IN THE SUPREME COURT OF FLORIDA

JAMES FRANKLIN ROSE, )

Appellant, )

vs. ) CASE NO: 63,996

STATE OF FLORIDA, )

Appellee. )



# INITIAL BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

This is an appeal from a sentence imposing the death penalty rendered July 15, 1983, in the Circuit Court of Broward County, Florida. (R-944-947). Notice of appeal was timely filed July 15, 1983 (R-948). The jurisdiction of this Court is based upon Article V, Section 3B 1, Florida Constitution (1972).

References to the record on appeal from the sentencing hearing held on remand from this Court's decision of December 9, 1982, will be referred to by the symbol "R" followed by the appropriate page number in parenthesis.

References to the original record on appeal in this Court's case number 51,724, will be referred to by the symbol OR followed by the appropriate page number in parenthesis.

All emphasis supplied to quotations contained in this brief will be denoted by the symbol "E.S." following the quotation.

## STATEMENT OF THE CASE

This is an appeal from a sentence imposing the death penalty rendered July 15, 1983, in the Circuit Court of Broward County, Florida (R-944-947). Notice of appeal was timely filed July 15, 1983 (R-948).

Appellant was originally tried by jury in Broward County, Florida, in March of 1977, which resulted in a mistrial due to a hung jury on a question of guilt or innocence (R-77-78). Following the hung jury mistrial, the trial judge changed venue to the Thirteenth Judicial Circuit, Hillsborough County, Florida (R-79). Trial by jury was held in May of 1977, resulting in verdicts finding appellant guilty of kidnapping as charged in Count I of the indictment and finding appellant guilty of murder in the first degree as charged in Count II of the indictment (R-105-106). On May 13, 1977, the trial court sentenced appellant to life imprisonment on Count I and imposed the death sentence on Count II (R-131-137). On direct appeal to this Court the judgments of conviction were affirmed in an opinion issued December 9, 1982, but the death sentence was vacated and the cause remanded for a new sentencing proceeding before a jury. Rose v. State, Case No. 51,724, page 7 of slip opinion. The remand for a new jury sentencing proceeding was occasioned by the fact that the trial court gave the jury deadlock charge, known as the "Allen charge" during the penalty phase of the trial after the jury had advised the trial court via note stating that the jury was tied six to six and requesting further instructions. Rose v. State, supra, page 7 of slip opinion. A new jury was impaneled on July 5, 1983, to hear the testimony from the second

trial held in Hillsborough County, Florida, in May of 1977, read to them and for the purpose of returning a recommendation as to penalty. Additional evidence was presented by the state and by appellant, following the reading of the transcript, and the jury returned a recommendation by a vote of eleven to one for the death penalty to be imposed (R-934). On July 15, 1983, the trial court made findings of fact that the jury had recommended the death sentence in an advisory verdict, that the crime for which appellant is to be sentenced was committed while he was under sentence of imprisonment, that appellant had previoulsy been convicted of a felony involving the use or threat of violence to the person, the court noted that it was aware that appellant had been convicted on two other occasions for non-violent felonies, and the court found that pursuant to the statute there were no mitigating circumstances present in the case (R-944-946). The trial court imposed the death sentence upon appellant, concurrently with the life sentence for kidnapping which had previously been imposed (R-946). Notice of appeal was timely filed on the same date (R-948).

Various motions were filed by appellant and legal issues raised during the proceedings on remand which, for clarity, will be listed in the Statement of the Facts portion of this brief.

## STATEMENT OF THE FACTS

In the opinion of December 9, 1982, the court set forth the facts upon which the convictions rested. The death sentence was vacated and the cause remanded to the trial court for further proceedings on grounds set forth by the court as follows:

> Defendant also challenges his death sentence. He contends that the trial court reversibly erred in giving the 'Allen charge' during the penalty phase of the trial. We agree. The record indicates that the charge was given after the jury advised the court by a note which read, 'We are tied six to six, and no one will change their mind at the moment. Please instruct us.' At that point, the trial judge should have advised the jury that it was not necessary to have a majority reach a sentencing recommendation because, if seven jurors do not vote to recommend death, then the recommendation is life imprisonment. There was no reason to give the 'Allen' charge during the penalty phase of the trial. We therefore vacate the death sentence and hold that defendant is entitled to a new sentencing proceeding before a jury. In light of this deposition, we find it unnecessary to resolve the remaining challenges to the death sentence raised by defendant.

Rose v. State, supra, slip opinion at page 7.

At the original jury sentencing proceeding a six to six tie resulted, which this Court held in its prior decision in this case to be a recommendation for a life imprisonment. The trial court in the original sentence to death found two aggravating circumstances, (1) that the appellant had previously been convicted of a crime involving the use or threat of violence, and (2) that the capital felony was committed during a kidnapping (R-131-135). Upon remand the jury returned a verdict recommending the death sentence and the trial court found three aggravating circumstances, again finding the two previously found

and adding the additional finding that the appellant was under a sentence of imprisonment at the time the capital felony was committed (R-944-947). In both sentencing orders the trial court found no mitigating circumstances pursuant to the statute (OR-133-134; R-946).

At the sentencing hearing on remand the trial court instructed on only three aggravating circumstances and as to two of those circumstances the court instructed the jury that the facts constituted the aggravating circumstance (R-927-928). Over objection by appellant's counsel the court advised the jury that a crime committed while a person is on parole is committed by a person under sentence of imprisonment (R-927). The court further instructed the jury that the crime of breaking and entering with intent to commit a felony, to wit: rape, is a felony involving the use or threat of violence to another person (R-927). The other aggravating circumstance on which the court instructed the jury was that is is an aggravating circumstance if the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of kidnapping (R-928).

At the resentencing before the jury the state introduced into evidence over timely objection the information and judgment and sentence in case no. 71-17071, State v. Rose, showing a prior conviction for breaking and entering with intent to commit a felony, to wit: rape (R-698-699). Appellant objected to introduction of those documents in evidence because the judgment was not for a felony involving actual violence or threat of violence to another person, based on Mann v. State, 420 So.2d 578 (Fla. 1982) (R-924-925). Appellant also objected to introduction

of the documents relating to burglaries with intent to commit theft because he had waived the mitigating circumstance of lack of a substantial prior history of criminal activity (R-57-58, 698-700).

The trial judge refused several requests by appellant to instruct the jury on the definition of homicide and the elements of first degree murder both felony and premeditated because it was unknown which basis the jury verdict of guilty was based upon (R-235, 820-821, 823). The trial court denied their request to tell the jury about the definition of homicide and first degree murder on the ground that it was not relevant (R-823).

Appellant objected to evidence of any additional aggravating circumstances than the ones which were found in the original sentencing findings (R-833). This was the subject of a pretrial motion as well (R-917-918). The court denied appellant's motion stating that this would give the defendant something else to appeal (R-37). Appellant renewed his objection at the time of the jury instruction conference at which point it was again denied (R-699-700).

Appellant also requested that the trial court instruct the jury on circumstantial evidence in view of the fact that the prosecuting attorney referred in his opening statement to the evidence being circumstantially sufficient (R-820-821). This request was denied (R-820-821).

During the prosecutor's opening statement reference was made to the state not being able to prove the cold, calculated or premeditated factor because "only one person knows for sure exactly how this crime was committed and that's the accused." (R-247).

Appellant requested a pre-sentence investigation to be made to cover the period from 1977 onward in order to show the appellant's adjustment, his record and behavior during the six plus years of incarceration (R-38). This motion was denied (R-39).

Appellant moved for the trial court to impose a life recommendation on this case on the ground that the error which the Supreme Court found in vacating the original death sentence occurred after the jury had reported in writing to the trial court that it was deadlocked six-six on the penalty question and that the error occurred after the jury reported the tie vote which this Court subsequently held, in its decision originally in this case, to constitute a recommendation for life imprisonment (R-45). The appellant argued that because of the fact that no error occurred until after the jury had made its report of a tie vote that the recommendation given in 1977 was a good recommendation and that the court should construe it as a life recommendation (R-45). The prosecutor objected on the ground that the trial court was bound by the mandate, and the motion was denied (R-45).

Appellant made a motion for discovery relating to sentencing, and the prosecuting attorney agreed at the hearing in provide discovery (R-36).

During the prosecutor's closing argument at the penalty phase he argued by use of the vials containing tissue samples and stated: "These two objects right here, ..., this is Lisa Berry, or part of her. And somebody helped her speak to us through these two items." (R-842). The prosecutor further argued that "She spoke to us" through the pants, through through the blouse, through the autopsy, and through the injuries (R-842-843). The prosecutor offered his personal opinion on the evidence stating Dr. Davis and Dr. Wright's testimony had little to do with anything because, "[I]n my opinion, and obviously in the opinion of the prior jury, [Mr. Rose] committed the crime of murder while he was engaged in the act of kidnapping Lisa Berry." (R-844).

## ISSUE I

THE APPELLANT WAS DENIED A FAIR AND IMPARTIAL JURY SENTENCING PROCEEDING BECAUSE THE STATE EXERCISED ITS PEREMPTORY CHALLENGE PRIVILEGE TO EXCLUDE THE ONLY PROSPECTIVE JUROR WHO, WHILE QUALIFIED TO SERVE, WAS CONCERNED THAT THE DEATH PENALTY BE APPLIED ONLY IN EXTREMELY, EXTREMELY HEINOUS CASES.

