Constitutional Protection Against Double Jeopardy By Finding The Aggravating Factor Of Cold, Calculated and Premeditated.

It cannot be disputed that the trial judge failed to find this aggravating circumstance following Appellant's first trial on these charges. (A1-7) By failing to make such a finding, this circumstance was implicitly rejected at the first trial. The state should not now be permitted to argue and the trial court allowed to find that this circumstance supports the imposition of the extreme penalty. To permit this to occur would constitute a violation of Appellant's constitutionally protected right against double jeopardy. Amend. V and XIV, U.S. Const.; Art I, Sec. 9, Fla. Const.

This Court has declared that the aggravating circumstances set forth in the statute "actually define those crimes" punishable by death, and thus "must be proved beyond a reasonable doubt." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). In this respect, aggravating circumstances under Florida's death penalty system are analogous to individual offenses. By failing to find the circumstance at the first trial, Appellant was acquitted of that particular factor. To allow the trial judge at the second trial to use this factor in support of a death penalty imposition would violate the dictates of North Carolina v. Pearce, 395 U.S. 711 (1969). Bullington v. Missouri, 451 U.S. 430 (1981), also supports Appellant's contention. Bullington barred the imposition of a death sentence following a retrial after a defendant's appeal where the jury's verdict at the first trial fixed the punishment as life. The Court pointed out that double jeopardy applied, since the sentencing portion of the trial was like the trial on the question of guilt or innocence. In Bullington the Court stated that it did not matter whether the state would seek to rely on the same or additional evidence holding that "[h]aving received one fair opportunity to offer whatever proof it could assemble, Burks v. United States, 437 U.S., at 16, 98 S.Ct., at 2150, the State is not entitled to another." Bullington v. Missouri, supra at 446. An acquittal, regardless of how obtained, constitutes an absolute bar to relitigation. Sambria v. United States, 437 U.S. 54 (1978).

The situation presented here is analogous to one involving an accused on trial for burglary. Burglary of a dwelling is normally a felony of the second degree in Florida, but Section 810.02(2), makes it a felony of the first degree if the perpetrator is armed or assaults someone during the burglary. Mills v. State, 400 So.2d 516 (1981). Hence, these factors, if present, aggravated the crime as well as the possible punishment. In the hypothetical

trial, evidence is revealed that, during the course of the burglary the perpetrator stole a loaded gun. If the jury convicted the defendant of simple burglary, he appealed and won a new trial, the state could not then retry him for armed burglary.

A parallel situation occurred in the case at bar. The instant case is obviously different but would still be prohibited, especially in light of the fact that findings of aggravating circumstances are generally mixed questions of law and fact. See State v. Dixon, supra. The improperly found aggravating circumstance must be stricken on these grounds.

This circumstance must also be stricken for other reasons. In Combs v. State, 403 So.2d 418 (Fla. 1981), this Court indicated that Section 921.141(5)(i), Florida Statutes (1981) authorizes a finding in aggravation for premeditated murder where the premeditation is "cold, calculated and...without any pretense of moral or legal justification." Id. (Emphasis supplied). In Jent v. State, 408 So.2d 1024, 1032 (Fla. 1982), this Court noted that:

> The level of premeditation needed to convict in the [guilt] phase of a first degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor - "cold, calculated ... and without any pretense of moral or legal justification."

Subsequently, in McCray v. State, 416 So.2d 804 (Fla. 1982), this Court noted that (5)(i) "ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not meant to be all-inclusive." Id. at 807.

The trial court's finding of this circumstance purports to rely upon certain physical acts of Jennings which led up to the murder. As argued in Point III and supported by the defense evidence of intoxication and mental

problems, these acts are not evidence of premeditation or calculation. Furthermore, the acts cited, if they do reflect premeditation, reflect it only as to the crimes accompanying the murder. They do not prove premeditation in the murder itself. Accordingly, the circumstance should be stricken on this basis also.

C. The Trial Court Erred In Finding The Aggravating Factor That The Murder Was Committed During The Commission Of A Felony To Support The Imposition Of The Death Penalty.

