IN THE SUPREME COURT OF FLORIDA

CASE NO: 68,550

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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THEODORE S. BOORAS, ESQUIRE

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PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the prosecution in the Criminal Division of the Circuit Court of the Fifteenth 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.

QUESTIONS PRESENTED

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

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STATEMENT OF THE FACTS

The relevant facts are as follows: On March 24, 1984, Karen Slattery was found dead at 12:14 A.M. in the master bedroom of a residence in Delray Beach, Florida. The State offered testimony that Ms. Slattery died in the eating room of the residence, where a large pool of blood was located. (R. 2692). The facts further revealed that her body was dragged to the master bedroom, at which time insemination occurred. The victim was already deceased when the sexual intercourse occurred, based upon the State's own Medical Examiner who testified that:

"I believe in all probability Karen Slattery was dead by the time she was relocated to the back room." (R. 2693). Although she was deceased at the time of the insemination, 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. The following day, on May 30, 1984, Officer K. Petracco from the Boca Raton Police stopped Appellant who was walking down the street at 12:30 P.M. The officer justified the stop by stating that he "generally fit the description of the picture I had." (R. 633). Upon the approach of the marked patrol car, Appellant did not attempt to flee, and when requested to produce identification, he exibited a driver's license. He was then arrested at the scene and has been in custody ever since.

Appellant was then transported to the Boca Raton Police station, and after a substantial delay during which Lt. K. McCoy interrogated him, he was transported to the Palm Beach County Jail. On June 1, 1984, Sgt. M. Woods from the Delray Beach Police Department, along with Lt. McCoy of Boca, traveled to the county jail to interrogate the Appellant covering both the capital and non-capital cases that they hoped the Appellant 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 set up for video taping, and which they subsequently used to record in excess of twenty (20) hours of interrogation with Appellant. Both Detectives admitted during their respective depositions that there was no technical or other reason that the session was not recorded, but rather it was a conscious decision on their part not to make any effort to preserve that interview with Appellant. Notwithstanding the length of that interrogation, Lt. McCoy generated a hand written account of their interrogation complete with statements in quotations.

Over the next three weeks, various investigators from both Boca Raton and Delray Beach went to the 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 of Karen Slattery.

During the interrogation, reference the instant appeal which occurred at the latter portion of the seventy-two (72) hour ordeal, the Appellant twice indicated that he no longer wished to discuss the case any further with the police:

> APPELLANT: I rather not talk about it. (R. 3000)
>
> APPELLANT: I don't want to talk about it. (R. 3018)

Appellant's expressed Fifth Amendment assertion fell on deaf ears as was evident by law enforcement's continued interrogation.

During the trial, the State called Detective Pelligrini, a lead investigator in the instant cause. During the cross-examiniation of this witness, counsel for Appellant attempted to elicit information concerning similarities between the Appellant's case and another investigation. (R. 2471). After a State objection, trial counsel proffered the testimony which would have established that this officer made observations at another crime scene which were similar to the instant crime scene but involved a different suspect. After the objection was sustained, counsel for Appellant advised the court that no effective cross-examination of the witness could be conducted and the Appellant's theory of defense had been stripped.

Additionally during the State's case in chief, the trial

court, over vigorous defense objection, allowed the victim's mother to testify before the jury on matters which were grossly prejudicial and totally irrelevant to the issues presented.

At the close of the State's case, the counsel for Appellant made a Motion for Judgement of Acquittal as to Count II, Sexual Battery. Even though the prosecutor advised the court that it was error to reserve ruling on such a motion, the judge, when confronted with controlling precedent from this Honorable Court, violated Florida law and reserved ruling anyway. The record is unclear as to when if ever the lower court ever ruled on the motion. The prosecutor cited the controlling case of Hitchcock v. State, 413 So.2d 741 (Fla. 1982), to the judge, but this likewise fell upon deaf ears.

During the Phase II proceedings, the trial court allowed, over defense objection, the State to cross-examine Dr. Peterson, the court appointed expert designated to examine and evaluate the Appellant, reference an interview between him and Ontra Jones. (R. 3810-14). It was established by the prosecutor that Ontra Jones was also charged with a separate capital murder and was represented by one of Appellant's trial attorneys, Barry Krischer, Esquire.