During the jury selection in this case Mrs. Marcus expressed during voir dire that she had reservations about wanting to sit on the jury in a capital case. She stated that she would not like to sit on the jury in this case and that she would be uncomfortable (R-210-211). She explained that in other cases that she had seen in her life that they were extremely, extremely heinous for the death penalty to result (R-210-211):

> If the crime was not heinous, cruel or atrocious, but you found that there were two or three other aggravating circumstances and no evidence in mitigation at all, do you feel that you could, in any event, come back with a recommendation for death?
>
> MS. MARCUS: It would make me very uncomfortable to have to do that in any circumstance.
>
> MR. RAY: Would you prefer, due to the unique nature of this proceeding and your feelings on capital punishment, not to be asked to sit?
>
> MS. MARCUS: Yes.
>
> MR. RAY: Okay.
>
> Your Honor, the State would excuse Mrs. Marcus.
>
> THE COURT: Thank you, ma'am. If you would be kind enough to go back downstairs, ma'am.
>
> Juror Number 24, Victor McIntosh, would you take seat four for me, please, sir.

However, on her voir dire she expressed no inability to follow the law, nor any beliefs against the death penalty which would prevent her from following the law.

During the jury selection for this case Mrs. Marcus was the only prospective juror who expressed reservations about the proper use of the death penalty. The other prospective jurors stated, in varying ways, that they had either no reservations about the death penalty or would have "no problem" in voting for the death penalty. None of the jurors were voir dired concerning their ability to recommend life imprisonment according to the court's instructions in a case where first degree murder had occurred. Thus Mrs. Marcus was the sole individual to provide balance in making this jury a representative and the cross-section of the community.

As shown by the above quoted question, the prosecuting attorney, before asking Mrs. Marcus whether she would rather not sit, asked Mrs. Marcus if she could vote for death if the crime were not heinous, cruel or atrocious, thus violating the rule that on voir dire a jury should not be asked how he or she would note on a specific set of facts (R-210).

It is now axiomatic that the jury recommendation in a capital case is for the purpose of representing the conscience of the community. It being essential therefore that the jury be chosen in a manner providing that it can represent a fair cross-section of the community, an excusal by use of a peremptory challenge, just as with a challenge for cause, can deprive the defendant of a jury chosen from a true cross-section of the community. In Witherspoon v. Illinois, 391 U.S. 510, (1968), the

Supreme Court declared that jury selection procedures which prevent those jurors who are able to follow the law from serving on juries in capital cases would prevent defendants from receiving due process of law. No death sentence imposed as a result of a jury so selected can be affirmed. Davis v. Georgia, 429 U.S. 122 (1976).

The Supreme Court decided in Witherspoon v. Illinois that jurors who have scruples against the broadest use of the death penalty, but who are nevertheless not so rigid in their beliefs that they are unable to follow the law to sit impartially in the case, constitute a cognizable group within our society. No systematic exclusion nor absolute exclusion of such persons can be tolerated. Florida's statute has no provision to permit such use of challenges for cause. See Section 913.03, Florida Statutes (1981). Nor does the history of the state's privilege to exercise peremptory challenges permit them to be used to accomplish the same exclusion, as is explained by this Court in Mathis v. State, 31 Fla. 291, 12 So. 681 (1893), where the historical origin and development of the peremptory challenge was set out, 12 So. at 688:

> Originally, at common law, the crown had an unlimited number of peremptory challenges, and in any any criminal case might, by exercising this right, indefinitely postpone the trial pro defectu juratorum. During the reign of Edward I. a statute was passed depriving the king of the right to any challenges except for cause; but under this statute the practice obtained not to compel the crown to show cause against a juror at the time of his challenge, but he was directed by the court to stand aside until the entire panel was gone over, or until enough jurors without objection had been found to make out the requisite number. The defendant was required to challenge or accept the qualified jurors tendered him, and if, after exhausting

> his peremptory challenges, a sufficient number of persons remaining on the list could be procured that were unobjectionable, these were selected, but in case of deficiency the crown was then required to show cause in respect to those jurors who had been directed to stand aside. (e.s.)

If the Court does not accept the assertion that Witherspoon declares such jurors to be a cognizable group in the context of death penalty trials, then the issue is a question of fact. Hernandez v. Texas, 347 U.S. 475 (1954). This Court held in Williams v. State, 228 So.2d 377 (Fla. 1969), that Florida had long recognized that to be a fact, long before Witherspoon. The exclusion of the only person with reservations about the degree of aggravation needed to warrant a death sentence is improper in Florida where our statute "does not preclude one who may find an accused guilty but who has reservations against infliction of the death penalty itself." Wilson v. State, 225 So.2d 321 (Fla. 1969). In Hawkins v. Wainwright, 245 So.2d 865 (Fla. 1971), the Court noted that systematic exclusion is prohibited. The use of peremptory challenge can violate the 6th and 14th Amendments where "the regular practice or custom involving the use of peremptory challenges results in an effective disenfranchisement of a particular class of persons from serving...." United States v. Carlton, 456 F.2d 207, 208 (5th Cir. 1972). Thus under Swain v. Alabama, 308 U.S. 202 (1965), the presumption that prosecutor uses his peremptories to obtain a fair and impartial jury does not apply to death penalty proceedings where the result outlawed by Witherspoon is obtained. The nature of the challenge is irrelevant when it is clear that the purpose of the exercised peremptory was to exclude all such persons.

## ISSUE II

THE TRIAL COURT DENIED APPELLANT A FAIR JURY PROCEEDING ON THE QUESTION OF PENALTY BY DENYING HIS MOTION THAT THE JURY BE INSTRUCTED ON THE DEFINITION OF FIRST DEGREE MURDER, BOTH FELONY AND PREMEDITATED, IN ORDER FOR THE JURY TO UNDERSTAND THE ALTERNATIVE WAYS IN WHICH THE CRIME, FOR WHICH THEY WOULD RECOMMEND A PENALTY, COULD HAVE BEEN COMMITTED.

Appellant timely requested in writing that the trial court read the definition to the jury of murder thus explaining to the jury that first degree murder consists of both felony murder and premeditated murder in order for the jury to understand the alternative ways in which the crime could have been committed in this case (R-235). Appellant's request was denied and appellant renewed his request at the charge conference and argued again at the time the instructions were given that the court should instruct the jury on the definition of felony- and premeditated murder (R-820-823).

Appellant was correct in arguing that the jury in this case was entitled to understand, and that appellant would be prejudiced by the jury not being instructed upon, the alternative factual ways in which the crime of first degree murder could have occurred in this case. The jury that returned the verdicts of guilty did not make any finding, nor was any alternative verdict form provided, from which it could be determined if the verdict was based upon felony murder or a finding of premeditated murder. The capital felony in this case as supported by this Court's original affirmance of appellant's conviction of kidnapping could have been based upon a felony murder theory. Rose v. State at p.5 of slip opinion.

The jury is entitled to know, and must know in order to properly perform its function, the legal significance of the facts and circumstances. Otherwise jury has no adequate basis to measure greater or lesser culpability or the relative weight of the aggravation. Whether the evidence was sufficiently strong for a satisfactory conclusion of premeditated murder or whether the conviction rested more heavily on a finding of felony-murder alone was not irrelevant to this jury's function.

Even though it is possible for a "felony-murder" to be premeditated yet committed during the commission of a felony, this possibility does not obviate the need for the jury to understand the alternative ways in which the conviction for first degree murder could have been based. The jury was not adequately informed that all unlawful homicide is not first degree murder nor that two varying types of first degree murder exist in Florida, each with distinct factual elements.

The prejudice which resulted from the jury knowing no more than the name of the crime is the fact that the jury that did know of the definition of murder voted six to six on the question of penalty. It was only because of the trial court's misunderstanding of the result of the tie vote on penalty, that the convicting jury subsequently returned a death recommendation. Since this Court overturned that recommendation in its original review, there is no question but that appellant has demonstrated prejudice in this record from the trial court's denial of his request to have the jury instructed on the basic legal definition of the crime for which the penalty jury was to recommend a penalty.

## ISSUE III

THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING APPELLANT'S REQUEST TO INSTRUCT THE JURY ON THE RULE OF CIRCUMSTANTIAL EVIDENCE.

Appellant requested the trial court to instruct the jury on circumstantial evidence based upon the fact that the prosecutor argued circumstantial evidence to the jury at the penalty proceeding. During the prosecutor's opening statement to the jury, prior to the reading of the testimony, emphasized that the circumstantial evidence was sufficiently strong to support a verdict of guilty to first degree murder. By arguing the strength of circumstantial evidence to the jury, when it was not proper for appellant to challenge the strength of the evidence, at this proceeding, proceeding, it became imperative for the jury to be instructed upon the special rule of circumstantial evidence.