In light of the impropriety in finding that the aggravating factors of heinous, atrocious and cruel and cold, calculated and premeditated were applicable (See arguments, Sections A and B, supra), the sole remaining aggravating factor found to apply by the trial judge is (d) that the murder occurred in the commission of a burglary, sexual battery and kidnapping. The trial judge relied on the jury's verdicts on the two counts of felony-murder in support of this finding. (R1047C) The use of the underlying felony as an aggravating circumstance would apply to every felony-murder situation and defeat the function of the statutory aggravating circumstances to confine and channel capital sentencing discretion, and thus would violate the principles enunciated in Furman v. Georgia, 408 U.S. 238 (1972). A death sentence for a felony-murder cannot be supported by an aggravating circumstance which takes into account the same underlying felony in which the murder was committed. Certainly, all felony-murders do not, and constitutionally cannot, mandate the death penalty. To the extent a death sentence is founded upon automatic aggravating circumstances, it is unconstitutional. Woodson v. North Carolina, 428 U.S. 280 (1976). To uphold a death sentence simply because a murder was committed in the course of another felony would leave judges and juries with unfettered, unchanneled discretion, would provide no meaningful basis for distinguishing between those felony-murder cases which receive the ultimate penalty and those that receive life, and would

render the Florida death penalty statute arbitrary and capricious as applied. Cf. Proffitt v. Florida, 428 U.S. 242 (1976); Godfrey v. Georgia, 446 U.S. 420 (1980).

Applying such reasoning, the North Carolina Supreme Court invalidated the use of the underlying felony as an aggravating circumstance. State v. Cherry, 257 S.E. 2d 551 (N.C. 1979). The Cherry court found that the death penalty in a felony-murder case would be disproportionately applied due to the "automatic" aggravating circumstance, and thus struck the use of the underlying felony as an aggravating circumstance. Likewise, in Keller v. State, 380 So.2d 926 (Ala.Ct.Cr.App. 1979) app. after remand 380 So.2d 938, writ. den. 380 So.2d 938 (Ala. 1980) and in Bufford v. State, 382 So.2d 1162 (Ala.Ct.Cr.App. 1980), writ. den. 382 So.2d 1175 (Ala. 1980), the court held that the underlying felony of robbery could not be used as an aggravating circumstance to support the imposition of the death penalty.

D. The Trial Court Erred In Finding No Mitigating Factors Present.

In the findings of fact to support the imposition of the death sentence, the trial court made references to each of the statutory mitigating factors, rejecting each, and then concluded no mitigating factors, statutory or otherwise exist. (R1047D-1047F) The trial court erred in rejecting three of the statutory mitigating circumstances and in rejecting or not considering the existence of several non-statutory factors in mitigation.

Appellant concedes that trial counsel stipulated that the defense would not rely upon statutory mitigating circumstance (a); no prior significant criminal history. (R265-266,1047D)

Because they are interrelated, Sections 921.141(6)(b) and (f), Florida Statutes (1979) will be discussed together. See Burch v. State, 343 So.2d 831

(Fla. 1977) and Miller v. State, 373 So.2d 882 (Fla. 1979). In the instant case there was both lay and expert testimony to support this in mitigation. Appellant's mother testified that Bryan has had a long history of psychiatric problems from the time he was four years old. (R736-745)

Two psychiatrists and one clinical psychologist testified. Dr. Wilder, testifying for the state, said that following a one and one quarter hour examination of Appellant, his opinion was that none of the mitigating factors apply. (R695-700) However, Dr. Wilder agreed that Appellant suffered some kind of character disorder, referring to Appellant as a sociopath. (R695)

Both Dr. Gutman and Dr. McMahon testified that in their professional opinions, Appellant suffers from a long-term character and behavior disorder and was sexually perverse. (R714,759-763) Their testimony indicated that Appellant probably met the criteria set forth in these mitigating sections. They both agreed that at the time of these offenses, Appellant had difficulty conforming his conduct to the requirements of the law. (R721,770-773) Dr. Gutman also testified during the guilt phase that although the defendant was legally sane at the time he committed the offense, his psychological disorder combined with his consumption of alcohol could create a situation wherein the defendant could not function as a normal person. (R714-715,721-722) Dr. McMahon testified that after her exhaustive seven hour examination, she concluded that Appellant functions at the emotional and social level of a child. (R760) In State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), this Court interpreted these mitigating circumstances, stating:

> Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered a mitigating circumstance.... Like subsection (b), this circumstance [f] is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.

