IN THE FLORIDA SUPREME COURT

IRA MARTIN AMAZON, :

Appellant, :

vs. : Case No. 64,117

STATE OF FLORIDA, :

Appellee. :

:

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

INITIAL BRIEF OF APPELLANT

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

W.C. McLAIN
ASSISTANT PUBLIC DEFENDER
CHIEF, CAPITAL APPEALS

Hall of Justice Building
455 North Broadway Avenue
Bartow, Florida 33830-3798
(813)533-0931 or 533-1184

COUNSEL FOR APPELLANT

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STATEMENT OF THE CASE

On December 7, 1981, a Pinellas County grand jury returned an indictment charging Ira Martin Amazon with two counts of first degree murder for the death of Joy J. Chapin and Jennifer Chapin. (R8-9) The State Attorney, on December 8, 1981, filed an information charging Amazon with burglary of the Chapin residence and sexual battery upon Joy Chapin. (DCR1-2)[1/] These crimes were committed at the same time as the murders. (R1-2, 8-9)(DCR17-18) On January 6, 1982, Amazon filed a written plea of not guilty on the two murder charges (Cir.Ct.Case No. 81-9622 CFANO). (R27) Amazon appeared before Circuit Judge Thomas E. Penick, Jr. on April 26, 1982, and pleaded guilty to the burglary and sexual battery charges (Cir.Ct.Case No. 81-9620CFANO). (DCR12-20) Judge Penick accepted the plea on that date, but withheld adjudication of guilt. (DCR20)

After entering guilty pleas to the burglary and sexual battery charges, Amazon moved to dismiss the murder charges on double jeopardy grounds because he had been placed in jeopardy when he entered guilty pleas to the underlying felonies. (R47-53) Circuit Judge Penick denied the motion. (R84) Amazon filed a petition for writ of certiorari in the Second District Court

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[1/] References to the record on appeal will be designated with the prefix "R." A supplemental record filed in this case is a copy of the record on appeal filed in the Second District Court of Appeal in Amazon v. State, Circuit Court Number 81-9620CFANO. References to this supplemental record will be designated with the prefix "DCR."

of Appeal seeking review of the double jeopardy issue. The petition was denied without prejudice to raise the issue on appeal. (R144-145)

Amazon proceeded to a jury trial on the indictment containing two counts of first degree murder. (R738-2426) The jury found him guilty (R182-183,2135-2136), and after hearing additional evidence, the same jury recommended life sentences for the homicides. (R199-200,2419-2420) Circuit Judge Penick delayed sentencing. (R2423-2425)

On December 8, 1982, Judge Penick adjudged Amazon guilty of the two murders and sentenced him to death. (R239-243, 2439-2442,491-499) He found five aggravating circumstances: (1) the homicides occurred during the commission of a burglary, sexual battery and kidnapping; (2) the homicides were committed to avoid arrest; (3) the homicides were committed for pecuniary gain; (4) the homicides were especially heinous, atrocious or cruel; and (5) the homicides were premeditated. (R495-499) No mitigating circumstances were found. (R491-495)

After sentencing, information regarding juror misconduct while sequestered during the course of the trial was related to the court. (R265-378,382) Amazon amended his pending motion for new trial to include juror misconduct as an additional ground. (R410-412) An extensive inquiry into the misconduct was conducted. (R385-406,413-435,2467-3225) Via two separate orders, the trial court denied Amazon's motion for new trial. (R447-452, 489-490)

Amazon timely filed his notice of appeal to this Court on August 10, 1983. (R500)

STATEMENT OF FACTS

GUILT PHASE:

During the early morning of December 1, 1981, Candice Doherty heard a scream. (R1259) At about the same time, her telephone rang. (R1259) She answered and heard another scream over the telephone. (R1259) She spoke to Jennifer Chapin (R1259), the eleven-year-old daughter of Doherty's friend and neighbor, Joy Chapin. (R1253-1254) Thinking something was wrong with Joy, Doherty ran across the street to the Chapin residence. (R1260) The house was locked, and Doherty enlisted the aid of another neighbor, John Calder. (R1239-1240,1260-1261) They finally gained entry into the residence through an open sliding glass door at the back of the house. (R1240-1242,1261) Inside, they found Joy Chapin in the living room and Jennifer Chapin in the kitchen. (R1243-1246,1262-1263) Both had been stabbed. (R1407) Calder and Doherty telephoned the sheriff's office. (R1244-1245,1263)

Sheriff's deputies arrived within seven minutes of the call. (R1228,1265) Deputy Jerry Davis was first to arrive. (R1228) Several others arrived, secured the scene and began talking to neighbors who had gathered outside. (R1236) Donna Brown, a pathologist and medical examiner, examined the bodies at the scene. (R1404-1405) Later, she performed autopsies at the medical examiner's office. (R1406) Brown concluded that both Joy and Jennifer Chapin died as the result of multiple stab wounds. (R1406-1407)

Joy Chapin had suffered seven stab wounds and two superficial cuts. (R1409) There were some bruises and abrasions to her cheek, chin and lips. (R1410) Two sucker type bruises were found on her right breast and left shoulder. (R1414-1415) She also had some scrapes on her chest and two superficial wounds on her right wrist. (R1410) One stab wound caused injury to her stomach. (R1410-1411) Two stabs were in her back and two were located in the flank area. (R1411) Finally, the most severe stab wound was 5 to 6 inches deep and traversed her lung. (R1411) Death would have occurred within 15 or 20 minutes from that wound. (R1412)

Jennifer Chapin had suffered sixteen stab wounds and two superficial cuts. (R1412) Four wounds were found on her left shoulder, six in the back, four more to her thigh, two superficial wounds on her left hand. (R1413) There were also a few superficial scrapes. (R1413) The most severe wound was underneath the armpit and punctured the lung and aorta. (R1413) Jennifer would have died with 15 to 20 minutes after the stabbing. (R1414)

Among the neighbors who gathered outside the Chapin residence was Ira Amazon. (R1335-1336) He lived next door with his mother, Naomi Amazon, twin brother, Harry and sister, Jodi. (R1195,1270-1271) Deputy John Davis interviewed Jodi and Ira while they stood in the front yard of their home. (R1337) Jodi said she heard some screams from the Chapin house which woke her up at 3:57 a.m. (R1337) Ira said that when Jodi turned on

her light, he was awakened, looked through his bedroom window and observed someone run from the Chapin's residence and scale the backyard fence. (R1337-1338) At a later time, Ira also advised that the Amazon residence had been burglarized. (R1346-1351) He pointed out a cut screen and noted items which had been moved around inside the house. (R1346-1352) Naomi Amazon's purse was later discovered approximately 150 yards from the Amazon's residence. (R1205-1208) A sheriff's department tracking dog followed a scent from the back of the Chapin residence, over the fence separating the Chapin's and Amazon's yard and around the Amazon's house. (R1155-1159) The dog did not find a scent at the fence at the back of the Chapin's yard. (R1157)

A knife was found on the fence line between the Amazon's and the Chapin's yards. (R1194-1195) It was a common kitchen knife manufactured by Chicago Cutlery. (R1324-1328) Human blood of the same type as Joy Chapin's was discovered on the knife. (R1526) Additionally, a fiber consistent with fibers from the carpet in the Chapin's house was on the knife. (R1477) John Chapin, Joy Chapin's husband from whom she had been separated for about a year (R1295-1296), testified that no such knife was in the residence when he lived there. (R1298) He also said that he had not noticed the knife in the home on occasions when he visited his children. (R1297) Candice Doherty, the neighbor, also testified that she had not noticed a knife of that type in the Chapin residence. (R1269,1279-1280) Over relevancy objections, (R1047,1257-1259,1265) Doherty was also allowed to

testify that she had once owned a similar knife that had been stolen when her house was burglarized several months earlier. (R1265-1269) She could not identify the knife as the one she had owned. (R1268,1281,1284-1285)