The verdict finding appellant guilty of first degree murder could very likely have been based upon a felony-murder finding because it would have been necessary for the first jury to have found beyond and to the exclusion of every reasonable doubt that the facts were inconsistent with any possibility of innocence to premeditation for the jury to have convicted upon a premeditated murder basis. Thus, on circumstantial evidence, in view of the fact that the prosecuting attorney argued such legal matter at the penalty proceeding, became an issue at the penalty phase. Appellant should have been given an opportunity for this jury in recommending a penalty to understand that appellant was not necessarily convicted of premeditated murder. It is of course constitutionally required under Lockett v. Ohio, 438 U.S. 586, (1978) that appellant be permitted at the penalty proceeding

in a capital case to proffer any basis arising out of the facts and circumstances of the case upon which a sentence less than death may be predicated. Although the jury in Florida is not the sentencer, this Court has held that the requirements of Lockett do apply at the jury sentencing proceeding where a recommendation is made to the trial court. Songer v. State, 365 So.2d 696 (Fla. 1978).

Accordingly, the appellant did not receive a fair penalty proceeding because the jury was denied the opportunity to be aware of the significance of the circumstantial evidence rule in its evaluation of the aggravated or less aggravated nature of the capital offense for which they were charged with the responsibility of making a solemn recommendation.

## ISSUE IV

THE PROSECUTING ATTORNEY COMMITTED PREJUDICIAL AND FUNDAMENTAL ERROR IN MAKING A REFERENCE TO THE SILENCE OF THE ACCUSED DURING HIS OPENING STATEMENT TO THE JURY.

During the prosecuting attorney's opening statement at the penalty proceeding reference was made to the silence of the accused when the prosecutor stated that the only person who knows for sure exactly how this crime was committed was the accused (R-247):

> [Prosecuting Attorney]: The State does not feel necessarily it can prove that the act was cold, calculated, premeditated without legal or moral justification because only one person knows for sure exactly how this crime was committed and that's the accused.
>
> Thank you.

Although there was no objection to this comment, and ordinarily objection and motion for mistrial would be required for reversal under Clark v. State, 363 So.2d 331 (Fla. 1978), this Court has a special duty in review of death penalty cases to insure that no constitutional violation tips the scales for death.

This responsibility is reflected in the Florida Rules of Appellate Procedure which provide in Rule 9.140(f) that:

> In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial ....

Moreover, the Legislature has provided by statute that this Court "shall" review the entire record of the judgment and sentence of death. Section 921.141(4), Florida Statutes (1981). Several administrative orders including the one in this case

dated August 9, 1983, directing that the complete record be prepared and transmitted to the Court for the purpose of such review of the death sentence imposed.

Accordingly, upon the merits the issue is whether the comment is susceptible of being viewed by a jury as a comment upon the right of the accused to exercise his privilege not to testify. Appellant did exercise his privilege to remain silent during the sentencing proceedings in this case as he did at the original sentencing proceeding.

The above comment, coupled with the failure of the trial court to advise the jury of the definitions of the crime itself, should also be considered in light of the fact that the prosecutor argued the strength of the circumstantial evidence to the jury at the penalty phase of this proceeding. The damaging nature of making reference, assuming arguendo the truth of the statement, that only the appellant knows for sure exactly how the death of Lisa Berry occurred, is that it calls unmistakably to the attention of the jury the silence of the appellant and also tends to place the burden upon the appellant to demonstrate how the death occurred in order to avoid the death sentence contrary to Mullaney v. Wilbur, 421 U.S. 684 (1975). Such a proceeding is inherently and fundamentally unfair under state and federal due process protections. Where the sentence of death is involved such error should be remedied.

## ISSUE V

THE TRIAL COURT PREJUDICIALLY ERRED IN OVERRULING APPELLANT'S OBJECTION TO INTRODUCTION OF THE AUTOPSY PHOTOGRAPH WHEN APPELLANT STIPULATED TO ALL OF THE TESTIMONY CONCERNING THE INJURIES TO THE VICTIM WHICH HAD BEEN INTRODUCED AT THE FIRST TRIAL.

The jury at this proceeding was charged solely with the responsibility of recommending a penalty of life imprisonment or death. This jury was not charged with the responsibility of determining the guilt or innocence of the appellant. In the testimony from Dr. Fatteh, then the chief medical examiner in Broward County, read from the first trial transcript, the medical examiner explained the injuries to the body of the deceased in complete detail. The nature of his testimony as used at this trial was to show historical fact not triable questions of guilt. This jury was not trying guilt or innocence. question

Due to this fact the trial judge had a special duty to weigh the prejudicial nature of any inflammatory photograph. Where it is not relevant to the jury's evaluation of issues before it such photograph is inadmissible. Foster v. State, 369 So.2d 928 (Fla. 1979) requires such photographs to be relevant, not merely cumulative.

Moreover, the Florida Evidence Code, Section 90.403, Florida Statutes (1981), requires the trial courts to balance the danger of unfair prejudice against the relevance in determining whether to admit potentially prejudicial evidence. This applies to both collateral crimes evidence as well as to inflammatory or gruesome evidence. It should be noted that at the guilt trial of this case the trial judge stated expressly that this was "one of the most

gruesome photographs I have ever seen" (R-590). As such, it should have been excluded upon appellant's timely motion from this penalty phase proceeding to avoid an inflammed jury reaction.

The Florida Evidence Code was in effect at the time of this proceeding. It applies to this case because, although not in effect at the time of the criminal trial, Section 90.103(2), Florida Statutes (1981) provides for its application to (1) crimes committed after its effective date, (2) to civil actions pending and (3) to "all other proceedings pending on or brought after October 1, 1981."

This penalty proceeding was neither the trial of a charge of crime nor a criminal proceeding, it was the special penalty jury recommendation which this Court has held does not constitute a criminal proceeding for double-jeopardy purposes regarding overruling a jury's decision in favor of the accused on penalty. Thus, it is a hybrid or quasi-criminal proceeding to which the Evidence Code applied on general evidentiary issues not specifically addressed in Section 921.141. Hearsay is the only evidentiary provision of Section 921.141 that would supersede the Code in penalty trials.

Under the Florida Evidence Code, it is not sufficient for a trial court to simply determine basic relevance. The Court upon timely objection and request as made here is required to balance potential prejudice to the accused against the relevance, whether great or slight, in determining whether to admit inflammatory evidence. This the trial judge did not do (R-65-67,255). This Court must consider whether it was an abuse of discretion to

admit the photograph showing the bloated and deteriorated face and head of the victim of this homicide after she had been dead four days. Nothing could be served on the penalty issues in view of the fact that the trial court did not even instruct the jury on the heinous and atrocious and cruel aggravating circumstance. Nor would it apply anyway under this Court's decisions in Halliwell v. State, 323 So.2d 557 (Fla. 1975), and Pope v. State, Case No. 62,064 (Fla. Oct. 27, 1983) because the deterioration or disposal of the body after a homicide is not relevant to this factor. See also Herzog v. State, Case No. 61,513 (Fla. Sept. 22, 1983).

Thus under both the pre-Code law concerning relevance itself, and according to the post-Code evidence rule requiring a balancing of relevant evidence against the potential prejudice, this Court must find that the trial court abused his discretion in permitting the inflammatory photograph to be admitted as an exhibit for the jury's consideration of penalty. Accordingly, this Court must afford relief by remanding for a sentence to life imprisonment.

## ISSUE VI

THE TRIAL COURT PREJUDICIALLY ERRED IN OVERRULING APPELLANT'S OBJECTION TO INTRODUCTION OF THE CERTIFIED COPY OF THE PAROLE CERTIFICATE ON THE GROUND THAT HE HAD NOT RECEIVED ANY NOTICE THROUGH DISCOVERY OF THE STATE'S INTENDED USE OF THE DOCUMENT AT THE PENALTY PROCEEDING.

Appellant made a motion prior for discovery pursuant to the Florida Rules of Criminal Procedure regarding evidence to be used at the penalty proceeding. Although appellant made a separate motion to be specifically advised of aggravating circumstances, his motion for the application of the discovery rule was separate (R-36).

The prosecuting attorney conceded that there would be "no problem" with providing discovery and agreed to provide discovery to appellant of witnesses and evidence upon which it would rely at the penalty proceeding (R-36). Thus the trial court should not have overruled the objection made by appellant in a timely manner at the sentencing proceeding to the introduction of a copy of a parole certification which presumably was the basis upon which the determination was made that the aggravating circumstance of under sentence of imprisonment was made.

Appellant's objection to the introduction of the document was specifically grounded upon the fact that he had not received any notice through discovery although his timely demand for discovery had been made and had been accepted by the prosecutor as the procedure that would be followed (R-707-708).
The record shows that the prosecuting attorney had led appellant to rely upon the prosecuting attorney's own statement that it would be "no problem" and that the state would provide

appellant with discovery of any evidence that would be used at the penalty proceeding, thus the prosecuting attorney was collaterally estopped from claiming at the mid point of the evidentiary proceeding that the discovery procedure would no longer apply.

The trial court overruled appellant's objection without holding any hearing although stating there was "no prejudice" (R-709). In Richardson v. State, 246 So.2d 771 (Fla. 1971), and Cumbie v. State, 345 So.2d 1061 (Fla. 1977), this Court held that the failure of a trial court to hold a hearing at the time of being apprised of a discovery violation requires reversal and remand for a new proceeding.