The evidence clearly showed that alcohol was definitely a contributing factor in the commission of this crime. (R529-531,539,543,714-715,721-722,732,775) As Justice Ervin noted in his dissenting opinion in Gardner v. State, 313 So.2d 675, 679 (Fla. 1975) (death sentence later reversed by the United States Supreme Court and, upon remand, the defendant was resentenced to life imprisonment), the more enlightened perspective on heavy alcohol use is that it is no longer considered simply an emotional weakness, but rather a form of disease, which, like other physical and mental ailments, can cause aberrant behavior and require treatment. The heavy consumption of alcohol, when coupled with the personality and psychological disorders noted by the doctors clearly establishes the mitigating circumstances of mental and emotional disturbance as well as inability to conform one's conduct to the requirements of law. Sections 921.141(6)(b) and (f), Florida Statutes (1979); See Jones v. State, 332 So.2d 615 (Fla. 1976). In Jones, supra, wherein evidence indicated the defendant had consumed large amounts of alcohol, this Court approved of this mitigating circumstance, stating that "extreme emotional conditions of defendants in murder cases can be a basis for mitigating punishment." Jones v. State, supra at 619. See also State v. Dixon, supra at 10. The result in Jones should be applied to the instant case. See also Gardner v. Florida, 430 U.S. 349, 352 (1977) (wherein intoxication was held to establish the mental mitigating circumstances).

Section 921.141(6)(g), Florida Statutes (1979), provides that the age of the defendant at the time of the offense can be considered in mitigation. In its consideration of this factor, the trial court made this finding:

> Sec. 921.141(6)(g), Fla. Stat.: The Court finds that the Defendant was twenty (20) years of age at the time of these offenses (Date of Birth: December 9, 1958). He was home on leave from overseas assignment in Okinawa with the United States

> Marine Corps. Though of fairly young age, he was an adult of above average intelligence, and had accepted the obligations of adulthood by his Military Service. The Court finds that the Defendant's age is not a Mitigating Circumstance in this case. (R1047E)

However, the information that "inadvertently" came out at trial through the testimony of Dr. Wilder clearly shows that despite his service in the Marine Corps, Appellant simply did not "accept the obligations of adulthood." (R693) Therefore, it is shown that Appellant had refused to accept the obligations of adulthood, or in all probability, could not accept them, thus age would certainly be a mitigating factor in this case.

This Court has held on several occasions that a young age is mitigating, especially where coupled with other mitigating circumstances. See Sullivan v. State, 303 So.2d 632 (Fla. 1974) (Overton, J. Concurring: age 25 with no prior record); Swan v. State, 322 So.2d 485 (Fla. 1975) (age 19); Thompson v. State, 328 So.2d 1 (Fla. 1976) (age 17 with no prior record); Meeks v. State, 336 So.2d 1142 (Fla. 1976) (age 21 coupled with dull-normal intelligence); Hoy v. State, 353 So.2d 826 (Fla. 1978) (age 22 with no prior record); Jackson v. State, 366 So.2d 752 (Fla. 1978) (age 18 with no prior record); Mikenas v. State, 367 So.2d 606 (Fla. 1979) (age 22); Brown v. State, 381 So.2d 690 (Fla. 1980) (age 23); Neary v. State, 389 So.2d 197 (Fla. 1980) (age 26), and King v. State, 390 So.2d 315 (Fla. 1980) (age 23).