The point of entry into the house was an upstairs bedroom window where a screen had been removed. (R1189) It was gathered as evidence (R1360-1363), and latent fingerprints matching Ira Amazon's fingers were discovered on the aluminum frame of the screen. (R1366,1400-1401,1445-1457) A forensic metallurgist, William Tobin, examined the screen and the knife and testified over defense objections. (R1729-1746) He found some markings on the screen frame consistent with having been made with a flat tool. (R1743) However, he could not determine when the marks were made. (R1742) Tobin also examined the knife and found some impression markings on the tip of the blade, but he could not tell when the marks were placed there. (R1738-1739,1742) The marks on the screen and the knife were insufficient for Tobin to determine if the knife made the marks on the screen. (R1744)

Four pieces of rope were found in the bedroom area of the house on the floor. (R1219,1312-1314) A pubic hair which was consistent with the pubic hair of Ira Amazon was found on the rope. (R1472) John Chapin testified that there was no rope of that type in the house while he lived there a year earlier. (R1295-1296,1302) A former neighbor of the Amazon's, Michael Fitzgerald, testified that he had seen similar clothesline type

rope in the Amazon's backyard one or two years before the homicide. (R1484-1490) He could not identify the rope found in the Chapin's house as the same rope. (R1486-1488)

The latent fingerprint examiner compared the print found on the window screen to known fingerprints of Ira Amazon which he had taken as elimination prints regarding the reported burglary at Amazon's home. (R1304-1310,1444-1456) They matched. (R1456) As a result, Amazon was taken to the sheriff's office for questioning. (R1538-1541) This occurred approximately 12 hours after the homicides. (R1239,1541)

When questioned, Amazon first denied involvement in the homicides. (R1542-1543) However, after being confronted with the fingerprint match, Amazon admitted to the murders. (R1543-1549) He said, "I killed her" and began crying. (R1545-1546) Ira then said he went into the house through a bedroom window. (R1547) It was dark inside. (R1547) Someone hit him on the head with a candlestick. (R1547) He confronted Joy Chapin, took her into a bedroom and raped her. (R1547-1548) Next, he asked her for silver or money and she directed him downstairs. (R1549) As they came downstairs, Ira saw Jennifer Chapin talking on the telephone in the kitchen. (R1549) He grabbed a knife from the kitchen counter and stabbed her. (R1549) When Joy Chapin began fighting him, Ira stabbed her also. (R1549) At that time, he heard someone screaming at the door, and he fled through the sliding glass doors. (R1549) According to Detective Gary Herbein, Ira said he killed the Chapins because they could recognize him. (R1559) However, Detective Earling

did not hear such a statement. (R1656-1657) The statement did not appear in the tape or typed statement Amazon gave the detectives. (R1579-1582) Amazon said he ran to his house, staged a burglary, changed clothes and waited for the police. (R1549) He also told the detective that he had consumed LSD, quaaludes and several alcoholic drinks shortly before the homicides. (R1558-1559)

Shortly after Amazon's arrest and 17 hours after he last consumed drugs or alcohol, he gave blood and urine samples for testing. (R1496,1791-1792) Tests conducted by two experts were negative for the presence of drugs or alcohol. (R1095, 1725-1726) However, Dr. Brian Finkle testified that a large amount of alcohol could have been consumed and eliminated from the system in 17 hours. (R1125-1128) Also, there was no commercially reliable test for the presence of LSD. (R1099-1100) Finkle did run an experimental test on the urine sample which proved negative. (R110-1105) But, this was the first time he had used the experimental test on samples which were several months old at the time of the test which could have affected the results. (R1115-1122) Some neighbors and deputies who talked to Amazon at the scene said he did not appear to be under the influence of drugs or alcohol. (R1170-1171,1234,1273,1341) Amazon required treatment for drug withdrawal his first night in jail. (R2284-2285)

Amazon testified at trial. (R1784-1900) He again admitted to the homicides. (R1803-1808) His girlfriend, Stacey Burkowitz, was visiting at the Amazon's. (R1786) She and Ira

were drinking rum. (R1786-1787) After Stacey left around 1:00 a.m., Ira drove his mother's car to get a street sign which had his girlfriend's name on it. (R1789-1792) He intended to give to her as a gift. (R1789) On the return trip home, Ira stopped a Brewer's Lounge where he consumed three more drinks. (R1790) Upon his return, Ira stole some money, jewelry and pills from his mother's purse. (R1793-1794) He staged a burglary to cover-up the theft. (R1796-1798) Next, he listened to music in his bedroom and consumed LSD. (R1799-1801) It was not until 8:00 a.m. the next morning that Ira had a clear memory. (R1812-1813) He did not remember killing the Chapins until he was provided with information about the crimes while being questioned at the sheriff's office. (R1829-1831) His memory of the killings then returned, in flashback form, and that is when Ira admitted to the homicides. (R1830-1831)

During the trial, the jury was taken to the crime scene for a view. (R1174-1226) Four deputies testified at the scene describing the house and the location of various items and activities. (R1180-1226) A video tape of the crime scene prepared during the investigation was played and narrated for the jury. (R1207-1221) Ira Amazon was not present during this portion of the trial. Defense counsel stated that after discussion with Amazon, a decision to waive his presence was made. (R1044-1047) However, Amazon did not personally waive his presence or personally ratify his counsel's waiver. (R1044-1047)

At the jury instruction charge conference, defense counsel objected to the instruction on felony murder. (R1914-

1922,1974) Counsel also requested special verdict forms which would require the jury to designate upon which theory a first degree verdict was reached--premeditated or felony murder. (R1944-1954) The trial court denied the request. (R1954) All objections and requests were renewed after the court gave the instructions. (R2123)

PENALTY PHASE:

The State presented two witness at the penalty phase of the trial. (R2244-2260) Over defense objections (R2223-2244), John Chapin was allowed to testify about comments made by his 3 1/2 year old daughter, Christen Chapin, who was present at the house at the time of the homicides. (R2244-2246) The second State's witness was Michael Coachman who photographed the bodies at the medical examiner's office. (R2247-2260) He was permitted to present photographs depicting wounds. (R2247-2260)

Amazon presented only one witness (R2261-2366), Dr. Sydney Merin, a psychologist who had examined Ira. (R2261) Merin testified that Ira was markedly disturbed emotionally. (R2289-2292) His family's failure to provide him with love and support left him an emotional cripple. (R2294-2302,2314) Ira did not have the internalized ability to determine if his behavior was right or wrong (R2292-2295); he depended on external sources for behavior control. (R2292-2315) Aspects of his emotional development were at a 13-year-old level, but others were at the level of a 2-year-old. (R2315)

In addition to his emotional disorder, Amazon had abused drugs for several years. (R1840-1842,2318-2319) Merin concluded that drug usage probably caused Ira to lose control of his behavior and that the homicides were the result of a panic reaction to the stress of the situation. (R2303-2322) Merin testified that during such a reaction Amazon could not control his behavior. (R2300-2322)

JUROR MISCONDUCT INQUIRY:

After the trial, information came to the judge's attention regarding possible misconduct of one of the jurors in the case. (R265-378) One of the jurors had been seen in the bar of the motel where the jury was sequestered. (R265-378) Pursuant to this information, the court, with counsel, conducted an extensive inquiry of all jurors and potential witnesses to juror misconduct. (R385-406,413-429,430-435,436-438,439-445,455-460,461-464,2467-3229) Amazon amended his pending motion for new trial to include a ground based on juror misconduct. (R410-412)

The inquiry disclosed that four jurors violated the sequestration instructions. Three of the four jurors, George Fox, Margaret Trembly and Francis Marcotte, went to the bar in the motel. (R2619-2662,2667-2695,2697-2711,2714-2723,2725-2776, 2823-2825) Fox and Trembly were in the bar on two occasions. On the day a verdict was reached, but before the penalty phase began, George Fox may have been in the bar intoxicated. (R2752, 2889-2890) While there were other people in the bar with whom

the jurors spoke, the trial court found that the jurors were not improperly exposed to information about the case. (R448-449)

Francis Marcotte, who was an alternate juror, also met and had dinner with his fiancee while the jury was sequestered. (R449,2698-2711) His fiancee did not talk to him about the case. (R2704) Marcotte never expressed an opinion about the case to any other juror or alternate juror. (R2706)

One juror, Frank Hunter, watched television news accounts of the trial on three or four occasions. (R2940-2942, 2951-2954) He wanted to see himself on television, and he kept the volume turned off so that he heard none of the news story. (R2951-2952,3142) Most of the video taped portions of the trial which Hunter saw showed only jurors or court personel. (R3144-3232) However, one showed a portion of the FBI metallurgist's testimony about comparing the knife and markings on the framing of the window screen. (R3158,3169) This segment included the witness's demonstration of the possible pry marks on the knife and screen. (R3158,3169)

The trial court concluded that the juror's misconduct had not resulted in prejudicial information or influence reaching the jury's deliberations. (R447-450,489-490) Amazon's motion for new trial was denied. (R447-450,489-490)

ARGUMENT

ISSUE I.

