IN THE SUPREME COURT OF FLORIDA

BILLY RAY NIBERT, :

Appellant, :

vs. : Case No. 67,072

STATE OF FLORIDA, :

Appellee. :

:

Of 51 pages

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

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

On December 12, 1984, the grand jurors of Hillsborough County returned an indictment charging Billy Ray Nibert, Appellant, with first degree murder. (R10-11) Trial was before the Honorable Harry Lee Coe III and a jury on April 8 through 11, 1985.

Following the jury verdict of guilty as charged (R73), a penalty phase hearing was held. By a vote of 7 - 5, the jury recommended that Nibert be sentenced to death. (R74-75) The court followed the jury recommendation and imposed a sentence of death by electrocution. (R79)

The court found two aggravating circumstances and no mitigating circumstances to be applicable. (R684) He ordered the prosecutor to prepare a written order reflecting this determination. (R684) A written order was submitted and signed stating that the murder was especially heinous, atrocious or cruel and committed in a cold, calculated and premeditated manner. (R81-83)

Nibert's amended motion for new trial (R88-89) was heard and denied May 3, 1985. (R686-691) Notice of appeal was filed in the circuit court on May 16, 1985. (R90) The Public Defenders of the Tenth and Thirteenth Judicial Circuit were associated and appointed to represent Nibert on appeal. (R693)

Pursuant to Article V, Section 3(b)(1) of the Florida Constitution and Fla.R.App.P. 9.030(a)(1)(A)(i), Nibert now takes appeal to this Court.

STATEMENT OF THE FACTS

A. Pre-Trial Motions

On March 5, 1985, in open court Appellant asked the trial judge to remove defense counsel Meyers from his case. (R747) The court told Appellant that his only choices were to hire private counsel, defend himself, or be represented by the public defender, Meyers. (R748)

Then on April 4, 1985, Appellant requested in open court that he be permitted to represent himself at trial. (R752, 755) Defense counsel, public defender Meyers, stated that he didn't believe he could effectively represent Nibert because there had been no cooperation in preparation of the defense, specifically for the event that a penalty phase proceeding would be necessary. (R753)

After thorough inquiry and admonition from the trial judge, Appellant decided to let public defender Meyers continue to represent him. (R773) Meyers then requested the court to grant a continuance so that he could be prepared in the eventuality that penalty phase proceedings were required. (R775) The court denied the request for a continuance. (R775)

B. Trial-Jury Selection and Voir Dire

Four days later, on April 8, 1985, Appellant's trial commenced. As part of the prosecutor's voir dire of the prospective jurors, he advised them concerning the law of first-degree felony murder as applied in Florida. (R150-151,237,360) Four prospective jurors, Ms. Garces, Ms. Davis, Mr. Fortson and Ms. Rask all stated that they could determine impartially

whether the defendant was guilty or innocent, but would refuse to recommend that the death penalty be imposed, regardless of the circumstances. (R161,165,167-168,171) The prosecutor's challenges for cause to these jurors were initially taken under advisement by the Court and later granted. (R199-203,282)

On voir dire examination, prospective juror Ms. Stalvey said that she believed that the death penalty should be imposed in every case where guilt of first degree murder has been found. (R191-192) The Court addressed prospective juror Stalvey briefly and denied defense counsel's requested challenge for cause. (R206) Defense counsel used a peremptory strike to dismiss juror Stalvey. (R206)

Later, defense counsel's request for additional peremptory strikes was denied by the court. (R324) Defense counsel objected to the jury impaneled because the prosecutor was given too many challenges. (R371) The prosecutor had been granted four challenges for cause (R282) and exercised eight peremptory challenges. (R203,256,281,323,334)

C. Trial - Guilt Phase

James Snavely, brother of the victim, testified for the State. (R382-399) The victim, his fifty-seven year old brother, lived directly across the street from him on November 16, 1984. (R383) Snavely described his brother as a frequently intoxicated alcoholic who was unemployed except for odd jobs. (R385,396) The victim traveled around the neighborhood on a bicycle and would collect aluminum cans to sell as scrap. (R385)

On the date of the homicide, the victim was at the witness's home and left about five o'clock in the afternoon. (R387) The witness saw an individual, apparently an acquaintance, approach his brother as the brother returned to his house. (R388) The two entered the brother's house together. (R388)

Forty-five minutes later, Snavely's brother banged on the witness's front door. (R392) He was holding a knife, bleeding profusely and said that he had been stabbed. (R389,392) The witness did not get a good view of the person who had apparently been the attacker but gave a general physical description which was in some ways consistent with Appellant's appearance and in other aspects, inconsistent.

Lee Robert Miller, Associate Medical Examiner for Hillsborough County performed the autopsy on Eugene Howard Snavely, the homicide victim. (R406) He counted seventeen separate stab wounds on the victim's body. (R407) Three of the wounds were major and potentially fatal. (R408) Four of them were to the right hand and were characterized by the medical examiner as "defense wounds." (R410) The examiner testified that the victim would not necessarily have lost consciousness rapidly after the attack and would probably have been able to run a short distance. (R411-412) The victim died from loss of blood as a result of the stab wounds. (R412)

Tampa Police Department crime scene technicians took photographs of the kitchen area in the victim's house. There was a large amount of blood on the kitchen floor and shoe prints were found. (R435) A six-pack of large (16 oz.) beer

cans was found at the scene with indications that the beer had been consumed by the victim and his attacker. (R422-423)

The prosecution's star witness was Jack Andruskiewiecz who was acquainted with both Appellant and the victim. On the date of the homicide, Andruckiewiecz resided at the Peter Pan Motel, approximately one-half mile from the scene of the killing. (R489) Around 6 o'clock in the evening, the witness saw Appellant approaching his apartment at the motel. (R493) He described Appellant as "covered in blood." (R494)

Andruskiewiecz allowed Appellant to enter his apartment where Appellant sat on the floor gasping for breath and running in and out of the bathroom to vomit. (R495) Appellant was totally incoherent for a couple of hours; he was babbling and kept saying "oh God, oh God." (R495,510-511) Finally, the witness was able to make Appellant clean the blood off himself in the bathroom. (R495) Andruskiewiecz gave Appellant a change of clothing and threw the blood-soaked clothes into the dumpster. (R496,499)

According to Andruskiewiecz, Appellant initially told him that he had been in a knife fight, in a bar or on the street. (R495) As the two men were watching the 11:00 news, a report was aired about the stabbing of Snavely. (R497) The witness testified that Appellant then admitted killing the victim, who was referred to by both Andruskiewiecz and Appellant as "the old man." (R498)

Over defense counsel's objection that the prosecutor was trying to introduce evidence of a collateral crime, Andruskiewiecz was permitted to testify that two days prior to

the homicide, Appellant had told him that he knew where he could get a lot of money. (R502-503) As the man who was later to be the homicide victim rode by on bicycle, Appellant allegedly pointed at him and told Andruskiewiecz that the "old man" had a lot of money and he was going "to rob" him. (R503) The day prior to the homicide, Appellant told Andruskiewiecz that he had stolen three thousand dollars from the "old man" and buried it by the river. (R514-515,532) However, Andruskiewiecz never saw Appellant with any money at this time and did not believe the story. (R515,532)

To corroborate the testimony of Andruskiewiecz, the State introduced a piece of blood-stained carpet from the motel room. An FDLE crime lab analyst testified that the blood type was consistent with the victim's blood type. (R459) Shoes recovered from a suitcase allegedly belonging to Appellant (R442) also had blood stains consistent with the victim's blood type. (R457)

Over defense counsel's objection that he was unqualified to testify as an expert, Edward Guenther was permitted to give an opinion that shoe prints left at the scene of the homicide could have been made by the shoes retrieved from the suitcase allegedly belonging to Appellant. (R467,474) The trial judge did not find Guenther to be qualified as an expert but left that determination up to the jury. (R468)

Defense counsel moved for judgment of acquittal on the ground that the State failed to present a prima facie case of premeditated murder. (R533) Defense counsel also pointed out that the State failed to introduce any evidence to show

that Appellant took or attempted to take any property from the homicide victim. (R533-534) The trial court eventually ruled that there was no evidence to support the State's theory of murder in the course of a robbery or attempted robbery and declined to give a jury instruction on felony murder. (R543-548) However, the court did not assent to defense counsel's request for a curative instruction to the jury telling them to disregard the previous discussion about the first-degree felony murder rule. (R547) And the prosecutor was permitted to argue in closing argument that Appellant went to visit the homicide victim with the intent to rob him. (R589)

The defense presented no witnesses; Appellant did not take the stand. The jury found Appellant guilty as charged.