Appellant requested discovery to avoid trial by ambush. With no notice of the document upon which an additional aggravating circumstance was found in this case, appellant was deprived of his procedural right as set forth in Wilcox v. State, 367 So.2d 1020 (Fla. 1979), at 1023:

> In this case, had petitioner known what the officer was going to say, he might have successfully excluded the testimony before trial. At the very least, advance knowledge would have given petitioner time to gather rebuttal evidence.

The hearing required by Richardson must involve inquiry of whether "the state's violation was inadvertent or willful, whether the violation was trivial or substantial, and most importantly, what effect, if any, it had upon the defendant's ability to prepare for trial." Wilcox, at 1022. When no hearing is held the error "is reversible as a matter of law." Cumbie v. State, supra at 1062.

## ISSUE VII

THE TRIAL COURT PREJUDICIALLY ERRED IN SUSTAINING THE STATE'S OBJECTION TO EVIDENCE PRESENTED BY A WITNESS FOR APPELLANT, THEREBY DENYING APPELLANT'S RIGHT TO PRESENT ADMISSIBLE EVIDENCE IN HIS BEHALF.

During the testimony of Floyd Templeton, the question was asked by appellant's counsel if appellant had ever talked with Mr. Templeton about the burglary for which appellant had been on parole. The state's objection to that testimony was sustained.

The testimony was not excludable because Section 921.141 (1), Florida Statutes (1981), provides expressly that evidence of the nature of the crime or character of the defendant is admissible "regardless of its admissibility under the exclusionary rules of evidence" provided that the defendant has an opportunity to rebut hearsay statements. This section does not provide that only the state may introduce hearsay at the sentencing proceeding because the statute provides that "any such evidence" is admissible.

It is a constitutional right to present any evidence concerning the background and character of the offender which might be argued to support a sentence less than death. Lockett v. Ohio, 438 U.S. 586 (1978). Since the jury was being apprised of the fact that appellant was on parole and had a prior conviction, it was relevant for appellant to show by any admissible evidence which would indicate that the circumstance was not sufficiently aggravated to warrant a sentence of death. Determination of the weight to be given any aggravation is central to the jury's role. Since Mr. Templeton gave testimony to having worked closely with appellant during the years that

appellant was on parole after having been sentenced for the prior offense, the discussion that appellant had with Mr. Templeton regarding that offense, although hearsay under traditional rules of evidence, was not excludable on the basis of hearsay at the sentencing proceeding. Section 921.141(1) anticipates that the jury can assess the relative weight and credibility of hearsay testimony. The fact that it could be viewed self-serving does not obviate the fact that the Legislature made a policy determination that it was more preferable at capital phase trials for the jury to have in evidence the facts it could evaluate any relevant factors in the offender's background. This is particularly significant since appellant was showing a positive factor regarding the prior difficulty with the law. By preventing testimony from going to the jury that was admissible the trial court erred under the terms of Section 921.141(1) as well as denying the appellant his constitutional right to present evidence relevant to the sentencing decision at the sentencing phase thus violating the Sixth, Eighth and Fourteenth Amendments.

## ISSUE VIII

IT WOULD BE UNFAIR AND ERROR FOR THIS COURT TO AFFIRM THE DEATH SENTENCE WHEN THE JURY THAT TRIED THE EVIDENCE OF GUILT AND INNOCENCE RETURNED A WRITTEN STATEMENT TO THE COURT OF A SIX TO SIX TIE ON PENALTY, WHICH HAS BEEN HELD TO CONSTITUTE A LIFE RECOMMENDATION, WHEN THE CIRCUMSTANCES ARE NOT SUFFICIENT FOR THE TRIAL COURT TO MAKE ANY CONTRARY CONCLUSIONS OF FACT.

It would be erroneous for the court to affirm this death sentence under Florida law because a trial court is limited in enhancement of sentences to making only such factual findings as are consistent with the verdict from the jury.

> The trial judge's view of the evidence may be entirely correct but he is not free to disregard the jury's findings even for the purpose of enhancing a sentence.

Owen v. State, ___So.2d___, 3d DCA Case No. 82-342 (Opinion filed November 8, 1983).

The findings of fact spoken of in Owen are analogous to the jury recommendation in a capital case. The Florida Standard Jury Instructions expressly direct the jury to base its determination to recommend either a life or death sentence upon the evidence of the circumstances and aggravation and mitigation.

The 1981 Edition of the Standard Jury Instructions, Criminal Cases, in no uncertain manner directs the jury to base the advisory sentence "upon the evidence" (p.78), to consider aggravating circumstances "that are established by the evidence" (p.78), to consider the mitigating circumstances "established by the evidence" (p.80), to consider "all the evidence tending to establish one or more mitigating circumstances" (p.81), and to give "that evidence such weight as you feel it should receive"

(p.81), to recommend a sentence "based upon the facts as you find them from the evidence and the law (p.81), and to "carefully weigh, sift and then consider the evidence" (p.81).

In this case a jury has by its written action demonstrated that it had reached a six to six determination of penalty, before being instructed by the trial court to do otherwise, thus a life recommendation was returned by the first jury to sit at a full penalty phase. (OR-1303). The written statement from the first jury was filed just as the verdict should have been. This court held in its original decision upon review of the conviction, Rose v. State, p.7 of slip opinion:

> The record indicates that the charge was given after the jury advised the court by a note which read, 'We are tied six to six, and no one will change their mind at the moment. Please instruct us.' At that point, the trial judge should have advised the jury that it was not necessary to have a majority reach a sentencing recommendation because, if seven jurors do not vote to recommend death, then the recommendation is life imprisonment. There was no reason to give the 'Allen charge' during the penalty phase of the trial.

The decision in Harich v. State, 437 So.2d 1082 (Fla. 1983), makes clear that the first jury's life recommendation should be the advisory sentence upon which the sentence should be based. In Harich, it was contended that the former standard penalty instruction was confusing in stating that a majority was required for a death or life recommendation. The Court held, Harich v. State, supra at 1086:

> The jury returned a death recommendation by a nine-to-three vote, and there is nothing in this record to show that the jury was confused by the instruction. In view of the jury's vote, we find no prejudice." (e.s.)

In the original record of this case it is shown that appellant's jury was tied six-to-six and unable to reach a death recommendation until the erroneous deadlock charge was given, which this Court held to have been unnecessary. In Harich, there was no indication of a tie vote on the advisory sentence. Obviously, there was a life recommendation for appellant where there was not even confusion in Harich.

It is also clear that imposition of a death sentence is an enhancement of the basic penalty for a capital crime. In 775.082, Florida Statutes (1981), the Legislature expressly provided in subsection (1) that a person convicted of a capital crime "shall be punished by life imprisonment"... "unless...", special proceedings are held by the trial court and sufficient findings made to impose a death sentence. In State v. Dixon, 283 So.2d 1, at 7, the Court recognized that the Legislature had "chosen to reserve" the death penalty's application "only to the most aggravated and unmitigated of most serious crimes."

Our present death penalty law is exactly the opposite of the prior death penalty law in Florida where death was the sentence for conviction of a capital offense unless the jury in the exercise of its exclusive authority gave mercy by recommending life to the trial court with its verdict of guilty.

Therefore it can be seen that reduction of a capital case to life imprisonment under the prior law made a life sentence the special sentence which could only be imposed a specified circumstance. Under the present law, however, the sentencing statute has expressly modified the basic sentence for a capital offense to life imprisonment and provided that imposition of the

death sentence is the special enhanced penalty which can be imposed only in specified circumstances. The procedure statute is Section 921.141.

Therefore trial court findings which are inconsistent with the jury's findings can not lawfully be made the basis for enhancement of a sentence. See State ex rel. Cavanaugh v. Coe, ___So.2d___ [8 F.L.W. 2522], holding that a trial court may not refuse to issue a certificate to recover costs on a theory that the court believed the defendant factually guilty when the jury found for the defendant. This rule does not conflict with the authority given a trial judge to exercise considerable discretion in imposing a death sentence, yet the rule that a trial judge is not free to disregard the jury's findings in exercising sentencing discretion shows that the rule is akin to the collateral estoppel or double jeopardy bar and applies to all sentencing. See Fraley v. State, 426 So.2d 983 (Fla. 3d DCA 1983).

Appellant additionally maintains, as had been urged in Douglas v. State, ___So.2d___ and in Johnson v. State, ___So.2d___, that it would not be unconstitutional for a jury recommendation of life imprisonment to be binding upon the sentencing authority of the trial court and that Proffitt v. Florida, 428 U.S. 242 (1976), nor Gregg v. Georgia, 428 U.S. 153 (1976) do not require the Florida procedure for application of the death penalty to include imposition of death sentences when juries recommend life imprisonment.

Under both the Florida and federal constitutions appellant submits that his death sentence cannot constitutionally be affirmed under the double jeopardy clause of the Fifth Amendment, the right to trial by jury provisions of the Sixth Amendment, the concept of cruel and unusual punishment under the Eighth Amendment and the due process clause of the Fourteenth Amendment because it is unfair in this case to base his death sentence upon a death recommendation when the trial jury's vote constituted a life recommendation.

