IN THE FLORIDA SUPREME COURT

MILO A. ROSE, :

Appellant, :

vs. : Case No. 64,484

STATE OF FLORIDA, :

Appellee. :

_____ :

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

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

The Grand Jury for Pinellas County indicted the Appellant, Milo A. Rose, on October 26, 1982, for the first degree premeditated murder of Robert C. Richardson on October 18, 1982, in violation of Section 782.04(1)(a), Florida Statutes. (R4,5)

Appellant filed discovery demands on November 16, 1982 (R53-57), and April 12, 1983. (R169,170) The State filed answers to these demands on December 1, 1982 (R60-63), and April 20, 1983. (R172-176) The State filed an additional list of witnesses on June 27, 1983. (R233) Michael Craft was not listed as a potential witness for the State. (R60-63,172-176,233)

Appellant filed a motion to suppress photo-pak on June 27, 1983. (R260,261) An evidentiary hearing on the motion was held before the Honorable Susan F. Schaffer, Circuit Judge, on June 27, 1983. (R453,472-509) The court granted the motion in part, suppressing out-of-court identification by Melissa Mastridge, but denied it with regard to identifications by Catherine Bass, Maryann Hutton, and Carl Hayword. (R267,507-509)

Appellant was tried by jury before Judge Schaffer on June 27-30, 1983. (R453) The jury found Appellant guilty as charged on June 30, 1983. (R293,1100,1101) The court adjudged Appellant guilty of first degree murder. (R297,298,1109)

The sentencing phase of the trial was conducted on July 1 and 5, 1983. (R1111,1216) The jury recommended the death penalty by a vote of 9 to 3 on July 5, 1982. (R310,1365) The court sentenced Appellant to death on July 8, 1983. (R323-342,349,1372,1383-1395)

Appellant filed a motion for new trial on July 18, 1983. (R345-347) The court heard and denied the motion on September 12, 1983, but the order was not filed until September 28, 1983. (R355,1150-1152)

Appellant filed a notice of appeal on October 31, 1983. (R356) The court appointed the Public Defender for the Tenth Judicial Circuit to represent Appellant on this appeal. (R360)

STATEMENT OF THE FACTS

A. Motion To Suppress

Appellant testified that the Clearwater Police arrested him on the night of October 18, 1982. He was photographed wearing a black t-shirt and blue jeans. "Happiness is a hot slot, Las Vegas, Nevada," was printed on the shirt in white. His hair was in a ponytail. The officers told him to remove the rubber-band from his hair and mess it up before they took the picture. (R473,474) Appellant identified photograph number 4 (R372) contained in State's exhibit 1 (R368-372) as the photograph of him. (R475,476)

Catherine Bass testified that she had a clear view of the perpetrator of the offense for four to six minutes. (R476,482,483) She told the first officer on the scene, Patrolman McKenna, that the perpetrator was six feet to six feet two inches tall, thin, 150 to 180 pounds, wearing a black t-shirt with white lettering, light colored pants, and white tennis shoes. (R478,479) Between one and three hours after the offense, the police showed her a photo pack, State's exhibit 1. She identified photo number 4 based upon the facial features, hair, and clothing. (R477,480-482) The officer did not suggest which photo she should select. (R482) She told him she could not positively state this was the suspect, but she felt confident that it was. (R477,478)

Bass rejected photo number 1 (R370) because the man was too stocky. (R484) She rejected photo number 3 (R368)

because the hair was too long, and the perpetrator was wearing a t-shirt instead of an open-collared shirt. (R484,485) She rejected photo number 2 (R369) because the perpetrator had darker, bushier hair. (R485) She rejected photo number 5 (R371) because the perpetrator had much longer hair and did not have a full beard. (R485)

Bass saw a photo of the suspect in the newspaper the next day. (R480) It was the same photo she had selected. (R484) She identified Appellant in court based on her memory of seeing him the night the crime was committed and on seeing his photo in the photo pack. (R483-486)

Melissa Mastridge testified that she told the first officer who arrived at the scene that the suspect was medium height, with dark hair, wearing blue jeans and a dark t-shirt. She hadn't noticed any lettering on the shirt. (R487-489) The police showed her the photo pack, State's exhibit 1, on the night of October 18, 1982. She identified photo number 4, but she was not positive of her identification. It was the only photo which matched the description. (R487,488) She could not identify anyone in court. (R490)

Detective Ronald Luchan, Clearwater Police Department, testified that he took the photograph of Appellant and prepared the photo pack by attempting to obtain photos of people who looked similar. (R491-500) He did not ask Appellant to do anything to his hair. (R495) He was not aware of the descriptions given by the witnesses at the scene but obtained descriptions of the suspect from the four witnesses at the Police

Department. (R497) He conducted the photo display about two hours after the offense. (R493) He did not suggest which photo the witnesses should select. (R494,498-500) Melissa Mastridge said she was not positive of her identification, only ninety percent sure. (R494,499) Hutton, Bass, and Hayword made positive identifications. (R494,499) In his police report, Luchan had stated that Bass was the witness who was only ninety percent certain. (R500,501)

Defense counsel argued that the photo pack was impermissibly suggestive because only the photo of Appellant matched the description given by the witnesses. (R502-505) The court granted the motion in part, suppressing Mastridge's out of court identification, but denied the motion with regard to Bass, Hutton, and Hayword. (R507-509)

B. Trial Testimony

Around 10:00 p.m. on October 18, 1982, Catherine Bass, Melissa Masteridge, and Maryann Hutton were talking together outside the Mastridge residence on Jones Street in Clearwater. (R701-703,734-736,755,756) They saw two men walking down Garden Street. (R703,704,736,756) Bass and Hutton did not think the men were talking loudly. (R716,717,766) Mastridge said the men were talking very loudly. (R736,741) Bass could tell they had been drinking. (R717)

Bass, Mastridge, and Hutton heard the sound of breaking glass. (R704,737,757) They saw that one of the men was lying on the ground with one knee up. The other man was standing or

kneeling over him. (R704,705,757,758) Mastridge said he told the man on the ground to get up. (R737) Hutton saw the flash of something silver and thought it might be a knife. (R757) The other man walked across the street and called out to the man on the ground. He walked back and looked at the man in the ground. (R705,706,737,758) Next, he walked into a nearby vacant lot and appeared to look around for something. (R706,737,758) He returned to the man on the ground carrying a concrete block. (R707, 737,738,759) He raised the block over his head and hurled it down toward the man's head. (R707,738,759) Bass said the man on the ground rolled to one side, then rolled back over with both legs down. (R707) The standing man picked up the block and hurled it down a total of three to eight times. (R707,708,739, 759)

Mastridge went to her neighbors' house and told them to call the police. (R739,770,771) Kathy Hayword called the police. (R739,771) Carl Hayword went outside. He saw the man holding the block over his head. Hayword shouted. The man hesitated, then dropped the block. (R708,739,740,760,771,772, 776,777) The man turned and ran or walked behind a building. (R708,728,729,740,760,767,772) Hayword and Bass drove around the neighborhood but couldn't find the man. (R708,729,772) Ambulances, police cars, and firetrucks arrived. (R708,760)

The area was well lighted, so the witnesses were able to see the man with the concrete block clearly. (R711-713,760, 776,777) Bass estimated her distance from the scene to be 200 feet. (R711,712) Hayword said he was 50 to 75 feet away. (R776)

Bass, Mastridge, and Hutton described the perpetrator to the police. (R710,722-724,739,760,762)

Identification Technician Tracy Velong of the Clearwater Police was called to the scene to take photographs and collect evidence. (R802,803) She found and photographed a concrete block, State's exhibit 2, two feet four inches away from the head of the victim. (R803-805,817-819) The block was admitted into evidence without objection. (R808)

Defense counsel and the State stipulated that the victim was Robert C. Richardson. (R820,821) Dr. Donna Brown performed an autopsy on Richardson (R838-841) and determined that he died from head injuries caused by multiple blows with some type of blunt object. (R841-850) The injuries were consistent with being struck five or six times with the concrete block. (R844) She also found aspirated blood in the lungs. (R846) In her opinion, Richardson was not dead after the first blow, but he may not have been conscious. (R847) Richardson had a blood alcohol level of 0.19 percent. (R857)

Mark Poole and Rebecca Borton had been staying with Appellant and Barbara Richardson at 666 Mandalay in Clearwater Beach for two or three weeks. (R862,863,866,876,888) Mrs. Richardson was Robert Richardson's mother. (R876,881,882) Robert Richardson was also called Butch. (R865) Appellant had asked Poole and Borton to find their own place to live, but Mrs. Richardson told them they could stay. (R877,883,884)

On October 18, 1982, Poole and Borton had been out drinking at a bar called Mano's Place and Suzanne Duke's apart-

ment located above the bar at 29 Garden Street. (R862,863,867, 872-875,877,878,886,894,895,897,898) Poole had an argument with Richardson because Richardson asked him for money to buy beer. (R898) Around 10:00 p.m. Poole and Borton left Dukes' apartment, drove down Garden, and saw firetrucks and ambulances in the area of Garden and Jones. They turned left on Drew and found Appellant hitchhiking at the intersection of Drew and Cleveland. (R862-865,877,878,887,888) Appellant got into Poole's truck and said he had just killed Butch. (R865,878,879,888) Poole and Borton did not believe him because he was too calm. (R866, 888) Appellant repeated that he just killed Butch, that he picked up a brick and smashed his head in. (R866,868,888,889) Appellant said if he wasn't dead he was a vegetable. (R891) When Poole asked why he killed Butch, Appellant said because he was angry or mad. (R883,892) Appellant asked where they had been. They told him they had been at Duke's apartment. Appellant said, "Well that is where I was at. That is where I'm telling them I was at." (R866,867,890) Appellant had a bloody nose. He said another hitchhiker hit him. (R868,879,893,896) Appellant did not appear to be drunk. (R872,894)

When they got home, no one told Mrs. Richardson about Butch. (R869,880,892,893,898) Appellant washed or wiped the blood off his face. Borton pointed out some blood on his hand. (R870,893,894) Poole and Appellant drove to a convenience store to buy some beer. Appellant continued to talk about killing Butch. (R870) After they returned everyone went to bed. (R871, 880,881)

Earlier that evening Officer McKenna had interviewed Richardson and Appellant about a fight in which Richardson had been involved. (R983,984) On the basis of witness interviews and other information they had received, Detective Peter Fire and Officer McKenna went to 664 and 666 Mandalay Avenue. (R951) Mrs. Richardson permitted Fire to enter the house. He found Appellant asleep in bed and arrested him. Appellant had blood on his clothing and arms. (R952-954) McKenna went upstairs. (R952) While in Mrs. Richardson's presence in the house, Poole and Borton denied knowing anything about what had happened. Once they got outside, they told the officer what they knew. (R881,882,900,901)

Fire advised Appellant of his Miranda rights at the police station. Appellant agreed to talk. (R955,956) Appellant said he had been drinking with Richardson at Mano's bar earlier in the evening. They had four or five beers. Richardson was involved in a fight. Appellant was punched in the nose while breaking up the fight and got blood on his arms and clothing. Richardson left the bar. Appellant had not seen him since then. (R957,959) Appellant left the bar and went upstairs to a girl's apartment for a drink. He rode home with Poole and Borton. (R960)

During the course of the interview, Fire left the room to get some coffee for Appellant. Fire spoke to Poole and Borton. (R974-976) Fire confronted Appellant with their story that they had picked him up hitchhiking and he told them he killed Richardson with a brick. Appellant said they were liars. (R961-966)

Detective Ronald Luchan took a photograph of Appellant, photo number 4, State's exhibit 1E, and prepared a photo pack, State's exhibit 1, which was admitted into evidence over defense counsel's objection. (R368-372,782-792) He showed the photo pack to the witnesses separately without suggesting one photo over another. (R789-791) Luchan took another photograph of Appellant, State's exhibit 5, which was admitted in evidence over defense counsel's relevancy objection. (R378,792-794) Luchan weighed and measured the concrete block, State's exhibit 2. It weighed 35 pounds. (R794,795)

When defense counsel attempted to cross-examine Luchan about his interview with Maryann Hutton (R797), the State objected that this was beyond the scope of direct examination. (R798) Defense counsel responded that Luchan had made inconsistent statements in his police report, his deposition, and his prior testimony. Defense counsel was attempting to make the jury aware of the level of Luchan's professionalism and credibility. (R798,799) The court sustained the objection and restricted cross-examination to the photo pack, the concrete block, and the pictures he took. (R799)

Bass, Hutton, and Hayword identified the photograph of Appellant from the photo pack. (R713-715,762,763,773,774, 801) They also identified Appellant in court. (R709,710,732, 733,764,774,775,779,780)

C. Sentencing

On July 1, 1983, the court continued the sentencing phase of the trial until the following Tuesday. (R1111-1114)

After excusing the jury, the court held a conference in chambers. (R1115) The court ruled that it would instruct upon the cold, calculated, and premeditated aggravating circumstance over defense counsel's objection that it did not apply. (R1115-1118) The court also ruled that the State could present, over defense counsel's relevancy objection, the testimony of Mr. Walker regarding Appellant's prior conviction for aggravated assault in addition to the judgment and sentence for that offense. (R1118-1121)

The sentencing phase of trial resumed on July 5, 1983. (R1216) The prosecutor indicated that he would have to use Appellant's arrest record on "rap sheet" to prove Appellant's prior convictions. Defense counsel objected that the State could not prove irrelevant prior crimes. The court ruled that the State's witness could testify from the arrest record but the record itself could not be admitted. (R1223-1227) At the State's request, the court took judicial notice of the testimony presented during the first phase of the trial (R1230,1231); State's exhibit 4, Appellant's prior judgment and sentence for aggravated assault (R423-426,1231); and the first degree murder judgment previously entered in this case. (R1231,1232)

Tommy Walker testified that he was driving home from work on Gulf-to-Bay Boulevard in Pinellas County around 6:00 p.m. on March 29, 1982, when he was caught in heavy traffic backed up because of an accident. He saw a car, two cars in front of him, bump another car in the rear three or four times. (R1232,1233) As he tried to drive past, he noticed that Appel-

lant and another man had gotten out of the car and were beating on the man in the front car. Walker stopped and told them it didn't take both of them to beat on the man. He was told to return to his car. He replied that he did not have to be anywhere. They started approaching Walker, who went back to his car and got a T-square. (R1233,1234) Walker began to swing the T-square. (R1235) The court overruled defense counsel's objection to proof of aggravated battery when Appellant was not charged with or convicted of that offense and allowed Walker to testify that Appellant picked up a three to five inch pipe, which he threw and hit Walker in the neck. (R1235-1237)

Appellant then entered Walker's car and removed several tools, including a dry wall hatchet, State's exhibit 8. (R1237) The court admitted the hatchet into evidence over defense counsel's prior objection. (R1237,1238) Appellant removed Walker's car keys from the ignition and threw them into the street. Appellant, the other man from the car, and the driver of the car began circling around Walker. (R1238) Appellant jumped on his back. Walker lost the T-square and began to run. Walker fell. Appellant and the others caught him. Appellant still had the hatchet in his hand. They also had the T-square. Walker was placed in fear. Appellant participated in beating him. (R1239, 1240) Over defense counsel's renewed objection, the court allowed Walker to testify that he sustained a head injury and a broken arm. (R1242)

When the State called Michael Craft to testify (R1246), defense counsel objected that he was notified of the discovery

of this witness at home around 9:00 p.m. on Friday evening, had no opportunity to depose the witness, and had no opportunity to refute his testimony. The State had told defense counsel that Craft would testify that Appellant had a prior arrest in Illinois and was on parole and that there was an outstanding capias or warrant in that state. (R1247) The court offered defense counsel the option of stipulating that Appellant was on parole. Defense counsel responded that he could not relieve the State of its burden of proof. The court responded that defense counsel had enough time to talk to Appellant to find out whether it was true. Defense counsel stated that he had discussed it with Appellant and stood on his objection. The court overruled the objection. (R1248) The prosecutor asserted that he had notified defense counsel that Craft would be available for deposition the night of July 4 and at 8:00 on July 5. (R1248,1249)

Michael Craft, Chief Investigator, Illinois Department of Corrections, testified that he was custodian of records on parole violators. (R1249,1252) He identified State's exhibit 1 as copies of a picture of Milo Rose, a parole violation warrant for Michael Rose, and a statement of the charges prepared by the parole agent. These documents indicated that Michael Rose was on parole for aggravated battery and burglary on October 18, 1982. (R1249-1251) The court overruled defense counsel's renewed objection to the arrest record (R1254,1256), and allowed Craft to testify that a prison identification number on the photograph corresponded with the number on the arrest record for Michael A. Rose. The arrest record indicated that Rose was on parole.

The parole had been scheduled to expire on January 17, 1983, but on April 29, 1983, a warrant for violation of parole was issued because he could not be located. (R1254-1259)

Lowell Chamblin, a latent fingerprint examiner for the Pinellas County Sheriff's Department, testified that he compared the fingerprints of Michael A. Rose on State's exhibit 2 with the fingerprints on Appellant's judgment for first degree murder and found that they were made by the same person. (R1262-1266)

Defense counsel and the State stipulated Michael A. Rose, Mike A. Rose, and Milo Rose were the same person. (R1272, 1273) State's exhibits 5 and 6, judgments and sentences for robbery and aggravated battery, were admitted in evidence over defense counsel's objection. (R430-432,446-449,1273)

Dr. Vincent Slomin, Jr., a clinical psychologist, was qualified as an expert in psychology and counseling of persons with alcohol problems. (R1275-1277) He examined Appellant on June 24, 1983. (R1277,1278) According to Appellant and a pre-sentence investigation report, Appellant had a history of alcohol abuse and was a member of Alcoholics Anonymous. Both his parents and his brothers were alcoholics. (R1278) Appellant may have had an alcoholic black-out at the time of the offense. (R2178, 1279) All of Appellant's responses on a Rorschach ink-blot test were within normal limits. His precepts were those of a normal, intelligent, bright individual. There were no delusions, overt hostility, nor aggression. (R1280) Appellant suffered from an antisocial personality disorder. (R1281,1288) Dr. Slomin has treated persons with antisocial personality disorders. (R1283,

1284) Appellant would be able to function adequately within a jail environment. (R1285,1286)

Appellant told Dr. Slomin he was drinking a lot on the night of the offense. (R1287) Appellant attended two years of college in Illinois, studying psychology and mental health. (R1287,1288) Appellant said he was married for nine years and divorced in 1978. His former wife and their two children lived in Hudson, Florida. (R1289) Appellant was born on January 25, 1950, and was 33 years old. (R1291)

In response to a hypothetical question based upon the State's evidence at trial, Dr. Slomin said the facts were consistent with an antisocial personality disorder and not consistent with an alcoholic black-out. (R1291,1292)

Josephine Singletary was a correction and social worker who conducted individual and group counseling at the Pinellas County Jail. (R1294) Appellant had participated in her group counseling sessions for the past three or four months. Appellant participated fully and did a lot of re-evaluating. He initiated a study group. (R1295) Appellant had made the appropriate adjustment to life in jail. She had observed a definite improvement since he initially came into the jail. She was not aware of any negative reports about his behavior. (R1296)

Barbara Richardson, Butch Richardson's mother, testified that she loved Appellant. He had been like a husband to her. He was a very good person. She lived with him for sixteen months. The left side of her face was paralyzed because her son tried

to kill her with a gun. (R1299,1300) Appellant visited her twice a day while she was in intensive care in the hospital. Appellant loved her son. (R1302) Appellant faithfully attended Alcoholics Anonymous. (R1303) He tried to get her to stop drinking. He came to the defense of and helped her son Butch a number of times. Her son was jealous. Appellant felt threatened by him. He stopped living with her a couple of times to try to get his life in order. (R1304) He told her she was not supportive in his effort to reform his life. Appellant taught her survival, not to be selfish or self-centered, and to be a woman. He was a beautiful person. Mrs. Richardson did not want to see another person dead. (R1305) She did not believe Appellant killed her son. (R1306)

Appellant admitted that he had been convicted of robbery in 1968 and aggravated assault upon Mr. Walker in Pinellas County. (R1307,1308,1315) He admitted that he was on parole for a 1979 bruglary and aggravated assault on October 18, 1982, and that he had absconded his parole. (R1316)

Appellant testified that he was an alcoholic and had experienced an alcoholic black-out. He sought treatment for his alcoholism at a self-help program. He had not had any alcohol for eight or nine months. He was chairman of the Jail Alcohol Program which met every Tuesday night. He was active in church and began a prayer group which met every night. He was taking a Bible study course and passed out Bibles to new men in the pod. He was active in Ms. Singletary's group. (R1308, 1309)

Appellant loved Butch Richardson. He had come to Richardson's defense and helped him quite a bit. (R1309) He did not kill Richardson. (R1310) He remembered the night of October 18, 1982. Richardson became involved in fights, and Appellant helped Richardson. (R1310,1311) Appellant talked to Poole that night and rode home with him. (R1317)

Appellant was a plumber. During the two years prior to his arrest, he had been employed for one month. (R1317) During most of that time he lived with Mrs. Richardson. (R1317, 1318) Butch Richardson started to live with them. There were not a lot of hard feelings between Appellant and Richardson, but they did have differences of opinion. (R1318)

Appellant told the psychiatrist about his background, that he was married and had two children. (R1318) He was interviewed by Mrs. Pat Tastis for a presentence investigation. He did not recall her asking about his family. (R1320,1322) The presentence investigation report stated that he said he had never been married and had fathered no children. (R450,451,1321, 1322) Appellant testified that was not true. (R1322)

Appellant's "legal" name, the name on his birth certificate, was Milo Andrew Trusseo. He later had his name changed to Rose. He had also gone by the name of Michael Andrew Rose. (R1322,1323)

Patricia Tastis, a Parole and Probation Officer for the State of Florida, testified that she spoke to Appellant to prepare a presentence investigation. Appellant said he had

never been married and had fathered no children. (R1324,1325) He told her his name was Milo Rose. He did not tell her he went by the name Milo Andrew Trusseo. (R1326,1327)

Following a lunchtime recess (R1329), Appellant requested the opportunity to take the stand again to clarify and supplement his testimony. (R1330,1331) The prosecutor objected. (R1331) The court denied the request. (R1332,1333)

After the jury recommended imposition of the death penalty (R1365), the court indicated that it would consider the presentence investigation report for the aggravated assault charge before imposing sentence. (R1368,1369) This report stated that Appellant was raised by alcoholic parents and experienced physical and mental abuse. He graduated from high school and attended a junior college for two years. He attended a trade school in Chicago and became a plumber. (R451)

On July 8, 1983, the court found three aggravating circumstances: (1) the capital felony was committed while Appellant was under sentence of imprisonment; (2) Appellant was previously convicted of felonies involving the use or threat of violence; and (3) the murder was committed in a cold, calculated, and premeditated manner. (R1384-1386,1388-1391) The court considered evidence of mitigating circumstances, including Appellant's drinking, his history of alcohol abuse, his anti-social personality disorder, and Mrs. Richardson's testimony that he was a good person, but found that there were no statutory or non-statutory mitigating circumstances sufficient to outweigh

or offset the aggravating circumstances. (R1391-1394) The court noted that as a defense attorney she had long opposed capital punishment. (R1394,1395) "But I took an oath when I became a judge and swore that I would uphold the law, and the law of this state says you have forfeited your right to live." (R1395) The court sentenced Appellant to death. (R1395)

ARGUMENT

ISSUE I.

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW BY DENYING HIS MOTION TO SUPPRESS, ADMITTING EVIDENCE OF AN IMPERMISSIBLY SUGGESTIVE PRETRIAL IDENTIFICATION, AND ALLOWING IDENTIFICATION IN COURT TAINTED BY THE PRETRIAL IDENTIFICATION.

Defense counsel moved to suppress the pretrial photographic identification of Appellant as impermissibly suggestive. (R260,502-505) The only eyewitnesses to testify at the hearing on the motion to suppress, Catherine Bass and Melissa Mastridge, both testified that they identified the photograph of Appellant (R372) because it was the only photo in the photo pack (R368-372) which matched the description of the man they had seen. (R477,481,482,484,485,487,488)

A photographic line-up which contains only one photo matching the description of the accused is impermissibly suggestive. M.J.S. v. State, 386 So.2d 323 (Fla.2d DCA 1980); Dell v. State, 309 So.2d 52 (Fla.2d DCA 1975). Yet the trial court granted the motion to suppress only as to the identification by Mastridge and denied it as to identifications by Bass, Maryann Hutton, and Carl Hayword. (R267,507-509)

At trial, the court admitted evidence of the pretrial identifications by Bass, Hutton, and Hayword. (R713-715,762,763, 773,774,801) The court also overruled defense counsel's renewed objection and admitted the photo pack into evidence. (R783-789) It is a denial of due process and reversible error to admit

evidence of an impermissibly suggestive pretrial identification. Foster v. California, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969).

Once it has been shown that a pretrial identification procedure was impermissibly suggestive, any identification in court must be presumed to be tainted and cannot be allowed unless the State shows by clear and convincing evidence that the in court identification is grounded upon an independent basis. M.J.S. v. State, supra 386 So.2d at 324; State v. Sepulvado, 362 So.2d 324,327 (Fla.2d DCA 1978), cert.den., 368 So.2d 1374 (Fla.1979). See United States v. Wade, 388 U.S. 218, 239-240, 87 S.Ct. 1926, 18 L.Ed.2d 1149,1164 (1967). At the suppression hearing Bass admitted that her in court identification was based upon seeing the photo in the photo pack as well as her memory of what she saw on the night of the offense. (R483-486) Thus, her identification of Appellant at trial (R709, 710,732,733) could not have had an independent basis. Nor did the State present any clear and convincing evidence that the in court identifications by Hutton and Hayword had an independent basis. (R764,774,775,779,780)

The trial court's denial of the motion to suppress, admission of evidence of an impermissibly suggestive pretrial identification, and admission of in court identifications not shown to have an independent basis violated Appellant's right to due process of law under Amendment XIV of the United States Constitution and Article I, Section 9 of the Florida Constitution. The judgment and sentence must be reversed and the cause remanded for a new trial.

ISSUE II.

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO CONFRONTATION BY RESTRICTING CROSS-EXAMINATION OF DETECTIVE LUCHAN ON MATTERS AFFECTING HIS CREDIBILITY.

Appellant had the absolute right under both the state and federal constitutions to confront and cross-examine the witnesses against him. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); Coxwell v. State, 361 So.2d 148 (Fla.1978); Amends. VI and XIV, U.S. Const.; Art. I, §16, Fla. Const. The right to cross-examine adverse witnesses includes the right to impeach the credibility of a witness. Davis v. Alaska, 415 U.S. 308,316, 94 S.Ct. 1105, 39 L.Ed.2d 347,353 (1974); Steinhorst v. State, 412 So.2d 332,337 (Fla.1982); Mendez v. State, 412 So.2d 965,966 (Fla.2d DCA 1982).

Detective Luchan was a key State's witness whose testimony concerned one of the major issues at trial, the pretrial photographic identification of Appellant as the perpetrator of the murder. (R782-792,801) See Issue I, supra. When Luchan took the stand to testify, he placed his credibility in issue. Mendez v. State, supra, 412 So.2d at 966. Yet when defense counsel attempted to cross-examine Luchan regarding prior inconsistent statements in order to test his credibility, the trial court sustained the State's objection that such examination was beyond the scope of direct. (R797-799)

The trial court's discretion to control the scope of cross-examination does not extend to the curtailment of examination designed to impeach the credibility of a key State's

witness. Hahn v. State, 58 So.2d 188,191 (Fla.1952); Robinson v. State, 438 So.2d 8,10 (Fla.5th DCA 1983); Mendez v. State, supra, 412 So.2d at 966. "[O]ne of the important objects of the right of confrontation was to guarantee that the fact finders had an adequate opportunity to assess the credibility of witnesses." Berger v. California, 393 U.S. 314,315, 89 S.Ct. 540, 21 L.Ed.2d 508,510 (1969).

> "The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted....But no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him....But no such case is presented here."

Smith v. Illinois, 390 U.S. 129,132-133, 88 S.Ct. 748, 19 L.Ed.2d 956,959-960 (1968), quoting, Alford v. United States, 282 U.S. 687,694, 51 S.Ct. 218, 75 L.Ed. 624,629 (1931).

The court's curtailment of defense counsel's cross-examination of Luchan requires reversal even though defense counsel did not specifically proffer the particular prior conflicting statements he intended to use for impeachment. (R797-799)

> "It is the essense of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial

> of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them....To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial...."

Smith v. Illinois, supra, 390 U.S. at 132, 19 L.Ed.2d at 959, quoting, Alford v. United States, supra, 282 U.S. at 692, 75 L.Ed. at 628.

The court's restriction of Appellant's constitutional right to test the credibility of Det. Luchan on cross-examination cannot be deemed harmless. The right to cross-examination is an essential and fundamental requirement for a fair trial, and its denial or significant dimunition calls into question the ultimate integrity of the fact-finding process. Chambers v. Mississippi, 410 U.S. 284,295, 93 S.Ct. 1038, 35 L.Ed.2d 297, 309 (1973). The denial of Appellant's right to effective cross-examination was constitutional error of the first magnitude which cannot be cured by any showing of want of prejudice. Davis v. Alaska, supra, 415 U.S. at 318, 65 L.Ed.2d at 355; Smith v. Illinois, supra, 390 U.S. at 131, 19 L.Ed.2d at 959. The judgment and sentence must be reversed and the cause remanded for a new trial.

ISSUE III.

THE TRIAL COURT ERRED BY ADMITTING THE TESTIMONY OF MICHAEL CRAFT WITHOUT CONDUCTING A PROPER INQUIRY UPON DEFENSE COUNSEL'S OBJECTION TO A DISCOVERY VIOLATION.

Upon receiving Appellant's demands for discovery (R53-57,169,170), the State was required to disclose "[t]he names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto." Fla.R.Crim.P. 3.220 (a)(1)(i). The State did not disclose the name and address of Michael Craft in its answers to Appellant's demands nor in its additional list of witnesses. (R60-63,172-176,233)

When the State called Michael Craft to testify during the sentencing phase of the trial (R1246), defense counsel objected that he was notified of the discovery of this witness at home around 9:00 p.m. on Friday evening. He had no opportunity to depose Craft and no opportunity to refute his testimony. The State had told him Craft would testify Appellant had a prior arrest in Illinois and was on parole and that there was an outstanding capias or warrant in that state. (R1247)

When a discovery violation is called to the trial court's attention, it must conduct an inquiry to determine whether the violation was willful or inadvertant, whether the violation was trivial or substantial, and whether the violation was prejudicial to the defendant's ability to prepare for trial. Wilcox v. State, 367 So.2d 1020 (Fla.1979); Richardson v. State, 246 So.2d 771 (Fla.1971). The burden is on the State to show

that the defense was not prejudiced by the violation. Cumbie v. State, 345 So.2d 1061 (Fla.1977); Hill v. State, 406 So.2d 80 (Fla.2d DCA 1981).

Here the court failed to conduct any inquiry into the State's late disclosure of Michael Craft. The court failed to make any of the requisite determinations. Instead, the court offered defense counsel the opportunity to stipulate that Appellant was on parole. When defense counsel declined to relieve the State of its burden of proof, the court responded that he had enough time to talk to Appellant to find out whether it was true. When defense counsel stood upon his objection, the court overruled the objection. (R1248) The prosecutor then asserted that he had notified defense counsel that Craft would be available for deposition the night of July 4 and at 8:00 on July 5. (R1248, 1249)

Because of the court's failure to conduct a proper inquiry, it cannot be determined whether the State's late disclosure of Craft was willful or inadvertant. The violation was substantial because Craft testified that Appellant was on parole on the date of the offense (R1250,1258,1259), one of the aggravating circumstances found to support the death sentence. (R1384, 1385) There was a factual dispute as to whether defense counsel had the opportunity to depose Craft (R1247-1249), but defense counsel plainly asserted that his ability to prepare for the sentencing phase of trial had been prejudiced since he claimed that he had no opportunity to refute Craft's testimony. (R1247)

Under such circumstances, the court's failure to conduct the requisite inquiry was reversible error requiring remand for a new sentencing trial. See Wilcox v. State, supra; Cumbie v. State, supra.

ISSUE IV.

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF NON-STATUTORY AGGRAVATING CIRCUMSTANCES INCLUDING PRIOR OFFENSES FOR WHICH APPELLANT HAD NOT BEEN CONVICTED AND A PENDING ALLEGATION OF PAROLE VIOLATION.

Section 921.141(5), Florida Statutes (1981), provides in pertinent part:

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

This Court has long held that the statute excludes the consideration of mere arrests or accusations. Odom v. State, 403 So.2d 936,942 (Fla.1981); Provence v. State, 337 So.2d 783, 786 (Fla.1976), cert.den., 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977).

Yet the trial court overruled defense counsel's relevancy objections (R1118-1121,1223-1227,1235-1237,1242,1254,1256) and admitted evidence that Appellant had committed prior offenses for which he had not been convicted and that a charge of parole violation remained pending. (R404-409,1233,1234,1237-1242,1250, 1251,1258,1259) Appellant had been convicted of aggravated assault for threatening Tommy Walker with a hatchet. (R423-426, 450,1231,1236,1237) He had not been convicted of battering the driver of the other car or Walker. (R450,1235-1237) While Appellant had been accused of violating his parole, the accusation remained pending. (R405-409,1250,1251,1258,1259)

The admission of evidence of such non-statutory aggravating circumstances is reversible error requiring a new sentencing proceeding before a new jury when there are also mitigating circumstances to be considered and weighed. Perry v. State, 395 So.2d 170,174-175 (Fla.1980); Elledge v. State, 346 So.2d 998, 1002-1003 (Fla.1977). Since the trial court did consider evidence of mitigating circumstances in the weighing process (R1391-1394), and there was evidence of other mitigating circumstances the court failed to consider, see Issue VI, infra, the death sentence must be reversed and the cause remanded for a new sentencing proceeding before a new jury.

ISSUE V.

THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS TO TESTIFY IN HIS OWN BEHALF, TO PRESENT EVIDENCE IN MITIGATION, AND TO RESPOND TO THE STATE'S EVIDENCE BY DENYING HIS REQUEST TO RETAKE THE STAND TO CLARIFY AND SUPPLEMENT HIS TESTIMONY PRIOR TO CLOSING ARGUMENTS.

During the sentencing phase of trial, after Appellant had testified and rested (R1307-1327), the State had presented a rebuttal witness (R1324-1327), and the court had taken a luncheon recess (R1329), Appellant requested the opportunity to take the stand again to clarify and supplement his testimony. (R1330,1331) The prosecutor objected on the grounds that his witnesses had been excused and Appellant had had the chance to consult with defense counsel. (R1331) Defense counsel responded that he had been preparing his closing argument and had not consulted with Appellant regarding his testimony during the recess. (R1332) The court denied Appellant's request (R1332, 1333) and proceeded to argument of counsel. (R1333-1335)

The trial court had discretion to allow the defense to reopen its case and present further testimony by Appellant. Stewart v. State, 420 So.2d 862,865 (Fla.1982), cert.den., __U.S.__, 103 S.Ct. 1802, 76 L.Ed.2d 366 (1983). The court's denial of Appellant's request was an abuse of discretion because it violated Appellant's constitutional rights to testify in his own behalf, to present evidence in mitigation, and to respond to the State's evidence.

Due process of law includes the defendant's right to personally make his own defense. Faretta v. California, 422

U.S. 806,818-819, 95 S.Ct. 2525, 45 L.Ed.2d 562,572 (1975). The Florida Constitution provides that the defendant has the right to be heard in person, by counsel, or both. Art. I, §16, Fla. Const. It is basic to a defendant's right to be heard that he be able to testify in his own behalf. Hall v. Oakley, 409 So.2d 93,95 (Fla.1st DCA 1982), pet.for rev.den., 419 So.2d 1200 (Fla.1982); Moore v. State, 276 So.2d 504 (Fla.4th DCA 1973).

The Eighth and Fourteenth Amendments to the United States Constitution gave Appellant the right to present mitigating evidence. See Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). "The law is clear that the trial court must consider all evidence offered in mitigation." Pope v. State, 441 So.2d 1073,1076 (Fla.1983). This requirement was imposed because the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." Lockett v. Ohio, supra, 438 U.S. at 604, 57 L.Ed.2d at 989.

The risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments. Id., 438 U.S. at 605, 57 L.Ed.2d at 990. Thus, the sentencer must not be precluded from considering mitigating evidence and must not refuse to consider mitigating evidence:

> [T]he Eighth and Fourteenth Amendments require that the sentencer...not be precluded from considering as a mitigating factor, any aspect of

> a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. [Footnotes omitted.]

Id., 438 U.S. at 604, 57 L.Ed.2d at 990.

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.... The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration. [Footnote omitted.]

Eddings v. Oklahoma, supra, 455 U.S. at 113-115, 71 L.Ed.2d at 10-11.

Furthermore, the trial court's denial of Appellant's request to retake the stand to clarify and supplement his testimony violated Appellant's due process right to respond to the evidence the State presented in rebuttal. In Gardner v. Florida, 430 U.S. 349,362, 97 S.Ct. 1197, 51 L.Ed.2d 393,404 (1977), the United States Supreme Court concluded "that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." Similarly, when the court denied Appellant's request to retake the stand, the court deprived Appellant of any opportunity to deny or explain the State's rebuttal evidence.

Thus, by denying Appellant's request to retake the stand, the court violated Appellant's constitutional rights to testify in his own behalf, to present mitigating evidence, and

to respond to the State's evidence. The court's action created a risk that the death penalty was imposed despite factors which might have called for a less severe penalty and rendered the decision to impose the death penalty inherently unreliable. The death sentence must be reversed and the cause remanded for a new sentencing hearing before a new jury.

ISSUE VI.

THE TRIAL COURT ERRED BY FAILING TO CONSIDER EVIDENCE OF MITIGATING CIRCUMSTANCES INCLUDING APPELLANT'S POTENTIAL FOR REHABILITATION, HIS FAMILY BACKGROUND, AND APPELLANT'S RELATIONSHIP WITH THE DECEASED.

As argued under Issue V, supra, the trial court was constitutionally required to consider all evidence offered in mitigation. Eddings v. Oklahoma, 455 U.S. 104,113-115,117, 102 S.Ct. 869, 71 L.Ed.2d 1,10-12 (1982); Lockett v. Ohio, 438 U.S. 586,604, 98 S.Ct. 2954, 57 L.Ed.2d 973,990 (1978); Pope v. State, 441 So.2d 1073,1076 (Fla.1983); Amends. VIII and XIV, U.S. Const.

Appellant presented evidence of his potential for rehabilitation. Dr. Slomin testified that Appellant's precepts were those of a normal, intelligent, bright individual. There were no delusions, overt hostility, nor aggression. (R1280) While Appellant suffered from an antisocial personality disorder (R1281,1288), Dr. Slomin had treated persons with such disorders (R1283,1284), and Appellant would be able to function adequately within a jail environment. (R1285,1286) Appellant had attended two years of college. (R1287,1288)

Ms. Singletary testified that Appellant participated fully in her group counseling sessions and had done a lot of re-evaluating. He initiated a study group. (R1295) Appellant had made the appropriate adjustment to life in jail. She had observed a definite improvement and was not aware of any negative reports about his behavior. (R1296)

Appellant testified that he sought treatment for his alcoholism in a self-help program and had not had any alcohol

for eight or nine months. He was chairman of the Jail Alcohol Program which met every Tuesday night. He was active in church and began a prayer group which met every night. He was taking a Bible study course and passed out Bibles to new men in the pod. He was active in Ms. Singletary's group. (R1308,1309)

The trial court's findings regarding mitigating circumstances completely omitted this evidence of Appellant's potential for rehabilitation. (R1391-1394) In Eddings v. Oklahoma, supra, the United States Supreme Court found evidence that Eddings suffered from an antisocial personality disorder but could be rehabilitated by fifteen to twenty years of intensive therapy was mitigating. Id., 455 U.S. at 107-108,115, 71 L.Ed.2d at 6,11. This Court has ruled, "A person's potential for rehabilitation is an element of his character and therefore may not be excluded from consideration as a possible mitigating factor." Simmons v. State, 419 So.2d 316,320 (Fla.1982). In McCampbell v. State, 421 So.2d 1072,1075-1076 (Fla.1982), this Court found that the defendant's prior record as a model prisoner, his positive intelligence, and personality traits showing a potential for rehabilitation were mitigating circumstances.

Appellant presented mitigating evidence regarding his family background. Dr. Slomin testified that both his parents and his brothers were alcoholics. (R1278) The presentence investigation report stated that Appellant was raised by alcoholic parents and experienced physical and mental abuse. (R451)

Again, the court ignored this evidence of Appellant's troubled family history. (R1391-1394) In Eddings v. Oklahoma, supra, the United States Supreme Court found evidence of a similary troubled family background to be mitigating. Eddings was the child of divorced parents, an alcoholic mother and a father who beat him. Id., 455 U.S. at 107,115, 71 L.Ed.2d at 6,11. This Court has also found evidence of the defendant's family background to be mitigating. McCampbell v. State, supra, 421 So.2d 1072,1075-1076 (Fla.1982); Shue v. State, 366 So.2d 387,389-390 (Fla.1978). Shue had suffered a childhood of brutality and deprivation. Id.

Finally, Appellant presented mitigating evidence concerning his relationship with the deceased. Richardson's mother testified that Appellant loved her son. (R1302) He came to the defense of and helped Richardson a number of times. Richardson was jealous of Appellant. Appellant felt threatened by him. (R1304) Appellant testified that he lived with Richardson's mother, and Richardson began living with them. (R1317,1318) He also testified that he loved Richardson and had come to his defense and helped him. (R1309-1311)

Once again, the court ignored this evidence of Appellant's relationship with the deceased. (R1391-1394) This Court has found the domestic relationship between the defendant and the deceased to be a mitigating circumstance. Herzog v. State, 439 So.2d 1372,1381 (Fla.1983).

While the trial court was entitled to determine what weight to give to the mitigating circumstances of Appellant's

potential for rehabilitation, his family background, and his relationship with the deceased, the court was not entitled to give them no weight by refusing to consider them. Eddings v. Okalhoma, supra, 455 U.S. at 113-115, 71 L.Ed.2d at 10-11. The court's error in failing to consider relevant evidence of mitigating circumstances requires reversal of the death sentence and remand for resentencing.

ISSUE VII.

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY UPON AND FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COLD, CALCULATED, AND PREMEDITATED BECAUSE THE EVIDENCE WAS LEGALLY INSUFFICIENT TO ESTABLISH THAT CIRCUMSTANCE.

Section 921.141(5), Florida Statutes (1981), provides in pertinent part:

> Aggravating circumstances shall be limited to the following:
>
> * * * *
>
> (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

This Court has ruled that this aggravating circumstance "ordinarily applies in those murders which are characterized as executions or contract murders...." McCray v. State, 416 So.2d 804,807 (Fla.1982). This circumstance does not apply where the evidence does not show beyond a reasonable doubt that there was a heightened degree of premeditation, calculation or planning. Richardson v. State, 437 So.2d 1091,1094 (Fla.1983). See also Washington v. State, 432 So.2d 44,48 (Fla.1983).

This case did not involve an execution or contract type killing. The evidence showed that Appellant and Richardson were walking together down the street talking. (R703,704,716,717, 736,741,756,766) They appeared to have been drinking. (R717) There was a sound of breaking glass. (R704,737,757) Richardson was lying on the ground. Appellant stood or kneeled over him

and told him to get up. (R704,705,737,757,758) After walking about for a moment, calling out to Richardson and looking at him (R705,706,737,758), Appellant wandered into a vacant lot and found a concrete block. He returned and threw the block down on Richardson's head several times in full view of three witnesses. (R706-708,737-740,758,759) When a fourth witness appeared and called out to him, Appellant dropped the block a final time and ran away. (R708,728,729,739,740,760,767,771,772, 776)

Upon being picked up by his friends while hitchhiking, Appellant immediately confessed and tried to improvise an alibi. (R863-867,888-891) When asked why he killed Richardson, Appellant said he was angry. (R883,892) When questioned by the police, Appellant admitted going out drinking with Richardson and having four or five beers but denied having seen Richardson after he got into a fight and left the bar. (R957,959)

The State failed to prove beyond a reasonable doubt that there was any heightened degree of premeditation, calculation, or planning. Instead, the evidence showed an extemporaneous homicide after two drinking companions had been involved in a bar fight. The homicide was so unplanned that Appellant had to resort to finding a weapon at the scene. This Court has repeatedly held that such extemporaneous homicides are not cold, calculated, and premeditated. E.g., Drake v. State, 441 So.2d 1079 (Fla.1983)(defendant met victim in bar, took her to wooded area, tied hands behind back with bra, and stabbed her eight times); Herzog v. State, 439 So.2d 1372 (Fla.1983)(defendant

smothered and strangled girlfriend after argument); Richardson v. State, 437 So.2d 1091 (Fla.1983)(defendant repeatedly struck burglary victim in head with fence post and cut victim); Mann v. State, 420 So.2d 578 (Fla.1982)(defendant abducted ten year old girl, stabbed and cut her several times, fractured her skull).

The Florida Standard Jury Instructions in Criminal Cases provide, at p.78, "Give only those aggravating circumstances for which evidence has been presented." Yet the trial court overruled defense counsel's objection that the cold, calculated, and premeditated circumstance did not apply to this case (R1115-1118) and instructed the jury on it. (R1360) The court erroneously found that the homicide was cold, calculated, and premeditated despite the legal insufficiency of the evidence. (R1388-1391)

Consideration of an improper aggravating circumstance by the court and jury requires reversal of the death sentence and remand for a new sentencing proceeding before a new jury when there are also mitigating circumstances. Perry v. State, 395 So.2d 170,174-175 (Fla.1980); Elledge v. State, 346 So.2d 998, 1002-1003 (Fla.1977). Since there were mitigating circumstances considered by the court (R1391-1394) as well as evidence of mitigating circumstances the court failed to consider, see Issue VI, supra, the trial court's instruction to the jury and reliance upon the unproven circumstance of cold, calculated, and premeditated requires reversal of the death sentence and remand for a new sentencing proceeding before a new jury.

ISSUE VIII.

THE TRIAL COURT ERRED BY FINDING THAT THE LAW REQUIRED IMPOSITION OF THE DEATH PENALTY IN THIS CASE.

After the trial judge stated her findings regarding aggravating and mitigating circumstances (R1384-1394), she noted that she had long opposed the death penalty as a criminal defense attorney. (R1394,1395) She then stated, "But I took an oath when I became a judge and swore that I would uphold the law, and the law of this state says you have forfeited your right to live." (R1395) Immediately following this statement, the judge sentenced Appellant to death. (R1395)

By finding that the law compelled her to sentence Appellant to death, the judge misinterpreted the law. Nothing in Section 921.141, Florida Statutes (1981), required the court to impose a death sentence under any circumstances. Section 921.141 (3) gave the court discretion to sentence Appellant to life imprisonment or death, requiring only that a death sentence be supported by written findings setting forth sufficient aggravating circumstances and that there were insufficient migitaging circumstances to outweigh the aggravating circumstances.

Florida's death penalty statute was not intended to mandate a death sentence in any case but to guide the trial court in the exercise of its discretion so that death sentences would not be imposed arbitrarily. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); State v. Dixon, 283 So.2d 1 (Fla.1973), cert.den. sub nom., Hunter v. Florida, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

If the statute provided for a mandatory death sentence under any circumstances, no matter how narrowly defined, it would be unconstitutional. See Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

In Ross v. State, 386 So.2d 1191,1197-1198 (Fla.1980), this Court reversed a death sentence and remanded for reconsideration of the sentence because the trial judge gave undue weight to the jury's recommendation of death and failed to exercise his own reasoned judgment as required by the law. Here, the trial judge failed to exercise her own reasoned judgment because she erroneously found that the law required her to sentence Appellant to death. The death sentence must be reversed and the cause remanded for reconsideration of the sentence.

ISSUE IX.

THE DEATH SENTENCE IN THIS CASE IS DISPROPORTIONATE IN COMPARISON WITH PRIOR CASES IN WHICH THIS COURT HAS REVERSED DEATH SENTENCES AND ORDERED IMPOSITION OF LIFE SENTENCES.

Proportionality review is an inherent aspect of this Court's review of all capital cases necessary to ensure rationality and consistency in the imposition of the death penalty. Booker v. State, 441 So.2d 148,153 (Fla.1983); Sullivan v. State, 441 So.2d 609,613 (Fla.1983). Such review is a discrete function separate from the process of determining procedural regularity and proper consideration of aggravating and mitigating circumstances. Brown v. Wainwright, 392 So.2d 1327,1331 (Fla. 1981).

When compared with prior cases in which this Court reversed death sentences and ordered the imposition of life sentences, the facts in this case do not call for the imposition of the death penalty. Appellant was convicted of killing the adult son of his lover. (R293,297,298,1299,1300) Richardson had tried to kill his mother. (R1300) Richardson was jealous of Appellant, and Appellant felt threatened by him. (R1304) On the night of the homicide they went out drinking together. (R957) Appellant became angry (R883,892) after they had become involved in a bar fight. (R959) When Richardson fell down in the street and wouldn't get up (R704-706,737,757,758) Appellant found a concrete block nearby and struck Richardson with it several times. (R706-708,737-739,758,759) However, Richardson may have been unconscious after the first blow. (R847)

This Court has reversed death sentences and remanded for the imposition of life sentences in numerous cases involving homicides which were as bad or worse than the present case. E.g., Herzog v. State, 439 So.2d 1372 (Fla.1983)(after argument with girlfriend, defendant gagged her, tried to smother her with pillow, strangled her, and burned corpse); Richardson v. State, 437 So.2d 1091 (Fla.1983)(defendant bludgeoned burglary victim by striking him repeatedly with fencepost, also cut victim); Cannady v. State, 427 So.2d 723 (Fla.1983)(defendant stole money, kidnapped victim, drove to remote area, shot victim five times); Mann v. State, 420 So.2d 578 (Fla.1982)(defendant abducted ten year old girl, stabbed and cut her several times, fractured her skull); Blair v. State, 406 So.2d 1103 (Fla.1981)(defendant planned murder of wife after argument, shot her, cleaned up scene, destroyed evidence, buried wife in backyard, poured concrete slab over burial site); McKennon v. State, 403 So.2d 389 (Fla.1981)(defendant murdered employer by beating her head against floor and wall, strangling her, slicing her throat, breaking ten of her ribs, and stabbing her); Welty v. State, 402 So.2d 1159 (Fla.1981)(after engaging in homosexual acts with victim for remuneration, defendant stole stereo and car while drunken victim slept, returned and struck victim several times in neck, strangled him, and set fire to bed); Neary v. State, 384 So.2d 881 (Fla.1980)(defendant raped and strangled elderly woman during burglary and robbery); Brown v. State, 367 So.2d 616 (Fla.1979)(elderly victim abducted, robbed, beaten,

shot, and drowned by defendant and accomplices); Burch v. State, 343 So.2d 831 (Fla.1977)(defendant stabbed young woman 35 or 36 times during attempted rape); Halliwell v. State, 323 So.2d 557 (Fla.1975)(defendant repeatedly struck lover's husband with metal breaker bar, dismembered body, and threw it in creek); Swan v. State, 322 So.2d 485 (Fla.1975)(defendant tied, gagged, and severely beat middle-aged woman during burglary, victim died a week later).

Because the death penalty in this case is disproportionate in comparison with prior cases, this Court must reverse the death sentence and remand for resentencing to life.

CONCLUSION

Appellant respectfully requests this Honorable Court to grant the following relief: with regard to Issues I and II, reverse the judgment and sentence and remand for a new trial; with regard to Issue IX, reverse the death sentence and remand for imposition of a life sentence; with regard to Issues III, IV, V, and VII, reverse the death sentence and remand for a new sentencing proceeding before a new jury; with regard to Issues VI and VIII, reverse the death sentence and remand for resentencing by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602 by mail on this 30th day of April, 1984.

Paul C. Helm

PAUL C. HELM

PCH:js