D. Trial - Penalty Phase

The trial judge announced that he would instruct the jury only on the statutory aggravating and mitigating circumstances which counsel believed were applicable to the case. (R627) Over objection, the court gave the jury instructions on the requested aggravating and mitigating circumstances prior to hearing the penalty phase evidence. (R634)

The jury was instructed on the aggravating factors found in section 921.141(5)(h)(especially heinous, atrocious, or cruel) and section 921.141(5)(i)(committed in a cold, calculated and premeditated manner). The mitigating circumstances presented to the jury were section 921.141(6)(b)(under the influence of extreme mental or emotional disturbance), (6)(e) (under extreme duress), (6)(f)(capacity substantially impaired)

and (6)(g)(age of the defendant).

The State relied upon the evidence presented at trial. (R641) For the defense, Linda Nibert, Appellant's wife, was the first witness. (R641) Ms. Nibert testified that she was now separated from Appellant after they had been married and living together for 2 1/2 years. (R642) She said that Appellant had a long-standing problem with alcohol which dated from his early teens. (R642) Appellant's father was also an alcoholic. (R643) The primary problem leading to her separation from Appellant was his drinking. (R644) When not drinking, Appellant was a very considerate husband. (R644)

Paul Hawks Sr. and Paul Hawks Jr. who operated a father and son refrigeration and air conditioning service in Tampa both testified on Appellant's behalf. (R645-652) They had employed Appellant for a total of about twenty-five months in the previous three years. (R647) Appellant had been fired a few times for not showing up at work because of his drinking problem. (R647) However, the company would later take him back because he was a good worker and never had problems on the job. (R648,651) Appellant was characterized as trustworthy and good for the company. (R648,652)

The jury recommended by a vote of 7-5 that the death penalty be imposed. (R681-682) Immediately, the court made a finding of "two aggravating and no mitigating circumstances" and sentenced Appellant to die in the electric chair. (R684) The court requested the prosecutor to prepare and submit a written order reflecting the two aggravating and no mitigating circumstances. (R684) This order had apparently already been

prepared by the prosecutor because it was signed by the trial judge on the same date (April 11, 1985) and filed with the clerk. (R81-85, see Appendix.)

SUMMARY OF ARGUMENT

The prosecutor tried to present the case on alternative theories of premeditated and felony murder. He emphasized the theory of felony murder and frequently advised the jury of the law regarding first-degree felony murder. When the trial judge eventually ruled the felony murder theory inapplicable, he denied defense counsel's request that the jury be advised to disregard what they had heard about the felony murder rule.

The prejudice was compounded by closing arguments referring to the felony murder rule and the trial judge's instruction to the jury which informed the jury of the penalty for first-degree felony murder. Disregarding Fla.R.Crim.P. 3.390(b), the trial court did not give written instructions to the jury as required in capital cases.

Four prospective jurors were erroneously excluded for cause after they had stated on voir dire that they would determine guilt or innocence impartially but would refuse to recommend a death sentence regardless of the evidence presented.

When defense counsel challenged the qualifications of a proffered expert witness, the trial court declined to rule whether the witness was qualified and left it to the jury to determine for themselves whether the witness was qualified. For this and the previously mentioned errors, Appellant should be granted a new trial.

Viewed in light most favorable to the State, the evidence was insufficient to prove a premeditated murder. The evidence, all circumstantial, was equally consistent with a

hypothesis that the homicide occurred in a sudden burst of rage with a frenzied stabbing attack. If Appellant's conviction is affirmed, the judgment should be reduced to second-degree murder.

A prospective juror who should have been excused for cause because she believed the death penalty should be imposed for all first-degree murder convictions was not excluded by the court. Defense counsel had to exercise a peremptory strike to exclude this juror.

The trial court reversed the procedure authorized by Fla.R.Crim.P. 3.390(a) and the Standard Jury Instructions when the jury was instructed on the applicable law in penalty phase prior to the reception of evidence and argument of counsel. For this and the previously mentioned reason, Appellant should be granted a new penalty proceeding before a new sentencing jury.

The trial court did not fulfill its constitutionally mandated responsibility to prepare a written statement of findings when imposing a sentence of death. Instead, the responsibility was impermissibly delegated to the state attorney's office.

Analysis of the findings regarding aggravating circumstances show that the cold, calculated and premeditated statutory factor was improperly found here. Neither did the evidence support a finding that the murder was especially heinous, atrocious or cruel. The trial court further erred by failing to consider all of the mitigating evidence presented at trial.

Finally, a sentence of death is not constitutionally permissible under the facts of this case. There is no meaningful way to distinguish the homicide at bar from the vast majority of knife slayings where a sentence of death is not imposed. To impose a death sentence under the circumstances of the case at bar would render invalid any capital sentencing procedure which would permit it.

Accordingly, if Appellant is not granted a new trial or a reduction in the conviction to second-degree murder, this Court should order the trial court to resentence Appellant to life imprisonment. At the least, a resentencing should be ordered with a new jury empanelled to render a new advisory verdict regarding penalty.

ARGUMENT

ISSUE I.

APPELLANT WAS DENIED A FAIR TRIAL BECAUSE DURING VOIR DIRE THE PROSECUTOR THOROUGHLY ADVISED THE JURY ON THE FELONY MURDER RULE WHICH WAS INAPPLICABLE TO THIS CASE. ALTHOUGH THE PREJUDICE WAS PROBABLY INCURABLE, THE TRIAL COURT INSURED ERROR BY NOT GIVING A CURATIVE INSTRUCTION TO THE JURY.

A. The prosecutor's address to the jury on voir dire.

When the warrant was issued for Appellant's arrest, the charges against him were first-degree murder and armed robbery. (R7) The indictment returned by the grand jury charged only premeditated first-degree murder. (R10-11) Nonetheless, the prosecutor recklessly made it clear from the beginning of trial that he was relying upon first-degree felony murder (specifically murder committed in the course of an attempted robbery) as well as a premeditated theory of murder.

In addressing the jurors on voir dire, the prosecutor stated:

> There is also another aspect of first-degree murder in Florida, and that is what is known as the first-degree-felony murder, law which Florida recognizes.
>
> When you get into the first-degree-felony murder, you are not concerned with premeditation. In essence what that law states is that if somebody is committing robbery or a rape or a burglary, and during the course of that robbery, rape, or burglary the victim is killed, even though the defendant had no intent or premeditated design to kill that person, he can still be found guilty of first-degree murder.
>
> What the law says is that if you're committing one of these felonies and somebody

> dies during the course of these enumerated felonies such as burglary, robbery, rape, kidnapping, et cetera, somebody dies, and you can be found guilty of first-degree murder even though there is no premeditation involved.
>
> In essence what the first-degree-felony murder rule does is it allows the State, in proving a first-degree murder case, to substitute the commission of the felony for the element of premeditation.
>
> Miss Wyatt, do you understand that, ma'am?
>
> JUROR WYATT: Yes.
>
> MR. BENITO (Prosecutor): Anybody have any problems with the first-degree-felony murder rule?

