IN THE FLORIDA SUPREME COURT

OTTIS ELWOOD TOOLE, :

Appellant, :

v. : CASE NO. 65,378

STATE OF FLORIDA, :

Appellee. :

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Appellant was the defendant in the trial court and will be referred to as "appellant" or by his proper name in this brief.

The record on appeal, consisting of one volume of pleadings and one volume of depositions, sequentially numbered at the bottom of each page, will be referred to as "R" followed by the appropriate page number in parentheses. The transcript of proceedings below is contained in thirteen volumes, sequentially numbered at the top of each page, and will be referred to as "T" followed by the appropriate page number.

II STATEMENT OF THE CASE

A grand jury indictment was filed September 8, 1983, charging appellant with the first degree murder of George N. Sonnenberg on January 4, 1982, by means of conflagration, and with first degree arson of a boarding house located at 117 East 2nd Street, Jacksonville, Florida, on the same date (R 1).[1]

1/ This indictment was ultimately nol prossed by the state (T 1405).

A subsequent indictment was filed on April 5, 1984, charging Ottis Toole in one count with first degree murder, alleging that on January 4, 1982, appellant inflicted mortal wounds on George N. Sonnenberg by means of conflagration, from which wounds Sonnenberg died on January 11, 1982 (R 99-100).

Due to a motion to withdraw by the Office of the Public Defender, Attorney Alfred Washington was appointed to represent appellant (R 6).

Appellant proceeded to jury trial before Circuit Judge James L. Harrison on April 25-28, 1984. At the conclusion of the trial, the jury found appellant guilty of first degree felony murder (R 163; T 1175-1176). Appellant's motion for new trial, filed May 7, 1984 (R 164-165; T 1379), was denied by written order (R 172).

Following an advisory penalty hearing on May 11, 1984, at which the state and defense each presented three additional witnesses, the jury recommended by a vote of seven to five that the trial court impose the death sentence (R 166; T 1366).

Appellant was adjudicated guilty of murder in the first degree and, in accordance with the jury recommendation, the court sentenced appellant to death (R 173-190; T 1380, 1395-1404).

Notice of appeal was timely filed (R 195) and the Public Defender of the Second Judicial Circuit was designated to handle the appeal. This appeal follows.

III STATEMENT OF THE FACTS

A. TRIAL

The first state witness was Patrolman Gary Bolling. On January 4, 1982, Bolling responded to the scene of a fire at 117 East 2nd Street in Duval County. Fire trucks and rescue units were already at the scene, extinguishing the fire and rendering aid to victims. Bolling observed four victims; he spoke to three of them, but the fourth victim was unconscious (T 720-722).

Firefighter/paramedic Brian Lamar Sweeney arrived at the scene at 10:30 p.m., approximately one-half hour after the fire alarm and the first fire and

rescue units were dispatched to the location. Sweeney rendered aid to the victim on the front porch, covered him in a sterile burn sheet and poured sterile water over him, started an I.V. and transported him to the trauma center at Baptist Hospital. The victim, Mr. Sonnenberg, was not conscious, but was in obvious pain (T 727-732).

Betty Goodyear owned the two-story rooming house at 117 East 2nd Street. She was at home on the evening of January 4, 1982, when her daughter called to inform her of the fire. Goodyear identified appellant in court and testified that Toole had worked for her approximately five or six months. After learning of the fire, the landlord and her daughter drove to Toole's house to get assistance. Lucas came to the door and Goodyear told him there was a fire. Lucas said that he and Toole would be down there in a few minutes. Goodyear and her daughter then proceeded to the rooming house on 2nd Street, approximately seven and a half blocks from appellant's residence. She saw Lucas and Toole at the scene shortly after she arrived there (T 735-739).

Goodyear testified that a tenant had moved out of the back bedroom on the first floor on the evening of the fire. Mr. Sonnenberg lived in the room next to the back bedroom. She recognized Sonnenberg when he was brought out of the house on a stretcher; he was unconscious (T 740-741).

On cross-examination, Goodyear testified that appellant had worked for her as a handyman since July 31, 1981. She never had any problems with him (T 742-743).

The acting fire marshall, Captain William J. Hiers, was qualified as an expert in determining the source and origin of the fires (T 749-754). Hiers was the primary investigator of the fire at 117 East 2nd Street on January 4, 1982. When he arrived, the fire had been extinguished and the victims removed

from the scene. Hiers located the origin of the fire in the back bedroom on the first floor. The room appeared to be vacant except for the remains of a bed frame and springs. The center of the springs had totally collapsed from the intense heat. The fire pattern revealed that the fire spread from the bedroom, down the hall and up the stairs. Photographs of the house and fire damage were admitted into evidence without objection (T 754-757), and identified by the witness (T 758-765).

Hiers testified that the house had no fire retardant rating (T 766). Hiers took a sample from underneath the bed at the point of origin, sealed it in a one gallon container and turned it over to the evidence custodian, Chief Earle (T 767).

On cross-examination, Hiers stated that he questioned only one witness, Harry Page, at the scene. Page gave him information which aided in determining the cause of the fire. Hiers initially determined that the fire was caused by a discarded cigarette. However, the test results showed the presence of volatile hydrocarbons (T 771-772, 777-778, 781).

Hiers stated on redirect examination that based on the lab report, he believed the fire was deliberately set (T 783).

Elizabeth Ann Reilly, R.N., testified that George Sonnenberg came into the emergency room between 10:30 p.m. and midnight on January 4, 1982, and was admitted to the critical care unit early the next morning. He was admitted in critical condition with second and third degree burns over 85 to 95 percent of his body. Sonnenberg died at 7:35 a.m. on January 11, 1982 (T 801-803).

Dr. Bonifacio Floro, a forensic pathologist, performed an inspection on George Sonnenberg on January 11, 1982 (T 804, 807). Dr. Floro testified that the cause of death was renal failure, resulting from the victim's extensive burns (T 808). Defense counsel stipulated that George Sonnenberg died as a result

of the fire and was properly identified by Dr. Floro, and the trial court announced the stipulation to the jury (T 810-811, 813). Dr. Floro further testified that in his expert opinion, Sonnenberg's death was the result of conflagration (T 814).

W. E. Earle, chief of the Jacksonville Fire Division, received a can of debris from Captain Hiers on January 5, 1982, and transferred it to the fire marshal's office on February 5, 1982 (T 819-821). Lieutenant Kenneth Geuter received the fire samples from Chief Earle on February 5, 1982, and transported the sealed containers to a chemical technician at the fire college (T 825).

The fire debris was analyzed by Victor Higgs, a chemist at the state fire marshal's lab in Ocala, Florida (T 828). Higgs, accepted as an expert in the field of chemical analysis of fire (T 828-832), testified that he examined the debris on March 12, 1982, by puncturing a hole through the lid of the container and withdrawing a sample of air from the headspace above the debris. The air was then injected into a gas chromatograph to determine the chemical properties in the vapor. The test results indicated the presence of volatile hydrocarbons, although Higgs was unable to identify the type of fuel present (T 833-835). Higgs excluded a cigarette as being the source of the fire (T 837).

Detective Stephen Higginbotham of the Jacksonville Sheriff's Office investigated the homicide resulting from the fire at 117 East 2nd Street. In connection with his investigation, the detective interviewed Ottis Toole at Lake Butler (T 861-862). After a proffer as to the voluntariness of appellant's statement (T 863-867), defense counsel objected to the admission of the statement on the ground that the state had not established the corpus delicti of either murder or arson. The objection was overruled after extensive argument by counsel (T 868-886). In the presence of the jury, Detective Higginbotham testified that he interviewed appellant on August 30, 1983. After advising Toole of his rights, Higginbotham told appellant he had reason to believe that Toole set a fire in which a man died. Toole responded that he did set the fire in

January of 1982, in a rear bedroom of a two-story residence at 117 East 2nd Street. Toole said he pulled apart a mattress and lit a fire in it (T 888-892). Higginbotham wrote out a statement, which appellant signed. The statement was admitted into evidence without objection and published to the jury (T 893-895).

Detective Jesse Terry was present when Higginbotham interviewed Toole on August 30, 1983, and corroborated the latter detective's testimony (T 909-913). He was also present in October, 1983, when two officers from Louisiana interviewed appellant in the holding cell at the Duval County Courthouse (T 914). Terry later had long conversations with appellant about writing a book (T 915-916).

On cross-examination, Detective Terry stated that he talked to appellant on numerous occasions (T 917-918).

The state next proffered the testimony of Sergeant J. Via of the Quachita, Louisiana, Sheriff's Office (T 923-941). After hearing the proffer and arguments of counsel (T 941-952), the trial court ruled that appellant's statement to Via on September 16, 1983, would be admissible without any reference to homosexual conduct or a sexual deviant profile, but excluded appellant's statement to Via on October 18, 1983, in its entirety, because it was taken in violation of appellant's right to counsel (T 952-953).

On direct examination in the jury's presence, Sergeant Via testified that he interviewed appellant on September 16, 1983 (T 953). During the interview, appellant indicated that he derived sexual pleasure out of starting fires, he knew the man who died in the fire, and after setting the fire, he walked outside and across the street and masturbated twice while watching people jump out of the two-story building (T 960-961).

Lieutenant Larry Joe Cummings of the Monroe, Louisiana, Police Department, was present on September 16, 1983, when Sergeant Via questioned appellant (T 965-966). After a proffer and over appellant's objection (T 967-969, 972), Cummings repeated appellant's statement that he knew the victim of the fire, with whom

he had a homosexual relationship, and that they had gotten into an argument (T 974).

At the close of the state's case, appellant moved for a judgment of acquittal, which motion was denied (T 978).

The first defense witness was Novella Toole, appellant's wife. On January 4, 1982, Ms. Toole, her husband and Henry Lucas were living at 214 East 7th Street in Jacksonville, Florida. Appellant was home all day working on a sink. He left for an hour at noon to get a part to fix the sink and left again with Lucas when Betty Goodyear came by to tell him about the fire. Ms. Toole recalled that the fire occurred between 9:00 and 10:00 that night (T 982-984).

On cross-examination, Ms. Toole testified that when appellant quit working at 7:00 p.m., they sat in the living room and talked. Appellant wanted his wife to go to the hospital to have surgery on her leg (T 990-991).

Appellant testified that he was living with his wife and Henry Lucas on the day of the fire. In August of 1983, Officers Higginbotham and Terry visited him in Lake Butler and told him about the fire. Appellant denied setting the fire, and stated he signed the statement so he could return to Jacksonville. After returning to Jacksonville, Toole had numerous conversations with Detective Terry about writing a book. Terry told Toole he could make lots of money and just needed to tell people what they wanted to hear (T 996-1000).

On January 4, 1982, Toole got up at 7:00 a.m. and started working on the kitchen sink. He needed new spigots and went to 1139 North Market Street, where Betty Goodyear kept her plumbing equipment. He returned at 1:00 p.m. and continued to work on the sink until 7:00 that evening. He then sat down and talked to his wife about going to the hospital. Around 9:00 or 10:00 p.m., Betty Goodyear came by and blew the horn. Lucas went to the door and Goodyear told him there was a fire in one of the apartments on 2nd Street. Toole then went down

to the scene of the fire. He did not see anyone jumping out of the windows and did not masturbate across the street. He again denied setting the house on fire (T 1001-1003).

On cross-examination, the prosecutor asked appellant why he could not return to Jacksonville and why he was in Lake Butler. The trial court overruled appellant's pro se objection to the former question and sustained defense counsel's objection to the latter question (T 1004, 1009). Appellant said he confessed so that he could come back to Jacksonville, but did not think he would be charged with the crime if he could prove he did not start the fire (T 1004-1006). The prosecutor then asked appellant, "Do you get off sexually in setting fires?" Again, the court denied appellant's pro se objection (T 1010). Appellant denied setting the fire, but explained how much gasoline it would take to burn down an entire house in 15 to 20 minutes. He stated he burned down a house in that manner when he was ten or eleven years old. Defense counsel objected that the questions about this incident went beyond the scope of direct examination, and the objection was overruled (T 1012-1014). In response to further questioning by the state, appellant testified that he told his mother about the fire when he was ten. The court sustained appellant's objection when the state inquired, "So you do confess to setting fires, right?" (T 1015).

Appellant further testified on cross-examination that he knew George Sonnenberg, but denied having a relationship with him or arguing with him on January 4 (T 1016-1017). Appellant acknowledged four prior felony convictions (T 1022).

B. PENALTY PHASE

At the commencement of the penalty phase on May 11, 1984, defense counsel objected to the admission of appellant's prior arson convictions to support the aggravating circumstance of a prior felony conviction involving threat of violence. Appellant waived reliance on Section 921.141(6)(a) as a mitigating circumstance.

The trial court held that the prior convictions were inadmissible as aggravation, but allowed the state to introduce the testimony of a juvenile co-defendant in the two arson cases to rebut the defense of diminished capacity (T 1191-1200).

The state presented three additional witnesses at the penalty phase of the trial. Sergeant Via was the first called to testify that he interviewed appellant a second time on October 18, 1983, but was not permitted to testify concerning this conversation at trial (T 1204-1205). Defense counsel immediately objected (T 1205) which objection was sustained (T 1206-1207). Sergeant Via was then excused (T 1208).

The medical examiner, Dr. Bonifacio Floro, testified that he examined George Sonnenberg and found evidence from soot in the nose that the victim breathed in hot air (T 1208-1209). Defense counsel objected to the state's hypothetical question posed to Dr. Floro regarding the degree of pain and suffering of a burn victim, but the objection was overruled (T 1209-1211). Dr. Floro explained that the victim's pain would be very severe. Over appellant's objection, the state introduced a photograph depicting second and third degree burns on the victim's face (T 1212-1217).

Charles Leon Hammock, age 17, is currently serving a sentence at the Lancaster Correctional Institution for two second degree arson convictions (T 1219). Appellant objected to Hammock's testimony on the grounds of relevancy, arguing that it lacked any probative value as to appellant's state of mind or to rebut any mental condition. The trial court found that the testimony was admissible as reflecting on appellant's character and overruled the objection (T 1219-1221). Hammock then identified appellant in court and testified that on May 23, 1983, he, John Redwine and Ottis Toole started a fire. Hammock and Redwine were 16 years old at the time. The fire was Toole's idea and he instructed the teenagers in carrying it out (T 1221-1223). Hammock pled guilty and was sentenced as a youthful offender (T 1219, 1226). Toole also pled guilty to the two arsons and is serving a twenty year prison sentence (T 1233).

After the state rested (T 1233), the court heard argument from respective counsel regarding the applicable aggravating circumstances (T 1235-1253). Defense counsel conceded the applicability of great risk of death, but objected to the court instructing the jury on both aggravating circumstances 921.141(5)(c) and 921.141(5)(d), arguing that it constituted an impermissible doubling, especially since the jury made a specific finding in its verdict of felony murder. The court agreed with appellant's logic, but relying on King v. State, 390 So.2d 315 (Fla. 1980), as authority, the court ruled that both aggravating circumstances could be presented to the jury (T 1238-1243).

Appellant presented three witnesses to testify in mitigation. Dr. Susana Urbina, a psychologist, was qualified as an expert in the areas of intellectual, personality and neuropsychological assessment (T 1259-1260). She interviewed and tested appellant twice, on February 3, 1984, and February 27, 1984, spending a total of 11 hours with him. During these sessions, Dr. Urbina administered the Lyurial neuropsychological battery to assess brain functioning, the Weschler I.Q. test and Rorschach ink blot test to assess personality, the graphomatic retention and hyperpersonality tests. Based on her examination and the test results, Dr. Urbina concluded that Mr. Toole was borderline retarded, falling in the bottom three percent of the general population in intelligence. The neurological testing revealed a brain malfunction of a long standing nature, probably dating to childhood (T 1261-1263).

In personality functioning, Dr. Urbina concluded that appellant was a fairly primitive type individual; his test responses were child-like; he was dependent and needed approval from other people; he acted on impulse without considering the consequences of his actions, and he exhibited a very low level ability to cope (T 1264-1265). Dr. Urbina further noted that while appellant has the capacity to understand the criminality of his conduct, he does not think through the consequences of his actions and his impulses block out the

ability to appreciate the consequences of his acts (T 1273-1275).

Dr. Eduardo Sanches, a psychiatrist, examined Toole on January 18 and February 27, 1984. He also concluded that appellant functioned at a very primitive, child-like level, was extremely impulsive and lacked the ability to foresee the consequences and magnitude of his actions. Sanches further stated that appellant was a pyromaniac and set fires as a way of releasing mounting tensions. At the time of setting a fire, appellant would be acting on impulse and under extreme duress. In the expert's opinion, Toole had no morose feelings toward the victim (T 1282-1286).

Finally, appellant's brother, Vernon Toole, testified. Appellant's parents were divorced and Vernon helped support and raise his younger brother. Ottis was the youngest in the family and was attached to his mother. Vernon testified that Ottis had spells as a child and continued to have them as an adult. His behavior would be abnormal after the spell (T 1300-1301). It was apparent that Ottis was different; he would go off by himself and act strange. He was a slow learner and in special classes in school (T 1301-1302). At some time, Ottis received an award or citation from the Jacksonville Sheriff's Department (T 1302).

Vernon Toole testified that both of his parents are dead and his mother's death greatly affected appellant (T 1303-1304). When he was a child, appellant fell on a nail and it stuck in his forehead, but he never received any medical attention because the family was too poor (T 1305). Appellant, according to his brother, has always been a quiet, scared individual (T 1306).

In chambers, the trial court ruled that it would instruct the jury on two aggravating circumstances, great risk of death and capital felony committed while the defendant was engaged in the commission of an arson. Appellant again objected to the court giving both aggravating factors on the grounds that it was impermissible doubling (T 1308-1309). With regard to the mitigating circumstances, the

defense requested instructions on both extreme mental or emotional disturbance and extreme duress, Section 921.141(6)(b) and (e), relying on the experts' testimony in the penalty phase. The trial court refused to give the requested instructions, finding that despite the psychiatric testimony, there was no testimony at trial regarding appellant's mental condition, that appellant at trial denied committing the offense and never testified that he was under duress. The court viewed the doctor's testimony as supporting only the mitigating circumstance under Section 921.141(6)(f) (T 1315-1321).

Following closing arguments (T 1323-1359) and instructions to the jury (T 1360-1364), a majority of the jury by a vote of seven to five recommended to the court that it impose the death penalty (R 166; T 1366). The trial court sentenced appellant to death, finding two aggravating factors were present, to wit: appellant knowingly created a great risk of death to many people, and the capital felony was committed while appellant was engaged in the commission of an arson. The court found no statutory mitigating factors, but found as the sole nonstatutory mitigating circumstance that appellant received an award or citation from the Jacksonville Sheriff's Office (R 179-190; T 1395-1404).

IV ARGUMENT

ISSUE I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING OVER DEFENSE OBJECTIONS EVIDENCE THAT APPELLANT WAS HOMOSEXUAL AND HAD A RELATIONSHIP WITH THE VICTIM WHERE SUCH EVIDENCE WAS IRRELEVANT AND INTENDED ONLY TO SHOW APPELLANT'S BAD CHARACTER.

On proffer by the state, Sergeant J. Via testified that he interviewed appellant in Jacksonville on September 16, 1983, regarding three homicides under investigation by the Quachita, Louisiana, Sheriff's Office. Via was accompanied by Lieutenant Joe Cummings. After advising appellant of his constitutional rights, Via asked Toole why he was in custody, and Toole responded that he was arrested for the arson death of an individual in Jacksonville. Toole told Via that he

started the fire, but claimed he did not know anyone was in the building at the time. Via interrupted Toole and began questioning him about his personal background, specifically regarding Toole's sexual preferences. Via explained on proffer that two of the three crimes he was investigating were sexually related homicides which suggested that the perpretrator had homosexual or deviant sexual tendencies (T 923-926; 940).

In response to Via's questions, appellant confirmed that he was homosexual. Via inquired whether Toole derived sexual pleasure out of starting fires and appellant responded affirmatively. Via testified that he asked appellant this question because arson is part of the personality profile of a sexual deviant. Toole related that he knew the victim who died in the fire and that after he set the fire, he left the building, walked across the street and masturbated while he watched people jumping from the building (T 927-928, 940-941).

Following the proffer, the state represented that it did not intend to elicit the testimony from Via regarding characteristics of a sexual deviant, but did intend to introduce the testimony that appellant was a homosexual because appellant stated in the second confession that he had a relationship with Mr. Sonnenberg. The state conceded that appellant's homosexuality was not relevant to the fire, but argued it was relevant to the credibility of the confessions because the admission of homosexuality in the first confession was consistent with appellant's admission in the second confession that he had a homosexual relationship with the victim (T 943-944). Defense counsel responded that evidence of appellant's homosexual preferences was an attack on appellant's character, which was not in issue (T 946).

The trial court admitted appellant's statement to Sergeant Via on September 16, but expressly excluded any reference to appellant's homosexual conduct or to the subject of a sexual deviant profile, it being apparent that such evidence was highly prejudicial and irrelevant to the credibility of the confession once the second statement was held inadmissible (T 952-953).

In an effort to circumvent the court's rulings, the state next proferred the testimony of Lieutenant Larry Joe Cummings. On proffer, Cummings repeated much of what Sergeant Via related, that appellant knew the individual who was burned in the house, that he set the fire and then walked across the street and masturbated twice. The state then asked Cummings what else appellant said about the person inside the house; with this prompting, Cummings testified that appellant said he knew the victim and had a homosexual relationship with him and left the house when he became angry at him [Sonnenberg] (T 968). The court then inquired of Cummings:

> Lieutenant, why did you not state, give the testimony about knowing the individual in the house along with the other facts rather than having to be asked by Mr. Stetson if he said anything else about the individual.
>
> THE WITNESS: Well, it's because of the two different conversations, I wanted to make sure that I did not bring up the second conversation.

(T 969). The witness informed the court that he did not have any notes of the two conversations, although the state attorney tendered to the court Sergeant Via's notes dated October 25, 1983 (T 969). Appellant again objected to the testimony regarding appellant's homosexual relationship with Sonnenberg, and this time the objection was overruled, the court finding that the evidence was relevant to motive (T 972).

The trial court correctly perceived that if appellant had an argument with Mr. Sonnenberg, it would provide a motive (T 946), but initially excluded any reference to homosexual conduct because its inflammatory nature outweighed any probative value (T 952). Despite this correct ruling, the evidence of appellant's homosexual relationship with the victim was subsequently admitted over appellant's objections. Appellant submits that evidence of his homosexuality and relationship with George Sonnenberg was not relevant to prove any material issue at trial and that its prejudicial impact substantially outweighed any probative value it may have had. Therefore, it should have been excluded.

The initial burden of objecting to the admissibility of the evidence on the basis of irrelevancy or prejudice is on the defendant. After that, the burden shifts to the state to show that the evidence is relevant to a factual issue and is not being introduced merely for the purpose of showing the defendant's bad character. Franklin v. State, 229 So.2d 892 (Fla. 3d DCA 1969).

The state below failed to demonstrate that the objectionable evidence was relevant to any material fact in issue. The prosecutor admitted that appellant's homosexuality "doesn't necessarily have relevance to the fire" (T 944), but rather urged that it was relevant to show a consistency between his two statements, one of which was excluded from evidence. Furthermore, the state initially represented that appellant disclosed his relationship with Sonnenberg only in the second statement to the Louisiana detectives, but after the statement was excluded, the state lured Lieutenant Cummings into testifying that this information came out in the former statement. At that point, the evidence lacked any relevance to show a consistency between the two statements.

In fact, the state never advanced the proposition that the liaison between Toole and Sonnenberg had any bearing on motive. The only possible evidence of motive was testimony that appellant had an argument with Sonnenberg at some unknown time and for some unknown reason. There was no evidence introduced at trial that the argument was related to a lover's quarrel or that it took place on the night of the fire, although the state advanced this theory in its closing argument (T 1063-1064, 1108, 1120-1121). For all the evidence showed, it could have been a fight over a gambling debt. Clearly, the state cannot speculate as to motive to present evidence which is not closely related or relevant enough to outweigh the prejudicial effects. See Akers v. State, 352 So.2d 97 (Fla. 4th DCA 1977); Clingan v. State, 317 So.2d 863 (Fla. 2d DCA 1975); Beagles v. State, 273 So.2d 796 (Fla. 1st DCA 1973); Machara v. State, 272 So.2d 870 (Fla. 4th DCA 1973).

In Machara v. State, 272 So.2d 870 (Fla. 4th DCA 1973), the defendants were convicted of arson. At trial, the state, over objection, presented evidence that the defendants were drug addicts. The court found that the introduction of this evidence was reversible error because it was an attack upon the character of the defendants when the defendants had not first put their character in evidence. The court rejected the state's contention, advanced for the first time on appeal, that evidence of drug addiction supplied the motive for the crime, finding that it was simply too remote. The same is true in the instant case.

The relevance of appellant's homosexual conduct is tenuous at best, but even assuming some arguable relevance in this testimony, its probative value is clearly outweighed by the prejudicial effects. Courts generally exercise great caution in the use of collateral evidence of homosexual conduct, recognizing its inherently prejudicial nature. In Harris v. State, 183 So.2d 291 (Fla. 2d DCA 1966), the defendant was charged with a crime against nature. The victim and a reverend testified that after the attack the defendant admitted to them that he was a homosexual and had slept with a number of men. In reversing the conviction, the district court held:

> The evidence admitted by the trial court in this case bore with deadly effect upon the character and propensities of the defendant. This is in violation of well-established precedent. It would be difficult to find a factual setting where the evidence was more clearly inadmissible due to a lack of relevancy and its sole purpose being to show bad character and propensity, thereby creating in the minds of the jurors more heat than reflecting light. While we are not in sympathy with the alleged conduct of this defendant, he has the constitutional right, like every citizen, to a fair and impartial trial. In consideration of our societal attitudes regarding such alleged conduct it is necessary that all available safeguards be employed to insure such a trial. It is without question that the testimony in this case severely prejudiced the defendant and he was convicted not solely upon the acts set forth in the Information but also for being a homosexual and having committed numerous homosexual acts, for which he was not being tried.

183 So.2d at 294 (emphasis in original). See also, Andrews v. State, 172 So.2d

505 (Fla. 1st DCA 1965)(reversible error in prosecution for crime against nature to permit prosecutor to elicit from defendant on cross-examination that he had been dishonorably discharged from military service because of homosexual acts).

The evidence allowed by the trial court in the case sub judice was offered merely to show appellant's bad character. In fact, Sergeant Via asked appellant about his sexual habits only because it related to a sexual deviant profile; it was not relevant to prove any material issues of the instant charge. The inescapable conclusion is that the state engaged in overkill by admitting such testimony, thereby depriving appellant of a fair trial. A new trial is mandated.

ISSUE II

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO CROSS-EXAMINE APPELLANT ABOUT HIS INCARCERATION IN LAKE BUTLER AND ABOUT A COLLATERAL CRIME WHEN APPELLANT WAS TEN YEARS OLD, THEREBY DEPRIVING APPELLANT OF HIS RIGHT TO A FAIR TRIAL.

The entire cross-examination of appellant is permeated and riddled with prejudicial, irrelevant and blatantly illegal questions and comments, and marked by an aggressiveness that far exceeded acceptable norms of fairness in prosecution and presentation. Taken as a whole, the prosecutorial overreaching in the questioning of appellant deprived appellant of his constitutional rights to a fair trial and to an impartial jury.

A. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO ELICIT TESTIMONY THAT APPELLANT WAS INCARCERATED IN LAKE BUTLER.

On direct examination, appellant testified that he signed the confession at Lake Butler so "I could come back to Jacksonville and get in touch with my kin people and my friends and all" (T 999). Drawing upon appellant's explanation, the prosecutor asked Toole on cross-examination, "Why couldn't you come back to Jacksonville anyway?" Upon being advised by the court that he had to answer the question, Toole responded that he was in Lake Butler. The prosecutor, not satisfied with this response, then engaged in the following colloquy:

Q Well, what is Lake Butler?

A It's a State Institution.

Q What kind of State Institution?

A The State Pen.

Q State Prison?

A State Prison.

(T 1004).

Appellant's inquiry of the court whether he had to answer the state's question as to why he could not come back to Jacksonville anyway was a sufficient objection to preserve the impropriety of the state's line of questioning for appellate scrutiny. The trial court ruled on the pro se objection, thereby forcing appellant to reveal to the jury that he was incarcerated in a state prison at the time he confessed. Appellant submits that this testimony was irrelevant and prejudicial, and the trial court erred in permitting this line of cross-examination.

It has long been the law of this state that an attack upon the credibility of a witness by use of prior convictions is strictly limited to the question whether the witness has been convicted of a crime; the inquiry must then stop unless the witness denies the conviction. Mead v. State, 86 So.2d 773 (Fla. 1956); McArthur v. Cook, 99 So.2d 565 (1957); Herman v. State 341 So.2d 1010 (Fla. 4th DCA 1977); Goodman v. State, 336 So.2d 1264 (Fla. 4th DCA 1976); Whitehead v. State, 279 So.2d 99 (Fla. 2d DCA 1973). The courts reason that the mere fact of a prior conviction is sufficient to cast doubt on the witness' credibility, but further inquiry into the nature of the conviction becomes an assault on the witness' character and

> Any additional light on his credibility which might be produced by the information would not compensate for the possible prejudicial effect on the minds of the jurors.

Goodman v. State, supra, at 1266.

The state's questions regarding Lake Butler were procedurally improper impeachment by means of prior conviction, and were calculated to further discredit

appellant, not only by showing that he had previously been convicted of a crime but also by revealing to the jury that he was presently incarcerated. See Mead v. State, supra (persistent cross-examination of defendant with reference to relative periods of incarceration in guard house while in military service resulted in abuse of the rule allowing impeachment by former convictions and constituted reversible error). The revelation that appellant was in prison in Lake Butler certainly casts doubt on the character and credibility of the accused, but went far afield of the proper scope of impeachment evidence. While relevancy of a prior conviction as to credibility is deemed to bear upon the truthfulness of the defendant, the relevancy of the accused's residence in a penal institution is tenuous at best, since it is based on the premise that because the defendant is currently incarcerated, he is even more disposed not to tell the truth.

The persistent questioning by the State along these lines underscored the state's position that appellant was unworthy of belief because he was incarcerated in Lake Butler. See Kelly v. State, 311 So.2d 124 (Fla. 3d DCA 1974)(persistent questioning of eyewitness regarding witness' juvenile record emphasized state's position that witness was unworthy of belief because of his prior trouble as a minor). The state did not merely ask why appellant could not return to Jacksonville, but insisted upon a confirmation that Lake Butler is a "State Prison." The tenor of the state's questions, "Well, what is Lake Butler?", "What kind of State Institution?", "State Prison?", was calculated to discredit appellant not only by showing that he was a previously convicted felon and sentenced to state prison, but also by suggesting to the jury that appellant was trying to hedge or lie about his predicament. This theme was reiterated in the state's closing argument:

> He [appellant] would look over at Mr. Washington and pause for a long time, and several times he would even ask the Judge do I have to answer that question because he didn't want to answer that question.

(T 1063). Four times during closing argument, the state referred to appellant's

incarceration at "Florida State Prison" when he confessed (T 1115, 1120, 1124, 1125). The state even went so far to test the court's limits as to ask appellant why he was in Lake Butler (T 1009). This was clearly a classic case of prosecutorial overkill.

Giddens v. State, 404 So.2d 163 (Fla. 2d DCA 1981), is analogous. There, the state introduced a statement which appellant made after his arrest, to the effect that "Last time you arrested me [for this] I fell for it and I told you the truth that I did it. Look where it got me then. I'm not falling for it this time." The court excluded the words "for this", thereby deleting any reference to appellant having been previously arrested for the same offense. Appellant testified and denied all the charges against him. The court rejected the state's contentions that the statement was admissible as impeachment to show that appellant intended to lie about the charges this time and found that the statement was not relevant to any issues other than to place appellant's character (criminal propensity) in issue by demonstrating that he had been previously arrested.

Here, the question "What is Lake Butler?" was intended as a negative inference that appellant had been previously convicted. The question was not permissible impeachment and the answer was not relevant to any issue other than to show appellant's bad character. As noted in Goodman v. State, supra at 1266:

> The jury would almost certainly make inferences which went beyond the question whether or not the witness was worthy of belief.

The prosecutor's cross-examination cannot be justified on the theory that inasmuch as appellant explained he wanted to return to Jacksonville, the state could fully examine him on the subject and take advantage of his explanation by emphasizing his current incarcerative status. Appellant did not open the door for this line of inquiry. Dixon v. State, 426 So.2d 1258 (Fla. 2d DCA 1983); Martin v. State, 411 So.2d 987 (Fla. 4th DCA 1982); Sneed v. State, 397 So.2d 931 (Fla. 5th DCA 1981). By taking the stand and explaining why he signed the

confession, appellant did not put his character in evidence and invite an assault on it by means of cross-examination. Mead v. State, supra.

The prejudicial effects flowing from this cross-examination are obvious. Appellant is thus entitled to a new trial.

B. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO QUESTION APPELLANT ABOUT AN ARSON COMMITTED WHEN HE WAS TEN YEARS OLD.

Taking another approach to discredit appellant in the eyes of the jury, the prosecutor engaged in a hypothetical discourse with appellant about burning down houses, highlighted by the following questions and answers:

Q Well, how do you know that's how you get a fire going?

A (Witness laughing.) Well, way back when I was a little bitty kid I done a house like that, so I can remember it from experience.

Q You did it back when you were a little kid?

A Yes.

Q How old were you?

A I'll say ten or eleven years old.

Q And where was that house?

A That was a country house.

Q Was anyone in it?

A No.

Q You just lit it and the whole house burned down?

A Yes. I soaked the whole house down.

Q The whole house with gasoline?

A Yes, it was a wooden house.

Q Well, where would you light the house if you were going to set the whole house on fire?

A I would fix me a line of gasoline going out of the door, and I would drop a match and it would blow all the windows out at one time.

Q Well, you know how all of these old houses are in Springfield with all of that good wood. Would you think it would be necessary to get all of that wood soaked with gasoline?

(T 1013-1014).

Defense counsel then objected that the questions went beyond the scope of direct examination and the objection was overruled. The prosecutor continued questioning appellant about the relative incendiary effects of five versus one gallon of gasoline, then returned to the prior arson incident:

Q Let me ask you this : On that fire you set when you were ten years old when you burned the whole house down, did you confess to setting that fire?

A That was our own house.

Q You burned down your own house?

A The house wasn't no good and my people was going to tear the house down anyhow, so I went on and burned the house down.

Q Did you tell anyone you set that fire?

A Yes, I told my mother.

Q So, you confessed to your mother?

A Yes, that I set that fire, right.

Q So you do confess to setting fires, right?

(T 1015). Appellant's objection to this final question was sustained (T 1015).

Cross-exmination regarding an irrelevant criminal incident constitutes reversible error. Gelabert v. State, 407 So.2d 1007 (Fla. 5th DCA 1981)(evidence that defendant threatened son with a weapon reversible error in prosecution for aggravated assault and improper exhibition of a weapon); Sneed v. State, 397 So.2d

931 (Fla. 5th DCA 1981)(State's cross-examination of defendant regarding nature of prior conviction for assaulting his daughter held reversible error). Here, the evidence that appellant burned down his parents' house when he was a child was entirely irrelevant to the crime with which he was charged. The only issues to which this evidence could have had any conceivable relevance were appellant's character and propensity to set fires. The cross-examination of appellant concerning an arson when he was ten or eleven years old was a flagrant violation of the Williams rule and constitutes reversible error. Williams v. State, 110 So.2d 654 (Fla. 1959).

In Hooper v. State, 115 So.2d 769 (Fla. 3d DCA 1959), the defendant, a former police officer, was charged with first degree arson. During police interrogation, in which the defendant confessed to the crime, he was questioned regarding fifteen episodes of fire occurring over a five year period. The interrogation as to the additional fires consisted entirely of the question, "Did you do this crime?", and the answer, "Yes." The entire confession was introduced at trial "with the natural implication that the defendant was a dangerous and a habitual arsonist." 115 So.2d at 770. On appeal, the court held that the confession was not freely and voluntarily given and further that the references to numerous other crimes of arson were irrelevant and highly prejudicial. The court reasoned:

> [W]e find that a reading of the record in this case is conducive to the conclusion that the defendant was tried for a series of crimes and found guilty of being a "firebug" rather than of the specific arson with which he was charged. The references to the additional accusations of arson had no real connection with the charges in the instant case . . . .
>
> * * *
>
> Applying [the Williams Rule], we hold the evidence concerning fifteen other crimes of arson committed over a five year period was not shown to be relevant to the crime charged, and such evidence was used by the state to inflame the minds of the jurors that the accused was a dangerous firebug, i.e., the sole relevancy of the evidence was to show the propensity of the accused to set fires. The state failed to show that the evidence of other crimes had probative value or was relevant to establish a plan, scheme, or design. [Citations ommitted.]

> Evidence of these fires did not tend to connect the accused with the crime for which he was on trial. Certainly evidence of a similar crime is not, by itself, without meeting the test of relevancy, admissible to prove commission of a like crime. Such a view would be repugnant to the senses, and the so-called "second timer" could be convicted by merely showing proof of a prior crime or conviction, if the jury were so persuaded by such evidence. Thus the evidence is not excluded because it relates to similar facts which point to the commission of a separate crime, but because the similar fact evidence is inadmissible due to a lack of relevancy.

Id. at 770-771. The holding in Hooper applies with equal force to the instant case.

The cross-examination below is reminiscent of that in Roe v. State, 96 Fla. 723, 119 So. 118 (1928), involving a prosecution for burning a building with intent to defraud the insurer. On cross-examination of each of the defendants, the state asked, "If you had burned this house, would you admit it?" This Court reversed, holding:

> We are of the opinion that these questions went beyond the bounds of legitimate cross-examination. Such a question is highly argumentative and speculative, calls for the opinion of the witness as to what he would do under certain circumstances, and also constitutes an insinuation that, although shown to be guilty of the crime charged, he would not admit it; thus reflecting upon the character of the witness and tending to prejudice his case in the minds of the jury. Cross-examination should generally be limited to questions of fact. The cross-examiner has no just cause for complaint because the court excludes questions which call for expression of the witness' opinion as to questions of moral obligation or the like. The proper function of questions is to interrogate, and not to serve as argument, or to form a subtle purveyor of argument.

119 So. at 122. Accord, Smith v. State, 340 So.2d 117 (Fla. 3d DCA 1976)(In prosecution for burglary, state's question of defendant on cross-examination, "You would never break into anybody's house, would you?" held improper impeachment by prior conviction and improper method of introducing collateral evidence under Williams Rule).

The prosecutions questions, "Well, how would you lay it out if you were going

to do it yourself?" and "Well, how do you know that's how you get a fire going?" (T 1013), coupled with the question, "So you do confess to setting fires, right?" (T 1015), constitute the same highly argumentative, speculative and insinuating cross-examination condemned in Roe. These questions reflected solely upon appellant's bad character and propensities and exceeded the bounds of legitimate cross-examination.

The cross examination of appellant was not even arguably close to the borderline of relevance. The fact that appellant burned down his parents' unoccupied country house when he was ten or eleven years old is entirely unconnected with the murder for which he was on trial and could only be relevant to show propensity to burn down houses.

The admission of irrelevant evidence showing bad character or propensity to crime is presumed harmful error, because of the inherent danger that a jury will take it as evidence of guilt of the crime charged. Straight v. State, 397 So.2d 903, 908 (Fla. 1981); see Pack v. State, 360 So.2d 1307 (Fla. 2d DCA 1978); Curry v. State, 355 So.2d 462 (Fla. 2d DCA 1978). This danger could not be born out more directly than by a prosecutor, in an arson murder case, asking the defendant, "How do you know so much about setting fires?" Since appellant's credibility was a critical factor for the jury's consideration, there is no way to determine how the evidence of an arson some 20 years before might have affected the jury. As noted by the court in Sneed v. State, 397 So.2d 931, 933:

> Without a doubt, the repulsive implications of this irrelevant crime would have some effect. Appellant was entitled to a fair trial free from irrelevant prejudicial testimony.

The entire cross-examination of appellant can best be described as far-reaching. Appellant contends he was denied due process of law by the trial court's errors in permitting the state to cross-examine him regarding his incarceration in Lake Butler and his arsonist tendencies. Even if each error standing alone does

not warrant reversal, when they are considered in combination it becomes clear that appellant was denied his right to a fair trial. While an accused is not entitled to an error free trial, he must not be subjected to a trial with error compounded upon error. Perkins v. State, 349 So.2d 776 (Fla. 2d DCA 1977); Barnes v. State, 348 So.2d 599 (Fla. 4th DCA 1977). Accordingly, this Court must reverse appellant's conviction and sentence and remand the cause for a new trial.

ISSUE III

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY, PURSUANT TO APPELLANT'S REQUEST, ON TWO STATUTORY MITIGATING CIRCUMSTANCES, THEREBY RENDERING APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL.

After instructing the jury on the applicable aggravating circumstances, the trial court turned to the mitigating circumstances and submitted to the jury the specific circumstance of "impaired capacity" and the general instruction on any aspect of the defendant's character or record and any other circumstance of the offense (T 1361). The trial court refused to instruct the jury on the specific mitigating circumstances of extreme mental or emotional disturbance, Section 921.141(6)(b), Florida Statutes, and extreme duress, Section 921.141 (6)(e), Florida Statutes, despite the unrefuted medical and lay testimony to support these mitigating factors. The failure to instruct on these two mitigating circumstances must be scrutinized for compliance with the established principle that a jury must be permitted to consider any and all possible mitigating factors. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

A. Evidence of Extreme Mental or Emotional Disturbance and Extreme Duress.

Three witnesses, two experts and appellant's brother, testified in mitigation at the penalty phase.

The expert testimony revealed that appellant was borderline retarded, falling in the bottom three percent of the general population with regard to intellectual

ability (T 1263). He suffered from a brain malfunction dating back to his childhood, although the cause of the brain damage was not ascertained (T 1263).[2] Both Doctors Urbina and Sanches testified that appellant functioned at a very primitive, child-like level, was extremely impulsive and exhibited antisocial behavior as a result of a personality disorder (T 1264-65, 1282-84). Dr. Urbina explained that as a result of appellant's impulsive nature, he blocked out the ability to appreciate the consequences of his acts; however, she acknowledged that appellant was capable of understanding the criminality of his conduct (T 1269, 1273, 1274, 1276). Dr. Sanches concurred in this assessment, stating that Toole was capable of appreciating the criminality of his conduct, but qualified this statement explaining that on one hand, Toole was capable of avoiding incriminating questions, but in the next breath would make an incriminating statement without being able to integrate the two events (T 1290). He further explicated that appellant lacked the ability to foresee the consequences and magnitude of his actions (T 1283).

Dr. Sanches opined that appellant lacked one of the important functions of socialization and could not cope with tension; he released tension through aggressive acts, such as setting fires, and when his tensions mounted, he was overwhelmed by the need to release them and acted by impulse. The psychiatrist claimed that when appellant set the fire, he was acting under extreme duress (T 1284-1285). Appellant suffered from pyromania, an overwhelming impulse to set fires (T 1286).

Both experts agreed that appellant was not legally insane (T 1267, 1288).

Appellant's brother testified that Ottis had spells as a child and continued to have them as an adult. His behavior would be abnormal after each spell. He was a slow learner and a loner (T 1301-1302). Appellant was very attached to his

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2/ Appellant's brother, Vernon Toole, testified that appellant fell on a nail when he was a child and the nail stuck in his forehead (T 1305).

mother and was deeply affected by his mother's death (T 1300, 1304).

Based on this testimony at the penalty phase, appellant requested jury instructions on the mitigating circumstances of extreme mental or emotional disturbance and extreme duress. The trial court rejected both mitigating factors, finding "not one scintilla of evidence of duress" and further stating that despite what the experts said, there was no testimony at trial regarding the defendant's mental condition (T 1317-1318). In rejecting the clear import of the expert medical testimony, the court viewed the mitigating evidence as supporting only an instruction on Section 921.141(6)(f), Florida Statutes, capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

Clearly, evidence existed on each of the two mitigating circumstances for which instructions were denied. It was not within the judge's authority to instruct only upon those mitigating circumstances which he believed were established. Just as a defendant has the right to a theory of defense instruction which is supported by any evidence, Bryant v. State, 412 So.2d 347 (Fla. 1982), he is also entitled to an instruction on mitigating circumstances supported by any evidence. The constitutional safeguards in imposing the death sentence require no less. U.S. CONST. amend. VIII, XIV.

B. Failure to Instruct on Requested Statutory Mitigating Circumstances.

It is well established in Florida that although the jury's role in the sentencing phase is an advisory one, it is an integral part of the death sentencing process. The trial jury and the judge are charged with the responsibility of independently weighing the evidence in aggravation and mitigation to determine whether a sentence of death is appropriate. Teffeteller v. State, 439 So.2d 840, 845 n.2 (Fla. 1983); Thomas v. State, 403 So.2d 371, 376 (Fla. 1981). As recognized by this Court in

Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976):

> The Legislature intended that the trial judge determine the sentence with advice and guidance provided by a jury, the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors. If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be preconditioned by the judge's view of what they were allowed to know.

Under Lockett and Eddings, the state may not constitutionally prevent a sentencing authority from considering evidence in mitigation which pertains to a defendant's mental defect. In Lockett, the Ohio death penalty statute which allowed consideration of only a limited range of specific mitigating circumstances was held invalid because it prevented "the sentencer from considering any aspect of the defendant's character and record as an independently mitigating factor." 438 U.S. at 607. The Lockett decision teaches that the sentencer must not only be allowed to hear all mitigating evidence, but must also give all mitigating factors offered by the defendant independent mitigating weight. As stated in a footnote to the Eddings opinion:

> [T]he . . . death penalty statute permits the defendant to present evidence 'as to any mitigating circumstance.' . . . Lockett requires the sentencer to listen.

455 U.S. at 115 n. 10.

In Eddings v. Oklahoma, supra, the Supreme Court reaffirmed the Lockett holding and reversed a death penalty imposed upon a 16 year old on the ground that the sentencing judge had not fully considered all the potentially mitigating circumstances present in the case. Specifically, the trial court failed to consider in mitigation the circumstances of Eddings unhappy childhood and emotional disturbance. The Court in Eddings concluded that evidence regarding a defendant's mental and emotional development is a relevant mitigating circumstance that the sentencer may not refuse to consider. 455 U.S. at 116.

To insure that the sentencer considers fully each mitigating factor, clear jury instructions on each such mitigating factor is required. Gregg v. Georgia, 428 U.S. 153, 192-193 (1976), emphasized the constitutional necessity for clear jury instructions in capital cases so that

> the jury is given guidance regarding the factors about the crime and the defendant that the state, . . ., deems particularly relevant to the sentencing decision.
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> * * *
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> It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

A fundamental corollary, therefore, to Lockett's prohibition against jury instructions which preclude consideration of mitigating circumstances, is the requirement that the judge clearly instruct the jury about all relevant mitigating circumstances.

In Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), the court noted that jury instructions must "describe the nature and function of mitigating circumstances" and

> communicate to the jury that the law recognizes the existence of facts or circumstances which, though not justifiying or excusing the offense, may properly be considered in determining whether to impose the death sentence.

661 F.2d at 472 (footnote ommitted). Accord, Westbrook v. Zant, 704 F.2d 1487, 1503 (11th Cir. 1983). The Spivey court went on to hold:

> [T]he eighth and fourteenth amendments require that when a jury is charged with the decision whether to impose the death penalty, the jury must receive clear instructions which not only do not preclude consideration of mitigating factors, Lockett, but which also "guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender. . ." Jurek v. Texas, 428 U.S. at 274, 96 S.Ct. at 2957.

661 F.2d at 471. In refusing to instruct the jury on the relevant statutory mitigating factors, the trial court below in effect denied the existence of certain facts or circumstances, i.e., appellant's low intelligence, personality disorder,

brain damage and pyromania, which the jury was required to consider, and failed to guide and focus the jury's objective consideration of the independent mitigating factors.[3]

In Eddings, the trial judge stated that he could not "consider the fact of this young man's violent background", referring to the mitigating evidence of Eddings' family history. There, as in the instant case, the trial judge did not consider the mitigating evidence and reject it, rather he found he could not consider the evidence as a matter of law. 455 U.S. at 113. While the lower court conceded that Eddings had a personality disorder, it ignored the evidence because Eddings knew the difference between right and wrong. Similarly, here, the trial court misapprehended the evidence of appellant's personality disorder, impulsive and antisocial behavior and pyromania as relating only to diminished capacity to appreciate the criminality of his conduct, and rejected clear evidence of extreme duress because it did not result from the domination of another person. As the Supreme Court held in Eddings:

> 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. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. 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.

455 U.S. at 113-115 (emphasis added).

3/ Ironically, the trial judge, in his sentencing order, acknowledged:

> The circumstances of Florida Statute 921.141(6)(b), 921.141 (6)(e), and 921.141(6)(f) may be present in the evidence and should receive the jury's attention.

(R 182). Yet, the trial court refused to bring two of these three mitigating circumstances to the jury's attention during the advisory hearing.

The instant case parallels Eddings for here the trial court's failure to instruct the jury on the relevant mitigating factors effectively required the jury to disregard much of the evidence which appellant presented at the penalty phase. The trial court below not only failed affirmatively to advise the jury that it could consider as mitigating factors appellant's mental or emotional disturbance and whether he acted under extreme duress, but the court expressly and inaccurately rejected the applicability of those two mitigating factors as a matter of law.

In State v. Pinch, 306 N.C. 1, 292 S.E.2d 203 (N.C. 1982), the North Carolina Supreme Court established a three-prong test to determine whether the omission of a statutory or requested mitigating circumstance constitutes reversible error: (1) whether the particular factor was one which the jury could have reasonably deemed to have mitigating value; (2) whether there was sufficient evidence of the existence of the factor, and (3) whether considering the case as a whole, the exclusion of the factor from the jury's consideration resulted in ascertainable prejudice to the defendant. Id., at 223-24. The threshold question is clearly satisfied when the requested instruction involves an enumerated statutory mitigating circumstance. State v. Pinch, supra.

The Pinch test was applied in State v. Stokes, 308 N.C. 634, 304 S.E.2d 184 (N.C. 1983), where the trial court denied the defendant's request that the jury be instructed on four statutory mitigating factors[4] and three nonstatutory

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4/ The defendant requested instructions on G.S. 15A-2000(f)(1), no significant history of prior criminal activity; G.S. 15A-2000(f)(2), capital felony committed while under influence of mental or emotional disturbance; G.S. 15A-2000(f)(6), impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, and G.S. 15A-2000(f)(4), accomplice or accessory to a capital felony committed by another person and defendant's participation relatively minor.

mitigating circumstances.[5] On appeal, the North Carolina Supreme Court initially noted that the specifically enumerated mitigating circumstances "are deemed to have mitigating value since they are specifically set out in the statute", and limited its inquiry

> to the question of whether there was sufficient evidence from which the jury could reasonably infer that these mitigating circumstances existed.

304 S.E.2d at 196. The court found sufficient evidence to support instructions on mental or emotional disturbance and impaired capacity based on testimony that the defendant had been treated for mental problems at a young age and was diagnosed as having an antisocial personality disorder and borderline mental retardation, and held that the trial judge should have submitted both mitigating circumstances to the jury. Quoting State v. Pinch, 306 N.C. at 27, 292 S.E.2d at 223, the court reasoned:

> Moreover, we must also point out that common sense, fundamental fairness and judicial economy dictate that any reasonable doubt concerning the submission of a statutory or requested mitigating factor be resolved in the defendant's favor to ensure the accomplishment of complete justice at the first sentencing hearing.

304 S.E. 2d at 196 (emphasis in original).

Applying the Pinch test to the case at bar, it is abundantly clear that appellant satisfied all three requirements. First, he requested instructions on two enumerated statutory mitigating circumstances, factors which are obviously deemed to have mitigating value. Second, there was substantial evidence of mental

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5/ The three non-statutory mitigating circumstances propounded by the defendant were: (1) The defendant in his formative years was subjected to cruelty and physical abuse by his parents; (2) The defendant in his formative years was subjected to mental abuse by his parents; (3) The defendant is an illegitimate child and has never experienced a relationship with his natural father.

condition, including brain damage, borderline mental retardation, and personality disorder, all directly bearing on the mitigating circumstance of extreme mental or emotional disturbance. In addition, Dr. Sanches unequivocally stated that appellant "is at the mercy of his own impulses most of the time" (T 1283), "becomes overwhelmed by the tension" (T 1285), and releases this tension by setting fires. At the time he sets the fires, "he is overwhelmingly taken by the impulse" and acting under extreme duress (T 1285). This testimony was undenied and unrefuted. Jones v. State, 332 So.2d 615 (Fla. 1976). The record here thus shows extreme mental and emotional conditions which can serve the basis for both statutory mitigating factors.

Regarding the third prong of the Pinch test, the court not only violated the Eighth and Fourteenth Amendments, but limited the jury's consideration of numerous facts and circumstances which militate against the imposition of the death penalty. While the trial court could determine the weight to be given these circumstances, the court could not, as he did, totally ignore these circumstances. Mines v. State, 390 So.2d 332 (Fla. 1980). It is impossible to determine whether proper instructions would tip the balance of the seven to five death recommendation in favor of life, but it is clear that the weighing process was fatally flawed by this impropiety.

Although the jury here was instructed on the "catch-all" reference to non-statutory mitigating circumstances, appellant avers that such instruction is totally inadequate to suitably guide and focus the jury's consideration on the independent mitigating weight to be given the applicable statutory mitigating circumstances. The jury cannot be presumed to give full consideration to mitigating circumstances unless it is informed of its ability to do so. Jury instruc-

tions are an indispensable tool for ensuring that the jury understands and considers the legal effect of the evidence that it has heard. Jury instructions not the argument of counsel, serve the function of informing the jury of the law.[6]

When incomplete jury instructions reduce the importance of any proffered mitigating circumstances, it unconstitutionally precludes those factors from receiving full and effective consideration by the jury. See State v. Johnson, 298 N.C. 47, 74, 257 S.E.2d 597, 616-17 (1979)(Lockett precludes instructing on only some mitigating circumstances and leaving others to the jury's recollection). Thus, in order to avoid detracting from the weight of proffered mitigating circumstances, jury instructions must include specific reference not only to the "catch-all" nonstatutory mitigating circumstances, but to the relevant statutory mitigating circumstances as well. Absent an itemized instruction of the pertinent mitigating factors, the

> constitutional requirement to allow consideration of mitigating circumstances would have no importance, . . ., if the sentencing jury is unaware of what it may consider in reaching its decision.

Chenault v. Stynchcombe, 581 F.2d 444, 448 (5th Cir. 1978).

In her concurring opinion in Eddings v. Oklahoma, 455 U.S. at 119, Justice O'Connor wrote:

> . . .Lockett compels a remand so that we do not 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.' 438 U.S. at 605, 57 L.Ed.2d 973, 98 S.Ct. 2954, 9 Ohio Ops 3d 26.

6/ As the Supreme Court observed in another context, "arguments of counsel cannot substitute for instructions by the court." Taylor v. Kentucky, 436 U.S. 478, 488-89 (1978)(concluding that the trial court's erroneous omission of a jury instruction on the presumption of innocence was not remedied by defense counsel's explanation of the presumption in opening and closing arguments).

* * *

> Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

In view of the gravity of this instructional error, in cannot be deemed harmless beyond a reasonable doubt. Thus, under Lockett and Eddings, appellant is entitled to a new penalty trial before a jury that is properly instructed on the applicable specific mitigating circumstances. See, e.g., Thomas v. State, 403 So.2d 371 (Fla. 1981); Maggard v. State, 399 So.2d 973 (Fla. 1981); and Perry v. State, 395 So.2d 170 (Fla. 1980).

ISSUE IV

THE TRIAL COURT ERRED IN FAILING TO CONSIDER UNREBUTTED MENTAL MITIGATION BECAUSE OF THE COURT'S MISAPPREHENSION AND MISAPPLICATION OF THE LAW.

Individualized sentencing, as required by Lockett v. Ohio, 438 U.S. 586 (1978), is more than a technical requirement. It requires that "independent mitigating weight" be given to all aspects of the "defendant's character and record and to the circumstances of the offense." 438 U.S. at 604-605.

The statutory mitigating circumstances under Sections 921.141(6)(b), (e) and (f), Florida Statutes, are specifically designed to cover a variety of mental and emotional disorders which fall short of legal insanity and which may not excuse a crime, but which may militate against the imposition of death. See State v. Dixon, 238 So.2d 1 (Fla. 1973). In the present case, the trial court limited its consideration of these mitigating circumstances by ignoring certain relevant evidence and by employing the wrong legal standards in deciding whether the mental factors would be found or weighed. These errors render appellant's death sentence invalid.

In its oral findings at the time of sentencing, the trial court stated:

> The Court . . . continues to feel that these mitigating circumstances as set forth in the statute are separate circumstances and the distinct nature of each of those must be considered in their application and even though one bit of evidence may be appropriate for the jury's consideration as to all of these mitigating circumstances, it should not be done unless it is made abundantly clear by the evidence that one mental condition will cause each of these mitigating circumstances to arise and to be operative, . . .

(T 1397). The court affirmed this notion in the written order, stating:

> The circumstances of Florida Statute 921.141(6)(b), 921.141 (6)(e), and 921.141 (6)(f) may be present in the evidence and should receive the jury's attention. But as in this case, they cannot all arise from the same evidence unless such is made abundantly clear by the evidence.

(R 182). Because the trial judge was convinced that the same evidence could not support more than one mitigating circumstance, the court attempted to pigeonhole the evidence into the one category he felt he could most easily dismiss. While the sentencer is required to give independent weight to mitigating factors, Lockett v. Ohio, supra, the trial judge here erred in treating each mitigating circumstance as independent and mutually exclusive.

Contrary to Judge Harrison's assertion that multiple mitigating factors "cannot all arise from the same evidence", this Court has held that the same evidence of a defendant's mental condition may establish more than one mitigating circumstance. In Mines v. State, 390 So.2d 332 (Fla. 1980), the defendant was diagnosed as being schizophrenic, chronic paranoid type. This Court deemed the unrefuted medical testimony as supporting both mitigating circumstances of extreme mental or emotional disturbance and substantial impairment of capacity to appreciate the criminality of his conduct. See also, Huckaby v. State, 343 So.2d 29 (Fla. 1977)(schizophrenia and brain malfunction constitute two mitigating circumstances which should have been weighed in determining the sentence) and Burch v. State, 343 So.2d 831 (Fla. 1977)(defendant's mental condition established two

mitigating circumstances).

It is clear from the court's oral statements and written findings that the trial judge did not give independent mitigating weight to all the factors in mitigation. The court's treatment of each mitigating factor further demonstrates the restrictive construction the court placed on the statutory scheme.

In reviewing the mitigating circumstances in the sentencing order, the trial court made reference only to the testimony of Dr. Urbina and Dr. Sanches regarding appellant's diminished capacity and pyromania and concluded, "Such was the only evidence produced" (R 181). The trial court clearly ignored the medical evidence of Toole's borderline mental retardation, personality disorder and long-standing brain damage, and further ignored the entire testimony of Vernon Toole that his brother was a slow learner, a loner, and "different", suffered from "spells" and received an injury as a child when he fell on a nail and was too poor to receive medical attention. While Judge Harrison purportedly "reviewed all the evidence at trial and at the advisory hearing and the arguments of counsel in light of all the mitigating circumstances" (R 182)(emphasis added), the sentencing order itself belies this statement.

The fatal flaw of the judge's sentencing order is not just the failure to consider all the evidence relating to mitigation, but also the mechanistic application of the statutory mitigating factors. Regarding the mitigating circumstance under Section 921.141(6)(b), the trial court considered only the psychiatrist's testimony that appellant is a pyromaniac and set fires to relieve tensions, but rejected this testimony because appellant and his wife testified at trial that Toole had the day off on January 4, 1982, and spent the day in a relaxed manner working in his apartment. Appellant denied setting the fire at trial and Novella Toole provided an alibi for her husband. This testimony was conclusively rejected by the jury in returning its verdict of guilty. It is both inconsistent and

illogical for the finders of fact to reject testimony in the guilt/innocence phase, only to have the trial judge rely on the very same testimony in the penalty phase to rebut the expert testimony of mental and emotional disturbance. Furthermore, even if the evidence at the trial had some remote bearing on this mitigating factor, appellant never testified that he spent a "relaxed day" (he was fixing his kitchen sink and trying to convince his wife to go to the hospital). Moreover, Dr. Sanches stated that tensions would mount in appellant and he would be under overwhelming tension when he set the fire. Appellant did not testify at trial as to his mental or emotional state when he set the fire because he denied doing it.