During the charge conference, counsel for Appellant requested a jury instruction, which had been approved by other circuit judges, that would not leave the jury with the impermissable impression that their activities were meaningless. This special defense requested jury instruction was denied by the trial

court.

After the rendition of the jury's eleven to one (11-1) recommendation, but prior to pronouncement of sentence, the trial court, now the sentencing court, solicited statements from the victim's family to "advise" the court as to what sentence to impose. (R. 3697, 4056-65).

On October 18, 1985, the jury returned a verdict of guilty for First Degree Murder (Count I), Sexual Battery (Count II), and Burglary (Count 111). On November 7, 1985, the jury returned a vote of eleven to one (11-1), recommending the death penalty. On March 13, 1986, the trial court sentenced the Appellant to death in Florida's electric chair, thus giving rise to this instant Appeal.

SUMMARY OF THE 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 that he no longer wished to discuss the case any further with the police. (R. 3000). The Appellant again, during the statement, expressed his desire to remain silent. (R. 3018).

Both of Appellant's requests 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 the sidewalk at 12:35 P.M. because he looked similar to a photograph possesed by the police. The Appellant 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 the Appellant'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 the Appellant in return for

cooperation including, but not limited to, bringing his brother to the next interrogation session for consultation with the Appellant, 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 is 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 that 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 suspect's best interest in mind. McCoy's approach to the Appellant 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.

The Appellant 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 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.

The Medical Examiner, Dr. Hobin, testified that Karen Slattery died in the eating room near the larger pool of blood. The doctor further testified that there were no traces of semen in the pool of blood and that the insemination occurred in the master bedroom. Dr. Hobin concluded his testimony by stating that, "I believe in all probability Karen Slattery was dead

by the time she was relocated to the back room." (R. 2693).

Two Florida Courts have ruled that sexual battery can not be committed against a corpse. McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983); and, McCall v. State, 503 So.2d 306 (Fla. 5th D.C.A. 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 Judgement 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 count which should have been dismissed.

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

During the trial, the Appellant was denied his Sixth Amendment right to present a defense when the trial court prohibited the cross-examination of Detective Pelligrini, a State witness, reference evidence which would lead to another suspect. This

ruling violates over seventy (70) years of precedent which holds that "one accused of a crime may show his innocence by proof of the guilt of another." Pahl v. State, 415 So.2d 42 (Fla. 2d D.C.A. 1982); cited therein, Lindsay v. State, 69 Fla. 641 (1915); et al.

At the close of the State's case, the trial court reserved ruling on the Appellant's Motion for Judgement of Acquittal for the Sexual Battery count, even though the prosecutor cited this court's holding in Hitchcock v. State, 413 So.2d 741 (Fla. 1982), that it is error to reserve ruling on a defendant's Motion for Judgement of Acquittal. The trial judge placed the Appellant in the impossible position as to whether to testify in his behalf on the pending counts while at the same time exercise his constitutional right to remain silent on the sexual battery count. The Appellant's right to testify was hindered by the trial judge's violation of Florida precedent, thus Due Process mandates a new trial.

The trial court committed further reversible error by allowing the victim's mother to testify to the jury during the guilt phase, and by allowing the victim's father to testify to the sentencing judge during Phase II but prior to pronouncement of sentence. This form of victim impact statement violates the Eighth Amendment as it has been recently interpreted by the Supreme Court in Booth v. Maryland, 55 U.S.L.W. 4836 (June 16, 1987). The Booth Court held that this form of testimony

improperly shifted the focal point from the accused to the victim and creates a constitutionally impermissible risk that the death sentences will be made in an arbitrary manner. The Eighth Amendment was additionally violated when a defense requested Phase II jury instruction was denied by the trial court. The requested instruction would have informed the jury that their decision or verdict was not meaningless, but rather, that the court could not override a verdict of life unless said court found that there existed no reasonable basis for the verdict. Instead, the trial court did down play the jury's role by telling them not less than twelve times that their recommendation was nothing more than an advisory sentence. The judge went further by instructing the jury that the final decision as to what punishment to impose shall rest with the judge. (R. 4041). These comments by the court are directly in conflict with three controlling cases which have interpreted this very issue and ruled that in each case the Eighth Amendment was violated. Caldwell v. Mississippi, 472 U.S. 320 (1985); Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987); and Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986).

The trial court sentenced the Appellant to die in Florida's electric chair based upon four 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. Next, the Appellant was sentenced to death because the offense was committed to avoid lawful arrest. The law in Florida can be

no clearer that the burden of proof is on the State to show that the death was result of avoiding arrest. Hansbrough v. State, 12 F.L.W. 307 (Fla. June 26, 1987). And when the victim is not a police officer, it must be clearly shown that the dominant or only motive for the murder was to eliminate the witness in order to avoid arrest. The facts of the instant Appeal do not even remotely established this factor, and as such it is an invalid aggravating circumstance.

In light of the foregoing, not only must the Appellant's sentence be vacated, but additionally, the conviction and judgement 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 JUDGEMENT OF ACQUITTAL AS TO COUNT II OF THE INDICTMENT

Appellant 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 Judgement of Acquittal pursuant to Fla.R.Crim.P., Rule 3.380(a). (R. 3289). 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 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 D.C.A. 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 way 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 clear that at the time of the sexual battery, the victim was already dead: thus, what in essence occurred, was a sexual battery on a corpse. A review of Dr. Hobin's testimony in conjunction with the taped confession of the Appellant will support this theory.

The autopsy of the victim was conducted by Dr. Hobin M.D., who is a licensed medical doctor in Florida, and had been employed for seven years in Palm Beach County as an Associate Medical

Examiner. (R. 2654-56). Dr. Hobin was qualified by the trial court as an expert in forensic pathology. (R. 2656). As part of his investigation, Dr. Hobin viewed the crime scene and observed the deceased in the master bedroom. (R. 2657). In examining the deceased, the doctor found eighteen stabbing and cutting injuries, seven which had lethal characteristics. (R. 2674). The doctor testified that the wounds were inflicted in the eating area near the "larger pool of blood". (R. 2692). This large pool of blood would have meant that the victim had bled out and could not have survived the massive blood loss in the front room. (R. 2682, 2693). The doctor further testified that there were no traces of semen in the pool of blood and that the insemination occurred in the master bedroom. (R. 2693). Dr. Hobin concluded his testimony by stating that, "I believe in all probability Karen Slattery was dead by the time she was relocated to the back room". (R. 2693)

During the State's case in chief, the Appellant's taped confession was admitted into evidence. (R. 2965). In this confession, Appellant admitted that after the stabbing, he took the victim to the bedroom and removed her clothes. (R. 3058-60). After being asked what happened after he removed her clothes, Appellant responded, "Then, you know, I just raped her, I guess you could say". (R. 3063)

The testimony of the State's expert, Dr. Hobin, proves

that when the victim was relocated to the bedroom she was already dead, and in fact, the homicide occurred in the "front room" where the large pool of blood was discovered. The Appellant's confession, as introduced in the State's case, revealed that the "rape" occurred in the bedroom. This testimony was totally uncontradicted by any other evidence throughout the entire trial. 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 D.C.A., 1987). Additionally, the law in Floirda, 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 inconsistant 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 D.C.A., 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 consistant 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 incumbant 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 the 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 corpses, 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; specifically, the court held:

> Sexual battery would require a human being, but that is not necessarily the case. (R. 3311)

> I don't think it made any difference to the legislature whether somebody was alive or dead. (R. 3433 - 34)

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, Massachusettes law classifies necrophilia as unnatural sexual intercourse. M.G.L.A. (Mass.) L.277, Section 39. California makes it 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 that 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 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 D.C.A. 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 A.2d 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 penetration occurred before the killing,
>
> * * *
>
> Evidence of force is not necessary to support a rape conviction where, €or 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 consistant with the conclusion that 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 Appellant maintains in the instant appeal. This Court has previously

held that when the State does not carry its burden of proof, a Mo ion For Judgement 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 proscribed 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 classifies sexual battery, as chared 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 vanishes when it is shown that the actual

rape occurred 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 proscribed 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 Appellant's Motion For Judgement of Acquittal.

C. The Appellant is entitled to a new trial because the court improperly denied the Motion For Judgement of Acquittal as to Count 11.

In light of the trial court's denial of Appellant's Motion For Judgement Of Acquittal as to Count II, the jury deliberating on sexual battery along with the capital murder violated Due Process and was a reversible error. Sexual battery as a matter

of law did not exist. A strong possibility exists that the jury convicted Appellant of the capital murder based upon their added deliberation on sexual battery. Had the Judgement 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 also confronted with sexual battery which influenced the jury to reach a more severe verdict of guilt than it would have otherwise. The denial of the sexual battery Judgement Of Acquittal was of such a nature *so* as to poison the minds of the jurors and to prejudice them *so* that a fair and impartial verdict was not rendered.

Evidence of the severe prejudicial impact on the jury deliberation is found by the numerous times the prosecution referred to "sexual battery" in her closing. (R. 3537, 3542, 3543, 3544, 3546, and 3547). Specifically, the prosecutor stated:

> With respect to sexual battery, it will be sexual battery. (R. 3542)
>
> * * *
>
> Now, in view of the fact that we know there was a sexual assault... (R. 3537)

* * *

> ...he was in the perpetration of a sexual battery! by virtue of the fact that in fact there was a sexual battery. (R. 3543)

In light of the foregoing, it is clear the jury deliberation was prejudicially poisoned to the extent that 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 arant the Judaement 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 Judgement For Acquittal Motion for Count 11: 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. Again the prosecutor made several references to sexual battery as an aggravating factor for the jury to return a death recommendation. (R. 3942, 3955, 3964, 3965, 4004, and 4005)

In 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. (R. 4659). Since by law, no sexual battery occurred, the trial judge based its Death Order on an 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).

11. 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 of 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. 1264-72). The prosecutor even stressed her discomfort with the judge's 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. 1266)

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 nulifies 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 a Boca Raton police officer who was acting on a 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 indentification, 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 States Supreme Court was confronted with a situation where the arresting officer observed two men in an 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 ommitted).
>
> ...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 ommitted).
>
> "In the absence of any basis for suspecting appellant of misconduct the balance between the public interest and appellant's right to personal sucurity 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 D.C.A. 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 idividual 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 detentions'". Cupp v. Murphy, 412 U.S. 291, 294 (1973).

In that the sole basis for detaining the Appellant and requesting indentification 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 Appellant of his rights based on the psychologically coercive interrogation techniques by law enforcement.

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

> **VOICE D:** You're an intelligent guy... (R. 3015)
>
> **VOICE C:** You'd make a hell of a cop. (R. 3015)
>
> **VOICE C:** Sure would. (R. 3015)
>
> **VOICE D:** **I** give you credit for being an intelligent guy. Because **I** consider myself fairly intelligent, you know, and it was a long run. (R. 2987)
>
> **VOICE D:** **I** give you all the credit in the world. (R. 2991)
>
> **VOICE D:** That was a smart move, the same way **I** would have played it too. (R. 2996)

> VOICE D:... I think I understand certain things about you. This has, this has gone for two months now, and in a lot of ways it is competition. It is something you are matching your wits, like the little poem you just recited. I give you all the credit in the world, you're sharp. (R. 2999)
>
> VOICE C: It's all over, and you were good, too. (R. 3002)
>
> VOICE D: Duane, I'm going to tell you and I going to say this one more time, because I get tired of telling you how good you are: you are good. (R. 3003)

By acting friendly towards Appellant and by flattering him as to his intelligence, the police distorted Appellant'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 the investigations, Appellant was interrogated in excess of fifty (50) hours, sometimes these sessions lasting in excess four hours and keeping him until 11:00 P.M. at night. Under a totality of the circumstances

approach, going over the day by day interrogations, the inevitable conclusion is that the last confession given by Appellant, which goes to the instant case, was the result of constant hammering for four to five hours at a time. This amounts to unconstitutional pshychologically coercive techniques employed by the police to compell 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 impermissable, 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 inadmissible at trial.

C. The police continued to interrogate Appellant after he invoked his riaht 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 indicated "I'd rather not talk about it " (R. 3000 and 3018), he did no more than assert a right which the Miranda decision and the Constitution had 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 incriminating statement, the Courts have ruled that before those statements are admissible, 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 D.C.A. 1977).

The Fourth District Court of Appeal has ruled that once an accused indicates 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 D.C.A. 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 D.C.A. 1978); Jones v. State, 346 So.2d 235 (Fla. 2nd D.C.A. 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 exculpatory 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 twice indicated that he no longer wished to discuss the case any further with the police, they confronted him with incriminating evidence.

> APPELLANT: I rather not talk about it. (R. 3000)
>
> VOICE D: I'll show you again. (R. 3002)
>
> APPELLANT: I don't want to talk about it. (R. 3018)

VOICE C: It's all over, you might as well. You can't get around all-this stuff, you got no out. (R. 3018)

Thereafter, the Appellant responded to the accusations and made incriminating statements. In Tierney V. State, 404 So.2d 206 (Fla. 2nd D.C.A. 1981), the District Court reviewed the indentical 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.

APPELLANT: I rather not talk about it. (R. 3000)

VOICE D: Things happen, Duane. We can't change them once they're done. But you can sure make it easier on two parents that need to know. (R. 3000-3001)

VOICE C: And a whole town full of babysitters that are afraid to go outside. That's how the kids make all their money in the summer. (R. 3001)

APPELLANT: I don't want to talk about it. (R. 3018)

VOICE D: Don't you think its necessary to talk about it, Duane? Two months have gone by already, Duane. that's a long time: its a long time for people to wonder: its a long time for you to hold it within yourself: its a long time for people to wonder. (R. 3018)

VOICE C: And be scared - (R. 3018)

VOICE D: Dosn't you think its time to put all that to rest? I think you do. (R. 3018)

VOICE C: Its all over, you might as well. You can't get around all this stuff. You got no out. (R. 3018)

VOCIE D: This isn't going to disappear. (R. 3018)

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

As a consequence of precedent and the Appellant's desire to no longer discuss the matter at issue with the police, any statements made thereafter to law enforcement officers should have been suppressed as violative of Appellant'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.

111. THE TRIAL COURT ERRED WHEN THE CROSS-EXAMINATION OF A STATE WITNESS WAS LIMITED IN SCOPE AS TO OTHER SUSPECTS IN THE CRIMINAL INVESTIGATION.

The law in Florida is clear that "one accused of a crime may show his innocence by proof of the guilt of another." Pahl v. State, 415 So.2d 42 (Fla. 2 DCA 1982); cited therein, Lindsay v. State, 69 Fla. 641, 68 So. 932 (1915); see also, Moreno v. State, 418 So.2d 1223 (Fla. 3 DCA 1982); cited therein, Holt v. United States, 342 F.2d 163 (5 Cir. 1965); Chandler v. State, 366 So.2d 64 (Fla. 3 DCA 1979); Watts v. State, 354 So.2d 145 (Fla. 2 DCA 1978); and Commonwealth v. Keizer, 385 N.E.2d 1001 (Mass. 1979). The Third District held in Moreno v. State, supra, that:

> Where evidence tends, in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission. at 1225.

In the instant appeal, Appellant maintains that he was denied his Sixth Amendment right to present a defense when he was prohibited by the trial court from cross-examining Detective Pelligrini, a State witness, as to evidence which would lead to another suspect. During the cross-examination of Detective Pelligrini, counsel for Appellant attempted to elicit information concerning similarities between the Appellant's case and another investigation. (R. 2471). After a State objection, the jury was excused from the courtroom. (R. 2475). Counsel for Appellant proffered the testimony of Detective Pelligrini to the court. (R. 2485-89). The trial court then sustained the State's objection to the particular line of questioning. (R. 2495).

The excluded testimony would have, in essence, shown that this officer made observations at another crime scene which were similar to the instant crime scene. Specifically, a burglary which occurred in another area of the city, where a bicycle was found with handlebars attached in a unique fashion and pink bubble gum on the bicycle. In the instant appeal, there exists evidence of Appellant's bicycle matching the above description, and there was gum found in the shorts of the victim. (R. 2488). Additionally, there was what appeared to be blood on the handlebars of this second bicycle, (R. 2489), which was not connected to the Appellant, but rather, would lead to another's involvement in the crime.

Basically, the theory of defense which was excluded was that evidence found at the second crime scene was so similar in nature so as to connect another person to the instant crimes rather than Appellant. Trial counsel advised the court that no effective cross-examination of the witness could be conducted and the Appellant's theory of defense had been stripped. Specifically, counsel stated

> ...it precludes Mr. Owen of effective cross-examination based upon the specific ruling. I am put in a position where I have no cross-examination.
>
> * * *
>
> By the court's ruling, the court has stripped the defense of their theory.
>
> I think the record needs to be clear as to why I am not cross-examining, if an appeallate court reads this many months from now that I don't want to cross-examine. By virtue of your ruling, he has been denied a portion of our competence, in that our -- his theory of

> defense is now being deprived; as a result of that, we have no cross-examination. (R. 2498-99).

In furthering his position, trial counsel moved for a mistrial because Appellant was in essence being deprived of his defense. (R. 2500). The trial court grossly overlooked the points being raised by Appellant, which is evident from the ruling.

> THE COURT: If I have to grant a motion for mistrial in every case where the Defendant has no defense of that which he is accused, there wouldn't be cases that could ever be tried. (R. 2501).

While the trial court's statement is accurate, it was non-responsive to the facts and issues at bar. It was not being argued that Appellant had no defense, bur rather that he did have a defense which the trial court had just excluded.

An analogy can be made to the situation where a trial court prohibits a defendant from aserting an insanity defense. This Court held in Moruan v. State, 453 So.2d 394 (Fla. 1984), that

> It is clear that appellant was denied a reasonable opportunity to present witnesses at his trial. The jury may not have accepted the testimony of these witnesses, but a defendant must be afforded an opportunity to present available defenses and witnesses in support of those defenses. at 397.

Morgan's conviction and sentence were vacated with a remand for a new trial because this Court found that, just as in the instant appeal, the defendant was denied his Sixth Amendment right to confrontation of witnesses, and to present a valid defense.

In the instant appeal, since the Appellant was denied his rights as guaranteed him by the Sixth Amendment to the United States Constitution, and since a valid defense was improperly

excluded by the trial court, the conviction and sentence must be vacated, and the cause remanded for a new trial.

IV. THE TRIAL COURT ERRED BY RESERVING RULING ON APPELLANT'S MOTION FOR JUDGEMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE

In the instant appeal, Appellant was charged by Indictment with three criminal offenses: murder, sexual battery, and burglary. At the close of the State's case, Appellant made a Motion For Judgement of Acquittal. (R. 3289). The trial court denied the Motion as it related to Counts I and III, but reserved ruling on Count II, sexual battery. (R. 3319-20). It is not clear from the record whether the trial court ever ruled on the Judgement Of Acquittal Motion for Count II. The trial judge stated:

> My intention is to reserve ruling with regard to that matter until the conclusion of this case. (R. 3322)

> It was my intention to reserve ruling until this matter came back with a jury determination with regard to it. (R. 3324)

The Court was advised by the State that such a stance would constitute reversible error. (R. 3325). Even in light of the State's concerns, the trial court still reserved ruling on the sexual battery issue. Appellant then rested his case without taking the stand or introducing any evidence. (R. 3320)