In the instant case, Appellant's age of 20, coupled with his mental condition and history of prior problems in general requires that it be found in mitigation.

In addition to the statutory mitigating factors clearly present in this case, the trial court erred in rejecting other matters in mitigation.

In rejecting Appellant's age of 20, as a mitigating factor, the trial court places great emphasis on the fact that he was serving in the Marine Corps. In this respect the trial court should have considered this in mitigation. In Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975), this court recognized that service in the armed forces can be a valid, albeit nonstatutory mitigating factor.

The trial judge rejected the contention that Jennings was a mentally disordered sex offender. The evidence clearly and unequivocally showed that Appellant met all the statutory criteria for certification as a mentally disordered sex offender under Chapter 917, Florida Statutes (1977). See Point IX, supra. The very definition of mentally disordered sex offender indicates that it is a person who is not insane but who has a mental disorder and is considered dangerous to others because of a propensity to commit sex offenses. See Section 917.13, Florida Statutes (1977).

Another factor that should have been found in mitigation is that Appellant showed remorse for his actions. During his questioning by the police officers, Agent Hudepohl recognized and believed that Appellant was truly sorry for his actions and also believed that Appellant did not intend to kill the victim. (R1195-1196) Appellant stated that he was sorry, that those things were not planned and he was unsure what made him do them. (R1196,1200) Dr. Gutman also testified that during his examination of Appellant, it is his opinion that Appellant did feel remorse for his actions. (R732-733)

Finally, the trial court failed in rejecting in mitigation the unstable family life of Appellant. Bryan Jennings never knew his natural father. (R735) He was a very hyperactive child who was born out of wedlock. (R735-736) He had mental problems from the time he was a toddler. Speculation was that his problems were caused by his constant falling down and bumping his head. (R737)

His mother admitted ignorance in her care of a young Bryan. (R737-738) His sexual problems also surfaced early. (R740-742) Bryan's problems went largely untreated due to lack of funds. (R736-737,743-745) This fact was misstated by the trial judge in his findings. (R1047F) Bryan was bounced back and forth between his mother and grandmother during his upbringing. (R747) Testimony also showed that Bryan was capable of helping others during a crisis, on two occasions, even saving two people's lives. (R749-750) Bryan's troubled upbringing certainly contributed to the position Bryan finds himself today. This, coupled with his redeeming qualities, are proper circumstances to consider in mitigation.

E. Summary.

The evidence is strong: the trial court impermissibly found three aggravating circumstances, which are not supported by law. Additionally, the trial court erroneously rejected all the statutory mitigating factors and ignored the plethora of non-statutory mitigating factors. Justice demands that Bryan Jennings' sentence of death be vacated and a life sentence imposed.

POINT XI

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. The issues are presented in a summary form in recognition that this Court has specifically or impliedly rejected each of these challenges to the constitutionality of the Florida statute and thus detailed briefing should be futile. However, Appellant does urge reconsideration of each of the identified constitutional infirmities.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors. Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." The statute, further, does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980).

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, 446 U.S. 420 (1980); Witt v. State, 387 So.2d 922, 931-932 (Fla. 1980) (England, J. concurring).

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and factors. See Lockett v. Ohio, 438 U.S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

The failure to provide the defendant with notice of the aggravating circumstances which make the offense a capital crime and on which the state will seek the death penalty deprives the defendant of due process of law. See Gardner v. Florida, 430 U.S. 349, 358 (1977); Argersinger v. Hamlin, 407 U.S. 25, 27-28 (1972); Amend. VI and XIV, U.S. Const.; Art. I, §§9 and 15(a), Fla. Const.

Execution by electrocution imposes physical and psychological torture without commensurate justification and is therefore a cruel and unusual punishment. Amend. VIII, U.S. Const.

The Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law.

The Florida capital sentencing system allows exclusion of jurors for their views on capital punishment which unfairly results in a jury which is prosecution prone and denies the right to a fair cross-section of the community. See Witherspoon v. Illinois, 391 U.S. 510 (1968).