(R150-151) As new members of the jury panel were seated, the prosecutor reiterated the law pertaining to first-degree felony murder. (R237,360)

Florida courts do not find it necessarily improper for the prosecutor to advise the jury regarding the law on voir dire. See Pait v. State, 112 So.2d 380 (Fla.1959). Compare State v. Marshall, 571 S.W.2d 768 (Mo.App.1978). In Pait, the prosecutor was proceeding solely on the theory of felony murder and asked the jurors on voir dire whether they could return a verdict of guilt to first-degree murder if it were proved that the homicide was committed during the course of a robbery. This Court said that the trial judge may permit hypothetical questions making correct reference to the law of the case to be asked of prospective jurors. The opinion in Pait specifically noted that there was sufficient evidence to show the homicide was committed in the course of a robbery.

It does not follow from Pait that a prosecutor may advise the jury on the theory of first-degree felony murder when this theory is not applicable to the case. The prosecutor may

not urge a theory of conviction which was neither charged in the indictment nor supported by the evidence under the Pait rationale. Moreover, an essential feature of the felony murder rule is that the underlying felony must be proved beyond a reasonable doubt. The prosecutor did not mention this to the jury and the jury may well have believed they could convict for first-degree felony murder if they thought the most likely motive for the homicide was robbery.

An earlier decision of this Court, Pope v. State, 84 Fla. 428, 94 So. 865 (1922), was relied upon by the Pait court. But the Pope decision suggests that even asking jurors hypothetical questions having correct reference to the law of the case may not be good practice. The Pope court did conclude that the question propounded could not have harmed the defendant because it was not misleading or confusing and the rule of law had been declared applicable by the trial court.

By contrast, in Appellant's case, the prosecutor's explanation of felony murder was clearly misleading and confusing to the jury. The case was not submitted to the jury under felony murder instructions, yet the jury may have considered the felony-murder rule when arriving at a verdict. It is evident that Appellant might well have been harmed by the discussion of felony murder.

B. The ruling of the trial court that felony murder was inapplicable and defense counsel's request for a curative instruction to the jury.

In his renewed motion for judgment of acquittal, defense counsel argued that the State had failed to introduce any

evidence of a robbery or attempted robbery in connection with the homicide. (R535) The State in turn requested jury instructions on first-degree felony murder and attempted robbery as the underlying felony. (R538) The court ruled that there was only speculation of robbery or attempted robbery on the date of the homicide and rejected the State's request for instruction on felony murder. (R546,551)

Defense counsel requested the trial judge "to mention that this matter has been resolved, that this is not a felony murder case." (R547) Counsel pointed out that the jury had been influenced by the prosecutor's remarks regarding felony murder and stated:

> All I want is the jury to know that has been resolved and this is not a felony murder case any more. They must decide only on premeditation.

(R547)

The trial judge responded to defense counsel:

> All right, you are entitled to tell them that they are only to consider this as to premeditated first-degree murder, felony murder is not part of it. But don't get into any argument about why it isn't.

(R548)

The following exchange occurred between the prosecutor and the trial court:

> MR. BENITO (Prosecutor): Judge, to be totally honest with the Court, if you are going to not instruct the jury on attempted robbery based on the evidence we presented, then I think I am inviting reversible error if I argue in my closing argument that this was a murder during the course of an attempted robbery.
>
> THE COURT: Fine. Don't argue it.

(R551)

The trial court's response to the prejudicial circumstances created by the prosecutor's remarks about felony murder to the jury on voir dire was totally inadequate. At the least, a curative instruction to the jury should have been attempted. The trial court has an affirmative duty to "check improper remarks of counsel to the jury, and by proper instructions to remove any prejudicial effect such remarks may have created." Carlile v. State, 129 Fla. 860, 176 So. 862 at 864 (1937). The trial court cannot delegate the responsibility of informing the jury about what law is applicable to their verdict to defense counsel. Merely restricting the prosecutor from arguing the felony-murder theory in closing argument was insufficient to remove the taint caused by the previous invitation to the jury to consider felony-murder.

C. Closing arguments and the court's instructions to the jury.

Any possibility that the jury might have disregarded the felony-murder rule was erased when defense counsel, following the ruling of the court, told the jury in closing argument:

> You are not going to be able to do like the prosecutor talked about, use a robbery or attempted robbery to supply that intent, so it doesn't mean that you can't find him guilty of first-degree murder, because you can, but you just can't infer that intent from a robbery or an attempted robbery....

(R579)(See also R585,604-605) One must certainly doubt whether the jurors found these instructions coming from defense counsel to be binding on them. The jurors more than likely treated these comments the same as the rest of defense counsel's argu-

ment--something they could accept or reject according to their view of the evidence.

The prosecutor further confused the jury by emphasizing in closing argument:

> He [Appellant] went there on Friday after two days earlier announcing his intentions of robbing the old man.

(R589) The trial court climaxed the disorientation by instructing the jury on penalty:

> It is my job to determine what a proper sentence would be, with the exception of murder in the first degree or felony murder in the first degree, if the defendant is guilty. (Emphasis supplied.)

(R623)

The mere lack of a jury instruction from the court on felony murder is not conclusive proof under the circumstances that the jury did not consider the felony-murder doctrine in arriving at their verdict. Certainly, the evidence of premeditation was totally circumstantial and minimal, consisting only of what inferences might be drawn from seventeen stab wounds.

D. The prejudice to Appellant was substantial and requires reversal for a new trial.

The felony-murder doctrine was allowed to become the feature of a trial in which it was totally inapplicable. The jury was misled when felony-murder was first suggested as an alternative theory of conviction for first-degree murder during voir dire. Appellant was further prejudiced by the failure to inform the jury that the felony murder rule was inapplicable because it required that an underlying felony be proved beyond a reasonable doubt.

The jury heard a lot of testimony from State witness Andruskiewiecz that Appellant expressed an intention to rob or steal money from the victim. While this testimony may be relevant as to motive, it was an insufficient basis for a finding of felony murder. This was not explained to the jury, however, and the trial court's silence could not have resolved the matter, particularly since the court mentioned the penalty for first-degree felony murder.

The appropriate standard for review in the appellate court was described by this Court in Pait, supra. The Pait court held:

> Unless this court can determine from the record that the conduct or improper remarks of the prosecutor did not prejudice the accused the judgment must be reversed. 112 So.2d at 385. Accord, Coleman v. State, 420 So.2d 354 (Fla.5th DCA 1982).

At bar, the likelihood that the jury was confused about the felony-murder rule and whether it was applicable to the verdict is substantial. Certainly, any mention of the felony-murder doctrine in a case where premeditated first-degree murder must be proved is misleading to the jury. Consequently, this Court should reconsider the wisdom of allowing the prosecutor to advise the jury regarding law applicable to the case on voir dire. Where, as here, the theory of law communicated to the jury should not be considered by them in their deliberations, reversal for a new trial is mandated.

ISSUE II.

THE TRIAL COURT ERRED BY FAILING TO GIVE THE JURY WRITTEN INSTRUCTIONS AS REQUIRED BY FLA.R.CRIM. P. 3.390(b).