Under the unusual circumstances of this case where the jury which tried the issues, passed upon factual and legal questions determinative of guilt, has reported to the court that its vote was such as to constitute a life recommendation under our law, the finding of that jury takes precedence over any subsequent determination by the trial court or the recommendation of the subsequent specially impaneled jury.

There is no question but that the enhancement of a sentence under Florida law is limited to findings which are consistent with the jury's findings and that the trial court is not free to disregard those findings for the purpose of enhancing a sentence even though the court is convinced that the defendant is factually more culpable than the jury found. Appellant's death sentence should be reduced to life imprisonment under Section 775.082(1), Florida Statutes (1981).

## ISSUE IX

THE COURT PREJUDICIALLY ERRED IN SUSTAINING OBJECTION TO THE QUESTION PROPOSED BY APPELLANT TO THE CHIEF MEDICAL EXAMINER AS TO WHETHER IF THERE HAD BEEN CERTAIN HEAD INJURIES THAT HE AS MEDICAL EXAMINER WOULD BE ABLE TO MAKE A DETERMINATION OF WHAT OBJECT HAD CAUSED THEM.

There was dispute among the three medical examiners who testified regarding this case as to the nature of head injuries sustained by the deceased. Then chief Broward medical examiner Fatteh's opinion was that a forehead injury existed possibly caused by a blow from a blunt object and that the deceased had sustained one or two injuries to the rear of her head causing a fatal basal skull fracture (R-268-269).

Dr. Joseph Davis, the chief medical examiner for the district encompassing Dade County, testified that, by court appointment, he reviewed all of the pertinent autopsy materials and that there was no blow to the forehead and that it was especially doubtful that any injury was caused by a hammer because there was no depressed fracture of the skull (R-772-773).

Dr. Ronald Wright, the chief Broward medical examiner, also participated initially as a consultant in reviewing the original autopsy in 1976 (R-796). Dr. Wright's opinion was that there was no forehead injury, or laceration, and that the decomposition of the area of the forehead was caused by enzyme activity which occurs post-mortum in an area where there is a skin abrasion (R-803-804).

Appellant asked Dr. Wright whether if there had been head injuries that he, as a medical examiner, would be able to make a determination of what object had caused them (R-801). The prosecuting attorney objected, and objection was sustained:

> Q Hypothetically, if there were head injuries from what you observed in your examination of the reports, the photographs and all of the data that you have, could you make any determination as to what type of object caused it?
>
> MR. RAY: Your Honor, I would object. He's already said that he doesn't know if there were head injuries. If he doesn't know if there were or not how could he --
>
> THE COURT: I think we are getting too much into speculation. I will sustain the objection.

As a result, appellant could present only Dr. Wright's testimony that the medical evidence and photographs did not support Dr. Fatteh's opinion. The question of whether an expert pathologist could determine what kind of object caused head injuries if there had been any was a very important question because appellant has a right to show any circumstances of the offense that could arguably suppport a sentence less than death. Lockett v. Ohio, supra.

Moreover, the hypothetical question posed to Dr. Wright by appellant was clearly admissible because it was based upon the evidence, namely the testimony of Dr. Fatteh that there had been blunt trauma head injury but that Dr. Fatteh was not able to determine the kind of blunt object.

Since Dr. Davis also gave evidence concerning the type of blunt object, stating differently from Dr. Fatteh, that it would have been a broad flat object toward which the head was more

likely moving than the other way around, the question hypothetically posed to Dr. Wright was relevant to the dispute among the experts as to the degree of sound opinion that could be formed from the medical evidence as to the type of object that caused the injury to the deceased.

This evidence was admissible and had a high degree of relevance to the advisory sentencing decision. The circumstances of the injury were pertinent to the jury's evaluation of the aggravated nature of the offense. Also it was relevant and admissible under the Sixth Amendment right of the accused in all criminal prosecutions to have compulsary process for obtaining witnesses in his favor. The appellant was denied the opportunity to present his side of the case and fromhaving the jury consider his evidence that showed this homicide was very unlikely to have been caused by a blow from a wielded object in the hand of the appellant. In Washington v. Texas, 388 U.S. 14 (1967), at 19, the Court stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

In Florida it has been established that an expert pathologist is permitted to testify how certain wounds may or may not have been inflicted. Johnson v. State, 314 So.2d 248 (Fla. 1st DCA 1975). Johnson reveals that a pathologist may testify to

the characteristics of types of injuries or wounds so that the jury may be able to determine the ultimate facts based upon all the testimony and evidence. The testimony which appellant sought from Dr. Wright was not a personal view of the case or evidence. It was precisely evidence based upon his stipulated expertise. The appellant was entitled to show that an expert pathologist would be able to determine the kind of object that caused the head injuries as described by Dr. Fatteh. This was particularly important in view of Dr. Davis' testimony.

The trial court erred and departed from the rule set forth in North v. State, 65 So.2d 77 (Fla. 1952), where this Court held that qualified medical testimony may be offered as an opinion whether wounds were consistent with an assault by blunt force.

Not only is North v. State closely on point factually, North held that a qualified witness can be asked whether certain injuries could have been caused in any factually relevant manner. See also, Clemons v. State, 48 Fla. 9, 37 So. 647 (1904), where this Court held that a qualified witness is to be permitted to answer whether a naked fist could have caused certain injuries. It was unfair for the state to present Dr. Fatteh's testimony about how the injury causing the deceased's death could have occurred while disallowing appellant from presenting evidence. The manner of the killing is relevant to the sentencing decision.

Appellant's effort to demonstrate to the jury that the injuries which caused the death of the deceased were not caused by an object wielded in the hand of the appellant was a most

significant, and perhaps the most significant of all, factual issues in this case at the penalty phase. Appellant could not have received a fair determination from this jury of an advisory sentence when he was not permitted to ask the chief medical examiner how much he could determine of what kind of object caused head injuries described by the examining pathologist

The failure of the investigating authorities to preserve or test the blood spot observed on the outside of the van did not totally preclude further analysis and investigation by the defense. (See-R-431,440,447,465,446-447). Both Dr. Wright and the proffered testimony, which was the basis for the continuance motion, revealed that expert analysis could show that the victim was not struck with a hammer and may have been struck by the moving vehicle then transported in it.

No more critical area of inquiry could exist because evidence as to the nature of the homicide and the defendant's actions is a sufficient basis for this Court to reduce a death sentence. See, Taylor v. State, 294 So.2d 648 (Fla. 1974); Slater v. State, 316 So.2d 539 (Fla. 1975), and Thompson v. State, 328 So.2d 1 (Fla. 1976). Contrast Spinkellink v. State, 313 So.2d 666 (Fla. 1975).

## ISSUE X

THE TRIAL COURT DENIED APPELLANT COUNSEL OF HIS CHOICE WHEN THE COURT REFUSED TO APPOINT APPELLATE COUNSEL TO REPRESENT APPELLANT AT THE PROCEEDINGS ON REMAND.

A hearing was held in the trial court April 14, 1983, upon the mandate issued by this Court directing that further sentencing proceedings be held (R-1). A motion was granted permitting Mr. Tom Bush to withdraw (R-13-14). Mr. Bush had withdrawn previously when the direct appeal was taken.

The April 14, 1983, hearing was conducted to determine the status of counsel for the proceedings on remand (R-5-8). Appellant stated his desire that he have the same counsel who handled the appeal be appointed for him during the remand (R-12). The trial court refused (R-12):

> THE DEFENDANT: That's one of my concerns. I believe Mr. Carres is here. He's worked on my appeal. If the choice came down whether it was Tom or another lawyer I would, myself, if I could request Mr. Carres to help me if he could or even be co-counsel, but the problem is him taking co-counsel, he's out of Palm Beach and he's a Public Defender. So, I don't know if he could get off or get away to do that.
>
> THE COURT: I won't appoint him as a trial lawyer because I don't know anything about him. He's a good appellate lawyer obviously.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: I'm not confident he is a qualified trial lawyer. I won't do it.

The trial court then declined to appoint an attorney named Bruce Lyons who was requested by Mr. Bush on behalf of appellant (R-17-21). Appellant then requested that Mr. Bush be re-appointed and allowed to withdraw if appellant could obtain other private counsel, but the court rejected this request

(R-17-18). Mr. Bush requested the court to appoint a private attorney instead of the public defender's office out of a concern that appellant would "not receive the representation that he should because of the complexity and the length of the transcript" (R-18-19).

As a result of this hearing, the trial court ex parte and sua sponte determined to appoint a private practitioner named Michael J. Entin who had "never gotten that far" to have had experience in a capital penalty trial (R-825).

The trial court had the duty of appointing an attorney for appellant because appellant had remained insolvent since shortly after the first trial which ended in mistrial due to the jury's inability to agree on a verdict (OR-74-76, 1310A). In circumstances where the Public Defender's office in the circuit cannot represent an indigent because of conflict, Section 27.523(3)(b) permits the court to appoint a Public Defender from another circuit. In Messer v. State, 384 So.2d 6454 (Fla. 1980), on rehearing this Court directed appellate counsel to continue to act as counsel and stated, at 645:

> When this Court, during the pendency of an appeal from a judgment imposing a sentence of death, orders a hearing on the issue of whether the sentence was imposed in consideration of any information not disclosed to the appellant, such hearing is a part of the appellate process and it is proper for appointed appellate couonsel to represent the appellant at such hearing.
>
> The trial court shall hold a further hearing to determine whether the sentence of death was imposed in consideration of any information not disclosed to the appellant or any reports not furnished to him prior to sentencing, and the

> Public Defender of the Second Judicial Circuit is hereby directed to represent the appellant at the hearing.

In Costello v. State, 260 So.2d 198 (Fla. 1972), the Court recognized that a defendant's request was granted and prior appointed counsel was dismissed when Mr. Tobias Simon came into the case as counsel on appeal.

Since counsel had to be appointed the court abused its discretion in denying appellant available counsel of his choice in either Mr. Carres, the assistant public defender who had represented appellant on appeal, or in Mr. Bush, who had represented appellant at the previous trials, both of whom were available as shown above.

Appellant's concerns about inexperienced counsel were well-founded as the appointed attorney had no experience and was unprepared to present all the desired evidence on July 5, thus necessitating a second continuance motion, which was denied, resulting in appellant not having available certain evidence to mitigation which counsel proffered in his motion but was prepared to present to the advisory jury. Appellant was prejudiced by this change of counsel.

## ISSUE XI

THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING THE MOTION MADE BY APPELLANT FOR AN UPDATED PRE-SENTENCE INVESTIGATION REPORT FOR A CONSIDERATION BY THE JUDGE IN DETERMINATION OF SENTENCE.

The appellant filed a written motion for preparation of a pre-sentence investigation report (R-888-890). A hearing was held on the motion on May 11, 1983 (R-38-39). Appellant argued that he needed a pre-sentence investigation to develop material subsequent to the original sentencing in 1977 and that due to the insolvency of the appellant he would be unable to prepare comprehensive information for the trial court concerning this portion of appellant's background in order to show grounds for the court to find mitigation (R-38-39,888-889). The trial court denied the motion on the ground that those matters were appropriate for presentation during the advisory stage of the trial, and the court noted that it had never ordered a pre-sentence investigation in a capital case (R-38-39). This Court in In Re: Florida Rules of Criminal Procedure 3.710, 362 So.2d 655 (Fla. 1978), held in revising the rule of procedure that a pre-sentence investigation in capital cases is available as a discretionary tool which the trial judge may utilize but that such report is not required. Of course it is well known that the state pre-sentence reports have frequently been requested and utilized by trial judges in determination of sentencing in capital cases. See, for example, Harvard v. State, 375 So.2d 833 (Fla. 1979), Meeks v. State, 364 So.2d 461 (Fla. 1978); Songer v. State, 365 So.2d 696 (Fla. 1978).

As appellant urged in his motion the denial of a pre-sentence investigation report would deprive the appellant, who was at the time of this remand for a new sentencing hearing, insolvent, the right to an equal opportunity to present relevant evidence concerning the last six years of his life. Due to the fact that appellant was unable to independently prepare a report showing the positive aspects of his incarceration and character, which was in the sole possession of the state as appellant was in the state's custody during this time, the trial court abused its discretion in this instance in denying the appellant the benefit of such a report. Moreover, as appellant urged in the trial court it was a denial of due process and equal protection of the laws to permit some capital defendants to have the benefit of a pre-sentence investigation while trial courts are authorized to deprive others of this benefit (R-888-889). On this ground also the trial court erred in a manner prejudicial to the appellant in the denial of his motion for a pre-sentence report.

## ISSUE XII

PREJUDICIAL AND INFLAMMATORY ARGUMENT WAS MADE BY THE PROSECUTOR TO THE JURY WHICH DENIED APPELLANT A FAIR AND IMPARTIAL JURY ADVISORY PENALTY PROCEEDING.

During the prosecutor's closing argument at the penalty trial the prosecutor made an appeal to the jury's sympathy, stated his own personal belief and used as testimonial evidence the verdict of another jury concerning how the crime occurred, and utilized inflammatory references and argument in urging the jury to recommend the death penalty.

> [THE PROSECUTOR]: Cookie Beard, Christine Flowers, Judy Greear, they all got up there and said, you know, he's a nice guy, really. He's good to kids. He takes them to the pool. What would Lisa Berry say about Jim Rose if she was here? Well, she said these things. These two objects right here, referring to State's Exhibits 37 and 35, this is Lisa Berry, or part of her. And somebody helped her speak to us through these two items. They said this is my blood and it's type B. Only 11 percent of the population has it.
>
> She spoke to us further through these pants. And the left leg she said this is type B blood that was found. On the right leg she spoke, this is type B blood. Jim Rose also, by his blood type, indicates that it wasn't his blood because his blood type is A. Lisa Berry spoke to us through the blouse that was found in Jim Rose's car when he kidnapped her. So, Lisa Berry was here. She spoke to us through the autopsy, through the injuries she sustained, the two severe blows to the back of the head, that incidentally were agreed to by Dr. Davis, but Dr. Wright, you know, I don't know what he knew.
>
> (R-842-843)

The exhibits number 35 and 37 which the prosecutor referred to in the above argument were the tissue and blood samples utilized from the autopsy to determine the blood type of the deceased. The inflammatory argument and appeal to sympathy

contained in the above argument of the prosecutor where he referred repeatedly to the deceased speaking to the jury through the blood, through the pants, through the blouse and through the autopsy is the kind of highly prejudicial and extensive appeal to prejudice and use of inflammatory argument which this Court has condemned. The combination of utilizing the inflammatory exhibits, including them into an inflammatory context of the victim speaking, and asking rhetorically what Lisa Berry would say was the kind of argument designed to detract the jury from a dispassionate consideration of the circumstances determinative of the penalty. In Wilson v. State, 294 So.2d 327, at 328-329 (Fla. 1974), this Court held that in the absence of objection, where improper comments affecting the impartiality of the proceeding are such that neither rebuke nor retraction would destroy their sinister inference that reversal is required. In Thompson v. State, 318 So.2d 549 (Fla. 4th DCA 1975), it was held that particular attention must be paid to improper comments in a close case where appeals to prejudice take on added weight. Such is the case here where the death of a child is involved. All who can readily sympathize and understand the particular grief and tragedy of such a homicide must also recognize that such an appeal to inflamed emotions tends to destroy the impartiality and fairness of the jury's advisory recommendation. This Court in State v. Dixon, supra, held that it is the responsibility of the judge in determining sentence to check against an inflamed penalty argument by utilizing the power to impose a life sentence.

In addition to the appeal to sympathy and use of inflammatory argumentation, the prosecutor also gave his personal opinion and utilized as a testimonial another jury's decision in arguing for the death penalty in this case where the prosecutor stated the following (R-844):

> [THE PROSECUTOR]: I would submit to you that the testimony of Dr. Davis and Dr. Wright really has little to do with anything because Mr. Rose, in my opinion, and obviously in the opinion of the prior jury, committed the crime of murder while he was engaged in the act of kidnapping Lisa Berry.

The above argument was more than a prefactory statement to items in evidence. It was instead the assertion of opinion by the prosecutor and use of "the opinion of the prior jury" as superior evidence to the testimony of Dr. Davis and Dr. Wright. This argument is likewise improper and prejudicial. See Edwards v. State, 288 So.2d 540 (Fla. 2d DCA 1974), and Coleman v. State, 215 So.2d 96, at 98 (Fla. 4th DCA 1968).

In the context of the closing argument in this case, the above improper appeal requires reversal under Pait v. State, 112 So.2d 380 (Fla. 1959), and Grant v. State, 171 So.2d 361 (Fla. 1965). As held by this Court in Singer v. State, 109 So.2d 7 (Fla. 1959), the defendant is entitled to a fair and impartial proceeding as to sentence just as he is entitled to on guilt or innocence. While it is the duty of the prosecutor to refrain from improper acts or comments, and while objection to such comments should be made, this Court has held that such comments require reversal for a new proceeding because where the inflammatory and improper effect cannot be erased by retraction or rebuke, the proceeding is fundamentally tainted. Sherman v.

State, 255 So.2d 263 (Fla. 1971). See also Akin v. State, 86 Fla. 564, 98 So. 609 (1923). In Stewart v. State, 51 So.2d 494 (Fla. 1951), this Court held that it is also the duty of the trial court to restrain and rebuke counsel who indulges in improper argumentation. See also Reed v. State, 333 So.2d 524 (Fla. 1st DCA 1976). As Justice Terrell stated in Stewart v. State, supra, at 495: "The trial of one charged with crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperment." As this Court stated in Teffeteller v. State, ___So.2d___, Case No. 60,337 (Fla. October 25, 1983), if this Court cannot determine that the needless and inflammatory comments by the prosecutor did not substantially contribute to the jury's advisory recommendation of death at the sentencing phase that reversible error is committed and that the trial court's failure to use its discretion to control such arguments will result in reversal where clear abuse has been shown.

The following rule stated by this Court in Teffeteller v. State, supra, quoted from the decision in Pait v. State, supra, at 385-386 requires reversal of appellant's death sentence:

> We think that in a case of this kind the 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 ...[sentence] must be reversed.

The failure of the trial court to check the remarks as required by this Court's decision in Barnes v. State, 58 So.2d 157 (Fla. 1951), as well as the cases stated above, in addition

to the fact that the remarks were so inflammatory, contained an appeal to sympathy, and included the personal testimony of the prosecutor and the prior jury, require overturning of the death recommendation because such remarks were so extensive in this case and so harmful to a dispassionate consideration of penalty that retraction, rebuke or cautionary instruction would not have entirely destroyed the influence of the argument. Thus under Blair v. State, 406 So.2d 1103 (Fla. 1981) the remarks may well "have influenced the jury to reach a more severe verdict," in this case on penalty, than otherwise it would have.

## ISSUE XIII

THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING A CONTINUANCE TO APPELLANT FOR COMPLETION OF PREPARATIONS FOR THE SENTENCING HEARING.

On July 5, 1983, appellant made a second motion for continuance (R-50-54). Appellant had received one prior continuance on May 11, 1983, when counsel had been appointed for twenty-three days and had not yet completed reading the written record in the case (R-30-35). At that time it was explained to the trial court that the counsel who was appointed had plans to get married on June 7 and to take a honeymoon (R-34).

On July 5, 1983, counsel for appellant explained in his motion for continuance that he had only the prior week talked with Dr. Wright, the medical examiner, and with a bloodstain analyst named Judy Bunker and that they had explained to appellant's counsel that the physical evidence did not appear consistent with the beating of the deceased with a hammer or any object in or outside the van (R-51-53).

Counsel for appellant explained that this evidence was "new and different evidence that was never used at the first trial." (R-53-54). Appellant further explained that prior counsel for appellant, Mr. Bush, "never explored these areas even once." (R-53). It was further shown that this evidence would show as mitigating evidence other ways that the death of the deceased could have happened consistent with the verdict of guilty (R-54). Counsel stated it took him five weeks to read the case and that he had used federal express to send photographs to the bloodstain analyst, had added Dr. Wright and Judy Bunker to the witness list, and had been seeking photographs which had been reviewed by

Dr. Wright and Dr. Davis in Miami at the time of the original autopsy (R-52-53). Appellant further showed that the additional investigation and evidence which was necessary for him to be prepared was to complete the consultation with the expert witnesses that he had mentioned, for a luminol test to be performed on the seat of the van in order to show "all of the blood in the various portions of the van which would show possibly whether it was done intentionally or accidentally" (R-55). The prosecutor conceded that certain photographs were missing and stated that he could look through his file again, that there were two boxes of files, in order to see if there were any more photographs that could provide any further information concerning the deceased's injury (R-56). The prosecuting attorney indicated that he had not had a chance to discuss the case with Dr. Wright at any length, and he did not argue in opposition to the continuance motion (R-56). The trial court denied the motion (R-56).

It is well-established that as a universal rule lying at the root of constitutional liberties that a defendant is entitled to adequate time for preparation of his defense. Valle v. State, 394 So.2d 1004 (Fla. 1981). In Coker v. State, 82 Fla. 5, 89 So. 222 (1921), an accused to trial without permitting preparation for his defense is a serious error. In view of the fact that the prosecuting attorney stated on May 11, 1983, when the first continuance was requested that the state would not be prejudiced by the continuance, and in view of the fact that the state did not argue against a continuance on July 5, the ground stated by appellant in support of his motion for continuance should have

been treated with the dignity that representations of counsel are normally accorded. Effective assistance of counsel reqeuires adequate preparation, not just representation. Martin v. State, 363 So.2d 403 (Fla. 4th DCA 1978). The record supports the statement by counsel for appellant that he was unprepared to give adequate representation at the July 5 hearing date due to the demonstrated uncompleteness of essential preparation.

According to the decision in Kimbrough v. State, 352 So.2d 925 (Fla. 1st DCA 1977), not only is timely appointment required but also an opportunity to prepare sufficiently for counsel to fulfill the constitutinally assigned role of seeing to it that all "available defenses are raised." These rules concerning preparedness apply both to the trial of the charge as well as to the penalty proceedings. The right to effective counsel applies at all critical stages of the proceedings. Francis v. State, 413 So.2d 1175 (Fla. 1982). The right to counsel, which includes effective and prepared counsel, is one of the fundamental rights. Witt v. State, 387 So.2d 922 (Fla. 1980), Powell v. Alabama, 287 U.S. 45 (1932). Counsel for appellant showed both that he was unprepared and specifically proffered those matters upon which he needed reasonable further time for preparation. It was an abuse of discretion to routinely deny the motion for continuance in the face of these representations when counsel showed in a detailed manner the areas in which further preparation was required. Cf. Morris v. Slappy, 103 S.Ct. 1610 (1983).

## ISSUE XIV

THE TRIAL COURT PREJUDICIALLY ERRED IN INSTRUCTING THE JURY THAT APPELLANT WAS UNDER SENTENCE OF IMPRISONMENT AS A MATTER OF LAW UNDER THE EVIDENCE.

The trial court instructed the jury upon only three of the aggravating circumstances, those being the ones the trial court concluded were applicable. The court instructed under Section 921.141(5), Florida Statutes, (1981), upon circumstances (a) that the capital felony was committed by a person under sentence of imprisonment, circumstance (b) that the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person, and (d) that the capital felony was committed while the defendant was engaged, or was attempting to commit, kidnapping.

Of those three circumstances the trial court instructed the jury that circumstances (a) and (b) were legally applicable. As to the third circumstance of kidnapping, the jury was instructed that the first jury's verdicts as to guilt were binding upon them. These instructions resulted in the jury being directed to find the three aggravating circumstances, the practical effect being a directed judgment for the state on aggravating circumstances at the advisory jury phase. This has not previously been sanctioned by this Court.

This Court directed trial courts in the 1981 revision of the Florida Standard Jury Instructions in Criminal Cases, page 78, to instruct the jury whether a particular prior crime is a felony involving the use or threat of violence to a person because that

determination "is a matter of law," the jury thus should have the benefit of a legal instruction on the nature of a prior felony introduced as evidence of the existence of that particular aggravating circumstance.

However, this Court has not placed any direction in the jury instructions for the trial court to instruct the jury that being on parole is the same as being under a sentence of imprisonment. Although this Court held after the original sentencing, Aldridge v. State, 351 So.2d 942 (Fla. 1977), that the status of parole permits finding aggravation, an instruction to the jury that it exists as a matter of law preempts the jury's consideration. It is the role of the jury to assess the relative weight and degree of aggravation. This includes evaluating whether appellant's parole status, under all of the circumstances of the case, are sufficiently strong to equal being under sentence of imprisonment. Even if the jury could have found that the circumstance existed, the weight to be given that circumstance should remain solely within the domain of the advisory jurors in making a recommendation for the trial court to consider. The instruction precluded the jury from making this assessment fully on their own.

It was also error for the court to instruct the jury that the circumstance of the defendant being under sentence of imprisonment applied in this case because that circumstance was not found by the court in its original sentence in this case. Since the findings in aggravation are essentially additional elements necessary to be proven by the state and found by the trial court to support a death sentence, State v. Dixon, supra,

the inclusion of an additional aggravating factor not found by the trial court violates appellant's right against being twice placed in jeopardy. Appellant's motion to preclude use of that circumstance on those grounds should have been granted (R-917-918). Bullington v. Missouri, 451 U.S. 430 (1981). This issue is presently pending on certiorari review by the Supreme Court in Arizona v. Rumsey, 33 C.r.l. 4165, reviewing a decision in Rumsey v. State, 665 P.2d 48 (Ariz. 1983), holding that a remand for the finding of an additional aggravating circumstance in a capital case violates the guarantee against being twice placed in jeopardy. Moreover, since no additional facts existed at the time of the second proceeding than existed at the time of the original sentencing proceeding, the finding of this additional aggravating circumstance violates North Carolina v. Pearce, 395 U.S. 711 (1969), which requires an order to dispel any appearance of vindictiveness under the due process clause that the reasons for a more severe sentencing decision on remand must affirmatively appear in the record and must be based upon objective information of identifiable conduct "occurring after the time of the original sentencing proceeding." Id. at 726. See also Justice White, concurring opinion, stating that any increase in sentence must be based upon "objective, identifiable, factual data not known" at the original sentencing. Id. at 751. Appellant submits that this principle applies fully to additional findings in aggravation made on remand in a capital case.

## ISSUE XV

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON ALL OF THE AGGRAVATING CIRCUMSTANCES AS REQUIRED BY THIS COURT'S DECISION IN COOPER V. STATE, 336 SO.2d 1133, (FLA. 1976).

Contrary to this Court's holding in Cooper v. State, 336 So.2d 1133 (Fla.1976), the trial court instructed the jury on only three of the aggravating circumstances contained in Section 921.141(5), Florida Statutes (1981). In Cooper at 1140, this Court stated as follows:

> The Legislature intended that the trial judge determine the sentence with advice and guidance provided by a jury, the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors. If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be preconditioned by the judge's view of what they were allowed to know. The judge should not in any manner inject his preliminary views of the proper sentence into the jurors' deliberations, for after the jury has rendered its advisory sentence the judge has the affirmative duty to decide the sentence in the context of his exposure to the law and his practical experience.