The trial court presumed that since the medical testimony was not corroborated by the defendant's testimony, evidence of appellant's mental condition was not established.[7] The lack of evidence at trial can hardly be a reasonable basis for rejecting this mitigating circumstance.

The trial court further considered only one aspect of the psychiatrist's testimony in examining appellant's mental or emotional disturbance, overlooking all the significant evidence of appellant's intellectual, personality and neurological functions, all of which bore directly on his mental condition. Likewise, the trial court totally disregarded the lay testimony of appellant's behavior as a child and as an adult, learning disability and familial relationships. Apparently, the court misconceived the evidence of appellant's brain damage, low intelligence and personality disorder as relating only to diminished capacity to appreciate the criminality of his conduct. It is unclear from the sentencing order whether the court misconstrued the experts' testimony or whether he misconstrued the statute.

7/ In his oral findings, the trial court ruled that despite the psychiatric testimony, there was no testimony at trial regarding appellant's mental condition (T 1318).

In a similar situation in Mann v. State, 420 So.2d 578 (Fla. 1982), a psychiatrist testified that Mann's mental condition was of such a nature that he was under the influence of extreme mental or emotional disturbance when he committed the offense and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. The trial court referred to the testimony as follows:

> The only mitigating circumstance apparent to the Court which is based solely upon the opinion of Dr. Alfred Fireman, a local psychiatrist, is that the defendant suffered from psychotic depression and paranoid feelings of rage against himself because of strong pedophilic urges.

This Court vacated the death sentence, finding:

> From this we are unable to discern if the trial judge found that the mental mitigating circumstances did not exist. If so it appears that he misconstrued the doctor's testimony. On the other hand, he may have found them to exist and weighed them against the proper aggravating circumstances. We, however, cannot tell which occurred.

420 So.2d at 581.

In Huckaby v. State, 343 So.2d 29 (Fla. 1977), this Court reversed the defendant's death sentence because of the trial court's failure to find the mental factors in mitigation. This Court stated:

> The trial judge ignored every aspect of the medical testimony in this case when he found that no mitigating circumstances existed.

Id., at 33. Likewise, in Mines v. State, 390 So.2d 332, 337 (Fla. 1980), the Court held:

> The trial court erred in not considering the mitigating circumstances of extreme mental or emotional disturbance under Section 921.141(6)(b) and the substantial impairment of the capacity of the defendant to appreciate the criminality of his conduct under Section 921.141(6)(f). These circumstances may not be controlling, but they were present in this cause and should have been considered.

These decisions control the facts of the instant case. This is not a case where the mental mitigation was never argued to the trial court, Hall v. State, 403 So.2d 1321 (Fla. 1981); nor where it was not proven, Daugherty v. State, 419 So.2d 1067 (Fla. 1982); nor where it was rebutted by expert testimony, Stevens v. State, 419 So.2d 1058 (Fla. 1982); nor where it was in conflict, Martin v. State, 420 So.2d 583 (Fla. 1982); nor where it was not clear, Middleton v. State, 426 So.2d 548 (Fla. 1982). Rather, this is a case where the mental mitigation was undisputed and properly presented to the trial court, but, to paraphrase Eddings v. Oklahoma, 455 U.S. at 115 n. 10, the sentencer refused to listen.

The trial court similarly discounted the mitigating circumstance of extreme duress under Section 921.141(6)(e), finding that appellant's diagnosed pyromania was not applicable to this circumstance. The trial court clearly applied the wrong standard in rejecting this evidence by equating extreme duress with "the coercive influence of another person" and by finding "no evidence of participation by another in this criminal offense" (R 184).

With regard to extreme duress, the trial court recalled Dr. Sanches' testimony that appellant was a pyromaniac and set fires to relieve overwhelming tension and would be under extreme duress at the time of such action, but the court seemed to be under the misapprehension that extreme duress could only result from the influence or domination of another person. Section 921.141(6)(e), Florida Statutes, states:

> The defendant acted under extreme duress or under the substantial domination of another person.

By using the disjunctive in defining this mitigating circumstance, it is clear that the legislature did not intend to equate extreme duress with substantial domination of another person.[8]

8/ See Telophase Society of Florida, Inc. v. State Board of Funeral Directors and Embalmers, 334 So.2d 563, 566 (Fla. 1976)("Or" when used in a statute is generally to be construed in the disjunctive).

A cursory reading of the aggravating and mitigating circumstances in Section 921.141(5) and (6) reveals that the disjunctive is employed in no less than nine of the enumerated factors, indicating that these circumstances can be proved by alternative means. Hence, a defendant may act under extreme duress without being substantially dominated by another person. See, e.g., Miller v. State, 373 So.2d 882 (Fla. 1979)(trial court found mitigating circumstance of extreme duress where the defendant suffered hullucinations and at the time of the murder, saw his mother's face in a yellow haze on the victim, a 56 year old female taxi driver). Because the court did not view this mitigating circumstance as contemplating extreme duress caused by a mental disorder, it is evident that the judge attributed no weight at all to the psychiatrist's testimony. As stated in Mines, supra at 337:

> These circumstances may not be controlling, but they were present and should have been considered.

The court finally addressed the mitigating circumstance under Section 921.141 (6)(f). As with extreme mental or emotional disturbance, the trial judge in considering this circumstance was persuaded by the lack of testimony that appellant was under tension during the days and weeks immediately preceding the date of the incident or on the day of the fire (R 186). The trial court did, however, note Dr. Sanches' testimony that the tension within appellant would have to be "extreme" to stimulate him to set a fire and that the need to release such tensions would be "overwhelming" (R 186). Since the jury conclusively determined that appellant did start the fire on January 4, 1982, the absence of testimony regarding his tension on that date is irrelevant to the finding of this mitigating factor.

The trial court was further persuaded by the expert testimony that appellant was capable of concocting an untruth to avoid the consequences of his acts and to avoid detection (R 185). This, too, is irrelevant to appellant's state of mind

at the time he committed the offense. Appellant's acts were the product of impulses. Dr. Urbina stated that while Toole has the capacity to appreciate the criminality of his conduct, his impulses blocked out the ability to appreciate the consequences of his acts. Sanches diagnosed appellant as suffering from pyromania, which he defined as the overwhelming impulse to set fire, and stated that appellant "is at the mercy of his own impulses most of the time" (T 1273-1275, 1283, 1286). When defense counsel asked Sanches about the irresistible impulse test, the court sustained the state's objections, stating, "Legal sanity or insanity is not at issue here" (T 1294, 1295). Clearly, the court misperceived the import of appellant's impulsive nature as it related to this mitigating factor, finding instead that it pertained to a standard of insanity not accepted in Florida.

The evidence of appellant's pyromania and its causal relationship with the crime was uncontroverted.[9] The court's failure to find any of the three mitigating circumstances regarding mental condition was caused in large part by the court's misapprehension of the law and application of the wrong standards in determining whether the mental factors in mitigation would be found or weighed. Ferguson v. State, 417 So.2d 639 (Fla. 1982); Ferguson v. State, 417 So.2d 631 (Fla. 1982). As illustrated above, the sentencing order is an exercise in contradictions and an attempt to fit appellant's uncontradicted medical testimony into legal pigeonholes. Because the court failed to give independent mitigating weight to all the factors in mitigation, the cause must be remanded for resentencing.

9/ See Miller v. State, 373 So.2d 882 (Fla. 1979); Huckaby v. State, 343 So.2d 29 (Fla. 1977).

ISSUE V

APPELLANT'S DEATH SENTENCE IS UNCONSTITUTIONAL, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE IT IS FOUNDED UPON AN AUTOMATIC AGGRAVATING CIRCUMSTANCE.

A death sentence for felony murder cannot be supported by an aggravating circumstance which takes into account the same underlying felony in which the murder was committed. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979); Keller v. State, 380 So.2d 926 (Ala. Ct. Cr. App. 1979), app. after remand, 380 So.2d 938, writ den., 380 So.2d 938 (Ala. 1980); Bufford v. State, 382 So.2d 1162 (Ala. Ct. Cr. App. 1980), writ den., 382 So.2d 1175 (Ala. 1980). In State v. Cherry, supra, the North Carolina Supreme Court held that under N.C.G.S. 15 A-2000 (e)(5), a felony murder aggravating circumstance, the presence of the underlying felony in a felony murder prosecution would create an unconstitutional automatic aggravating circumstance.

The recent decision of the United States Supreme Court in Zant v. Stephens, __U.S.__, 77 L.Ed.2d 235 (1983), compels the conclusion that application of Section 921.141(5)(d), Florida Statutes, to support a death sentence for a felony murder violates the Eighth and Fourteenth Amendments of the United States Constitution.

In Zant v. Stephens, supra, the Court articulated two characteristics required by the Eighth Amendment for a valid statutory aggravating circumstance: (1) it must generally narrow the class of persons eligible for the death penalty, and (2) it must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. The aggravating circumstance that the capital felony occurred during the commission of an arson, where the defendant is found guilty of felony murder, arson being the only underlying felony, does not

meet either requirement.[10]

The proposition that the aggravating circumstance that the offense occurred during the commission of an arson does not narrow the class of persons eligible for the death penalty, under the facts of this case, is revealed by examining the enumerated aggravating circumstances in Section 921.141(5), Florida Statutes (1981). Unlike the other aggravating circumstances contained in the statute, the aggravating circumstance attacked here is the only one automatically present in every murder. Not everyone who commits a felony or premeditated murder is under a sentence of imprisonment. Section 912.141(5)(a), Florida Statutes (1981). Not everyone who commits a felony or premeditated murder has been previously convicted of another capital felony or a felony involving violence. Section 921.141(5)(b), Florida Statutes (1981). Not everyone who commits a felony or premeditated murder creates a risk of death to many people. Section 921.141(5)(c), Florida Statutes (1981). Not everyone who commits a felony or premeditated murder does so with intent to avoid or prevent an arrest. Seciton 921.141(5)(e), Florida Statutes (1981). Not everyone who commits a felony or premeditated murder does so for pecuniary gain. Section 921.141(5)(f), Florida Statutes (1981). Not every one who commits a felony or premeditated murder does so to disrupt or hinder the enforcement of law. Section 921.141(5)(g), Florida Statutes (1981). Not every felony or premeditated murder is especially heinous, atrocious, or cruel. Section 921.141(5)(h), Florida Statutes (1981). Not every felony or premeditated murder is done in a cold, calculated, and premeditated manner. Section 921.141(5)(i), Florida Statutes (1981). See Jent v. State, 408 So.2d 1024 (Fla. 1982)(level of premeditation needed to convict in trial phase of a first degree murder trial does not necessarily rise to the level of premeditation needed to support a finding that

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10/ It should be noted that the jury, by its verdict, specifically found that the murder was not premeditated.

the homicide was committed in a cold, calculated, and premeditated manner).