Fla.R.Crim.P. 3.390(b) provides in pertinent part:

> Every charge to a jury shall be orally delivered, and charges in capital cases shall also be in writing.

In the case at bar, no written instructions were given to the jurors as required in a capital case. Appellant, however, must concede that defense counsel did not request written instructions nor object to the trial court's failure to provide them. (R625)

In McCaskill v. State, 344 So.2d 1276 (Fla.1977), this Court did not find reversible error where the trial judge failed to comply with Fla.R.Crim.P. 3.390(b) and the defendant made no objection. However, the McCaskill opinion is specifically grounded on a finding that no prejudicial error occurred under the circumstances of that case.

In contrast, the error was prejudicial in the case at bar. As noted in Issue I, the jury was likely confused about the applicable law due to the extensive discussion concerning the felony murder rule. The purpose of giving written instructions to the jury is to provide a valuable aid in understanding the applicable law. Matire v. State, 232 So.2d 209 (Fla.4th DCA 1970). The jurors in the case at bar did not get the benefit of this needed assistance in their deliberations.

Under the unique circumstances presented in Appellant's case, this Court should find the trial court's failure

to comply with Fla.R.Crim.P. 3.390(b) to have significantly prejudiced Appellant's position and to be fundamental error requiring reversal for a new trial.

ISSUE III.

THE TRIAL COURT ERRED BY EXCLUDING FOR CAUSE FOUR PROSPECTIVE JURORS WHO SAID ON VOIR DIRE THAT THEY COULD JUDGE GUILT OR INNOCENCE IMPARTIALLY BUT COULD NOT VOTE TO IMPOSE A SENTENCE OF DEATH THUS DENYING APPELLANT'S SIXTH AMENDMENT RIGHT TO BE TRIED BY A JURY SELECTED FROM A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY.

On voir dire, prospective jurors Garces, Davis, Fortson and Rask each stated that if there was a penalty phase in the trial, their votes would be against imposition of the death penalty regardless of the evidence presented in the penalty phase. (R203-204) All four were challenged for cause by the State. (R199-202) The trial court eventually granted the challenges for cause when it became apparent that the prosecutor would otherwise run out of peremptory challenges. (R282)

All four of the prospective jurors had previously stated that they would be impartial on the question of guilt or innocence and would not be prevented by their scruples against capital punishment from returning a verdict of guilt to first-degree murder if warranted by the evidence. (R165,167-168,171, 172) Thus, their service on the jury was not barred by Section 913.13, Florida Statutes (1983) which reads:

> A person who has beliefs which preclude him from finding a defendant guilty of an offense punishable by death shall not be qualified as a juror in a capital case.

In Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), the court held that a capital jury where venire persons who

stated they could never vote to impose the death penalty have been stricken for cause is a conviction-prone jury. Excluding this distinct group from a capital jury denies a defendant's right under the United States Constitution, Sixth Amendment[1/] to be tried by a jury selected from a representative cross-section of the community. Also implicated is the Fourteenth Amendment due process right to an impartial jury.

The Grigsby court concluded that defendants who were convicted by "death qualified" juries must have their convictions reversed and be given new trials. Review of this decision is currently pending before the United States Supreme Court.

Appellant recognizes that this Court has previously rejected on several occasions the argument that a conviction-prone jury does not reflect a representative cross-section of the community. Most recently in Dougan v. State, 470 So.2d 697 (Fla.1985), this Court declined to follow the Eighth Circuit's decision in Grigsby. Nevertheless, Dougan should be distinguished from the case at bar because the prospective jurors in Dougan who were excluded for cause had stated unequivocally that they could not return a verdict for first-degree murder if death was a possible penalty. By contrast, the four prospective jurors excluded for cause in the case at bar were eminently qualified to fairly try the question of Appellant's guilt or innocence.

1/ The Florida Constitution has a parallel provision, Article I, Section 16.

If a prospective juror is improperly excluded, any subsequently imposed sentence of death must be reversed. Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976). This per se rule requires that Appellant be granted a new trial.

ISSUE IV.

THE TRIAL COURT ERRED BY PERMITTING EDWARD GUENTHER TO TESTIFY AS AN EXPERT WITNESS IN SHOE PRINT ANALYSIS WITHOUT FINDING THAT HE WAS QUALIFIED AS AN EXPERT.

Crime laboratory analyst Edward Guenther was examined by the prosecutor regarding his background, training and experience in the field of shoe print analysis. (R463-467) The prosecutor asked the Court to qualify the witness as an expert. (R467) Defense counsel objected that Guenther had insufficient qualifications and noted that he had only been qualified in court as an expert in this field on one prior occasion. (R467) Defense counsel argued that the gravity of the charge against Appellant should also be considered in whether the tendered witness was sufficiently qualified. (R467)

The trial court declined to rule on whether Guenther was sufficiently qualified to testify as an expert. He merely passed the buck, saying:

> The jury can make that decision for themselves.

(R468)

It was error for the trial judge to leave the determination of whether Guenther was qualified to testify as an expert to the jury. The trial judge has the affirmative duty to determine whether a proffered expert witness is qualified to testify on the subject matter presented. McDonnell Douglas v. Holliday, 397 So.2d 366 (Fla.1st DCA 1981); Upchurch v. Barnes, 197 So.2d 26 (Fla. 4th DCA 1967). While the jury will decide the weight to be given to expert testimony, the question of ex-

pertise must be initially determined by the court. Ritter v. Jimenez, 343 So.2d 659 (Fla.3d DCA 1977).

The testimony of Mr. Guenther was extremely prejudicial to Appellant because he was allowed to give an opinion that the shoe prints found at the scene of the homicide matched the tread design, size and shape of a shoe found in a suitcase purportedly belonging to Appellant. (R475) To arrive at this opinion, complex corrections for the angle at which the shoe prints were photographed were necessary. (R478-479) Clearly, only a qualified individual could achieve an accurate result.

Opinion testimony given by a non-expert is incompetent and admitting this testimony may be error justifying a new trial. In Mills v. Redwing Carriers, Inc., 127 So.2d 453 (Fla. 2d DCA 1961), the appellate court concluded that a new trial was warranted where a non-expert witness had been allowed to give an opinion related to scientific evidence which only a properly qualified professional should have interpreted. Since Edward Guenther was never accepted by the trial judge as a qualified professional or expert, his opinion regarding the shoe prints in the case at bar was incompetent. The error warrants a new trial.

ISSUE V.

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH PREMEDITATION, THEREFORE THE JUDGMENT SHOULD BE REDUCED TO MURDER IN THE SECOND DEGREE.

An essential element of the State's proof at bar was to show that Appellant had a premeditated design to kill the victim. Premeditation need not be established by direct evidence; circumstantial evidence can suffice. Sireci v. State, 399 So.2d 964 (Fla.1981), cert.den., 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). However, the burden of proof generally applicable to circumstantial evidence must be applied. In Hall v. State, 403 So.2d 1321 (Fla.1981), this Court held that the circumstantial evidence was inconsistent with a reasonable hypothesis of innocence as to the homicide, but was not inconsistent with any reasonable exculpatory hypothesis as to the existence of premeditation. The same is true in the case at bar.

Taken in the light most favorable to the State, the facts presented at trial show that Appellant visited the victim at the victim's house, arriving about 5 p.m. (R388) The two shared a six-pack of sixteen ounce beer cans. (R423) Forty-five minutes from the time of Appellant's arrival, the victim had been stabbed seventeen times and appeared at his brother's house with the presumed weapon in his hand before collapsing. (R389,407)

There was no evidence to indicate what might have precipitated the attack on the victim. Perhaps there was a sudden quarrel between the two men. The record is silent as

to whether the knife belonged to the victim and was already at his residence or whether Appellant arrived at the scene carrying the knife.

Appellant allegedly told Andruskiewiecz two days prior to the slaying that he planned to steal money from the victim. Nothing in the record indicates that Appellant ever voiced an intent to attack or murder the victim.

At trial, much was made of the newly-remembered account of the details of the stabbing which Appellant allegedly related to Andruskiewiecz. According to this account, Appellant kept "stabbing him (victim) and stabbing him and made him get on his knees." (R498) Andruskiewiecz testified that it was unclear why the victim was driven or forced to his knees. (R499) In all, the account of Andruskiewiecz is as equally consistent with a sudden stabbing frenzy as it is with premeditated knifing.

Ambiguity again permeates the circumstances which surrounded the victim's flight from his residence with the knife. The State's theory was that the victim fought back, eventually seizing the knife and escaping his attacker. Equally plausible is a theory that the attacker relented after a frenzied stabbing attack and withdrew from the combat. Certainly, he did not pursue the victim when he ran over to his brother's house.

This last factor is a convincing indication that Appellant had not formed a fixed intent to take the life of the victim. When the victim ran from the scene, the attacker could only know that the victim was wounded. If the attacker intended

to ensure that the victim would die, he would attempt to prevent the victim from receiving medical attention. Yet the attacker himself ran from the scene (R390) and did not try to interfere with the victim's possible rescue.

When the case at bar is placed into perspective with other cases where the circumstantial evidence of premeditation was found sufficient, it becomes clear that this Court has required more evidence than that presented here. In Sireci v. State, supra, the victim suffered fifty-five stab wounds and was also hit with a wrench. But this Court specifically noted that the victim's neck was slit to ensure death. Additionally, Sireci's contention that this was a spur-of-the-moment act was contradicted by previous admissions to other witnesses. These factors are not present at bar.

In Preston v. State, 444 So.2d 939 (Fla.1984), the homicide was committed by multiple stab wounds. However, to establish premeditation, the Preston court looked to the particularly brutal use of the knife which nearly decapitated the victim in the course of cutting her throat. Similarly, excessive force was also the deciding factor in Heiney v. State, 447 So.2d 210 (Fla.1984), cert.den., __U.S.__, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984). The Heiney court reasoned that three blows with a hammer to the victim's head would have been sufficient to accomplish a robbery. Instead, the victim's head was hit at least seven times and beaten to a pulp, indicating intent to kill.

By contrast, the case at bar is more comparable with the circumstances in Tien Wang v. State, 426 So.2d 1004 (Fla.3d

DCA), pet.for rev.den., 434 So.2d 889 (Fla.1983). The witnesses in Tien Wang saw the accused chase the victim down the street, repeatedly striking him and eventually stabbing him to death. The Third District, applying the rule that circumstantial evidence must not only be consistent with guilt but also inconsistent with a reasonable hypothesis of innocence, found that Tien Wang's actions were equally consistent with an intent to kill absent a premeditated design (second-degree murder).

Accordingly, this Court should recognize the reasonable bypothesis that the homicide at bar was not premeditated and reduce Appellant's conviction to second-degree murder while ordering him to be resentenced by the trial court. Hall, supra.

ISSUE VI.

THE TRIAL COURT ERRED BY DENYING DEFENSE COUNSEL'S CHALLENGE FOR CAUSE TO PROSPECTIVE JUROR STALVEY.

On voir dire, defense counsel inquired of prospective juror Stalvey regarding the juror's attitude toward the death penalty.

> MR. MEYERS (defense counsel): Okay. Do you think that if there's a finding of guilt that the death penalty should automatically be imposed?
>
> JUROR STALVEY: Yes, sir.
>
> MR. MEYERS: So in every case of first-degree murder, then, the death penalty should be imposed if the person has been found guilty; is that correct?
>
> JUROR STALVEY: Yes, sir.
>
> MR. MEYERS: So it should be an automatic thing?
>
> JUROR STALVEY: Yes, sir.

(R191)

> The colloquy continued:
>
> MR. MEYERS: So in other words, it should be automatic death penalty if someone is found guilty of first-degree murder?
>
> JUROR STALVEY: Yes, sir.
>
> MR. MEYERS: So in this case if -- I'm making capital I's and capital F's -- if Mr. Nibert is found guilty of first-degree murder --
>
> JUROR STALVEY: Yes, sir.
>
> MR. MEYERS: -- you would automatically vote for the death penalty.
>
> JUROR STALVEY: Yes, sir.

(R192)

The prosecutor made no attempt to rehabilitate the prospective juror. When defense counsel requested the trial judge to dismiss Juror Stalvey for cause, the court addressed the prospective juror as follows:

> THE COURT: Ma'am, if there was a finding of guilt -- next to you -- at this point, you would automatically vote for the death penalty?
>
> JUROR STALVEY: Not automatically, but --
>
> THE COURT: Do you think there are some situations in which you would vote against the death penalty?
>
> JUROR STALVEY: Yes.

(R206)

This was the total inquiry made by the trial court into the juror's competency to sit on the capital jury. On this abbreviated basis, the trial court denied defense counsel's challenge for cause to prospective juror Stalvey. (R206) Defense counsel was forced to expend a peremptory strike to remove Stalvey from the panel. (R206)

First, it must be noted that the prospective juror made it crystal clear that if Appellant were found guilty of first-degree murder, an automatic vote for the death penalty would follow. (R192) The trial court, by contrast, made vague references to a finding of guilt. (R206) The juror was well aware that the jury could return a finding of guilt for an offense other than first-degree murder. Presumably, the juror would not automatically vote to impose the death penalty on someone who had been found guilty of a lesser offense than first degree murder.

Secondly, the trial court imposed an incorrect standard when he asked the prospective juror whether the juror would "automatically" vote for death. The defendant is entitled by the Sixth Amendment to a neutral jury drawn from a fair cross-section of the community. The appropriate standard for whether a juror is biased is whether the juror's views would

> prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

Adams v. Texas, 448 U.S. 38 at 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980); Wainwright v. Witt, 469 U.S.__, 105 S.Ct.__, 83 L.Ed.2d 841 (1985).

Prospective juror Stalvey's bias in favor of recommending a death sentence in any case where guilt of first-degree murder was proved "substantially impaired" this juror's ability to weigh the aggravating circumstances against the mitigating circumstances of the crime as required by law in the penalty phase of a capital case. Just because the prospective juror retreated from an assertion that the juror would automatically vote for death, does not mean that the juror would render a verdict "solely upon the evidence presented and the instructions on the law given to him by the court." Lusk v. State, 446 So.2d 1038 at 1041 (Fla.1984), cert.den., __U.S.__, 105 S.Ct. 229, __ L.Ed.2d__ (1984).

In the recent decision of Hill v. State, Case No. 63,-902 (Fla. October 10, 1985)[10 FLW 555], this Court stated;

> When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause.

At bar, prospective juror Stalvey's presumption in favor of the death penalty was at least as fixed as that of the challenged juror in Hill. Accordingly, prospective juror Stalvey should have been dismissed from the jury when challenged for cause by the defense. See also Thomas v. State, 403 So.2d 371 (Fla.1981).

ISSUE VII.

THE TRIAL COURT ERRED IN THE PENALTY PHASE BY INSTRUCTING THE JURORS ON THE LAW PRIOR TO THE TAKING OF EVIDENCE AND ARGUMENT OF COUNSEL.

Fla.R.Crim.P. 3.390(a) provides in pertinent part:

> The presiding judge shall charge the jury upon the law of the case at the conclusion of argument of counsel. [Emphasis supplied.]

Support for Appellant's position that this rule applies equally to the penalty proceeding in a capital trial is found in the Florida Standard Jury Instructions in Criminal Cases, 1981, at p.77-78 as follows:

> Note to Judge
>
> Give in all cases before taking evidence in penalty proceedings.
> The State and the defendant may now present evidence relative to the nature of the crime and the character of the defendant....At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.
>
> Note to Judge
>
> Give after the taking of evidence and argument.
> Ladies and gentlemen of the jury, it is now your duty to advise the court as to what punishment should be imposed upon the defendant for his crime of (crime charged).
>
> * * *
>
> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:

At bar, the trial court decided that he wanted to instruct the jury prior to hearing evidence and argument of counsel. (R634) The prosecutor specifically requested the judge to hear the evidence before giving instructions. (R634,636) Presumably, defense counsel did not object because it would have been futile in light of the trial court's response to the prosecutor's request.

The trial court proceeded to instruct the jury on the aggravating circumstances provided in Section 921.141(5)(h) and (i), Florida Statutes (1983). (R638) He also instructed the jury on the possible statutory mitigating circumstances provided in Section 921.141(6)(b), (e), (f) and (g), Florida Statutes (1983). (R638-639) Testimony from witnesses for the defense was then presented (R641-652) and counsel made their penalty phase final arguments. (R643-681) No further instructions were given to the jury.

The reason why this procedural irregularity was prejudicial to Appellant becomes evident when the content of the prosecutor's final argument is examined. Ignoring the court's reproach that his phrasing to the jury was misleading (R655), the prosecutor continued, stating to the jury:

> As the Court has already instructed you, there are two aggravating circumstances that apply in this particular case, and the State will contend that those two sufficient aggravating circumstances clearly, clearly outweigh any mitigating circumstances.

(R656)

This was a gross mis-statement of the jury's function in the penalty phase proceeding. Only the jury, not the trial

judge, determines whether an aggravating circumstance applies. Furthermore, aggravating circumstances must be proved beyond a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla.1980). And at least one statutory aggravating circumstance must be proved before the death penalty can be recommended. State v. Dixon, 283 So.2d 1 (Fla.1973), cert.den., 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

At bar, there was only scant reason to believe that any of the statutory aggravating factors was present. The prosecutor's misleading argument encouraged the jury to believe that the trial judge had already determined that two were present. Otherwise, the jury might well have determined that no aggravating factor was sufficiently proved--consequently a recommendation of life would be required.

Had the trial judge not deviated from procedural regularity, the prosecutor would not have been able to misrepresent the instructions to the jury. Under these circumstances, the court's error in instructing the jury on the law prior to argument of counsel was harmful and required reversal for a new penalty phase proceeding with a new jury to be empanelled.

ISSUE VIII.

THE TRIAL JUDGE FAILED TO PREPARE AN ADEQUATE STATEMENT OF FINDINGS TO SUPPORT IMPOSITION OF A DEATH SENTENCE. ENTRY OF A STATEMENT PREPARED BY THE PROSECUTOR DOES NOT FULFILL THE RESPONSIBILITY OF THE TRIAL COURT.

The order designated "Sentence" which appears in the record at R81-85 (and in the appendix to this brief) was not prepared by the trial judge. The record reflects that immediately following reception of the jury advisory recommendation of 7-5 in favor of death, the trial court proceeded to summarily sentence Appellant as follows:

> THE COURT: The Court does find that there are two aggravating and no mitigating circumstances and it is the judgment, order and sentence of this Court that the defendant be sentenced to die in the electric chair.
>
> * * *
>
> Please prepare a written order showing two aggravating and no mitigating and submit it on April 26, 8:30.

(R684)

Evidently, the prosecutor had such a written order already prepared because the order was signed the same day as oral pronouncement of the sentence (April 11, 1985) (R85) and filed with the Clerk immediately. (R81) Significantly, the record indicates the court adjourned following oral pronouncement of the sentence at 3:29 p.m., April 11, 1985. (R684)

Section 921.141(3), Florida Statutes (1983) governs the findings required of a trial judge to support a sentence of death. In pertinent part, the statute provides:

> ...if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings.

Nothing in the statute grants authority to the trial judge to replace these written findings of fact with a statement from the prosecutor best described as boilerplate.

While the trial judge is not barred from considering and deliberating the aggravating and mitigating circumstances concurrently with the jury, Randolph v. State, 463 So.2d 186 (Fla.1984), the trial judge must still exercise a reasoned judgment when imposing a sentence of death. The purpose of the written statement justifying the sentence of death is to present the reasoned consideration of the trial court as to whether death is the appropriate penalty in a form that can be meaningfully reviewed by this Court. State v. Dixon, 283 So.2d 1 (Fla.1973), cert.den., 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

In holding the Florida capital sentencing scheme constitutional in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the United States Supreme Court observed that the Florida trial judge was required to focus on circum-

stances of the crime and the character of the individual defendant before imposing a sentence of death. The Proffitt court declared:

> Since, however, the trial judge must justify the imposition of death sentence with written findings, meaningful appellate review of each such sentence is made possible. 428 U.S. at 251.

See also Holmes v. State, 374 So.2d 944 (Fla.1979); Ferguson v. State, 417 So.2d 639 (Fla.1982).

At bar, the trial judge did not fulfill this responsibility. He merely acted as an umpire and called the score 2-0 in favor of death. This Court should not review the partisan pronouncements of the prosecutor and call it meaningful appellate review of the sentence.

Where the trial court neglected to engage in a reasoned consideration of the aggravating and mitigating circumstances while imposing a sentence of death, this Court in Lucas v. State, 417 So.2d 250 (Fla.1982) reversed for a new sentencing proceeding. The Lucas court made an observation particularly applicable here as well:

> For the dual responsibility to be fulfilled [referring to review process in appellate court] the trial judge must exercise a reasoned judgment in weighing the appropriate aggravating and mitigating circumstances in imposing the death sentence. To satisfactorily perform our responsibility we must be able to discern from the record that the trial judge fulfilled that responsibility. 417 So.2d at 251.

An analogy can be drawn between the requirements of the capital sentencing statute and the findings which a trial judge must make in order to depart from the recommended sen-

tence range under the sentencing guidelines, Section 921.001(6), Florida Statutes (1983); Fla.R.Crim.P. 3.701(d)(11). In a recent decision, Carnegie v. State, Case No. 84-2020 (Fla.2d DCA, August 16, 1985) [10 FLW 1907], the trial judge indicated a desire to sentence the defendant outside the guidelines and requested the prosecutor to prepare a written statement justifying the departure in accordance with the above-cited statute and Rule. The Second District called this an improper delegation to the state attorney's office of a responsibility belonging exclusively to the court.

Certainly if the written findings necessary to support a guidelines departure sentence cannot be delegated to the prosecutor, logic demands application of the same principle where the ultimate penalty of death is imposed. Appellant's sentence should be vacated and, as in Lucas, supra, this cause remanded to the trial court for a new sentencing hearing.

ISSUE IX.

THE TRIAL COURT ERRED BY FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COLD, CALCULATED AND PREMEDITATED WITHOUT PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

This Court has described the aggravating circumstance provided in Section 921.141(5)(i), Florida Statutes (1983) as ordinarily applicable in murders characterized as executions or contract murders. McCray v. State, 416 So.2d 804 (Fla.1982). It may only be applied when the crime exhibits a heightened premeditation, greater than that required to establish premeditated murder. Gorham v. State, 454 So.2d 556 (Fla.1984), cert.den., __U.S.__, 105 S.Ct. 941, 83 L.Ed.2d 953 (1985); Jent v. State, 408 So.2d 1024 (Fla.1981), cert.den., 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982).

As discussed under Issue IV, the case at bar shows at most minimal circumstantial evidence of premeditation. Therefore, the requisite "heightened premeditation" is totally lacking.

Turning to the actual written findings in the record, the sentencing order states:

> [T]wo days prior to the murder, the defendant revealed his intention to rob the victim.

(R82-83, see Appendix) As previously noted, since the defendant did not indicate that he contemplated using force, it would be more accurate to say "steal from the victim" than "rob the victim." In any case, it is clear that this Court has held that in applying the aggravating circumstance of cold, calculated

and premeditated, the premeditation established for robbery cannot be automatically transferred to the murder. Gorham, supra. In an attempted robbery where the defendant killed the victim for unknown reasons, the finding of the cold, calculated and premeditated aggravating circumstance was improper. Thompson v. State, 456 So.2d 444 (Fla.1984).

The trial court went on to find:

> Defendant's familiarity with the victim reasonably suggests that the defendant knew he would need to kill said victim when he robbed him to prevent the victim from later identifying him...indicating a calculated murder.

(R83, see Appendix) In Caruthers v. State, 465 So.2d 496 (Fla. 1985), the trial court reasoned that since the defendant knew the victim, the killing was cold, calculated and premeditated as well as committed to avoid identification. This Court specifically found that heightened premeditation was not proved beyond a reasonable doubt by the circumstance that the defendant and the victim knew each other.

Moreover, in the case at bar, the trial judge found at trial that there was no evidence to support a robbery or attempted robbery by Appellant on the date of the homicide. (R553-554) The court had declined to give an instruction on felony murder with attempted robbery as the underlying felony because the premise that Appellant attempted to rob the victim was mere "theory and speculation." (R551) Therefore, the finding of the aggravating circumstance cold, calculated and premeditated also relies on "theory and speculation."

The trial court's written findings conclude:

> he had made the victim get on his knees during the attack..., the victim was stabbed seventeen (17) separate times....

(R83, see Appendix)

When witness Jack Andruskiewiecz testified that Appellant told him about making the victim get on his knees, he also testified that he did not know why this occurred. (R499) The circumstances surrounding the victim's being driven to his knees are so sketchy that any inference of an execution-style or "cold, premeditated killing" is clearly speculative. Seventeen stab wounds is equally indicative of a frenzied stabbing attack. And the victim's flight from his residence across the street to his brother's house indicates a likelihood that the attacker relented.

This Court has stated that the cold, calculated and premeditated aggravating factor emphasizes calculation prior to the murder itself. Hardwick v. State, 461 So.2d 79 (Fla. 1984). Thus, a killing which takes several minutes to accomplish does not support application of this aggravating factor absent proof of a pre-arranged plan. At bar, there simply is no evidence of a pre-arranged plan in the homicide.

The prosecution must prove the existence of aggravating circumstances beyond a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla.1980). Comparison with factually similar cases before this Court reinforces the conclusion that the cold, calculated and premeditated factor was improperly found here. See Harris v. State, 438 So.2d 787 (Fla.1983) (victim killed in her own house by multiple stab wounds and blows from a blunt

instrument); Mann v. State, 420 So.2d 578 (Fla.1982) (abducted young girl died from skull fracture and multiple stab wounds); Wright v. State, Case No. 64,391 (Fla. July 3, 1985)[10 FLW 364] (woman stabbed to death in her own bedroom); Peavy v. State, 442 So.2d 200 (Fla.1983) (victim stabbed to death in his own apartment).

ISSUE X.

THE TRIAL COURT ERRED BY FINDING THAT THE AGGRAVATING CIRCUMSTANCE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL WAS APPLICABLE.

In the sentencing order, the trial court found the murder for which Appellant was convicted to be especially heinous, atrocious or cruel. (R81, see Appendix) The sentencing order relied upon the fact that the victim was stabbed seventeen times with a knife and that four of the wounds were defensive in nature, indicating a struggle. Furthermore, the victim did not die quickly, but was able to run across the street to his brother's house before he expired from loss of blood.

While the factors of multiple knife wounds, pain and being conscious for several minutes after the attack while knowing that death might be imminent are relevant to a finding of heinous, atrocious or cruel, they are insufficient by themselves to support this aggravating circumstance. In Demps v. State, 395 So.2d 501 (Fla.1981), cert.den., 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981) the victim was found "bleeding profusely from stab wounds." He was rushed to a total of three hospitals and died shortly after arrival at the last of these. This Court declared the finding of the trial court that the murder was heinous, atrocious or cruel to be erroneous.

Similarly, in Teffeteller v. State, 439 So.2d 840 (Fla.1983), cert.den., __U.S.__, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984), this Court explained:

> The fact that the victim lived for a couple of hours in undoubted pain and knew that he

> was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies. 439 So.2d at 846.

The proper test for whether the statutory aggravating circumstance found in Section 921.141(5)(h) ("especially heinous, atrocious or cruel") applies is set forth in State v. Dixon, 283 So.2d 1 (Fla.1973), cert.den., 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). The Dixon court intended to include within this aggravating circumstance only the crimes "where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim." 283 So.2d at 9. This test requires review of the totality of the circumstances surrounding commission of the capital felony.

At bar, there were no additional acts which would set this knife murder apart from the norm of knife murders. The record sheds little light on what occurred immediately prior to the stabbing attack. We know only that the victim and the attacker shared a six-pack of beer before the attack. Indeed, the victim may have provoked the attack in some way. After the conclusion of the encounter, the attacker fled immediately.

In short, the only evidence supporting this aggravating circumstance is the frenzied knife attack and the suffering of the victim which is common to most stabbing murders. Also relevant to the totality of the circumstances is the victim's slight intoxication which arguably reduces the degree of cruelty. (R413) See Herzog v. State, 439 So.2d 1372 (Fla.1983). The

aggravating circumstance was not proved applicable beyond a reasonable doubt. Accordingly, this Court should reverse the trial court's finding and order Appellant resentenced to life imprisonment.

ISSUE XI.

THE SENTENCING ORDER FAILED TO PROPERLY CONSIDER EVIDENCE PERTAINING TO MITIGATING FACTORS.

Before imposing a sentence of death, the trial court must specifically articulate the mitigating circumstances considered in order to provide an opportunity for appellate review. Magill v. State, 386 So.2d 1188 (Fla.1980). The sentencing order entered at bar does not adequately consider the mitigating evidence presented at trial.

A. The sentencing order does not adequately consider the statutory mitigating circumstances applicable at bar.

The trial judge instructed the jury on four of the statutory mitigating circumstances, those provided by Section 921.141(6)(b), (e), (f) and (g), Florida Statutes (1983). (R638-639) The sentencing order found none were supported. (R83, see Appendix) Although the order goes on to reject two circumstances "claimed by defendant," (extreme mental or emotional disturbance and "capacity to conform conduct substantially impaired") the order ignores the other two statutory mitigating circumstances brought to the jury's attention ("acted under extreme duress" and "age of the defendant"). From the order, we cannot tell whether these circumstances were considered and rejected or merely overlooked.

In finding the mitigating circumstances provided by section 921.141(6)(b) and (f) to be unsupported, the sentencing order misinterprets the thrust of these mitigating factors. Voluntary intoxication is relevant to the ability to premeditate a killing and may provide a defense to this element of

first-degree murder. Gurganus v. State, 451 So.2d 817 (Fla. 1984). The statutory mitigating factors, however, contemplate situations where there is no legal excuse from criminal liability yet the circumstances may justify a lesser penalty. As this Court said in State v. Dixon, supra at 10, while referring to the statutory mitigating circumstances provided in subsections (b) and (f) of section 921.141(6); the circumstance:

> is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.

What was directly relevant to these mitigating circumstances was Appellant's history of alcoholism. Florida law recognizes a type of insanity caused by long and continued use of intoxicants which may be either permanent or intermittent. Cirack v. State, 201 So.2d 706 (Fla.1967). The trial court should have considered the testimony relating to Appellant's use of alcohol while living with his ex-wife and his being fired from work repeatedly because of his alcohol problem as being relevant to the statutory mitigating circumstances in Section 921.141(6)(b) and (f), Florida Statutes (1983).

B. The sentencing order fails to consider evidence of non-statutory mitigating circumstance which were presented to the trial court.

In Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the United States Supreme Court held that a trial judge in a capital case cannot exclude relevant mitigating evidence from consideration merely because it doesn't tend to support a legal excuse from criminal liability. Recognizing the impact of the Eddings decision, Justice McDonald wrote in

his concurring opinion to Lucas v. State, 417 So.2d 250 (Fla. 1982) that the sentencing judge should:

> explicitly consider and weigh the defendant's background and character along with the crime and the circumstances of its commission. 417 So.2d at 252.

The sentencing order at bar merely states that no non-statutory mitigating circumstances were found "notwithstanding testimony to the effect that defendant has had an alcohol problem since an early age." (R84, see Appendix) None of the other mitigating evidence presented at trial was apparently even considered by the sentencing authority.

In the penalty phase, Paul Hawks, Sr. and Paul Hawks, Jr., testified that Appellant had worked as their employee during the previous three years. (R647) Although Appellant had been fired a couple of times for failure to report to work, the refrigeration business always rehired Appellant because he was a trustworthy and valuable employee. (R652) This testimony was clearly relevant to Appellant's character; however, the sentencing order does not indicate whether it was even considered.

Also relevant to Appellant's character as well as the circumstances surrounding the commission of the killing was Jack Andruskiewiecz's description of Appellant's state of mind on the evening of the offense. As Andruskiewiecz testified:

> he was just incoherent, just sitting on the floor gasping and gasping and running in and out of the bathroom, dry heaves, couldn't talk to me.

(R495) And later, the following exchange occurred between defense counsel and Andruskiewiecz:

Q. How would you describe him as he was lying there on the floor after he came in?

A. As far as what?

Q. His condition?

A. Well, he was gasping for breath and breathing real hard and had the dry heaves.

Q. Was he in a state of shock as you would characterize it?

A. Yeah, I would say so. Freaked out. I know what you call shock, you know.

Q. What was he saying at this time?

A. "Oh, God. Oh, God," stuff like that.

* * *

Q. How long did that go on, that state of condition?

A. Oh, for a good while.

Q. For a couple of hours?

A. Yeah, you know, an hour or maybe two hours, something like that. He was just really hyped up, you know.

(R510-511)

This graphic description of Appellant's revulsion immediately following the killing was clearly indicative of remorse. As this Court noted in Magill v. State, 386 So.2d 1188 at 1190 (Fla.1980):

> The state of mind of a murderer during or immediately after the commission of the crime may be legitimately examined for remorse.

The sentencing order, however, makes no mention of whether Appellant's state of mind was even considered as a mitigating circumstance.

In summary, the trial court failed to perform its duty to consider all of the relevant mitigating evidence. This error requires reversal for resentencing. As Eddings, supra unequivocally demands:

> state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances. 455 U.S. at 117.

ISSUE XII.

THE DEATH SENTENCE IMPOSED ON APPELLANT MUST BE VACATED BECAUSE, UNDER THE CIRCUMSTANCES OF THIS CASE, A SENTENCE OF DEATH WOULD VIOLATE THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The teachings of the United States Supreme Court instruct us that in order for a sentence of death to pass constitutional muster, the sentencing authority's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action" Gregg v. Georgia, 428 U.S. 153 at 189, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). As the court commented in Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the Eighth Amendment requires that "capital punishment be imposed fairly, and with reasonable consistency, or not at all." 455 U.S. at 112. Recognizing that this Court (with the lone exception of Demps, supra) has consistently found the statutory aggravating circumstance, especially heinous, atrocious or cruel to be present where the homicide victim was stabbed to death, Appellant now asks this Court to consider whether this circumstance alone, in the context of the case at bar, can support a sentence of death.

In stabbing homicides, the victim is usually stabbed more than once and seldom does death occur instantaneously, or nearly so. In the vast majority of cases, the stabbing victim dies from loss of blood rather than the knife wound itself. By contrast, when homicide is committed with a firearm, death is often instantaneous. Therefore, it is possible to distinguish

between the physical brutality and suffering incurred by the victim of a knife slaying and the relatively painless death which accompanies most shooting homicides. This Court has done so and categorized the typical knife slayings as eligible for the statutory aggravating circumstance of especially heinous, atrocious or cruel. See e.g., Morgan v. State, 415 So.2d 6 (Fla.1982), cert.den., 459 U.S. 1055, 103 S.Ct. 473, 74 L.Ed. 2d 621 (1982).

It does not follow that a sentence of death may be imposed when the only aggravating circumstance is a knife murder undistinguished from typical knife murders. In Purdy v. State, 343 So.2d 4 (Fla.1976), this Court noted that the prerequisite to imposition of a death sentence was the finding of an aggravating circumstance enumerated in §921.141(5), Fla.Stat. The trial judge in Purdy had found the act especially heinous, atrocious, or cruel and imposed a death sentence. This Court ordered the defendant resentenced to life imprisonment because the circumstances were not sufficiently more egregious than any other violation of the infant sexual battery statute.

Although the majority of murders are now committed with firearms, stabbing remains a common means of killing. In only very few of the homicides committed by stabbing is a death sentence imposed. Thus, the constitutional dictates that a death sentence not be "freakishly" imposed are implicated in Appellant's situation. There must be a principled way to distinguish a case in which the death penalty is imposed from the many cases in which it is not. Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

In a law review article[2/] particularly relevant to the case at bar, the author contends that this Court has failed to objectively and consistently limit the application of the especially heinous, atrocious or cruel aggravating circumstance. When a state court fails to sufficiently limit the construction of a broad and vague aggravating circumstance, a sentence of death may not be constitutionally imposed in reliance on this aggravating circumstance. Godfrey v. Georgia, supra; see also, Zant v. Stephens, 456 U.S. 410, 103 S.Ct. 2733, 72 L.Ed.2d 222 (1983).

To summarize, there are no facts present in the circumstances of the case at bar which distinguish this case from the vast majority of homicides committed with a knife. A determination under Florida capital sentencing procedure that the death penalty is appropriate would only demonstrate that Florida's procedure is constitutionally inadequate. Appellant's sentence of death should be vacated and the trial court directed to impose a life sentence.

2/ Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller, 13 Stetson L. Rev. 523 (1984).

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Billy Ray Nibert, Appellant, respectfully requests this Court to grant him the relief requested in each of his arguments. Specifically he asks for a new trial and a reduction in conviction from first-degree murder to second-degree murder. If his conviction is affirmed, he requests this Court to order a reduction in sentence from death to life, a new penalty hearing with a new sentencing jury empanelled, or a resentencing hearing in the trial court.

Respectfully submitted,

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