The advisory function of the jury in the present case was limited by the trial court instructing only on three aggravating circumstances. Thus the jury was deprived of any opportunity to consider the applicable circumstances in the context of the full list of aggravating circumstances that may apply in capital cases. The jury thus could not weigh the relative weight of the

total aggravation in this case in the light of possible aggravations, or types of aggravations, involved in capital sentencing determinations under our statute.

The failure of the trial court to instruct the jury on all of the aggravating circumstances, coupled with the fact that the jury was instructed by the trial court that two of the three applied as a matter of law while the third, the kidnapping factor, applied automatically by virtue of the original jury verdict of guilt. Thus, the error in failing to instruct on the full list of aggravating circumstances was prejudicial to appellant in this advisory proceeding because they were directed and bound to follow the instructions to apply three of the three circumstances they were informed about. This narrowed the focus of the jury's understanding to such an extent that the jury could not consider how the circumstances in this case might compare or relate to the kinds of aggravation that might otherwise exist in other cases where a capital verdict has been returned. the jury's ability to evaluate the overall weight of the aggravation was so truncated by the narrow range of aggravating circumstances instructed upon that appellant was denied a fair penalty proceeding and had no practical opportunity to obtain a life recommendation from the specially impaneled jury.

## ISSUE XVI

THE COURT SHOULD REDUCE APPELLANT'S SENTENCE TO LIFE IMPRISONMENT OR REMAND FOR RECONSIDERATION OF THE SENTENCING DECISION BY THE TRIAL COURT ON THE BASIS OF A JURY ADVISORY LIFE RECOMMENDATION.

This Court did not review the sentence in its previous decision in this case as the court noted that it need not reach the sentencing issues as a result of its order remanding for a new advisory jury proceeding. At this proceeding the appellant had no practical opportunity to secure a life recommendation because this specially impaneled jury was not instructed on the elements or definition of homicide thus did not know that there was such a thing as felony murder and could not consider the kidnapping verdict as an indication that the trial jury could have found guilt based upon felony murder.

A reduction to life imprisonment or remand for resentencing based upon consideration of a life recommendation advisory verdict is required on the ground that this Court's decision in this case held that a six-six tie from a jury constituted a life recommendation. Thus it violates the double jeopardy clause for appellant to be required to obtain another life recommendation in his favor in order to have his sentence determined on the basis that a trial jury recommended a life sentence. The jury in this case reached a result, unlike the jury in Richardson v. State, 437 So.2d 1091 (Fla. 1983), where the unusual circumstance occurred that the trial jury became disqualified from being impaneled for the advisory sentencing proceeding. The statute prefers the use of the advisory recommendation from the trial

jury by providing in Section 921.141(1), Florida Statutes (1981), that the proceeding be conducted "before the trial jury" as soon as practicable and allowing a special jury only in one specified circumstance. That circumstance is only where the trial jury cannot "through impossibility or inability" reconvene for a hearing on the issue of penalty. Thus Richardson was such a case while the present one is not.

Appellant's trial jury returned a written sentence to the trial judge of the fact that the jury had securely formed a six to six vote. That statement was returned in writing to the trial court and it contained a request for instructions because the vote was not otherwise expected to change. In that circumstance, as this Court has determined, the six to six determination of the trial jury constitutes a life recommendation. Thus the relief ordered by the court should have been a resentencing based upon the life recommendation or reduction of sentence to life imprisonment. It was only the directions given to the original trial jury that prevented the jury from returning the six to six vote as the recommendation of the jury, which it is apparent would have been done if the jury had been properly instructed that it could do so.

Only this Court can change the relief ordered in its prior mandate, but since this is the first direct appeal from the actual sentencing decision, this is the appropriate proceeding for this Court to do so. The established rule that the lower court cannot deviate from the mandate of the appellate court also provides the exception that the reviewing court can, in rare but appropriate circumstances, reopen for discussion an issue decided

on the prior appeal. Strazzulla v. Hendrick, 177 So.2d 1 (Fla. 1965). The rule of law of the case applies only to questions actually decided on the prior appeal. Rogers v. State, 156 Fla. 161, 23 So.2d 154 (1945), but when the mandate on the prior appeal contains error, confusion or the interest of justice require modification the appellate court is not bound to follow its own error when its jurisdiction over the issue is properly invoked in a subsequent appeal. While this power of subsequent review may be a matter of grace as opposed to a matter of right, in a subsequent appeal such as the present case involving the first appellate review of the propriety of the death sentence, it is clearly appropriate for the court to exercise its own self-supervisory power. See State v. Williams, 198 So.2d 21 (Fla. 1967) at 23, where the Court stated that the rule that assignments or issues will usually not be considered where not properly presented in cases where they "do not involve fundamental error or capital punishment."

It does not denegrate the jury that sat and recommended by a six to six vote against the death penalty in this case for their recommendation to be followed. See Richardson v. State, supra, at 1095. The first jury reached a six to six vote; it was legally acceptable; it would denegrate the statutory provision as well for the jury that tried the case and returned a life recommendation to be ignored in favor of a subsequent jury's death recommendation when no cause necessitated a new jury proceeding, and this Court should not countenance it in this case either.

## ISSUE XVII

IT WAS PREJUDICIAL ERROR FOR THE TRIAL COURT TO OVERRULE OBJECTION TO INTRODUCTION OF EVIDENCE OF PRIOR CONVICTIONS AT THE ADVISORY SENTENCING PROCEEDING AND ERROR TO FIND THAT APPELLANT HAD BEEN CONVICTED OF A PRIOR CRIME INVOLVING VIOLENCE.

Appellant moved in writing prior to the trial to exclude evidence of the prior conviction of burglary of a dwelling with intent to commit a felony, to wit: rape (R-924-925). Appellant also moved in a separate motion to exclude evidence of two prior convictions, one in 1964 and one in 1971, for burglary with intent to commit petty larceny and grand theft, respectively (R-915-916). These motions were denied, and appellant timely and properly objected at the time the evidence was admitted (R-699-700).

Appellant waived reliance upon the statutory mitigating circumstance of lack of a substantial history of prior criminal activity (R-57). Appellant was entitled to waive this mitigating circumstance and thereby preclude evidence of non-violent prior felonies from being introduced at the penalty phase. Maggard v. State, 399 So.2d 973 (Fla. 1981) at 978.

The prior conviction of burglary with intent to commit a felony, to wit: rape, did not qualify as an aggravating factor and was erroneously found as such by the trial judge. Appellant was prejudiced at the sentencing hearing by its introduction into evidence and its use in argument by the prosecutor as a ground for recommendation of the death penalty. In Mann v. State, 420 So.2d 578 (Fla. 1982), this Court determined that the sufficiency of the evidence to establish existence of that circumstance is a

matter of law. The Florida 1981 revision of the Standard Jury Instructions in Criminal Cases specifically direct the trial judge that determination of whether a prior conviction involves a capital felony or a felony involving the use or threat of violence to another person is a matter of law. Thus the jury should be instructed accordingly when such a conviction is used at the penalty phase.

The method to determine which prior felony offenses involve the use or threat of violence was decided by this Court in Mann, 420 So.2dat 581 as follows:

> We hold that a prior conviction of a felony involving violence must be limited to one in which the judgment of conviction discloses that it involved violence.

This prevents the penalty trial from being a retrial of the alleged circumstances of some prior offense. Additionally, it limits the circumstance to a clearly defined category of offenses.

The evidence could constitute this aggravating circumstance. It was prejudicially admitted into evidence. It was improperly found as an aggravating factor. In Mann the Court noted that if he had been convicted of sexual battery, the factor would apply. This aggravating factor, then, applies when "the judgment of conviction" shows that "it involved violence," not in instances where the intent if ultimately carried out would have lead to violence or where if some other crime occurred violence would have been involved.

The actual conduct of the defendant as shown by the conviction is the determinative criteria. Mann v. State, supra.

In interpreting this aggravating circumstance the Court has adhered to the requirement that the section refers to "life threatening crimes in which the perpetrator comes in contact with a human victim." Lewis v. State, 377 So.2d 640 (Fla. 1979). In Lewis the Court held that possession of a firearm during commission of a felony is not a prior conviction that would qualify for this aggravating circumstance. In Provence v. State, 337 So.2d 783 (Fla. 1976), this Court held the circumstance is lilmited to convictions, not prior arrests or accusations. It is limited to matters inherent in the prior judgment of conviction as this Court held in Mann, not to matters not encompassed within the conviction as shown in the judgment.

Appellant's prior conviction of burglary with intent cannot qualify to establish the aggravating circumstance for which it was used. It was not established beyond a reasonable doubt that the felony involved the actual use or threat of violence to a person as required for proof of an aggravating circumstance under Williams v. State, 386 So.2d 538 (Fla. 1980).

Accordingly, this Court must find that the penalty proceeding was unfairly tainted by use of these prior convictions which were inadmissible because appellant waived mitigating circumstance (a) and the factors were not sufficient as a matter of law to establish the aggravating factor of a prior felony conviction involving the use or threat of violence.

## CONCLUSION

Wherefore the Court should reduce the sentence to life imprisonment or remand for resentencing by the trial court based upon a jury advisory sentence of life imprisonment.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by courier to JOY SCHEARER, Assistant Attorney General, Room 204, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida 33401, this 2nd day of December, 1983.