THE TRIAL COURT ERRED IN DENYING AMAZON'S MOTION TO DISMISS THE MURDER CHARGES ON THE GROUND THAT DOUBLE JEOPARDY PROTECTIONS BARRED THEIR PROSECUTION, OR ALTERNATIVELY, THE TRIAL COURT ERRED IN ALLOWING THE MURDER PROSECUTION TO PROCEED UNDER A FELONY MURDER THEORY.

In addition to the two murder counts charged in the indictment in this case (R8-9), the State charged Amazon, via an information, with burglary and sexual battery. (DCR1-2) On April 26, 1982, Amazon pleaded guilty to the burglary and sexual battery charges. (DCR13-20) The allegations in the information (DCR1-2) and the factual basis the State offered during the plea colloquy clearly established that the burglary and sexual battery occurred at the same time and as a part of the criminal transaction resulting in the murders. (DCR17-18)(R8-9) Circuit Judge Thomas E. Penich, Jr., accepted the guilty pleas and found Amazon guilty. (DCR19-20) Upon acceptance of these pleas, jeopardy attached to the burglary and sexual battery charges. Brown v. State, 367 So.2d 616,620-622 (Fla.1979); Reyes v. Kelly, 224 So.2d 303 (Fla.1969)

When the court accepted Amazon's pleas to the burglary and sexual battery, jeopardy also attached to the murder charges. First degree murder can be proven by establishing a premeditated murder or a homicide during the commission of certain felonies. §782.04(1)(a), Fla.Stat. (1981). An allegation of premeditated murder, such as in this case (R8-9), will support a prosecution

under both theories.[2/] Knight v. State, 338 So.2d 201 (Fla. 1976). Amazon was prosecuted under both theories. (R82-84,725-730,1006-1017,2019,2095-2100,2106) The burglary and sexual battery were the underlying felonies for the murders. (R2106-2108) Consequently, the burglary and sexual battery were the same offense as the murders for double jeopardy purposes. Whalen v. United States, 445 U.S. 684 (1980); State v. Hegstrom, 401 So.2d 1343 (Fla.1981). Double jeopardy protections afforded by the United States and Florida Constitutions prohibited the prosecution of the murder charges. Amends. V, XIV, U.S. Const.; Art. I, §9, Fla. Const.; Brown v. Ohio, 432 U.S. 161 (1977). Amazon's motion to dismiss (R47-53) should have been granted.

Assuming for argument that double jeopardy principles did not preclude the prosecution for premeditated murder because the burglary and sexual battery were not factual elements, the trial court still committed error by not striking the felony murder theory of prosecution. (R82-84,725-730,1006-1017) The Second District Court of Appeal in denying Amazon's petition for writ of certiorari regarding this double jeopardy question implicitly advised the trial court not to instruct the jury on felony murder. (R144-146) Nevertheless, over Amazon's objections

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[2/] For double jeopardy purposes, premeditated murder and felony murder are the same offense--first degree murder--since they are proscribed by the same criminal statute. §782.04(1)(a), Fla.Stat. (1981); see, Gay v. State, So.2d (Fla.2d DCA 1984)(Case No. 83-2194, opinion filed March 28).

(R1914-1922,1942-1954,1974,2096-2100), felony murder jury instructions were given. (R2106-2108) The State argued felony murder to the jury. (R2019) And, with only general verdict forms,[3/] it is impossible to determine if the jury convicted on premeditation or felony murder. (R2135-2138)

Failure to strike the felony murder theory was not harmless. Even if the evidence of premeditation is deemed legally sufficient to convict, it was not overwhelming. The evidence is just as consistent with Amazon's version that he killed while in a panic reaction and therefore, committed second degree murder. It is impossible to know if the jury would have returned a first degree murder verdict solely on a premeditation theory.

Amazon's constitutional right to be protected from double jeopardy has been violated. The trial court should have dismissed the murder charges, or alternatively, restricted the prosecution to a premeditation theory. Amazon asks this Court to reverse his convictions.

3/ Amazon requested specific verdict forms in this case which would have required the jury to designate premeditation or felony murder. (R1944-1950) This request was consistent with the suggestion made by the Second District Court of Appeal in denying the petition for writ of certiorari. (R144-146) While specific verdicts may not be legally required, it was an abuse of the court's discretion not to allow them in this case.

ISSUE II.

IRA AMAZON'S ABSENCE FROM THE JURY VIEW OF THE SCENE, WHERE TESTIMONY AND OTHER EVIDENCE WAS PRESENTED, VIOLATED HIS CONSTITUTIONAL RIGHT TO BE PRESENT AT ALL STAGES OF HIS TRIAL.

During the trial, the jury was given a view of the crime scene. (R1174-1226) Four deputies testified describing their observations at the scene. (R1180,1196,1205,1207) Additionally, a video tape of the crime scene area which had been made during the investigation of the case was played and narrated. (R1207-1220) Ira Amazon was not present for this portion of the trial conducted at the crime scene viewing. (R1174-1226) And, although defense counsel told the court that Amazon's presence would be waived (R1044), Ira Amazon never personally waived his presence or ratified his counsel's representation of a waiver. (R1044)

The Sixth and Fourteenth Amendments to the United States Constitution gives a criminal defendant the right to be present at every stage of his trial. As the Supreme Court said in Illinois v. Allen, 397 U.S. 337 (1970),

> One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial. Lewis v. United States, 146 U.S. 370, 36 L.Ed. 1011, 13 S.Ct. 136 (1892)

Id. at 338. This Court has acknowledged that a defendant "...has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence." Francis v. State, 413 So.2d 1175,1177 (Fla.1982).

Furthermore, standards regarding the defendant's right to be present has been incorporated into the Rules of Criminal Procedure. Fla.R.Crim.P. 3.180. The right extends to all phases of the trial, Shaw v. State, 422 So.2d 20 (Fla.2d DCA 1982), which includes "all proceedings before the court when the jury is present," and "any view by the jury." Fla.R.Crim.P. 3.180(a)(5) and (7). Section 918.05, Florida Statutes states "The judge and defendant...shall be present...at the [jury] view." Ira Amazon certainly had the right to be present at the jury view of the crime scene when evidence was presented in this case.

At an in-chambers discussion between the court and counsel prior to the jury view, defense counsel said he was authorized to waive Amazon's presence:

> MR. MEISSNER: Also, Judge, we need a formal waiver of the presence of the Defendant there.
>
> MR. COHEN: Yes, I will give you that now.
>
> THE COURT: Are you going to do that? Have you discussed it with your client?
>
> MR. COHEN: Yes, Judge.
>
> THE COURT: You make your record.
>
> MR. COHEN: Judge, Mr. Pippinger and I discussed this with Ira Amazon after our hearing yesterday morning, when the subject first came up. We discussed it with him in detail. We recommended to him he waive his presence, and he has authorized me to enter a waiver of his presence on his behalf, at the scene during that portion of the trial of this case.
>
> THE COURT: All right. That eliminates that problem.

(R1044) However, counsel's purported waiver was insufficient. It did not demonstrate that Amazon knowingly and intelligently

waived his presence at this portion of the trial. Francis v. State, 413 So.2d 1175 (Fla.1982). Amazon never spoke to the issue and was never asked. (R1044)[4/]

In Francis v. State, supra, this Court faced a similar issue. Francis voluntarily absented himself during jury selection in order to use the restroom. When asked by the court, defense counsel waived Francis' presence. Jury selection continued in the courtroom, and then was moved, at counsel's request, to the jury room. Francis returned but was left in the courtroom. The jury was selected in his absence. This Court reversed the case for a new trial holding that counsel's waiver was insufficient and that Francis' silence did not constitute a waiver. The record failed to show that Francis knowingly waived his right to be present or ratified his counsel's actions taken in his absence.

The record in this case fails to show that Amazon knowingly and intelligently waived his right to be present at the jury view where the jury received evidence. Just as in Francis, the record is silent. A valid waiver cannot be presumed. Amazon asks this Court to reverse his case for a new trial.

[4/] In McCollum v. State, 74 So.2d 74 (Fla.1954), this Court suggested, but did not decide, that unless a defendant indicates a desire to be present a jury view, his presence is deemed waived. However, this suggestion was based upon a jury view where no evidence is presented and, therefore, is not part of the trial proper. That was not the nature of the view in this case. Witnesses testified (R1180,1196,1205, 1207) and photographic evidence was displayed to the jury. (R1207-1220) The suggestion in McCollum is not applicable to the issue presented in this case.

ISSUE III.

THE TRIAL COURT ERRED IN DENYING AMAZON'S MOTION FOR NEW TRIAL BASED UPON THE JUROR MISCONDUCT WHICH OCCURRED WHILE THE JURY WAS SEQUESTERED.

The judicial inquiry into the juror misconduct in this case revealed that four jurors voluntarily and intentionally violated the rules governing their sequestration. Three jurors frequented the motel bar without the bailiff's supervision and in blatant disregard of the bailiff's instructions. (R2522, 2539-2540,2619-2662,2667-2695,2697-2711,2714-2723,2725-2776, 2823-2825) A fourth juror viewed television news broadcasts about the case on three occasions, knowing that the court had instructed the jury to refrain from such exposure. (R2940-2942, 2951-2954) These violations created a presumption of juror prejudice. Russ v. State, 95 So.2d 594 (Fla.1957); Raines v. State, 65 So.2d 558 (Fla.1953); McDermott v. State, 383 So.2d 712 (Fla.3d DCA 1980); see also, Remmer v. United States, 347 U.S. 227 (1953). And, it was the State's burden to establish at the inquiry that these violations were harmless. Id.

The State failed in its burden to show these incidents of misconduct were harmless. Amazon's motion for new trial should have been granted. Although the jurors involved testified that no outside information or influences affected their decision, these representations, alone, are not dispositive. United States v. Herring, 568 F.2d 1099,1105 n.15 (5th Cir. 1978). Furthermore, the circumstances surrounding the violation of the jurors' sequestration did not overcome the presumption of prejudice.

Juror George Fox was in the motel bar on at least two occasions. (R2682-2683,2718,2729-2735) He testified that he was there only once (R2718), but other witnesses placed him there twice. (R2682-2683,2729-2735) On one occasion he appeared intoxicated. (R2752,2889-2890) A television was present in the bar. (R2752) Other people were in the bar, and Fox spoke to them. (R2731-2734) While there was no evidence of direct communication to him about the case, something prompted Fox to state that he was a juror in the case. (R2731) Not everyone to whom he spoke was even identified (R2751), and as a consequence, they did not testify at the inquiry. Some discussions about the case may have occurred among others in the bar while Fox was present, but it was not established if he heard the conversation or not. (R3019-3028,3039-3043)

Juror Margaret Trembly visited the motel bar two times. (R2675,2678-2680) The first was the first night the jury was sequestered. (R2675) A bailiff saw her and reminded her of the prohibition. (R2676,2687) She left. (R2676-2677) Since she had been there briefly, she had spoken only to the barmaid. (R2675-2677,2687) Trembly's second visit to the bar occurred after the guilt phase verdict but before the penalty phase of the trial began. (R2679-2695) Alternate Juror Francis Marcotte and Juror Fox were also present at that time. (R2679-2680,2682-2683) Other people were in the bar. (R2703) They did not talk about the trial. (R2683)

Alternate Juror Francis Marcotte not only went into the bar (R2702), but he also met and talked with his fiancee.

(R2703-2704) He said that their discussion did not include the Amazon trial. (R2704) Marcotte was also Juror Frank Hunter's roommate at the motel and observed some of the news broadcasts that Hunter admitted watching. (R3178) He said he paid little attention to the broadcasts. (R3178) Marcotte first denied seeing any news broadcasts until advised that Hunter testified to watching them. (R2700,3178) Marcotte said that he did not try to influence Hunter's decision in the case. (R3191)

Juror Frank Hunter watched television news broadcasts about the case on at least three occasions. (R2940-2942,2951-2954,3144-3174,3206-3223) He said that he only wanted to see himself on television, therefore, he turned the volume off during the news story. (R2951-2952,3142) At least one of the broadcasts included video tape of the State's FBI metallurgist's testimony about comparing the knife and the screen markings. (R3158,3169) Hunter even commented to his roommate, Marcotte, that the witness's presentation was impressive. (R2951-2952)

The State failed to rebut the presumption of prejudice resulting from the jurors' misconduct. Improper communication to the jurors who were in the bar was neither proved nor disproved. No evidence of such communications was presented, but not all potential witnesses were produced at the inquiry. The potential exposure to improper influences was extremely great, see, North v. State, 65 So.2d 77,99-100 (Fla.1952), and the State failed to establish that no improper communications reached the jurors. The jurors representations that none existed are insufficient. United States v. Herring, 568 F.2d 1099,1105 n.15 (5th Cir. 1978).

Regarding Juror Hunter's viewing news broadcasts, the State not only failed to establish the misconduct was harmless, but actual prejudice was proved. Proving that the knife was brought into the house was an important goal for the State; it would have supported the premeditation theory. The FBI metallurgist's testimony about the marks on the screen and the knife was presented to prove that fact. By watching the witness testify and demonstrate his testimony on the news, Hunter improperly reviewed trial evidence. Furthermore, it was a review of evidence which never should have been admitted at trial. (See, Issue V, infra.)

The jurors' misconduct in this case was extensive. Actual prejudice was demonstrated in Juror Hunter's viewing of television newsbroadcasts. The State was unable to carry its burden of establishing that no prejudice resulted from the three jurors' visits to the bar and unsupervised exposure to other persons and sources of information. Amazon has been denied his rights to due process and a fair and impartial jury trial. Amends. V, VI, XIV, U.S. Const.; Art. I, §§9, 16, Fla. Const. He urges this Court to reverse his case for a new trial.

ISSUE IV.

THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT EVIDENCE OF COLLATERAL CRIMES WHICH ONLY TENDED TO PROVE AMAZON'S PROPENSITY TO COMMIT CRIMES.

At trial, the State tried to prove that Amazon carried a knife into the residence rather than arming himself in the kitchen just before the stabbings. Toward this end, Candice Doherty, a friend and neighbor of the Chapins, was allowed to testify that she had once owned a knife similar to the one found at the crime scene. (R1268,1277-1278,1281) Her knife had been stolen when her house was burglarized two (2) years earlier. (R1265-1267) Doherty could not identify the knife found as the knife she had stolen from her home. (R1268,1277-1278,1281-1285) The wood block holder which had once held Doherty's stolen knife along with the remainder of the set was introduced in evidence. (R1266-1267) Fred Ganglehoff, a representative of the Chicago Cutlery Company (R1321-1324), testified that the knife found at the scene was manufactured by his company. It was like the knife normally sold in the set Candice Doherty owned. (R1326) He also said the knife is sold separately and is a quite common type. (R1326-1328) This evidence of a collateral burglary in the same neighborhood as the homicides was irrelevant to prove an issue in this case. Its sole effect was to suggest that Amazon committed other crimes. The admission of this evidence violated Amazon's right to due process and deprived him of a fair trial. Amends. V, XIV, U.S. Const.; Art. I, §9, Fla.Const.; §90.404(2)(a), Fla.Stat.; Williams v.

State, 110 So.2d 654 (Fla.1959); Drake v. State, 400 So.2d 1217 (Fla.1981).

It is well established that evidence of a collateral crime is inadmissible if there is no proof that the defendant committed it. E.g., State v. Norris, 168 So.2d 541 (Fla.1964); Dibble v. State, 347 So.2d 1096 (Fla.2d DCA 1977). Without proof of the defendant's connection with the collateral crime, the evidence would become relevant only through an impermissible compounding of inferences. This Court, in State v. Norris, supra, explained as follows:

> Our analysis of the opinion under review leads us to conclude that the District Court used Wrather to demonstrate the related proposition that "Evidence of a collateral crime is inadmissible unless accompanied by evidence connecting the defendant therewith." Norris v. State, supra. In so holding, the Distict Court was on sound ground. This does not in any fashion detract or becloud the rule of admissibility announced in Williams v. State, supra. It simply means that in order for such evidence to be allowed against an accused, there must be accompanying evidence to identify or connect the accused with the collateral facts. [Illustrations omitted]
>
> A contrary rule would most often lead to the improper construction of inferences. The instant case is illustrative. In order for the questioned evidence to reach a degree of admissible relevancy, it would be necessary to infer that lethal potions of arsenic had been administered to Mr. Norris and to Mr. Pace. From that, we would have to infer that Mrs. Norris committed the acts. For the rules governing inferences, see Voelker v. Combined Ins. Co. of America, Fla., 73 So.2d 403, and Tucker Brothers, Inc. v. Menard, Fla., 90 So.2d 908. The evidence admitted here does not meet the test of the criminal rule announced by these decisions.

> Instead of deviating from Williams v. State, supra, the District Court followed the rule there announced. It merely prescribed a related requirement that in order for the evidence to be admissible there must be proof of a connection between the defendant and the collateral occurrences. In this respect mere suspicion is insufficient. The proof should be clear and convincing.

State v. Norris, 168 So.2d 541,543 (Fla.1964).

There was no proof that Amazon committed the Doherty burglary; mere suspicion is not enough. Id. Consequently, evidence of the burglary was irrelevant. To reach the premise the State desired to prove (Amazon carried the knife into the Chapin residence) requires an impermissible compounding of inferences. Id. First, it would have to be inferred that the knife found at the crime scene was the knife stolen from the Doherty residence. Second, it would have to be inferred that Amazon stole the knife. Third, it would then have to be inferred that Amazon carried the knife into the Chapin residence. Evidence relying upon such compounding of inferences has no probative value. Id.

The only relevance of the Doherty burglary evidence was to suggest that Amazon had committed other crimes in the neighborhood. This is improper use of collateral crimes evidence. §90.404(2)(a), Fla.Stat.; Williams v. State, 110 So.2d 654 (Fla.1959). Amazon has been denied a fair trial, and he asks this Court to reverse his case for a new trial.

ISSUE V.

THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF A FORENSIC METALLURIST REGARDING MARKS FOUND ON THE SCREEN FRAMING AND THE KNIFE, SINCE THE WITNESS WAS UNABLE TO RENDER AN OPINION AS TO WHETHER OR NOT THE KNIFE HAD MADE THE MARKS ON THE SCREEN FRAMING.

The purpose of expert testimony is to aid the jury in understanding facts in issue which are beyond the ordinary understanding of the jury. E.g., Johnson v. State, 393 So.2d 1071 (Fla.1980); Buchman v. Seaboard Coast Line Railroad Co., 381 So.2d 229 (Fla.1980). This Court has recognized two considerations regarding the admission of expert testimony.

> First, the subject must be beyond the common understanding of the average layman. Second, the witness must have such knowledge as "will probably aid the trier of facts in its search for truth." Mills v. Redwing Carriers, Inc., 127 So.2d 453,456 (Fla.2d DCA 1961).

Buchman v. Seaboard Coast Line Railroad Co., 381 So.2d 229,230 (Fla.1980). The testimony of William Tobin, an FBI forensic metallurgist, met neither of these requirements. His testimony should not have been admitted.

Tobin examined markings found on the framing of the screen and compared them to a slight impression on the tip of the knife blade. (R1738-1739) However, there were insufficient characteristics in the marks for him to reach a conclusion on whether the knife had ever made contact with the screen framing. (R1744-1745) Furthermore, he could not determine the age of the marks on the screen or the age of the impression on the knife blade. (R1742) His only opinion was that the marks on

the screen could have been made by the knife or any other flat-bladed tool. (R1739-1746)

It is not beyond the skill of the average layman to conclude that an instrument such as a knife could leave marks on a window screen frame if used to pry the screen away. That was the extent of Tobin's testimony. He did not possess any knowledge, beyond that of the jurors, which would aid in resolving the factual issue in this case. Yet, because of the aura of authority that is often perceived to surround an expert from the FBI, the State gained an unjustified advantage from the testimony. The jury could have been unduly swayed by having an expert conclude and demonstrate that the knife could have made the marks on the screen. The jurors may have given greater weight to that conclusion because it was said by an expert than if the jurors, themselves, had made the same conclusion from their everyday common sense and experience.

The State abused the use of the expert witness in this case. William Tobin should not have been allowed to testify. Amazon urges this Court to reverse his convictions with direction that he be granted a new trial.

ISSUE VI.

THE TRIAL COURT ERRED IN SENTENCING IRA AMAZON TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The sentencing judge improperly applied Section 921.141, Florida Statutes in sentencing Ira Amazon to death. This misapplication of Florida's death penalty procedures skewed the sentencing weighing process and rendered Amazon's sentence unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution. State v. Dixon, 283 So.2d 1 (Fla.1973). The specific errors are addressed separately in the remainder of this argument:

A.

The Trial Court Erred In Finding As An Aggravating Circumstance That The Homicides Were Especially Heinous, Atrocious Or Cruel.

In State v. Dixon, 283 So.2d 1 (Fla.1973), this Court defined the aggravating circumstance of heinous, atrocious or cruel provided for in Section 921.141(5)(h), Florida Statutes and the type of crime which the circumstance was intended to characterize 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 unnecessarily torturous to the victim.

Id. at 9. The trial court concluded that the homicides in this case fit the above characterization on the basis of three factors: (1) the victims were stabbed several times (R497)(A7); (2) the victims were killed in the presence of each other and each was aware of impending injury or death of the other (R497)(A7); and (3) the victims could have lived for 15 to 20 minutes after the stabbings. (R497)(A7) These three factors do not support the finding of this aggravating circumstance, and Ira Amazon urges this Court to reverse his death sentences.

Multiple stab wounds do not necessarily render a homicide heinous, atrocious or cruel. Demps v. State, 395 So.2d 501 (Fla.1981). In this case, the wounds evidenced the repetitive behavior of an emotionally disturbed person under stress.(R2311-2314), not the cruel, evil or wicked person desiring to inflict pain and suffering. Dr. Merin testified that Amazon's impaired personality was subject to disentergration under stress, particularly when under the influence of drugs or alcohol. (R2300-2301,2310-2322) Merin also concluded Amazon killed as a spontaneous or panic reaction to stress and was out of control at the time of the killings. (R2303-2314) The numerous stab wounds were consistent with the frenzied, repetitive attack by someone suffering from such an emotional disturbance. (R2312-2313,2362-2363) This Court has seen multiple stab wound cases

of this type in other cases and recognized that the causal relationship between the defendant's emotional disturbance and the wounds mitigated the aggravating quality of those wounds. E.g., Miller v. State, 373 So.2d 882 (Fla.1979); Burch v. State, 343 So.2d 821 (Fla.1977); Jones v. State, 332 So.2d 615 (Fla. 1976). Such a causal relationship exists in this case as well, and the trial court improperly relied on the multiple wounds as a basis for finding the homicides especially heinous, atrocious or cruel.

The trial court's second basis for finding this aggravating circumstance was also improper. In its findings, the court said,

> ...each victim died, suffering their own terrifying anguish, and sensing the tremendous excrutiating pain the other was feeling.

(R497)(A7) The fact that the victims may have been killed in each others presence cannot be used to find the homicides heinous, atrocious or cruel. This Court has held that a victim's awareness of the suffering of others is an irrelevant factor. Riley v. State, 366 So.2d 19,21 (Fla.1978).

Finally, the fact that the victims may have lived for 15 to 20 minutes after the stabbing does not render the homicides heinous, atrocious or cruel. While this Court has held that an instantaneous death never qualifies as a heinous, atrocious or cruel one, e.g., Cooper v. State, 336 So.2d 1133,1140-1141 (Fla.1976), this Court has not held that consciously surviving an attack always results in a finding of heinous, atrocious or

cruel. In Teffeteller v. State, 439 So.2d 840,846 (Fla.1983), this Court rejected the finding of this aggravating circumstance even though the victim lived for a couple hours in pain and aware of impending death. Consequently, the fact that the victims in this case may have survived and suffered for 15 to 20 minutes is also an insufficient basis for finding the homicides to be especially heinous, atrocious or cruel.

B.

The Trial Court Erred In Finding As An Aggravating Circumstance That The Homicides Occurred During The Commission Of A Burglary, Sexual Battery And Kidnapping.

In concluding that the aggravating circumstance provided for in Section 921.141(5)(d), Florida Statutes applied, the trial court found:

> FINDING: The evidence presented during the trial established that IRA AMAZON during the early morning hours of December 1, 1981, left his home, which was next to the Chapin residence. He scaled the wooden fence which divided the two residences, crossed the Chapin backyard to a point where he climbed the roof covering the back patio and then entered a second story window in the Chapin home. Once inside the house he found Joy Chapin and in an upper bedroom he bound her, inflicted a "taunting" knife wound to her buttocks, in an animal like manner he placed a "sucker" mark on her left shoulder and one on her right breast nipple and then he raped her. After holding Joy Chapin against her will and raping her, the Defendant forced her to accompany him as he went through the house looking for items of value. IRA AMAZON kidnapped Joy Chapin.
>
> This aggravating circumstance was established beyond a reasonable doubt.

(R495)(A5) The trial court's finding was improper for two reasons. First, the court improperly relied upon the burglary

and sexual battery to support this aggravating circumstance because the State had waived their use in aggravation (R2153-2155) and the jury had not been instructed upon those offenses as possible aggravating factors. (R2410-2411) Second, the court improperly relied upon the offense of kidnapping because the evidence was insufficient to prove that crime beyond a reasonable doubt.

Burglary And Sexual Battery

During the penalty phase jury instruction conference, the State specifically waived the use of the burglary and sexual battery as aggravating factors. (R2153-2155) Those offenses and evidence related to them could no longer be considered in aggravation in the sentencing weighing process. See, Maggard v. State, 399 So.2d 973 (Fla.1981). The trial judge properly instructed the jury so as to preclude consideration of the burglary and sexual battery. (R2410-2411) However, the judge, in considering these offenses in his findings to support the death sentences, violated Amazon's right to due process of law in two material ways. First, his death sentences were based, in part, upon matters which had been removed from issue for both the jury's and the court's sentencing determination by the parties. And, second, Amazon was deprived of notice and opportunity to be heard regarding the import of this evidence in the sentencing decision. Not only was he deprived of notice, but he was also misled because of the State's waiver (R2153-2155), the court's jury instructions (R2410-2411), and the court's

assurances that only matters presented to the jury would be used in the sentencing decision. (R2178-2213,2370-2371,2440)[5/] See, Presnell v. Georgia, 439 U.S. 14 (1978). This violation taints the entire sentencing process, and Amazon urges this Court to reverse his death sentences.

Kidnapping

The trial judge found a kidnapping existed because Amazon held Joy Chapin against her will during the sexual battery and "...forced her to accompany him as he went through the house looking for items of value." (R495)(A5) A kidnapping is

> ...forcibly, secretely, or by threat confirming, abducting, or imprisoning another person against his will and without lawful authority, with intent to...[c]ommit or facilitate commission of any felony.

§787.01, Fla.Stat. (1981). However, the confinement must be something more than the confinement inherent in the commission of the felony. Faison v. State, 426 So.2d 963 (Fla.1983). The only confinement present in this case was of that nature, and no kidnapping existed.

[5/] Throughout the penalty phase of this trial, Amazon's lawyers were diligent in trying to insure that all matters relevant to sentencing be presented to the jury. (R2178-2213,2370-2371,2440) The trial judge assured them that he considered only those matters presented to the jury with the exception of anything new disclosed in a presentence investigation report. (R2210,2440) No presentence investigation report was prepared (R2440), so Amazon justifiably believed all matters relevant to his sentencing had been presented to the jury. Furthermore, defense counsel's reliance upon the fact that the burglary and sexual battery had been removed from the sentencing decision is evidenced by the Memorandum In Support Of Life submitted to the court. (R224-229)

Initially, the trial court found that Amazon held Joy Chapin against her will and raped her. (R495)(A5) This finding included no confinement beyond that inherent in committing sexual battery. Therefore, there was no kidnapping committed in conjunction with the sexual battery. Faison v. State, 426 So.2d 963 (Fla.1983); Harkins v. State, 380 So.2d 524 (Fla.1980). Second, the trial court found that Amazon moved Joy Chapin from room to room looking for valuables. (R495)(A5) Again, this establishes no confinement or movement more than that inherent or inconsequential to the robbery. Faison v. State, 426 So.2d 963 (Fla.1983); Jackson v. State, 436 So.2d 1101 (Fla.4th DCA 1983). No kidnapping was proved in this case, and the trial court erred in finding kidnapping as an aggravating circumstance.

C.

The Trial Court Erred In Finding As An Aggravating Circumstance That The Homicides Were Committed To Avoid Or Prevent Arrest.

The aggravating circumstance of avoiding or preventing an arrest is not present when the homicide victim is not a law enforcement officer, unless the evidence clearly proves that the elimination of witnesses was dominant or only motive for the murder. §921.141(5)(e), Fla.Stat.; Riley v. State, 366 So.2d 19,21-22 (Fla.1978); Menendez v. State, 368 So.2d 1278,1282 (Fla.1979). In this case, the evidence did not clearly establish elimination of witnesses as the sole or dominant motive for the murders. This aggravating circumstance should not have been found, considered and weighed in the sentencing process.

Two factors were cited in the trial court's findings as justifying the finding of this aggravating circumstance. (R496)(A6) However, neither proves that the homicides were committed primarily to avoid arrest or to eliminate witnesses.

The first factor is the statement Amazon allegedly made to Detective Herbein that he killed the victims because they could recognize him. (R496)(A6) However, Herbein's testimony was severely impeached. The statement does not appear in Amazon's typewritten or tape recorded statements. (R1576-1603) And, none of the other detectives involved in questioning Amazon heard the statement. (R1656-1657) Herbein admitted that such a statement would be important and material, yet he did not have Amazon repeat the statement on tape. (R1577-1585) Furthermore, Herbein did not include the matter in his police report. (R1580-1581) Amazon's only expression of why he killed the victims is that it just happened and he did not mean to kill them. (R1836) This explanation fits with Dr. Merin's opinion that Amazon killed while emotionally distressed and in a panic reaction to stress.

A second factor, the trial court used was a finding that Amazon carried the knife and rope into the house which would have been evidence of an intent to kill. (R496)(A6) Initially, the evidence is not clear that Amazon carried the knife and rope into the house. But, even if adequately proved that Amazon did enter the house with a knife and rope, that does not establish that the victims were killed to eliminate them as

witnesses. The standard in Riley v. State is still not met. The aggravating circumstance of avoiding or preventing arrest was improperly found and considered.

D.

The Trial Court Erred In Finding As An Aggravating Circumstance That The Homicides Were Premeditated.

In his sentencing order, the trial judge found as an aggravating circumstance that the homicides were premeditated. (R497-498)(A7-8) Premeditation is not a valid statutory aggravating circumstance and cannot be properly considered in the sentencing process. §921.141, Fla.Stat.; State v. Dixon, 283 So.2d 1,9 (Fla.1973). Only when premeditation rises to the level of being cold, calculated and premeditated without any pretense of moral or legal justification does it qualify as an aggravating factor. §921.141(5)(i), Fla.Stat.; Combs v. State, 403 So.2d 413 (Fla.1981). The evidence in this case did not support the statutory aggravating circumstance based on premeditation, and the trial judge did not find that it did. By considering mere premeditation in aggravation, the trial court tainted and skewed the sentencing process. Amazon asks this Court to reverse his death sentence which is based, in part, upon this improper aggravating factor.

E.

The Trial Court Erred In Failing To Find As Mitigating Circumstances That Amazon Suffered From An Extreme Mental Or Emotional Disturbance And That His Capacity To Appreciate The Criminality Of His Conduct Or To Conform His Behavior To The Requirements Of Law Was Substantially Impaired.

Section 921.141(6)(b) and (f), Florida Statutes provides for the following mitigating circumstances.

> (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> * * * *
>
> (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

The evidence presented during the guilt and penalty phases in this case established the existence of these two statutory mitigating circumstances. Buchrem v. State, 355 So.2d 111 (Fla. 1977); Burch v. State, 343 So.2d 831 (Fla.1977); Jones v. State, 322 So.2d 615 (Fla.1976).

Dr. Sidney Merin, a clinical psychologist, testified for the defense during the penalty phase of the trial. (R2261-2366) He had examined and tested Ira Amazon. (R2276-2292) He characterized Amazon as an emotional cripple. (R2314) Although not psychotic, Amazon was markedly disturbed emotionally and mentally. (R2289-2292) He is impulsive and does not have the internalized ability to know if his behavior is correct or incorrect. (R2292-2295) His mental disorder was caused by his family's failure to provide him with love and support; he was rejected emotionally. (R2294-2302) He was never able to develop a conscience--the internalization of attitudes and controls over behavior. (R2296) As a result of his family living conditions, Amazon's emotional maturity never developed much beyond that of a 4 or 5-year-old child. (R2315) Some aspects of his emo-

tional development may have reached that of a 13-year-old, but other aspects were at the level of a 2-year-old. (R2315) Amazon's personality does not exhibit traits normally associated with destructive violence. (R2300)

While Amazon's control over his behavior is minimal, Merin concluded that something external caused the loss of that control which permitted agressive behavior to emerge. (R2300) That external cause was the use of alcohol and drugs. (R2300-2301) Ira Amazon had abused drugs for several years prior to the homicides. (R1840-1842,2318-2319) He testified that shortly before the homicide he consumed LSD, valium, dexadrene and at least six alcoholic drinks. (R1787,1790,1793-1794,1800-1801, 1839-1840) This was corroborated by the fact that he had to be treated for drug withdrawal shortly after he was incarcerated in the Pinellas County jail. (R2284-2285)[6/]

[6/] In his sentencing order, the trial judge relied on the testimony of two toxicologists who found no evidence of drugs or alcohol in blood and urine taken from Amazon when he was arrested. (R494)(A4) However, the tests did not conclusively show that Amazon had not consumed drugs or alcohol. First, the blood and urine samples were taken 17 hours after Amazon said he used the drugs and alcohol. (R1496,1791-1802) One toxicologist, Brian Finkel, testified that as much as an entire bottle of liquor could have been consumed, asimilated and passed completely from the body within that length of time. (R1125) Furthermore, the toxicologist testified that there was no commericially available reliable test for the presence of LSD. (R1099-1100) However, Finkle, at counsel's request, tested the urine sample using an experimental test which Finkle had developed to determine the presence of LSD. (R1100-1104) The test showed no LSD present. (R1104) Finkle said, however, that this was the first time he had used the test on samples taken 9 or 10 months before the test. (R1122) Furthermore, that test had been used on only 12 other occasions. (R1122) The FBI toxicologist, Drew Richardson, did not use the test in his laboratory. (R1722-1728)

Although Merin thought that Amazon was capable of forming an intent to enter the house and committ the sexual battery (R2302-2303), he concluded that the murders were the result of a survival panic reaction to the stress of the situation. (R2303-2314) Ira's already minimal behavior control system was further weakened by the drugs and alcohol, and he lost control. (R2300-2301,2310-2311,2320-2322)[7/] The multiple stab wounds were consistent with Amazon's having lost control of his behavior in a survival panic reaction to stress. (R2312-2313,2362-2363) Merin testified that uncontrolled repetitive acts are common in such panic reactions; the person's actions are automatic and beyond the person's control. (R2312-2313)

The trial court should have found and weighed the statutory mitigating circumstances regarding mental disturbance and impaired capacity. Amazon's death sentences have been unconstitutionally imposed, and he urges this Court to reverse them.

F.

The Trial Court Erred In Failing To Find Ira Amazon's Age As A Mitigating Circumstance.

Ira Amazon was nineteen at the time of the crimes. (R494)(A4) He was suffering from an emotional disturbance (R492,2261-2366)(A2), and at best, his emotional maturity level

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[7/] Brian Finkle, the toxicologist, testified that panic reactions are not uncommon in persons under the influence of LSD. (R1131)

was that of a 13-year-old. (R2315) Furthermore, some aspects of his emotional development stopped at that of a 2-year-old child. (R2315) The trial court's conclusion in rejecting this mitigating circumstance "...that he was mature enough to understand the consequences and criminality of his conduct" (R494) (A4), was contrary to the evidence. Amazon's chronological age of nineteen, particularly when coupled with his emotional maturity level, qualifies for the mitigating circumstance. E.g., Washington v. State, 432 So.2d 44 (Fla.1983); Hitchcock v. State, 413 So.2d 741 (Fla.1982); Hargrave v. State, 366 So.2d 1 (Fla.1978); Swan v. State, 322 So.2d 481 (Fla.1975); Meeks v. State, 336 So.2d 1142 (Fla.1976); Hoy v. State, 353 So.2d 826 (Fla.1977).

G.

The Trial Court Erred In Finding That Amazon Had Waived The Consideration Of Nonstatutory Mitigating Circumstances And In Failing To Consider And Weigh Evidence Of Nonstatutory Mitigating Circumstances.

The sentencing judge in a capital case must consider and weigh all evidence in mitigation before determining the appropriate sentence. He is not bound by the mitigating circumstances enumerated in Section 921.141, Florida Statutes. Eddings v. Oklahoma, 455 U.S. 1 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Songer v. State, 365 So.2d 696 (Fla.1978). Ira Amazon offered evidence of several mitigating circumstances which the sentencing judge refused to consider in sentencing. Consequently, the sentencing process was skewed, and Amazon's death sentences were unconstitutionally imposed.

Ira Amazon is not merely complaining about the weight the trial judge chose to afford the nonstatutory mitigating evidence. In his sentencing order, the judge stated that he did not consider nonstatutory mitigating circumstances because he believed defense counsel waived such considerations by waiving a presentence investigation report:

> MITIGATING CIRCUMSTANCES OTHER THAN STATUTORILY ENUMERATED MITIGATING CIRCUMSTANCES.
>
> This Court has the duty to consider any applicable mitigating circumstances in determining the fairness of a life or death sentence. Therefore, throughout both the guilt phase and the sentencing phase of the trial, the Court listened intently for evidence of any nature or kind which could be a mitigating factor whether it was a statutorily enumerated mitigating circumstance or a nonstatutory mitigating circumstance.
>
> The Defense argued adamantly that the Court should not order a Presentence Investigation (PSI) of the Defendant. The State argued that case law certainly supports the right of a trial judge in a first degree murder case to order and consider a PSI prior to sentencing the defendant. After much reflection this Court followed the urging of the Defense and ruled that sentencing would be based solely on the evidence presented during all phases of the trial. Therefore the chance for possible additional mitigating circumstances to be presented to the Court was waived by the Defense.

(R494-495)(A4-5)

Several nonstatutory mitigating circumstances exist in this case. First, Ira Amazon was suffering from a mental or emotional disturbance. (See, Issue VI, E, supra) The sentencing judge found this fact but concluded that the disturbance was not "extreme" and did not qualify for the statutory circumstance provided for in Section 921.141(6)(b), Florida Statutes. (R492)

(A2) Although Amazon contends that the statutory mitigating circumstance should have been found (Issue VI, E, supra), certainly his mental condition was a nonstatutory mitigating circumstance which the sentencing judge should have considered. The sentencing judge's application of the law in such a manner as to exclude from consideration all mitigating evidence which does not meet the threshold requirement for a statutory mitigating circumstance violates the Eighth and Fourteenth Amendments. While the limiting words employed in Florida's death penalty law regarding mitigating circumstances places a threshold which must be met before a statutory mitigating circumstance can be found, mitigating evidence failing to meet that threshold must, nevertheless, be considered and weighed in mitigation. See, Johnson v. State, 438 So.2d 775,779 (Fla.1983).

Three additional nonstatutory mitigating circumstances should have been considered. One was Amazon's drug and alcohol intoxication at the time of the crime. Buchrem v. State, 355 So.2d 111 (Fla.1978); Chambers v. State, 339 So.2d 204 (Fla. 1976). Again, this fact also supported a statutory mitigating circumstance which the trial court rejected. (Issue VI., E, supra) However, at the very least, it should have been weighed as a nonstatutory factor. Next, the fact that Amazon confessed (R1345-1559) and pleaded guilty to the underlying felonies (DCR1-42) was mitigating. See, Washington v. State, 362 So.2d 387 (Fla.1978) And, finally, Amazon demonstrated remorse when he cried while relating the detail of the crime that he remembered. (R1545-1546) Magill v. State, 386 So.2d 1188 (Fla.1980).

The trial court's failure to consider and weigh all the valid mitigating circumstances renders Amazon's death sentences unconstitutional. He urges this Court to reverse his death sentences.

ISSUE VII.

THE TRIAL COURT ERRED IN SENTENCING AMAZON TO DEATH OVER THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT BECAUSE THE FACTS SUGGESTING DEATH AS THE APPROPRIATE PENALTY WERE NOT SO CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER.

A jury's recommendation of life imprisonment must be given great weight, and

> In order to sustain a sentence of death following a jury's recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Tedder v. State, 322 So.2d 908,910 (Fla.1975). This Court has consistently said that a life sentence should be imposed where there is a reasonable basis for the jury's life recommendation. E.g., Hawkins v. State, 436 So.2d 44 (Fla.1983); Cannady v. State, 427 So.2d 723 (Fla.1983); Walsh v. State, 418 So.2d 1000 (Fla.1982). A reasonable basis exists in this case, and the trial court erred in refusing to follow the jury's recommendation.

Numerous factors justify the jury's life recommendation in this case. First, Ira was nineteen-years-old at the time of the crime, but he had the emotional maturity development of a child. (R2315) Second, he had been an abuser of drugs for several years and was intoxicated on drugs and alcohol at the time of the murders. (R1787,1793-1794,1800-1801,1840-1842,2284-2285,2318-2319) Third, Ira suffered from a mental or emotional disturbance which impaired his ability to control his behavior. (R2276-2292,2314-2315) His ability to control was further impaired by his drug and alcohol use. (R2300-2301) Finally, Ira

killed not from a planned design to do so but in, what the psychologist who examined him called, a survival panic; a spontaneous, uncontrolled reaction to the stress of the situation. (R2300-2333,2362-2363) The multiple stab wounds corroborated this theory as they evidenced the repetitive actions associated with such an uncontrolled reaction. (R2312-2313, 2362-2363)

The trial court's error in overriding the jury's recommendation is amply supported. Several aggravating circumstances were improperly found (See, Issue VI, A through D, supra) and several mitigating circumstances were not considered (See Issue VI, E through G). This improper evaluation of the aggravating and mitigating circumstances not only affected the trial judge's conclusion that the aggravating circumstances outweighed the mitigating, but it also impaired the judge's decision regarding the reasonableness of the jury's recommendation.

This Court has acknowledged that mental or emotional disturbance, such as Ira Amazon suffers, is a reasonable basis for a jury's recommendation of life. E.g., Cannady v. State, 427 So.2d 723 (Fla.1983); Burch v. State, 343 So.2d 831 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla.1976). Such mental impairment has been held sufficient to justify the jury's decision even where the trial court did not find that the mental mitigating circumstances existed. Cannady v. State, 427 So.2d 723,731 (Fla.1983). Drug and alcohol abuse and intoxication have likewise justified jury's life recommendations. Norris v.

State, 429 So.2d 688 (Fla.1983); Chambers v. State, 339 So.2d 204 (Fla.1976). A defendant's youth, particularly when coupled with impairments rendering emotional age much younger, has also been a basis for a life recommendation. Norris v. State, 429 So.2d 688 (Fla.1983); McKennon v. State, 403 So.2d 389 (Fla. 1981); Swan v. State, 322 So.2d 485 (Fla.1975). Finally, whether the homicides were planned or intentional has been a factor validly warranting life. All of the above circumstances are present in this case. Ira Amazon's jury acted rationally in recommending life sentences. The trial court had no information which was not also disclosed to the jury. (R495)(A5) He had no justification for rejecting the life recommendation. Ira Amazon urges this Court to reverse his death sentences with directions that he be sentenced to life.

ISSUE VIII.

THE TRIAL COURT ERRED IN IMPOSING DEATH SENTENCES UPON IRA AMAZON AFTER THE JURY RECOMMENDED LIFE IMPRISONMENT BECAUSE SUCH A SENTENCE PLACED AMAZON IN DOUBLE JEOPARDY, VIOLATED HIS RIGHT TO DUE PROCESS, AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Florida's death penalty sentencing statute which allows the imposition of a death sentence after a jury recommendation of life violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Portions of Section 921.141,Florida Statutes allowing such a sentence are unconstitutional on their face and as applied. The standards for overriding a jury's life recommendation are applied in a manner that discounts the jury's consideration of mitigating factors. Furthermore, these standards are so broad, vague and indefinite as to violate the constitutional requirement of reliability in sentencing.

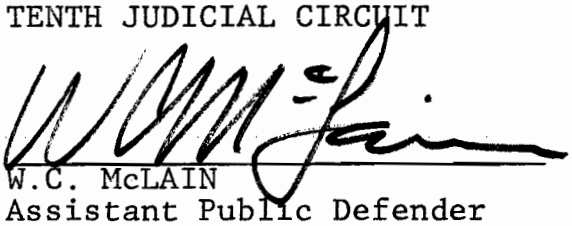
Amazon realized that this Court has rejected similar contentions in earlier cases. E.g., Douglas v. State, 373 So.2d 895 (Fla.1979); Spaziano v. State, 433 So.2d 508 (Fla.1983). However, the United States Supreme Court has granted certiorari to review this question. Spaziano v. Florida, __U.S.__, 104 S.Ct. 697 (1984). Amazon asks that this Court reserve ruling on this issue until the United States Supreme Court decides the question.

CONCLUSION

Upon the reasons and authorities presented in Issue I, Ira Amazon asks this Court to reverse his convictions with directions that he be discharged, or at least granted a new trial. In Issues II through V, Amazon asks this Court to reverse his case for a new trial. Finally, in Issues VI through VIII, Amazon asks that his death sentences be reduced to life imprisonment if this Court decides not to reverse his convictions.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: 
W.C. McLAIN
Assistant Public Defender
Chief, Capital Appeals

Hall of Justice Building
455 North Broadway Avenue
Bartow, Florida 33830-3798
(813)533-0931 or 533-1184

COUNSEL FOR APPELLANT