Yet everyone who is convicted of felony murder, the underlying felony being arson only, automatically goes to the penalty phase with the aggravating circumstance that the offense occurred while the defendant was engaged in the commission of that felony. This case is distinguishable from those where the accused is charged with felony murder, the underlying felony being arson, and the proof shows arson and another felony, burglary, for example. See King v. State, 390 So.2d 315 (Fla. 1980). Also distinguishable from the instant case are those where the proof shows premeditation as well as felony murder. See Welty v. State, 402 So.2d 1159 (Fla. 1981).

The application of the circumstance that the offense occurred during an arson does not justify a more severe sentence upon appellant compared to others convicted of murder, the second fact of a valid aggravating circumstance set out in Zant v. Stephens.

No element of a first degree murder which is committed with premeditation is included in Section 921.141(5), Florida Statutes (1981). While subsection (5) includes premeditation, it takes a greater level of premeditation to support this circumstance than it does to support a guilty verdict at the trial phase. Jent v. State, supra. Yet, as noted by the court in State v. Cherry, supra:

> A defendant convicted of a felony murder, nothing else appearing, will have one aggravating circumstance "pending" for no other reason than the nature of the conviction. On the other hand, a defendant convicted of a premeditated and deliberated killing, nothing else appearing, enters the sentencing phase with no strikes against him. This is highly incongruous, particularly in light of the fact that the felony murder may have been unintentional, whereas, a premeditated murder is, by definition intentional and preconceived.
>
> * * *
>
> We are of the opinion that, nothing else appearing, the possibility that a defendant convicted of a felony murder will be sentenced to death is disproportionately higher than the

> possibility that a defendant convicted of a premeditated killing will be sentenced to death due to the "automatic" aggravating circumstance dealing with the underlying felony.

257 S.E.2d at 551-552 (emphasis added).

Based upon the foregoing, appellant contends that application of Section 921.141(5)(d) to his death sentence runs afoul of the criteria set forth in Zant v. Stephens, supra, and the Eighth and Fourteenth Amendments.

ISSUE VI

APPELLANT'S DEATH SENTENCE IS UNCONSTITUTIONAL, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE IT IS FOUNDED UPON AN IMPROPER DOUBLING OF AGGRAVATING CIRCUMSTANCES.

Appellant has demonstrated in Issue V, supra, that the lower court improperly found the aggravating circumstance under Section 921.141(5)(d) because it constituted an automatic aggravating circumstance. That argument is incorporated by reference herein. In addition, the lower court has improperly doubled this aggravating circumstance with that of great risk of death under Section 921.141(5)(c), Florida Statutes.

In the seminal case of Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977), this Court recognized the impropriety of relying on two aggravating circumstances both based on the same evidence and the same aspect of the defendant's crime. Provence involved a robbery-murder and consideration of two aggravating circumstances, that the murder occurred in the commission of the robbery and that the crime was committed for pecuniary gain. In disallowing the doubling of these two factors, this Court stated:

> While we would agree that in some cases, such as where a larceny is committed in the course of a rape-murder, subsections (d) and (f) refer to separate analytical concepts and can validly be considered to constitute two circumstances, here, as in all robbery-murders, both subsections refer to the same aspect of the defendant's crime. Consequently, one who commits a capital crime in the course of a robbery will always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly diadvantaged. Mindful that our decisions in death penalty cases

> must result from more than a simple summing of aggravating and mitigating circumstances, State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), we believe that Provence's pecuniary motive at the time of the murder constitutes only one factor which we must consider in this case.

337 So.2d at 786 (emphasis in original). Accord, Oats v. State, 446 So.2d 90 (Fla. 1984).

The principle enunciated in Provence applies to the instant case. Just as subsections (d) and (f) refer to the same aspect of the defendant's crime in a robbery-murder, subsections (c) and (d) refer to the same aspect of the crime in an arson-murder such as this. At most, these factors constitute a single aggravating circumstance.

Both of the aggravating circumstances found in the instant case were based upon the single factor that appellant intentionally set fire to a rooming house. Unlike the finding of great risk of death in other contexts, where the aggravating circumstance has been narrowly construed,[11] this Court has broadly applied the circumstance of knowingly creating a great risk of death to many persons to any intentional fire of a dwelling. Welty v. State, 402 So.2d 1159 (Fla. 1981); King v. State, 390 So.2d 315 (Fla. 1980).

In King v. State, supra, this Court applied the aggravating circumstance of knowingly creating a great risk of death to many persons where the defendant intentionally set fire to a house, even though the victim was the sole occupant of the house, because the defendant

> should have reasonably foreseen that the blaze would pose a

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11/ Compare Lucas v. State, 376 So.2d 1149 (Fla. 1979)(raging gun battle); Raulerson v. State, 358 So.2d 826 (Fla. 1978)(shoot-out with police), and Alvord v. State, 322 So.2d 533 (Fla. 1975)(intentional elimination of witnesses), with Bolender v. State, 422 So.2d 833 (Fla. 1982)(actions never directed to uninvolved people); Mines v. State, 390 So.2d 329 (Fla. 1980)(flagging down motorist and driving at high rate of speed); Lewis v. State, 398 So.2d 432 (Fla. 1981)(two people in victim's house); Jacobs v. State, 396 So.2d 713 (Fla. 1981)(few people in highway rest area), and Kampff v. State, 371 So.2d 1007 (Fla. 1979)(two people in bakery, shots fired at close range).

> great risk to the neighbors, as well as the firefighters and the police who responded to the call.

390 So.2d at 320. Thus, under King, any arson of a dwelling will create the foreseeable risk of death to many persons and will support the aggravating factor under Section 921.141(5)(c). In King, however, there was no improper doubling of this aggravating factor with Section 921.141(5)(d) because the capital murder was committed during the commission of a burglary in the home of the victim.

In Welty v. State, supra, this Court upheld the finding of great risk of death to many persons when the defendant set fire to the victim's bed, reasoning:

> Setting the fire was clearly conduct surrounding the capital felony for which he is being sentenced. Mines v. State. There were six elderly people asleep in the building in which the victim's condominium was located. This can be classified as many persons. . . . [T]he fire posed a direct threat of death to those six elderly persons residing in the building as well as the neighbors, firefighters, and police responding to the call.

402 So.2d at 1164. The court went on to find that the trial court erroneously doubled up the aggravating circumstances of commission of the murder while defendant was engaged in a burglary and commission of the murder for pecuniary gain since the evidence revealed that Welty entered without consent with intent to steal from the victim. In Welty, unlike in the instant case, there was evidence supporting the verdict of guilty of first degree murder on the theory of felony murder, the underlying felony being burglary, as well as premeditated murder. Here, in contrast to Welty, appellant was convicted of first degree felony murder, the only underlying felony being arson (See T 1402-1403). Under this state of facts, it was improper doubling to find both commission of the murder while engaged in arson and great risk of death to many persons since both aggravating circumstances were supported by the same evidence and refer to the same aspect of appellant's crime.

In applying a Provence rationale, the Nebraska Supreme Court in State v. Rust, 197 Neb. 528, 250 N.W.2d 867, 874 (1977), held:

> We think it is not reasonable to construe the definitions [of aggravating factors] in such a manner as to make them

> overlap and make the same identical facts constitute two aggravating circumstances.
>
> We believe the Legislature intended by each definition to convey a different concept, at least to the extent that some added different and important element, . . ., is included in each separate definition even though some fact or facts in a particular case may pertain to more than one of the definitions, ... This principle is also illustrated by our holding in Simants [250 N.W.2d 881] where the multiple murders satisfy aggravating circumstance (e) [at the time the murder was committed, the offender also committed another murder], but are not construed to also include circumstance (f), i.e., "created a great risk of death to at least several persons."

Accord, State v. Stewart, 197 Neb. 497, 250 N.W.2d 849, 964 (1977).

Great risk of death in an arson murder context has been so construed as to make it overlap with Section 921.141(5)(d), where the underlying felony can only be arson. Since both aggravating circumstances are based on the identical evidence and the same essential facts, they must be considered cumulative and may not be considered individually. Oats v. State, supra.

Since this Court cannot determine what effect the erroneous submission of these two circumstances had on the jury's seven to five death recommendation, the case must be remanded for a new penalty phase hearing. As recognized by the North Carolina Supreme Court in State v. Goodman, 298 N.C. 31, 257 S.E.2d 569, 587 (1979):

> Of course, we have no way of knowing if submission of the erroneous issue in the case at hand tipped the scales in favor of the jury finding that the aggravating circumstances were "sufficiently substantial" to justify imposition of the death penalty.

(Emphasis in original).

Since the erroneous submission of both great risk of death and in the commission of an arson may have made the difference in the jury's recommendation, a new sentencing hearing is required.

CONCLUSION

For the reasons set forth in Issues I and II, appellant requests that his conviction be reversed and remanded for a new trial. Alternatively, appellant request this Court vacate his death sentence and remand the cause for a new sentencing hearing for the reasons set forth in Issues III, IV, V and VI.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Initial Brief of Appellant has been furnished by hand delivery to Mr. Raymond L. Marky, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301; and a copy furnished by U.S. Mail to appellant, Ottis Elwood Toole, #090812, Leon County Jail, 2825 Municipal Way, Tallahassee, Florida 32304 on this 4th day of October, 1984.

Paula S. Saunders
PAULA S. SAUNDERS