The Elledge Rule (Elledge v. State, 346 So.2d 998 (Fla. 1977)), if interpreted to automatically hold as harmless error any improperly found aggravating factor in the absence of a finding by the trial court of a mitigating factor, violates the 8th and 14th Amendments to the United States Constitution.

The amendment of Section 921.141, Florida Statutes (1979) by adding aggravating factor 921.141(5)(i) (cold and calculated) renders the statute in violation of the 8th and 14th Amendments to the United States Constitution because it results in death being automatic unless the jury or trial court in

their discretion find some mitigating circumstance out of an infinite array of possibilities as to what may be mitigating. Application of this aggravating circumstance to this particular defendant is violative of his constitutional protections against ex post facto laws, since the crime was committed in May of 1979, while the statute was amended in July of 1979. Amend. V, VIII and XIV, U.S. Const.; Art. I, Sec. 9 and Art. X, Sec. 9, Fla. Const. This contention is raised in spite of this Court's holding in Combs v. State, 403 So.2d 418 (Fla. 1981).

It is a denial of equal protection to allow as an aggravating circumstance the fact that the defendant committed a capital felony while on parole and legally not incarcerated, but to prohibit a finding of an aggravating circumstance in the same circumstances for a defendant on probation.

Additionally, a disturbing trend has become apparent in this Court's recent decisions and its review of capital cases. This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction. Quince v. Florida, ____ U.S. ____, 32 C.L. 4016 (U.S. Sup.Ct. Case No. 82-5096, Oct. 4, 1982) (Brennan and Marshall, J.J., dissenting from denial of cert.); Brown v. Wainwright, 392 So.2d 1327 (1981). Appellant submits that such an application renders Florida's death penalty unconstitutional.

In rejecting a constitutional challenge to the statute, the United States Supreme Court assumed in Proffitt v. Florida, 428 U.S. 242 (1976), that this Court's obligation to review death sentences encompasses two functions. First, death sentences must be reviewed "to insure that similar results are reached in similar cases." Proffitt, supra, at 258. Secondly, this Court must review and reweigh the evidence of aggravating and mitigating circumstances to

determine independently whether the death penalty is warranted. Id. at 253. The United States Supreme Court's understanding of the standard of review was subsequently confirmed by this Court when it stated that its "responsibility [is] to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." Harvard v. State, 375 So.2d 833,834 (1978) cert. denied, 414 U.S. 956 (1979) (emphasis added).

In view of this Court's abandonment of its duty to make an independent determination of whether or not a death sentence is warranted, the constitutionality of the Florida death penalty statute is in doubt. For this and the previously stated arguments, Appellant contends that the Florida death penalty statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

BASED UPON the foregoing cases, authorities and policies, Appellant respectfully requests that this Honorable Court grant the following relief:

1. As to Points I, II, IV and V: Vacate Appellant's judgments and sentences and remand for a new trial;

2. As to Point III: Vacate Appellant's judgment and sentence for first degree murder and remand for imposition of a conviction for second degree murder;

3. As to Points VI, VII and VIII: Vacate Appellant's death sentence for the imposition of a life sentence or, in the alternative, for a new penalty phase;

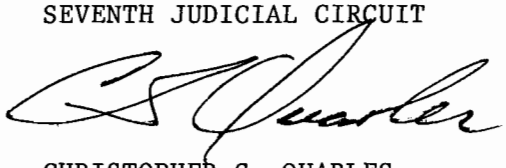
4. As to Point IX: Vacate Appellant's sentences for first degree murder and sexual battery and remand for sentencing as a mentally disordered sex offender;

5. As to Point X: Vacate the death sentence and remand with instructions to impose a life sentence;

6. As to Point XI: Declare the death penalty unconstitutional.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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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 Jim Smith, Attorney General, at his office located at 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014; and a copy mailed to Mr. Bryan Jennings, Inmate No. 073045, Florida State Prison, P. O. Box 747, Starke, Florida 32091, this 17th day of January, 1983.

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER