IN THE SUPREME COURT OF FLORIDA

CASE NO: 68,549

DUANE EUGENE OWEN,

Appellant/Defendant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

The undersigned counsel for Appellant respectfully request that this Honorable Court hear oral argument for the issues herein raised.

Respectfully submitted,

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PRELIMINARY STATEMENT AND ACKOWLEDGMENT

Appellant was the Defendant and Appellee was the prosecution in the Criminal Division of the Circuit Court of the Fifttenth Judicial Circuit, in and for Palm Beach County, Florida.

In this brief, the Appellant will be referred to as he appears before this Honorable Court, and Appellee will be referred to as the State.

The symbol "R" will be used to designate the record on appeal followed by the page number. The symbol "SR" will be used to designate the supplemental record on appeal followed by the page number.

Many portions of this brief are in whole or in part taken from the brief filed on behalf of Appellant Duane Eugene Owen in Florida Supreme Court Case No. 68,550 as prepared by Theodore S. Booras, Esq. of the law firm of Salnick and Krischer. The language and content from that brief that is reprinted herein is with the express permission of Mr. Booras, for which the undersigned counsel is most grateful.

QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT ERRED BY NOT GRANTING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT II OF THE INDICTMENT?

II. WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS APPELLANT'S CONFESSION?

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STATEMENT OF THE FACTS

The relevant facts are as follows: On May 29, 1984, Georgiana Worden was found dead at approximately 8:00 A.M. in the master bedroom of her residence in Boca Raton, Florida. A neighbor discovered the body after Georgiana Worden's children had phoned his residence. (R. 2805-09). The State offered testimony that Georgiana Worden died from mutiple blows to the head by a blunt instrument consistent with a hammer. (R. 3042 - 3046). The injuries to the head were followed by lacerations to the wall of the victim's vagina. The State presented testimony from the medical examiner that there was little or no blood pressure in Georgiana Worden's body at the time of the lacerations to the vagina due to an absence of hemorrahaging. There was no evidence presented to show that Georgiana Worden was alive at the time of vaginal penetration either by an instrument or a man's penis. The medical examiner stated: "The victim may have been dead at the time of those lacerations, that is correct." (R. 3092). The State also showed that there were no "defensive injuries" about the victim's which, if present, would have indicated a struggle. (R. 3087). This is consistent with the confession of Duane Owen which incicates that Georgiana Worden

was asleep at the time of the attack and unaware. In addition, the attack was brief in duration. (SR. 1008 - 1014).

Although the evidence failed to establish that Georgiana Worden was alive at the time of the insemination and the lacerations, Appellant was still indicted under Count II of Sexual Battery upon a "person", and was convicted. Appellant was then sentenced to life imprisonment for that offense.

On May 29 1984, the Boca Raton Police Department issued a B.O.L.O. or flier for the Appellant, DUANE OWEN, after his picture was identified from a photo line-up. (R. 689 - 691). The following day, on May 30, 1984, Officer K. Petracco from the Boca Raton Police stopped Duane Owen who was walking down a street at 12:30 P.M. The officer justified the stop by stating the he "generally fit the description of the picture I had." (R. 650). Upon the approach of the unmarked partol car, Duane Owen did not attempt to flee, and when requested to produce indentification, he exhibited a driver's license. He was then arrested at the scene and has been in custody ever since.

Duane Owen was then transported to the Boca Raton Police Station, and after substantial delay during which Lt. K. Mccoy interogated him, he was transported to the Palm Beach County Jail. On June 1, 1984, Sgt. M. Woods fron the Delray Beach Police Department, along with Lt. McCoy of Boca, traveled to the county jail to interrogate Duane Owen covering both the capital and non-capitol cases that they hoped Duane Owen would clear. This interrogation lasted from 3:55 P.M. until 10:45 P.M.

Neither officer brought a tape recorder, nor did they make any attempt to record this interrogation even though they had the Appellant in a room at the jail that was setup for video taping, and which they subsquently used to record in excess of twenty (20) hours of interrogation with Appellant. (R. 873 - 894). Lt. McCoy generated a hand written account of their interrogation complete with statements in quotations. (R. 893).

Over the next three weeks, various investigators from both Boca Raton and Delray Beach went to Palm Beach County Jail to interrogate Appellant on video tape in excess of twenty (20) hours, as follows:

June 3, 1984: 5:00 P.M. -11:30 P.M.
June 6, 1984: 11:15 A.M. - 4:20 P.M.
June 7, 1984: 6:00 P.M. - 10:55 P.M.
June 8, 1984: 1:45 P.M. - 4:00 P.M.
June 18, 1984: 4:30 P.M. - 9:10 P.M.
June 21, 1984: Approximately five (5) hours

During these interviews, as a review of the video tapes themselves would confirm, various interrogation techniques were utilized, including but not limited to, "the false friend", "Mutt and Jeff", and misstatements of the law so as to mislead, deceive, and delude Appellant as to his true position. In total, Appellant was interrogated in excess of seventy-two (72) hours. The consequence of these lengthy interrogation sessions, the interrogation techniques utilized, and the totality of the circumstances resulted in the Appellant making statements which lead to his indictment and conviction for the murder of Georgiana Worden .

During the interrogation, reference the instant appeal which occurred at the latter portion of the seventy-two (72) hour

ordeal, the Appellant was misled by his interrogators into giving a statement. Duane Owen was misled into thinking he would be "helped" if he confessed to his new "friend" the Boca Raton police officer:

> THE DEFENDANT: See, see, let's say for instance this John Doe does a certain crime--
> OFFICER MC COY: Let's stay on this crime; that is what I am talking about.
> THE DEFENDANT: Let's say John Doe murdered somebody.
> OFFICER MC COY: Uh-huh.
> THE DEFENDANT: He gets arrested for it and he has a couple of options: they are going to take his fifty-fifty back, he can either go to a jury, be found guilty or not guilty; or he can confess to it and take his chances there.
> OFFICER MC COY: Uh-huh.
> THE DEFENDANT: He has got two different chances there -- maybe three.
> OFFICER MC COY: Uh-huh.
> THE DEFENDANT: So let's say he takes the first chance by confessing to it. And you know, John Doe -- there is a lot of different things that can happen to him there.
> OFFICER MC COY: Sure.
> OFFICER WOODS: Uh-huh. But John Doe gets to select his options rather than John Doe doing what the jury tells him.
> THE DEFENDANT: John Doe doesn't have any options, John Doe doesn't.
> OFFICER MC COY: Sure he does.
> THE DEFENDANT: Because by confessing to such a crime, he could get burnt. You know what I am talking about?
> OFFICER MC COY: Am I still here?
> THE DEFENDANT: But still --
> OFFICER MC COY: Am I still here? Have I been here?
> I am still here, okay. I am still here. He can make me understand, Okay. Make me understand why the crime happened. He can do that, man.
> * * * *
> OFFICER MC COY: John Doe could make me understand alot already for the last couple days, okay. He has made me understand alot already. That is what he has going for him.

That is the test that John Doe is called for, okay.
And John Doe can decide on his new mission in life. We can get him started, okay. The longer John Doe keeps fighting it, somewhere along the line he may get left behind. And he would still be fighting that battle. Okay.
And he may not have that guy to help him understand, okay. That is why I am here now. I don't think you are going to find too many other guys like myself. Okay.
You said yourself. You said the other cops are like...
(SR. 107 - 110).

Duane Owen is consistently misled into believing the officers will help him through their purposely vague syntax and non-stop contention that Officer McCoy is his buddy who will protect him and help him get the treatment he needs:

OFFICER MC COY: Like I told you -- like I told you -- what do you have going for you? When you get right down to the nitty-gritty, what do you have going for you?
THE DEFENDANT: That's besides the point.
OFFICER MC COY: Wait a minute.
* * * *
THE DEFENDANT: Still though -- still, its a whole different ball game.
OFFICER MC COY: You will get the help. You will get the help.
THE DEFENDANT: Yeah, but still we are playing this thin line game, this here chance.
OFFICER MC COY: No, we're not. You will definitely get the help, okay. The Court system will see to that.
(SR. 167 - 168).

At one point Officer Livingston is sent in to play the "bad cop" opposite McCoy's "good cop" role:

OFFICER LIVINGSTON: Kevin sat in here and he's gone way beyond even what I think is reasonable, and it was against my better

judgment, but he wanted to do it. He thought there was something about you that he thought he could help, and he went way beyond what I ever thought should have been done.

* * * *

OFFICER LIVINGSTON: But I don't want you to -- I don't want you to confess to me, not me. If you ever decide to do that, I'll tell you who to do it to, that's the guy who was in here a few minutes ago. You owe him. You don't owe me.

He's the closest thing you got in the world of a friend right now. Maybe outside of your brother, he's probably all you got left, but not me. I don't even want to hear it...

(SR. 413 - 420).

This technique is non-stop. The supplemental record on appeal is a transcript of all the taped conversations all of which were considered by the trial court in denying Duane Owen's Motion to Suppress Statements.

Appellant's tacit refusal to talk about the murder over all those hours was an express assertion of his Fifth Amendment rights. This indirect assertion fell on deaf ears as was evident by law enforcement's continued interrogation.

After the rendition of the jury's ten to two (10-2) recommendation, but prior to pronouncement of sentence, the trial court, now the sentencing court, solicted statements from the victim's family to "advise" the court as to what sentence to impose. (R. 4364 -4369).

On February 18, 1986, the jury returned a verdict of guilty for First Degree Murder (Count I), Sexual Battery (Count II), and Burglary (Count III). On March 5, 1986 the jury returned a vote of ten to two (10-2), recommending the death penalty. On

March 13, 1986, the trial court sentenced the Appellant to death in Florida's electric chair, this giving rise to this instant Appeal.

SUMMARY OF ARGUMENT

From the moment of his arrest through the pronouncement of the sentence, the Appellant, DUANE EUGENE OWEN, was denied a fair trial in violation of Due Process. After his arrest, the Appellant was interrogated for approximately seventy-two (72) hours. During the latter portion of this interrogation, the Appellant gave in to the coercive techniques utilized by police and began giving statements reference the instant case. However, prior to actually making the statement, the Appellant indicated by his actions an unwillingness to discuss the case any further with the police. Appellant's wishes were ignored by police as indicated by their continued questioning. The statements thereafter obtained by the police from the Appellant were taken in violation of the Fifth Amendment to the United States Constitution as interpreted by the Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966), and Rhode Island v. Innis, 446 U.S. 289 (1980).

The statements are further tainted by the unlawful stop and seizure of the Appellant, who was stopped while walking down a sidewalk at 12:35 P.M. because he looked similar to a photograph possessed by the police. Duane Owen did not attempt to flee, and when requested, he produced identification. In Brown v. Texas, 443, U.S. 47 (1979), the Supreme Court ruled that stopping a person to obtain identification is a seizure as defined in the Fourth Amendment. Based upon nothing more, the instant seizure

of the Appellant was unlawful, thus any and all statements which resulted were subject to suppression.

An additional ground for suppressing Duane Owen's statement was the obvious psychological coercion utilized by the police. Throughout the recorded sessions there are numerous instances where law enforcement attempts to communicate to the Appellant that by confessing he will have more control over his future, than by remaining mute. Further, that by confessing he will be able to take his future into his own hands, rather than placing it in the hands of the jury. Additionally, these tapes depict various promises made to Owen in return for cooperation including, but not limited to, bringing his brother to the next interrogation session for consultation with him, as well as a contact visit; something not authorized or permitted to other pre-trial detainees. Police trickery and deception in obtaining confessions are common techniques, but ones which have long been criticized by the Supreme Court. In Miranda v. Arizona, supra, the Court stated:

> Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented... This Court has recognized that coercion can be mental as well as physical, and that the blood of the accused in not the only hallmark of an unconstitutional inquisition.

The Court then goes on to outline those psychologically oriented tactics utilized by law enforcement to acquire confessions. The Court utilizes the very text books written by police officers, for police officers to instruct them on the utilization of

psychological coercion to break through a defendant's normal defenses to acquire a confession. In particular, the Court criticized such techniques as the "Mutt-and-Jeff" interrogation, in which a supposedly sympathetic interrogator promises to protect the suspect from a hostile interrogator if the suspect will only cooperate. Officers McCoy and Livingston utilize this technique throughout the interrogations taking place over numerous days and hours. But the most pointed example can be found on tape #5, at the end of the session where Livingston tells the Appellant the he owes it to McCoy to confess, and McCoy tells the Appellant that Livingston thinks he is wasting his time on the Appellant, but he, Mccoy doesn't feel that way. It is the overall effect of the long and constant interrogation sessions that make the statements provided by the Appellant inadmissible.

In a similar vein, some forms of police trickery involve falsely taking the side of the suspect, convincing him that the interrogator is a friend and really has the suspects best interest in mind. McCoy's approach to Duane Owen as it developed over the various interrogation sessions are a text book example of this technique in action. The Court has found that confessions under these circumstances to be involuntary.

Duane Owen was charged and convicted, under Count II of the instant Indictment of Sexual Battery upon a "person". The evidence produced during the trial clearly indicated that the "person" was most likely dead at the time of the sexual battery. Since the sexual battery was committed against a corpse rather

than a person, no violation of F.S. 794.011 (3), was committed since this statute requires the victim to be a person.

Two Florida Courts have ruled the sexual battery cannot be committed against a corpse. McCrae v. Wainwright, 439 So.2d 268 (Fla. 1983); and, McCall v. State, 503 So.2d 306 (Fla. 5th DCA 1987). Additionally, Pennsylvania, California, Maryland, and the Court of Military Appeals have held that, as a matter of law, in order to support a conviction of sexual battery or rape, the victim must be alive at the moment of penetration.

The trial court denied Appellant's Motion for Judgment of Acquittal for the Sexual Battery Count even after being confronted with this Court's decision in McCrae v. Wainwright, supra. It becomes obvious that the Appellant was denied a fair trial at this point in violation of Due Process because of the gross prejudicial effect of the jury deliberating on the murder issue along with a court which should have been dismissed.

The error was further magnified when the State was allowed to argue in aggravation to both the jury and sentencing judge the aggravating circumstance of sexual battery, which as a matter of law, never occurred.

The trial court sentenced the Appellant to die in Florida's electric chair based upon three invalid aggravating circumstances, while still finding mitigating circumstances. The Appellant was sentenced to death based upon sexual battery, which as a matter of law and previously addressed, did not occur.

In light of the foregoing, not only must Duane Owen's sentence be vacated, but additionally, the conviction and judgment must be set aside with directions for a fair trial within the bounds of Due Process, and a new impartial trial judge.

I. THE TRIAL COURT ERRED BY NOT GRANTING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT II OF THE INDICTMENT

Duane Owen was charged and convicted, under Count II of the Indictment, of sexual battery upon a "person". After the State rested its case in chief, the Appellant made a Motion For Judgment of Acquittal pursuant to F.R.Crim.P. 3.380(a). The foundation for the Motion was that the evidence introduced during trial clearly indicated that the "person" was dead at the time of the sexual battery; thus, sexual battery was not committed against "a person" but rather a corpse. As such, the Appellant would maintain that no violation of F.S. 794.011(3), was ever committed since this statute requires the victim to be "a person". F.S. 794.011(1)(i).

A. At the time of the sexual battery the victim was already deceased.

For over sixty years the law in Florida has been clear that the version of events as related by the defense must be believed if the circumstances do not show that the version to be false. McArthur v. State, 351 So.2d 972 (Fla. 1977); Mayo v. State, 71 So.2d 899 (Fla. 1954); Holton v. State, 87 Fla. 65, 99 So. 244 (1924); and Flower v. State, 492 So.2d 1344, (Fla. 1st DCA 1986), see also, Jenkins v. State, 120 Fla.26, 161 So. 840 (1935), Kelly v. State, 99 Fla. 378, 388, So. 366 (1924); and Metrie v. State, 98 Fla. 1228, 125 So 352 (1930). It should be noted that the

seven authorities cited above were all homicide cases. In Mayo v. State, supra, this Court held that:

> A defendant's version of a homicide cannot be ignored where there is absence of other evidence legally sufficient to contradict his explanation. Id., at p.903.

Also, in Kelly v. State, supra., this Court held that:

> ...there was no substantial evidence that in any was contradicted the testimony of the accused. Id., at p.388.

Applying the foregoing principle of law to the instant appeal and reviewing the evidence as presented in the State's case in chief, it is more likely than not that at the time of the sexual battery, the victim was already dead; this, what in essence occurred, was a "sexual battery" on a corpse.

Applying the rule of law that the version of events as related by the defense must be believed if the circumstances do not show that version to be false, Mayo v. State, supra, the confession of the Appellant that the rape occurred in the bedroom must be accepted as the actual version of the facts. Thus, it becomes clear and undisputed that at the time of the actual sexual battery, the victim was already dead.

Appellant would further assert that the State has the burden to establish that the penetration occurred prior to the death of the "person". By implication, the Fifth District held that there was no clear and convincing evidence presented by the State that the sexual battery occurred prior to death, thus, this was an improper reason for departure from the sentencing guidelines.

McCall v. State, 503 So.2d 1306 (Fla. 5th DCA 1987). Additionally, the law in Florida, when addressing circumstantial evidence cases, is that when the State relies upon circumstantial evidence to convict an accused, such evidence must not only be consistent with the defendant's guilt, but it must also be inconsistent with any reasonable hypothesis of innocence. McArthur v. Nourse, 369 So.2d 578 (Fla. 1979); McArthur v. State, supra; Davis v. State, 90 So.2d 629 (Fla. 1956); Mayo v. State, supra; Head v. State, 62 So.2d 41 (Fla. 1952); and Davis v. State, 436 So.2d 196 (Fla. 4th DCA 1983). It has been held that "even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence". McArthur v. State, supra, at 978; and Davis v. State, supra, at 632.

Reading McCall v. State, supra, in conjunction with the circumstantial evidence law in Florida, it becomes clear that the State had the burden in the instant case to prove that the penetration occurred prior to the death; a burden which has not been met.

B. Sexual battery as defined by Florida Statute cannot be committed against a corpse.

The Appellant was charged and convicted under Count II of the instant Indictment with sexual battery upon a "person" in violation of F.S. 794.011(3). To sustain a conviction for sexual battery, it is incumbent upon the State to first establish that the "person" be a living human being. An analogy can first be

made to the law of homicide, where it has been held that "it is not criminal homicide to shoot a dead body". North Carolina v. Simpson, 244 N.C. 325, 93 S.E.2d 425, 430 (1956); U.S. v. Hewson, 26 F. 303 (C.C.D. Mass. 1844); see also, W. LaFave and A. Scott, Criminal Law, p. 607 (2nd ed., 1986). In U.S. v. Hewson, supra, the Federal Court held that:

> The shooting and mutilation of a body that was already a corpse was not a homicide, even though this was done in belief on the part of the accused that he was committing a murder. Id.

The same rational and analogy can be applied to the law of sexual battery: the act must be committed upon a live human being. If the person is dead at the time of the act, then this would be necrophilia, which is defined by Black's Law Dictionary (4th ed.) as:

> A form of affective insanity manifesting itself in an unnatural and revolting fondness for corpse, the patient desiring to ... mutilate them and even (in a form of sexual perversion) to violate them.

The trial court erred by making a legal determination that necrophilia was encompassed within the meaning of F.S. 794.011. The trial court stated:

> But I believe, and I have addressed this matter previously, that our Statute does not necessarily require a person to be alive in order to have suffered a sexual battery. (R. 3677).

Florida Statutes are silent as to necrophilia. Chapter 794, deals with sexual battery to "persons", the obvious intent is

that such "person" be a living human being. Chapter 872, which deals with dead bodies and graves, is also silent as to necrophilia. To follow the conclusion of the trial court would violate hundreds of years of precedent which require laws to be codified so that the public has notice of their existence.

Several states have enacted statutes which in essence deal with necrophilia. Pennsylvania law states:

> ... a person who treats a corpse in a way that he knows would outrage ordinary sensibilities commits a misdemeanor of the second degree. 18 Pa.C.S. 5510

The New York legislature has enacted a chapter entitled sexual misconduct, which states:

> A person is guilty of sexual misconduct when:
> 3. He engages in sexual conduct with...a dead human being. Sexual misconduct is a Class A misdemeanor. N.Y. Penal Law 130.20

Additionally, Massachusetts law classifies necrophilia as unnatural sexual intercourse. M.G.L.A. (Mass.) L.277, Section 39. California makes is a felony to mutilate, disinter, or remove from the place of interment any human remains without the authority of law. California Health and Safety Code, sec. 7052.

The Model Penal Code has also codified necrophilia and related offenses.

> There are occasional legislative provisions penalizing sexual relations with or disrespectful treatment of corpses. The section is included here rather than in the chapter on sexual offenses because there we were primarily concerned

> with preventing physical aggressions, whereas here we deal with outrage to the feelings of the surviving kin, outrage which can be perpetrated as well by mutilation or gross neglect as by sexual abuse. American Law Institute, Model Penal Code, Section 250.10; Comment at p.40 (Tent. Draft No. 13)

Necrophilia can be traced to an earlier drafting of the Model Penal Code, found under Deviate Sexual Intercourse, Section 207.5, Sodomy and Related Offenses (Tent. Draft No. 4, 1955).

Obviously, corpses are not without legal protection by the various state legislatures. However, necrophilia is never characterized with sexual battery or rape by any of the statutes, but rather it constitutes a separate and distinct offense that is codified.

Only two Florida Courts have ever addressed the issue of whether sexual battery can be committed against a corpse: both answered in the negative. In McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983), this Court held that:

> ...a rape may not have occurred because the intended victim was dead at the time of the actual penetration... Id., at 871.

Additionally, the Fifth District held in 1987, that:

> Contrary to the finding by the trial court, neither sexual battery nor robbery can be committed against a corpse. McCall v. State, 503 So.2d, 306 (Fla. 5th DCA 1987)

Other jurisdictions have also held that, as a matter of law, in order to support a conviction of sexual battery or rape, the

victim must be alive at the moment of penetration. Pennsylvania v. Holcomb, 498 A.2d 833 (Pa. 1985); Pennsylvania v. Sudler, 436 A2d 1376 (Pa. 1981); California v. Stanworth, 114 Cal.Rptr. 250, 11 Cal.3d 588, 522 P.2d 1058 (1974); California v. Vela, 218 Cal.Rptr 161, 172 Cal.App.3d 237 (Cal App. 5th Dist. 1985); Hines v. Maryland, 473 A.2d 1335 (Md.App 1984); and United States v. Thomas, 13 C.M.A. 278 (Ct.Mil.App. 1962).

In Pennsylvania v. Sudler, supra, that State's Supreme Court held "that penetration after a victim's death is not within the definition of rape". Id., at p.1379. In reaching this conclusion, the Court reasoned that:

> Although the evidence supports a conclusion that Appellant was responsible for the presence of sperm in the victim's vagina, there is not evidence to support a conclusion beyond a reasonable doubt that the penetration occurred before the killing.
>
> * * *
>
> Evidence of force is not necessary to support a rape conviction where, for example, a complainant testifies that she did not resist the aggressor because she feared further injury. Here, however, on a record containing no such testimony, or probative physical evidence, the lack of evidence of force is as consistent with the conclusion that the penetration occurred after the killing as with the conclusion that the victim was afraid to resist. Thus, it cannot be said that the jury could conclude, beyond a reasonable doubt, that rape had been committed. Id., at p. 1380.

In essence, the Sudler court ruled that the evidence was insufficient to support a conviction for rape, precisely that which the Appellant maintains in the instant appeal. This Court has previously held that when the State does not carry its burden of proof, a Motion for Judgment of Acquittal should have been granted because the State's case was legally insufficient to support a conviction. McArthur v. Nourse, supra, at 580; and McArthur v. State, supra, at 976 N.12.

Additionally, California v. Vela, supra, held "that in order for a conviction of rape to stand, the victim must be alive at the moment of penetration". at 164.

Appellant's argument gains final support when the various court decisions and the legislative intent for enactment of sexual battery and rape statutes are analyzed. Society, acting through the legislature, has deemed rape to be a severe crime deserving harsh punishment. Until 1977, some states even prescribed the death penalty for those convicted of rape. Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L.Ed.2d 982 (1977). Currently, Florida classified sexual battery, as charged herein, as a life felony. The purpose for such penalties is an attempt to deter such conduct, and a form of retribution to the victim who suffers emotional trauma for the rest of her life. Such a justification is valid, even if the victim only lives one minute. The justification for such penalties vanished when it is shown that the actual raped after the victim had died, thus no longer a living human being. The real victims in this situation would be

the family members who learn of this fact. Such an act cannot be classified as sexual battery with a prescribed penalty of life incarceration. As stated by the California Supreme Court, when holding "that a female must be alive at the moment of penetration in order to support a conviction of rape":

> Nevertheless, dead bodies are not without protection. ...In protecting the physical integrity of a dead body section 7052 of the Health and Safety Code makes it a felony to mutilate, disinter or remove from the place of interment "any human remains without authority of law..." California v. Stanworth, supra, at 262, note 15.

Thus, it becomes abundantly clear that the law in Florida and other jurisdictions require the victim of sexual battery be a living person, and as such, the trial court should have granted the Appellant's Motion for Judgment of Acquittal.

C. The Appellant is entitled to a new trial because the court improperly denied the Motion For Judgment of Acquittal as to Count II.

In light of the trial court's denial of Duane Owen's Motion For Judgment of Acquittal as to Count II, the jury deliberating on sexual battery along with the capital murder violated Due Process and was reversible error. Sexual battery as a matter of law did not exist. A strong possibility exists that the jury convicted Duane Owen of the capital murder based upon their added deliberation on sexual battery. Had the Judgment of Acquittal Motion been granted, and the jury not being confronted with

deliberating on sexual battery, a verdict other than guilty to capital murder could have been rendered.

Essentially, the jury was poisoned and prejudiced in its deliberation to the capital murder count because they were confronted with sexual battery which influenced the jury to reach a more severe verdict of guilt that it would have otherwise. The denial of the sexual battery Judgment of Acquittal was of such a nature so as to poison the minds of the jurors and to prejudice them do that a fair and impartial verdict was not rendered.

In light of the foregoing, it is clear the jury deliberation was prejudicially poisoned to the extent that the Appellant was denied his right to a fair trial; and as such, Appellant's conviction and sentence must be vacated and remanded for a new trial.

D. Appellant's death sentence must be vacated because the trial judge did not grant the Judgment of Acquittal for the sexual battery count.

In the previous argument, Appellant maintained that the jury deliberations were poisoned because the trial judge erred by not granting the Judgment For Acquittal Motion for Count II: Sexual Battery. Appellant's argument becomes strengthened during the Phase II portion of the trial, because the jury for a second time deliberated over the sexual battery charge, when by law no such crime occurred.

In the light of the jury's recommendation, it becomes obvious that the jury returned a more severe recommendation than it would have otherwise because of being confronted with the

aggravating sexual battery factor when by law that was clearly error.

Additionally, the trial court's Death Order also cites to the sexual battery offense as an aggravating factor for the imposition of the death penalty. Since by law, no sexual battery occurred, the trial judge based its Death Order on the improper factor. As such, the Appellant's sentence must be vacated with a remand for resentencing. see generally, Stokes v. State, 403 So.2d 377 (Fla. 1981); Odom v. State, 403 So.2d 936 (Fla. 1981); Jones v. State, 332 So.2d 615 (Fla. 1976); and, Tedder v. State, 322 So.2d 908 (Fla. 1975).

II. THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS APPELLANT'S CONFESSION

Normally, it is the settled law of Florida that a trial court's ruling on a Motion to Suppress is clothed with presumption on correctness on appeal, and the reviewing court should interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling. McNamara v. State, 357 So.2d 410, 412 (Fla. 1978). However, in the instant case, the trial judge at the Motion to Suppress hearing went at length in great detail what the effect would be on the State's case should the motions be granted. (R. 1312 - 1320). The prosecutor even stressed her discomfort with the judges inquiry.

> I am a little uncomfortable with you asking those questions, because

> I am sure - I guess maybe because I don't understand why you are asking the questions. I am not sure that that is a relevant consideration as to whether or not the Motion should be granted or not. (R. 1314)

The State's obvious concern was that the trial judge was going to base his ruling, not on the law, but rather on the effect to the State's case. This is totally improper and nullifies the presumption of correctness by which the ruling has come before this Court.

A. The police totally lacked a well founded suspicion to stop and seize the Appellant.

Appellant was stopped while walking down the sidewalk at 12:35 P.M., by Boca Raton police officer who was acting on the photograph which looked similar to the Appellant. Upon the approach of the patrol car, Appellant did not attempt to flee, and when requested to produce identification, he produced a driver's license. There existed no suspicious activity on Appellant's part, yet he was further detained and subsequently arrested.

In a case whose facts are quite similar, Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, (1979), the United state Supreme Court was confronted with a situation where the arresting officer observed two men in a alley and upon the approach of the officer's patrol car the two men separated and walked away. The officers stopped Brown because the situation "looked suspicious and we had never seen that subject in that area before." There

was no claim of specific misconduct nor was there any reason to believe he was armed.

The United States Supreme Court in the Brown case stated:

> "when the officers detained (Brown) for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment... The Fourth Amendment of course, "applies to all seizures that involve only a brief detention short of traditional arrest." (cites omitted).
>
> ...The Fourth Amendment requires a seizure must be based on specific, objective facts indicating that society legitimate interests required the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of the individual officers." (cites omitted).
>
> "In the absence of any basis for suspecting appellant of misconduct the balance between the public interest and the appellant's right to personal security and privacy tilts in favor of freedom from police interference".

This Court when confronted with this same issue in State v. Levin, 452 So.2d 562 (Fla. 1984), approved the decision of the lower court in Levin v. State, 449 So.2d 288 (Fla. 3rd DCA 1983). The Third District Court of Appeal in the Levin case stated "something more is required than simply being out on the street during late and unusual hours in an area where crimes have been committed in the past, before the police may properly stop and detain an individual for possible criminal activity."

"Any curtailment of a person's liberty by the police must be supported by a reasonable and articulable suspicion that the person seized is engaged in criminal activity." Reid v. Georgia, 448 U.S. 438, 440 (1980).

"The detention of the respondent against his will constituted a seizure of his person, and the Fourth Amendment guarantee of freedom from unreasonable searches and seizures is clearly implicated..." Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detention'". Cupp v. Murphy, 412 U.S. 291, 294 (1973).

In that the sole basis for detaining the Appellant and requesting identification was his similarity to a photograph without anything more does not constitute a well founded suspicion based upon articulable factors.

B. The manner in which Appellant's statements were obtained, over the many hours of interrogation, resulted in psychological coercion.

Appellant's confession was taken in violation of the Fifth Amendment to the Constitution of the United States, and as such, should have been suppressed. The statements given by Appellant to law enforcement officers were not free and voluntary because there was no voluntary, knowing and intelligent waiver by the Appellant of his rights based in the psychologically coercive interrogation techniques by law enforcement.

One form of psychological coercion utilized by police, can be entitled feigned empathy towards Appellant and also flattered him throughout the interrogation as to how intelligent he was.

By acting friendly towards Appellant and by flattering him as to his intelligence, the police distorted Duane Owen's perception of his right to remain silent, thus rendering the confession involuntary and taken in violation of the Fifth Amendment.

An additional form of improper psychological coercion employed by the police in the instant appeal was the format and the length of the interrogations. Rather than being turned over to the county jail, Appellant was held by the Boca Raton Police in excess of twelve (12) hours and interrogated by different agencies. Through the course of investigations, Appellant was interrogated in excess of fifty (50) hours, sometimes these sessions lasting in excess of four hours and keeping him until 11:00 P.M. at night. Under a totality of the circumstances approach, going over the day to day interrogations, the inevitable conclusion is that the confession given by Duane Owen was the result of constant hammering for four to five hours at a time. This amounts to unconstitutional psychologically coercive techniques employed by the police to compel an involuntary confession.

As to the format of the interrogation in the instant case, most of the testifying and factual relation was done by the police. At certain points, the transcript of the record on appeal goes on for pages without Appellant ever saying a word.

This was grossly prejudicial and constitutionally impermissible, because in essence, the police were able to testify as to conclusions and speculations without the benefit of cross-examination in violation of Appellant's right to confrontation.

Through the use of the foregoing psychologically coercive interrogation techniques by the police in the instant appeal, an involuntary confession was coerced from the Appellant, thus should have been rendered inadmissable at trial.

C. The police continued to interrogate Appellant after he invoked his right to remain silent.

The Fifth Amendment to the United States Constitution as interpreted by the Supreme Court mandates that, "the mere fact that (the Appellant) may have answered some questions....does not deprive him of the right to refrain from answering any further inquiries." Miranda v. Arizona, 384 U.S. 436, 445, 86 S.Ct. 1602, 1612 (1966). Accordingly, even though the interrogation had already begun, the Appellant had the absolute right to cut it off at any time and for any reason. Thus, when the Appellant avoided discussing the Georgiana Worden homicide, he did no more than assert a right which the Miranda decision and the Constitution has granted him. see also, Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321 (1975).

Where an accused has indicated a refusal to discuss a crime with law enforcement and subsequently makes an incrimination statement, the Courts have ruled that before those statements are admissable, the State must shoulder a heavy burden of showing

that the accused knowingly waived his right to remain silent. State v. Dixon, 348 So.2d 333 (Fla. 2nd DCA 1977).

The Fourth District Court of Appeal has ruled that once an accused indicated his desire to remain silent, a waiver subsequently made necessitates the State to demonstrate that the interrogation was terminated at the accused's request and was resumed only when the accused has indicated his desire to continue conversing with law enforcement. Nunez v. State, 227 So.2d 324 (Fla. 4th DCA 1969).

Florida courts have recognized that in light of the relative positions of the police and the accused in an interrogation situation, it is acknowledged that relatively little pressure by the police may overcome the suspect's will to remain silent. Breedlove v. State, 364 So.2d 495 (Fla. 4th DCA 1978); Jones v. State, 346 So.2d 235 (Fla. 2nd DCA 1975). In the Jones case, the police admitted that after the defendant indicated that he did not want to say anything, they continued to question the defendant, who subsequently made statements. The Court held the admissions inadmissible as having violated the defendant's right to remain silent and the conviction was reversed.

In the instant case, when the Appellant indicated that he was unwilling to discuss the case with the police, they confronted him with incriminating evidence. Although Duane Owen never said anything to the effect of "Don't talk to me anymore," his repeated avoidance of their questioning over twenty hours of taped statements has the same effect. Thereafter, the Appellant

responded to the accusations and made incriminating statements. In Tierney v. State, 404 So.2d 206 (Fla. 2nd DCA 1981), the District Court reviewed the identical situation wherein the defendant indicated after being advised of his Miranda warnings that he did not want to talk to the deputy. The deputy then confronted the defendant with the incriminating statements. The Court therein concluded that the Miranda safeguards come into play wherever a person in custody is subjected to either express questioning or its functional equivalent. The Court found specifically that the deputy, regardless of his underlying intent, should have known that his remarks to the defendant were reasonably likely to elicit an incriminating response. Thereafter the admission of the exculpatory statements were in violation of the principals enunciated in Miranda v. Arizona, supra, and Rhode Island v. Innis, 446 U.S. 289, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).

In addition to the police confronting the Appellant with incriminating evidence, they also applied psychological pressure to overcome Appellant's invoking his Fifth Amendment right to remain silent.

The police had deprived Duane Owen of his complete mental freedom which amounted to coercion thus rendering the confession involuntary. The police employed psychologically coercive interrogation techniques which impaired Owen's mental freedom.

As a consequence of precedent and Owen's desire to not discuss the matter at issue with the police, any statements made

thereafter to law enforcement officers should have been suppressed as violative of Owen's constitutional right to remain silent. Since these statements were introduced into evidence over Appellant's objections and in violation of the Fifth Amendment to the United States Constitution, Appellant's conviction must be reversed, and this cause remanded for a new trial.

III. THE TRIAL COURT ERRED BY ALLOWING MEMBERS OF THE VICTIM'S FAMILY TO TESTIFY PRIOR TO PRONOUNCING SENTENCE

This nation's highest court has just recently held that "victim impact statements at the sentencing phase of a capital murder trial violate the Eighth Amendment". Booth v. Maryland, _____U.S._____, 55 L.W. 4836, 4839 (June 16, 1987). In the instant case, the trial judge invited statements' from members of the victim's family. The very concerns feared by the Supreme Court in Booth came to life in the instant case. In Booth, the Supreme Court held that victim impact statements create a constitutionally impermissible risk that death sentences will be made in an arbitrary manner.

> The fact that the imposition of the death sentence may turn on such distinctions illustrates the danger of allowing juries to consider this information certainly the degree to which a family is willing and able to express its grief is irrelevant to the decision whether a defendant, who may merit the death penalty should live or die.
>
> * * *
>
> Nor is there any justification for permitting such a decision to turn on the perception that the victim was a sterling member of the

> community rather than someone of questionable character. Booth v. Maryland, supra, at 4838.
>
> We are troubled by the implication that defendants whose victim's were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions. Id., note 8; see also, Furman v. Georgia, 4098 U.S. 238 (1972).

In the instant case, the fears of the Booth Court that the death penalty will be imposed arbitrarily become evident through the words of the trial judge, who in Florida is the sentencing body. The trial judge specifically solicited the advice and recommendations from the victim's family as to what sentence to impose.

In holding victim impact statements violative of the Eighth Amendment to the United States Constitution, the Supreme Court rejected the notion that the existence of emotional distress to the family of the victim, or the personal characteristics of the victim, were valid sentencing considerations in capital cases. Id., at 4839. Additionally, in Gardner v. Florida, 403 U.S. 349, 358, (1977), the Supreme Court ruled that the decision to impose the death sentence must "be, and appear to be, based on reason rather than caprice or emotion".

The problem with allowing the victim's family member to address the sentencing court prior to sentencing is that the focus is unconstitutionally shifted from the defendant to the victim. It is well settled law that the sentencing body is required to concentrate its focus on the defendant as a "uniquely

individual human being". Woodson v. North Carolina, 428 U.S. 280, 304 (1976); see also, Booth v. Maryland, supra, at 4838. The Booth Court specifically addressed this issue, wherein, Justice Powell, writing for the Majority, held that:

> The focus of a VIS, (victim impact statement), however, is not on the defendant, but on the character and reputation of the victim and the effect of his family. These factors may be wholly unrelated to the blameworthiness of a particular defendant. As our cases have shown, the defendant often will not know the victim, and therefor will have no knowledge about the existence of characteristics of the victim's family. Moreover, defendants rarely select their victims based on whether the murder will have an effect on anyone other that the person murdered. Allowing the (sentencing body) to rely on a VIS therefore could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill. This evidence thus could divert the jury's attention away from the defendant's background and record, and the circumstances of the crime. Id., at 4839.

Based upon the holding of the Supreme Court's most recent opinion, of Booth v. Maryland, supra, it is clear that the Eighth Amendment mandates that the Appellant's death sentence be vacated.

IV. THE TRIAL COURT ERRED BY SENTENCING THE APPELLANT TO DEATH BASED ON INVALID AGGRAVATING CIRCUMSTANCES

It is the Appellant's contention that when any one of the aggravating circumstances in a sentencing judge's Death Order is invalid, then the entire Order is void, and the cause must be remanded for resentencing. See generally, Stokes v. State, 403 So.2d 377 (Fla. 1981); Odom v. State, 403 So.2d 936 (Fla. 1981); Jones v. State, 332 So.2d 615 (Fla. 1976); and Tedder v. State, 322 So.2d 908 (Fla. 1975). In the instant appeal, three of the four aggravating factors are invalid.

A. Appellant's death sentence must be vacated because no sexual battery occurred.

In the sentencing judge's Death Order under section "B", the aggravating circumstances employed by the court was that the murder occurred while the Appellant was committing sexual battery. Since the victim was more than likely deceased when the intercourse occurred, no sexual battery, as a matter of law, could exist. (This issue has already been thoroughly briefed in section "I" of Appellant's Initial Brief on Appeal).

B. The death sentence must be vacated because the evidence presented did not support a legal finding of cold and calculated premeditation.

The aggravating circumstances cited by the sentencing judge under section "E" of the Death Order was not supported by the law. The sentencing court found that the homicide "was committed

in a cold, calculated and premeditated manner". The legislative intent of F.S. 921.141 (1), as interpreted by this Court, was for contract type murders. Hansbrough v. State, 12 F.L.W. 305 (Fla. June 26, 1987); and Bates v. State, 465 So.2d 615 (Fla. 1976); and State v. Dixon, 283 So.2d 1 (Fla. 1973). This Court just recently held in Hansbrough v. State, supra, and citing the Bates' opinion, that:

> This aggravating factor is reserved primarily for execution of contract murders or witness elimination killings. at 307.

While addressing the issue of premeditation, this Court held that:

> Hansbrough's frenzied stabbing of the victim does not demonstrate the cold and calculated premeditation necessary to aggravate his sentence with this statutory factor. Hansbrough v. State, supra, at 307.

While in Hansbrough where this Court found that a robbery got out of hand when the victim was stabbed in excess of thirty times, in the instant case, it becomes obvious that the burglary got out of hand when this victim was likewise struck several times in her sleep in a frenzied attack.

Since the law does not support this additional aggravating factor, this cause must be remanded for a resentencing consistent with the laws of the State of Florida.

C. The death sentence must be vacated because the evidence presented did not demonstrate a wicked, evil, atrocious or cruel manner.

The aggravating circumstances employed by the sentencing judge under section "D" of the Death Order was not supported by the evidence. The sentencing judge found that the homicide "was especially wicked, evil, atrocious or cruel". Maintaining the focal point on the Appellant, the facts do not support the aggravating conclusion derived by the lower court.

Additionally, the facts of the instant case do not meet the criteria set forth by this Court in State v. Dixon, 283, So.2d 1 (Fla. 1973), which held:

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily tortuous to the victim. Id., at 9.

In the instant case the victim was unaware of her attacker as she was asleep and the attack was brief. Here, again, this aggravating factor utilized by the lower court in its Sentencing Order is not valid, and a such the death sentence imposed on the Appellant must be vacated.

D. The death sentence must be vacated because the trial court did not find mitigating factors.

Assuming arguendo that this Honorable Court rejects the Appellant's contention that if any of the aggravating factors are invalid then there must be a resentencing, then this Court's previous holding in Elledge v. State, 346 So.2d 998 (Fla. 1977), would be controlling. The law is clear that prior to imposing a

death sentence, the court must weigh the aggravating circumstances against the mitigating circumstances. Id., at 1003. In a case, such as the instant one, where aggravating circumstances are legally invalid, and there does not exist mitigating factors, then the cause must be remanded for a new sentencing.

In the instant case, the trial court did find there to be several mitigating circumstances to be considered; specifically, in the Sentencing Order, the court found:

> The defense has offered the following matters by way of mitigation: DUANE OWEN is an orphan whose mother died when he was very young. DUANE was very close to his mother. She was taken to the hospital without DUANE even being able to day goodby or given any explanation as to why she was leaving. She died without him ever having seen or talked to her again. His father was an alcoholic who began to drink more heavily than ever after his mother died. About a year after his mother's death, DUANE'S father committed suicide by asphyxiation in the garage with the car running. DUANE and his brother were then shuffled from his aunt and uncle to another foster home ultimately to the American Legion Home. While in the Home, the defense suggests that DUANE was sexually and otherwise abused although no evidence was presented to this effect. While at the Home, DUANE suffered another rejection when his brother escaped from the Home and left DUANE there. A respected psychologist testified in DUANE'S behalf that even though DUANE knew right from wrong with regard to the crime, he had a "snap" of the mind after the first stab occurred and thereafter DUANE was acting in a frenzy much like a

> shark attack when there is blood in the water. The psychologist states that these matters were all a game or test from which DUANE got excitement. That DUANE is a thrill seeker who needed more and more of a challenge. That DUANE was trying to fill a Ego need and that DUANE has little self-esteem. In addition to all of this DUANE wanted to be a policeman and enlisted twice in the army. (R. 4954-55)

Once reaching the conclusion that several of the aggravating circumstances are invalid and there does exist mitigating circumstances, we must return to the issue and holding in Elledge v. State, supra, which mandates a remand in the instant case. In Elledge, this Court held that:

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been presented? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial. Id., at 1003.

It is apparent from the facts of this cause and the laws of this country and State that the Appellant is entitled to a remand for a new sentencing. Additionally, based upon all the trial court's error, and some obvious bias and prejudice of the trial judge, the Appellant would request that the remand be with directions to have a new judge assigned.

V. THE TRIAL COURT ERRED IN DENYING ALL DEATH PENALTY MOTIONS OF APPELLANT

Prior to the commencement of the trial in the instant cause, Appellant, through his counsel, filed six motions to prohibit the use of death penalty in the instant cause, which were all summarily denied by the court. (R. 4694 - 4744).

A. Florida Statutes 921.141 and 922.10 are unconstitutional.

Death sentences in Florida are carried out by electrocution. Florida Statute Section 922.10. Death by electrocution is cruel and unusual punishment in light of evolving standards of decency and the availability of less cruel but equally effective methods of execution. Thus, it is violative of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution.

> "Sometime after dawn on the condemned man's last day, the hair will be shaved from his right calf. A priest or minister will be with him. The Bible will be read and there will be prayer.
>
> His head will be shaved. Completely. A clear greasy substance will be smeared on the top and back of his shiny scalp.
>
> The ointment looks like petroleum jelly. Its purpose is to help conduct electricity and reduce the burning of human flesh.
>
> Now his cell will be opened and two guards will come in. They are his escorts. One will be handcuffed to each arm with chrome plated cuffs that prison officials refer to as "iron claws".

The prisoner will be told it is time to go. Most men walk to their death, quietly and without struggle. Some cry. Some have to be helped.

* * *

The walk is but a few steps. Through one door, across a corridor and through the last door into the chamber. The walls in this room are beige, the tile floor is green. It is an ugly place.

From now until the end is only about five or six minutes depending on the efficiency of the death committee. The executioners have practiced several times. Their work should be finished quickly.

The chair and its leather straps and steel buckles look like something out of science fiction. It is a grotesque thing resting there like a throne, the focal point in a room that measures 12 by 15 feet.

* * *

People begin working rapidly after the man is ushered into the chair by his escorts. A strap two inches wide is buckled across the chest and upper arms. Another is buckled over the lap. One on each arm, one on each leg.

The straps are fastened tight, and the escorts are freed. The body is left alone and helpless, held rigid against the solid oak - so rigid that the wild wrenching and contortions will be minimal when the power crashes into the brain.

Most of the straps are new. There is no breaking out.

* * *

The prisoner is always asked in these moments if he has nay last words.

Some men confess, others proclaim one last time that they are innocent. Some ask their

God to have mercy on their soul. Many are silent.

* * *

Now the electrician's assistant will buckle a crude device to the right calf. This is a wide strap lined with a thin sheet of lead that has a screw protruding from it. A wire will be bolted to the screw.

Then the electrician will retrieve the sponge from the bucket. The salt water has made it an efficient conductor of electricity.

He will squeeze it out and prepare the death cap. Onto that sponge is a piece of heavy copper wire mesh. To that is welded another screw.

The sponge is inserted into the death cap so that the screw protrudes through the upper back. The other wire - a cable really - is bolted to that screw.

The death cap, like the other tools of death, are homemade. It is made of black leather lined with sheepskin.

The condemned man will feel that cold sponge on his head, and then the strap will be secured under his chin. Another strap will hold his head back against a cradle formed by two vertical slats in the back of his chair.

Now he will not be able to move.

The electrician will bolt the wire to the screw, and the prisoner will feel him give it a tug to make sure it is secure.

The electrician will put on a pair of thick rubber gloves at some point. They serve but one purpose. Sometimes the cap slops and he has to step up and hold it in place while the power is being applied.

Now the man is ready.

He is motionless. He can do little more than look straight ahead. In front of him, behind

a glass partition, will sit a dozen official witnesses.

Some may soon faint of become sick. All will be there of their own volition. Their manner will be funeral.

They have come here to watch a man die.

* * *

Now the mask that is part of the death cap will be pulled over the head and there will be darkness.

The mask id large and black. It covers the face and neck and reaches down over the chest. It is made of soft leather, and it drapes there, closing off the prisoner's view. It also hides his face from the spectators.

There are only seconds left in his life, only seconds left to wait.

* * *

The executioner stands in a booth behind and to the right of the chair, only four steps from his prey. He will peer at the other human through a 9-inch by 4-foot opening in the wall. His mask will be black.

Before him is a panel of buttons, dials, and switches. A light comes on to tell him when this creation of Westinghouse is ready to use current generated by Florida and Light Co. to kill a human being.

The system is automated. All the man in the black vestments has to do is flip a switch to the left.

The machine is capable of producing 3,000 volts and 20 amps and delivering it into a human body. The amps are the current that will kill the man. The volts are the force behind that current.

* * *

The equipment is designed to go through four cycles, high and low surges, beginning at 2,500 volts and cycling down to 600. The power will flow for about 2 1/2 minutes.

It will happen in just a few seconds now.

The body will lurch upward and backward. It will stiffen and tremble in convulsions. The arms and legs and chest will strain at the straps as the muscles contract tighter than they ever have before.

Muscle tissue will break, and the body will bleed inside. The massive jolt will explode the mind, and the temperature of the brain will rise.

Then the power will cycle down to 600 volts. The muscles will relax and the body will sag slightly. Then the power goes up again and the violent convulsions return. Then it sags again. This goes on through four cycles, for more than two minutes.

The execution goes better if the man has had plenty of liquids during the few hours before. If he hasn't, his flesh will burn more readily.

Sometimes the man in the black mask is signaled to turn the machine off early if the skin begins to burn too much.

Always there is burned flesh. The stench in the death chamber is sickening. Always.

Steam rises from the wet sponge within the death cap, and usually white smoke is given off by the scorching of human meat. A large blister forms on the head.

The nerve cells in the brain are exploded and destroyed. Prison officials and some doctors claim the cells that emit pain impulses are killed at once.

If that is true, the inmate will feel nothing. If that is true, the last sensation he has is sitting in the darkness waiting.

> The heart usually stops immediately. A doctor steps forward and listens and pronounces the man dead. But the heart doesn't always stop immediately.
>
> At times it has been necessary to reset the machine, flip the switch again and send a second jolt to stop the heart.
>
> Almost invariably, when the mask is removed, the man's eyes are found to be open.
>
> The executioner is ready now. He watches for the signal.
>
> * * *
>
> When all is ready, if no legitimate appeal has surfaced, if the governor is not moved by some reason to stop it, the signal will be given.
>
> This is the final moment in a ritual that began when the man in the chair broke the law, or many laws, got caught and convicted and could show no defect in his passage through the American system of justice.
>
> The costs to this point come to millions. Police, lawyers, courts, prisons, mountains of paper and years, all leading to this moment when the man sits there in darkness, waiting.
>
> But in the end, the cost of the electricity to exact his punishment if only three or four cents. Maybe even less.
>
> The signal comes now. The executioner turns the switch to the left and earns his $150.00. There is a loud click which the dying man never hears.
>
> Nobody really knows what happens after that.

Both before and after this article appeared in the Tallahassee Democrat, the people of this state and of other states began a process of re-examining the use of electrocution as a method of inflicting the death penalty. Representative of the process of

re-examination prompted by the re-commencement of electrocutions, the editors of The Atlanta constitution and The Atlanta Journal wrote as follows after the execution of John Evans in Alabama:

> "Evans was tortured to death. The gruesome process took the better part of an hour, while officials tried to make their electric chair "work" and while attorneys and politicians argued over Evans' half-dead body.
>
> It took three 30-second charges of 1,900 volts to kill Evans, eventually. At the first, the electrode on his leg exploded in fire and smoke, and flames burned around the black shroud over his head. Even a second charge did not kill him. It was not until after the third jolt of electricity that the heart in his battered body finally stopped. The third charge was ordered after Governor George Wallace rejected an argument that the first two amounted to unconstitutionally cruel and unusual punishment and that the horror should be stopped.
>
> The death penalty in America, to our national shame, is essentially an act of double standard justice against the poor.
>
> Still, the calls for general adoption of lethal injections deserve to be heeded, Injections mainly serve to ease a public repelled by the crudities of its own legalized killings and may make executions more acceptable. But that is not an argument for denying whatever real or imagined comforts there may be in them for the condemned and their families. Id., April 23, 1983.

Electrocution has become increasingly re-evaluated and rejected as a method of execution for several reasons:

Electrocution is cruel because it may inflict excruciating pain. Many experts argue that electrocution amounts to excruciating torture. See: Gardner, executions and indignities -

An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment, 39 OHIO STATE .. 96, 125 n. 217 (1978) (herein after cited, "Gardner"). Unquestionably, malfunctions in the electric chair can cause unspeakable torture. See; Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 480 n.2 (1947). The preliminary rituals which accompany electrocution - so graphically described in the Tallahassee Democrat article, supra -- increases the condemned person's apprehension of his death and increase psychological suffering. See; ROYAL COMMISSION REPORT ON CAPITAL PUNISHMENT, 1949-53, (CMD. No. 8932, at 253 (1949-1953)) (one requirement of "humane execution is to keep the preliminaries to the actual execution as simple as possible). Electrocution offends human dignity because of the physical violence to and mutilation of the body which occurs during electrocution. As summarized by Gardner:

> Sometimes the victim's eyeballs fall from their sockets. He urinates and defecates, and his tongue swells. The body may catch on fire and the smell of burning flesh permeates the chamber...At the moment the switch is thrown all the muscles of the body contract; the result is severe contortions of the limbs, fingers, toes, and face. The body turns bright red as its temperature rises. Witnesses to electrocution often become emotionally upset by the gruesome aspects of this method of death. Id. at 126.

None of this cruelty and human indignity is necessary because less cruel alternatives are available. See; Gardner at 110-118, 128-129.

In recognition of the availability of less cruel alternatives, within the last year, eight states (Massachusetts, Arkansas, Delaware, New Jersey, Nevada, North Carolina, Washington, and Illinois) have rejected other methods of execution, including electrocution under their capital sentencing statutes. With the addition of these states, thirteen states now have adopted lethal injection (the latest states which have joined are Oklahoma, Texas, Idaho, New Mexico and Montana). As a result, lethal injection is now the favored method of execution among those jurisdictions which have death penalty statutes and persons condemned under those statutes. Lethal injection is generally recognized as a less cruel method of execution than electrocution. Gardner at 128-129.

The foregoing facts demonstrate that electrocution is violative of the Eight Amendment, for it is unnecessarily cruel. See; Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In re Kemmier, 136 U.S. 436,447 (1890); Louisiana ex rel. Francis v. Resweber, supra, 329 U.S. at 463-464, 473-474; Coker v. Georgia, 433 U.S. 584, 592-596 (1977). Because the view of what is "unnecessarily" cruel evolves with society's "standards of decency", Trop v. Dulles, 356 U.S. 86, 101 (1958), a punishment which was constitutionally permissable in the past can no longer be so when less but equally effective alternatives have become available. Furman v. Georgia, 408 U.S. 238, 279 (Brennan, J., concurring), 342 (Marshall, J., concurring), 430 (Powell, J., dissenting). Cf. In re Kemmler, supra (electrocution is not a cruel and unusual

punishment). Lethal injection is clearly a less cruel alternative. Gardner at 128-129. Moreover, the majority movement of the states toward lethal injection is a critical index of society's evolving view that this less cruel alternative method of execution is the form of execution compatible with today's standards of decency. Finally, lethal injection id no less effective in accomplishing the two principal societal goals of the death penalty -- "retribution and deterrence of capital crimes by prospective offenders," Gregg v. Georgia, supra, 428 U.S. at 183 - than electrocution. See: Gardner at 113-118. Accordingly, electrocution violates the Eighth Amendment, for it "is nothing more than the purposeless and needless imposition of pain and suffering." Coker v. Georgia, supra, 433 U.S. at 592.

B. Florida Statutes 782.04 and 921.141 are unconstitutional

The circumstances to be considered in mitigation under Section 921.141 are insufficient in violation of the Due Process and Equal Protection clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, Sections 2 and 9, of the Constitution of the State of Florida. In Section 921.141, it also provides for cruel and unusual punishment in violation of Eighth and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 17, of the Constitution of the State of Florida. Florida Statute Section 921.141 is unconstitutional on its face in that the mitigating circumstances contain language which is unnecessarily restrictive, and the enumerated mitigating circumstances are

restrictive in scope and unconstitutionally restrictive in their language. The statutory mitigating circumstances in Section 921.141 are inadequate in that they unduly emphasize certain mitigating circumstances to the jury to the exclusion of other mitigating circumstances on which the defendant may introduce evidence. Because the statute singles out certain mitigating circumstances and raises them to the dignity of a legally stated instruction, it diminishes the forcefulness and effect of other mitigating circumstances which are not dignified by statutory language and judicial instruction. This is akin to instructing on the law of self-defense in a murder case where the defense is insanity and failing to instruct the jury on the law of insanity by letting the evidence of insanity go to the jury. Lockett v. Ohio, 438 U.S. 586 (1978) requires that the sentencing body, the judge and the jury, be allowed to give independent, mitigating weight to any aspect of a defendant's character of record, and to the circumstances of the offense, that the defendant proffers as a basis for a sentence.

The instruction of the statutory mitigating circumstances, could easily lead the jury to denigrate the importance of nonstatutory mitigating circumstances are listed in the Standard Jury Instructions. Florida Standard Jury Instructions In Criminal Cases at p.80. This subverts the mandate of Lockett, supra.

The modifiers in Section 921.141(6)(b)(e) and (f) also

unconstitutionally restrict the consideration of mitigating evidence. These circumstances state:

> (6) MITIGATING CIRCUMSTANCES
>
> Mitigating circumstances shall be the following:
>
> (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (e) The defendant acted under extreme duress or under the substantial domination of another person.
>
> (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> (Emphasis Supplied) Florida Statute Section 921.141 (6)(b)(e)(f)

In each case, the mitigating circumstances is limited by the modifiers "extreme", "substantial" or "substantially".

This limiting language could lead a jury to give no mitigating weight to mitigating evidence that does not rise to the "extreme" or "substantial" test. For example, there could be evidence that a defendant suffered from a mental or emotional disturbance; but one of more jurors felt that it did not rise to the level of an "extreme" disturbance and thus find it absolutely be free to give:

> independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation.
>
> Lockett v. Ohio, 438 U.S. 586, 605 (1978); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982).

As such, Florida Statutes 782.04 and 921.141 should be deemed unconstitutional.

C. Florida Statute 921.141(5)(d) is unconstitutional

Aggravating circumstances (5)(d) of Section 921.141, Florida Statutes is unconstitutionally overbroad, arbitrary, and capricious on its face and as applied in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 2, 9, and 16 of the Florida Constitution. This circumstance is to be applied when:

> The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy of the unlawful throwing, placing, or discharging of destructive device or bomb. Section 921.141(5) (d) Florida Statutes

The function of aggravating circumstances has been delineated by the United States Supreme Court.

> Statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: They circumscribe the class of persons eligible for the death penalty. Zant v. Stephens, U.S. 103S. Ct. 2733, 2743 (1983).

The Court in Zant went on to state that:

> An aggravating circumstance must genuinely marrow the class of persons eligible for the death penalty.
> Id. at 2742-2743.

Thus, it is clear that an aggravating circumstance can be so broad as to fail to satisfy Eighth and Fourteenth Amendment requirements.

Concern over the severity and finality of the death penalty has mandated that any discretion in imposing the death penalty be narrowly limited. Gregg v. Georgia, 428 U.S. 153, 188-189 (1976); Furman c. Georgia, 408 U.S. 238 (1972). The Court in Gregg interpreted the of Furman to impose these severe limits because of the uniqueness od the death penalty.

It is well established that, although a state's death penalty statute is constitutional, an individual aggravating circumstance may be so vague, arbitrary, or overbroad as to be unconstitutional. People v. Superior Court (Engert), 647 p.2d 76 (Cal. 1982); Arnold v. State, 224 S.E. 2d 386 (GA.1976).

Section 921.141 (5)(d) on its face and as applied, had failed to "genuinely narrow the class of persons eligible for the death penalty".

All of the felonies listed in aggravating circumstances (5)(d) are also felonies which can be used as substitutes for premeditation, under the felony murder rule. Section 782.04 Florida Statutes. Thus, all felony murders begin with one aggravating circumstance, regardless of whether the homicide is intentional.

The Florida Supreme Court has specifically held that this aggravating circumstance can be applied, regardless of whether the homicide is intentional. White v. State, 403 So. 2d 331, 335-336 (Fla. 1981).

Therefore, this aggravating circumstance fails to "genuinely narrow the class of persons eligible for the death penalty."

Zant v. Stephens, supra, at 2733, 2742-2743. Indeed, this circumstance fails to narrow the class whatsoever. All felony murders qualify for this aggravating circumstance. The broad interpretation of this circumstance is additionally objectionable, because it renders our statute arbitrary and capricious. All felony murders are subject to the death penalty; thus allowing judges and juries to arbitrarily pick and choose whether to impose the death penalty. Even if the State puts on no evidence whatsoever in phase two, the defendant will begin with one aggravating circumstance in all felony murder cases. This would shift the burden of proof upon the defendant in the penalty phase of the capital trial. State v. Dixon, 283 So.2d 1 (Fla. 1978). This section creates a presumption that death is a proper sentence. This is an unconstitutional shifting of the burden of proof in a criminal case. Mullaney v. Wilbur, 421 U.S. 684 (1975).

The North Carolina Supreme Court has recognized the problems with a broad reading of a similar aggravating circumstance, and has held that it can only be applied when the aggravating felony is committed during a premeditated murder. State v. Cherry, 257 S.E. 2d 551, 567-568 (N.C. 1979). The Court specifically held that the underlying felony could not be used both as a substitute for premeditation and as an aggravating circumstance. Id, the Court stated:

> 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 convic-

> tion. On the other hand, a defendant convicted of a premeditated and deliberated killing, nothing else appearing, enters the sentencing with no strikes against him. This is highly incongruous, particulary in light of the fact that the felony murder may have been unintentional, whereas, a premeditated murder is, by definition, intentional and preconceived...
>
> Once the underlying felony has been used to obtain a conviction of first degree murder, it has become an element of that crime and may not thereafter be the basis for additional prosecution of sentence. Neither so we think the underlying felony should be submitted to the jury as an aggravating circumstance in the sentencing phase when it was the basis for, and an element of, a capital felony conviction.
>
> 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. To obviate this flaw in the statute, we hold that when a defendant is convicted of first degree murder under the felony murder rule, the trial judge shall not submit to the jury at the sentencing phase of the trial the aggravating circumstance concerning the underlying felony.
>
> 275 S.E. 2d at 567-568.

The logic of the North Carolina Supreme Court's opinion takes on greater constitutional significance in light of the requirement of Zant v. Stephens, supra that the circumstances "genuinely narrow" the class, This circumstance wholly fails in this regard.

D. Florida Statute 921.141 is unconstitutional

The death penalty is imposed in Florida in an arbitrary, discriminatory manner -- on the basis of factors which are barred from consideration in the sentence determination process by the Florida death penalty statute and the United States Constitution. These factors include the following: The race of the victim, race of the defendant, the place in which the homicide occurred (geography), the occupation and economic status of the victim, occupation and economic status of the defendant, and the sex of the defendant. The imposition of the death penalty on the basis of such factors violates the Eighth and Fourteenth Amendments to the United States constitution and requires the dismantling of the statutory system which allows it to happen.

Four years after Furman v. Georgia, 408 U.S. 238 (1972), the Supreme Court referred to Furman as having

> mandate(d) that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that 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, 189 (1976). Four years after Gregg, the Court held that sentencing discretion is "suitably directed and limited" only if a death penalty statute

> channel(s) the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'

Godfrey v. Georgia, 446 U.S. 420, 428 (1980). In accordance with these principles, the Florida death penalty has enumerated aggravating and mitigating circumstances to provide the "specific and detailed guidance" of sentencing discretion which must be provided. To this end, the statutorily-enumerated aggravating circumstances are the only factors which can be considered in support of the imposition of the death penalty. Cooper v. State, 335 So.2d 1133, 1139 n.7 (Fla. 1976); Purdy v. State, 343 So.2d 4, 6 (Fla. 1977).

Despite the Eighth Amendment's requirement that sentencing discretion be suitably directed and limited, and the Florida death penalty statute's attempt to comply with that mandate through the use of and exclusive list of aggravating circumstances, the death penalty is still imposed in Florida for reasons other than those aggravating circumstances. Death sentences are still imposed in Florida, for example, because the victim was a white person instead of a black person, because the defendant is a black person rather than a white person, because the homicide was committed by chance in a county where the death penalty is much more frequently imposed rather than in a county which seldom imposes the death penalty, because the victim held a job in a skilled or professional occupation, because the defendant is a man instead of a woman, or because of the defendant's economic status.

Not only does the imposition of death sentences on the basis of this factors violate the Eighth Amendment's requirement of

carefully channeled sentencing discretion; it also violates due process by its reliance upon constitutionally impermissible, irrelevant factors. See; Zant v. Stephens, _____U.S._____, 103 S.Ct 2733, 2747 (1983). Certainly there can be no dispute that the consideration of race (of the defendant or of the victim) in the course of deciding a capital sentence violates the Thirteenth and Fourteenth Amendment's mandates abolishing slavery and all badges of slavery and requiring the equal treatment of all people without regard to considerations of race. Likewise, the Fourteenth Amendment's requirement of equal protection indisputably forbids the differential treatment of people on the basis of sex or on the basis of totally irrelevant considerations such as geography or societal or economic status.

That death sentences are imposed on the basis of these factors is not, however, a simple matter to demonstrate. Juries and judges do not tell un that the real reason they have recommended or imposed death in particular cases is one or more of these constitutionally impermissible factors. Accordingly, circumstantial evidence must be relied upon to demonstrate the determinative role played by these factors in the course of capital decisions in this case. Statistical evidence is, therefore, the form of circumstantial evidence which must be examined in relation to this claim.

The best-developed statistical evidence available at this time with respect to the imposition of the death penalty is Florida has focused upon only one of the constitutionally

impermissible factors: the race of the victim. Taking into account all publicly available data respecting the imposition of the death penalty in Florida, this evidence persuasively demonstrates that the race of the victim is a determinative factor in the imposition of the death se

ntence in Florida

VII. THE TRIAL COURT ERRED BY DENYING THE PRECLUSION OF DEATH QUALIFICATION OF JURORS AND A BIFURCATED JURY

This issue is one which was expressly reserved by the United States Supreme Court in Witherspoon v. Illinois, 391, U.S. 510 (1968). The Court in Witherspoon held that the available data, at the time, (in 1968) was "too tentative and fragmentary" to determine whether a death qualified jury is prosecution prone. 319 U.S. at 517-518. The Court went on to explicitly state that this issue would have to be reconsidered, if better data was presented.

> Even so, a defendant convicted by such a jury in some future case might still attempt to establish that the jury was less than neutral with respect to guilt. If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence -- given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment. That problem is not presented here, however, and we intimate no view as to its proper resolution. 391. U.S. at 520 n.18.

Thus, the United States Supreme Court has specifically left open the issues involved here. The Court has held that this issue is one which should be revisited if more complete data is presented. The Court has also posited the bifurcated jury as one possible method of harmonizing the interests of the prosecution and the rights of the defendant pursuant to the Sixth and Fourteenth Amendments.

Subsequent to the decision in Witherspoon, the Eighth Circuit Court of Appeals has held that this issue requires an evidentiary hearing. Grigsby v. Mabry, 637 F.2d 525, 526-528 (8th Cir. 1980). A federal district court recently held an evidentiary hearing on this issue and declared the practice of death qualification unconstitutional, on a wide variety of grounds (The court granted the relief requested by the defendant, in this case). Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983).

The Eighth circuit affirmed the District Court's decision and finding that death qualified juries are unfairly and unconstitutionally prosecution prone, on January 30, 1985. Mabry v. Grigsby, 758 F.2d 226 (8th Cir. 1985). On October 7, 1985, the United States Supreme Court agreed to review that decision, and to decide, for the first time, whether the death qualification of jurors before the guilt/innocence phase of a bifurcated capital trial violates the Sixth and Fourteenth Amendments to the Constitution. Cert. granted sub nom Lockhart v. McCree, _____ U.S._____, 106 S.Ct. 59 (1985). The United States Supreme COurt

reversed the judgment of the Court of Appeals. Lockhart v. McCree, ____U.S.____, 54 U.S.L.W. 4449. However, the Court in Lockhart did not deal with the precise issue raised here; the disproportionate exclusion of blacks and women by the process of death qualification. Indeed, the Court in Lockhart reaffirmed the fact that blacks and women are cognizable classes and their exclusion violated the United States Constitution. 54 U.S.L.W. at 4452-4453.

The right to a fair, representative, cross-sectional jury was originally based solely on the due process and equal protection requirements of the Fourteenth Amendment. The earliest cases dealt with the exclusion of blacks from the jury service. Strauder v. West Virginia, 100 U.S. 303 (1880). However, the Court in Strauder made clear that the principles involved would also apply, if the group excluded was "white men" or "naturalized Celtic Irishmen." Id., at 308. In Hernandez v. Texas, 347 U.S. 475, the Court extended this doctrine to Mexican-Americans.

The Court in Peters v. Kiff, 407 U.S. 493 (1972) held that the exclusion of blacks constitutes a denial of due process to any defendant, black or white.

> When any large and identifiable segment of the community is excluded from the jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable...
>
> It is the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce... In light of the great potential for harm latent in the unconstitutional jury-selection

> system, and the strong interest of the criminal defendant in avoiding that harm, and doubt should be resolved in favor of giving the opportunity for challenging the jury to too many defendants rather than giving it to too few. 407 U.S. at 503-504 (footnote omitted).

The Court in Duncan v. Louisiana, 391 U.S. 145 (1968) extended the Sixth Amendment to state criminal trials.

> A right to trial is granted to criminal defendants in order to prevent oppression by the Government... Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge... The deep commitment of the Nation to the right of the jury trial in serious criminal cases as a defense against arbitrary law enforcement qualified for protection under the Due Process Clause of the FOurteenth Amendment, and must therefore be respected by the States. 391 U.S. at 155-156.

The Court in Williams v. Florida, 399 U.S. 78 (1970) concluded that in a criminal trial "a group of laymen representative of a cross-section of the community" 399 U.S. at 101.

In Taylor v. Louisiana, 419 U.S. 522 (1975) representativeness became the central consideration.

> We accept the fair cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. 419 U.S. at 503.

Duren v. Missouri, 439 U.S. 357 (1970) outlined the requirements for establishing a violation of the fair cross-section requirement.

> In order to establish a prima facie violation of the fair-cross-section requirement,the defendant must show (1) that the group

> alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under representation is due to systematic exclusion of the group in the jury-selection process. 439 U.S. at 364.

Duren also makes clear that:

> In Sixth Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross-section. The only remaining question is whether there is adequate justification for this infringement. 439 U.S. 368 n.26.

The available evidence clearly shows that the process of death qualification disproportionately excludes blacks and women.

The currently available evidence indicates that the exclusion of persons who can fairly decide the question of guilt or innocence, but who cannot vote for a death sentence, serves to disproportionately exclude blacks and women. It is clear that both blacks and women are cognizable classes and cannot be disproportionately excluded from jury service. Strauder v. West Virginia, supra; Taylor v. Louisiana, supra. The Available data demonstrates that those excluded by death qualification are disproportionally blacks and women and that the process of death qualification thus indirectly denies a defendant a cross-sectional jury.

The requirement of death qualification is particularly senseless in Florida. The first, and perhaps the best, measure of the State's interest is the statutory scheme which governs

jury selection in this State. Florida Statutes, Section 913.13 (1985) provides that "[a] juror who has beliefs which preclude him form finding a defendant guilty of an offense punishable by death shall not be qualified as a juror in a capital case." This section does not authorize the disqualification of jurors who can find a defendant guilty if the prosecution carries its burden, but who will vote to inflict a death sentence. The Florida legislature, therefore, has not proclaimed any interest in the death qualification procedure followed in this or any other case. The only other relevant statutory authority is Florida Statutes, Section 913.03(10), which authorizes the removal of jurors whose "state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, of the person whose complaint the prosecution was instituted that will prevent him from acting with impartiality..." But reliance on this provision to justify the exclusion of jurors who will be fair to both sides in the guilt phase but not in the penalty phase arises only if the same jury must decide both guilt or innocence and penalty. See; Winick, Witherspoon in Florida: Reflection on the Challenge for Cause of Jurors in Capital Cases in a State in Which the Judge Makes the Sentencing Decision, 37 U. Miami L. Rev. 825, 835-40 (1983).

Florida Statutes, Section 921.141(1) provides, in relevant part:

> Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should

> be sentenced to death or life imprisonment as authorized by Section 775.082. The proceeding shall be conducted by the trial jury as so as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of the penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in Chapter 913 to determine the issue of the imposition on the penalty.

Nothing in this statute precludes a trial judge from, for example, seating alternate jurors who attended the guilt phase of the trial, on the jury during the sentencing phase in place of jurors who would not consider imposing the death penalty. The substitution of a small number of alternates would be simple, efficient, and fair. The jury would thus be impartial in both the guilt and sentencing phases. Under current practice, the trial jury is not impartial in the critical determination of the defendant's guilt or innocence. Impartiality in the sentencing phase is bought too dearly when the cost is impartiality in the more important determination of guilt or innocence.

This is especially true in Florida for two reasons. First, the verdict in the sentencing phase need not be unanimous. Even if the sentencing jury were less than impartial, it might still reach the same result by a smaller majority. This point is discussed in greater detail below. In general, the determination of guilt or innocence is more important because the cost of an erroneous conviction is surely far higher that the social cost of and erroneous sentence of life imprisonment. See; 4 W. Black-

stone, Commentaries of the Laws of England, 358 (better that ten guilty men go free than one innocent person be convicted).

Florida law gives the trial judge the final decision on sentencing in a capital case. Florida Statutes, Section 921.-141(3). The jury's recommendation receives "great weight" in the judge's final decision, Tedder v. State, 322 So.2d 908 (Fla. 1975), but judges retain, and not infrequently exercise, the power to override jury recommendations of life imprisonment or death. See; Mello and Robson, Judge over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases, 13 Fla. St. Univ. L. Rev. 31 (1985).

> Because the trial judge decides sentence without being bound by a jury recommendation, he may impose capital punishment in an appropriate case even if 'automatic life imprisonment' jurors remain on the capital jury and vote, as inevitably they will, for life imprisonment. Indeed, whatever guidance the judge is provided by a jury whose members include "automatic life imprisonment' jurors. Since voir dire questioning will identify those jurors as being 'automatic life imprisonment' jurors, the judge will be aware of the number of such jurors sitting on the capital jury and will be able to give appropriate weight to the jury's advisory vote on sentence.
>
> Winick, supra, 37 U. Miami L. Rev. at 852 (footnotes omitted).

In sum, Florida's statutory procedure already provides ample safeguards against "erroneous" failures to impose a death sentence. For this reason, the State's interest in an impartial jury in the sentencing phase is insubstantial by comparison to the defendant's constitutional right to have an impartial jury

decide the question of guilt or innocence.

CONCLUSION

For the reasons set forth above, the Appellant, DUANE EUGENE OWEN, respectfully prays this Honorable court to reverse the judgment and sentence entered by the Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida.

Respectfully submitted,

Craig A Boudreau

CRAIG A. BOUDREAU, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this pleading was served, by hand delivery, upon **Attorney General Robert Butterworth,** Office of the Attorney General, Palm Beach County Regional Service Center, Room 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401, this 23rd day of February, 1988.

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