The law is clear that it is error for trial court to reserve ruling on a defendant's Motion For Judgement of Acquittal. U.S v. Conway, 632 F.2d 641 (5th Cir. 1980); Hitchcock v. State, 413 So.2d 741 (Fla. 1982), cert. denied, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213; State v. Rolle, 202 So.2d 867 (Fla. 2nd D.C.A. 1967); and Adams v. State, 102 So.2d 47 (Fla. 1st D.C.A. 1958). When a defendant is charged with serveral counts, such as in the instant appeal, and the trial court reserves ruling on one of the counts, a criminal defendant is placed in an impossible position. A defendant may be willing to testify in his own behalf on several of the pending counts while at the same time exercise his constitutional right to remain silent on the other counts. If the trial judge would have granted a Judgement Of Acquittal Motion to any one of the pending counts, the defendant may then wish to take the stand; however, when the ruling is reserved, said defendant must gamble with his rights.

> ... It is only after the State has sustained its intitial burden of proof by making out a prima facie case, establishing the guilt of the accused beyond and to the exclusion of every reasonable doubt, that it becomes procedurally necessary for the accused to determine whether he will present evidence in rebuttal thereof or accept the consequences of his failure to do

> ***so...*** The accused should not be required to gamble his procedural rights on his own rather that the courts interpretation of the law. A fortiori, he should not be put in the position of having to speculate upon what disposition the court will make of the motion for directed verdict on the ground of insufficiency of the evidence. Adams v. State, 102 So.2d 47, 49, (Fla. 1st D.C.A. 1958); see also, State v. Rolle, supra, and Hitchcock v. State, supra.

In the instant appeal, the Appellant was compelled to make an important decision regarding his taking the stand or remaining silent without first knowing the legal status of one of his pending charges. To take the stand would have meant subjecting himself to the prosecutor's cross-examination on a crime that the trial judge had yet to make a legal determination. The Appellant did not take the stand nor did he present any evidence in his defense, a decision which could be directly inputed to the trial court's reserved ruling on the Judgement Of Acquittal Motion. Since the Appellant's right to testify was hindered by the actions of the trial court, Due Process mandates a new trial.

V. 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 statement's from members of the victim's family.

> ... it would be my intention, after receiving the jury's advisory opinion to receive any advice from the victim's family. (R. 3697)
>
> * * *
>
> I indicated to you earlier... that it was my intention to inquire of the victim's family with regard to any suggestions that you might have, or advice to me, with regard to these matters. (R. 4056-57)
>
> * * *
>
> I will repeat that I do not intend to impose sentence with regard to these matters at this time. (R. 4057)
>
> * * *
>
> If I do not hear from you, I assure you, before these matters are concluded I will hear from the people that I have indicated. At this time, is there a spokesman for the family, or somebody from the family who would like to be heard from at this time? (R.4057)

Whereupon, Mr. Slattery, the victim's father came forth to be heard. (R. 4058-4065). 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 distictions. Id., note 8; see also, Furman v. Georgia, 408 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, even prior to the jury returning a recommendation of death.

> ... it would be my intention, after receiving the jury's advisory opinion, to receive any advice from the victim's family. (R. 3769)

While the foregoing statement was made prior to the jury's recommendation of death, the following was made after the jury's recommendation but before the sentence was imposed.

> I indicated to you earlier... that it was my intention to inquire of the victim's family with regard to any suggestions that you might have or advice to me, with regard to these matters. (R. 4056-57)

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, 430 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 a 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 or characteristics of the victim's family. Moreover, defendants rarely select their victims based on whether the murder will have an effect on anyone other than 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 4838.

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 Appellant's death sentence be vacated.

VI. 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, five of the six 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 comitting sexual battery. Since the victim was deceased when the intercourse occurred, no sexual battery, as a matter of law, could exist. (This issue has already been throughly briefed in section "I" of Appellant's Initial Brief on Appeal).

B. The death sentence must be vacated because the Appellant did not commit the offense charged to avoid lawful arrest.

The aggravating circumstances utilized by the sentencing

judge under section "C" of the Death Order has absolutely no support in the record. The trial judge found that Appellant killed the victim in order to avoid or prevent a lawful arrest. It is established precedent that the burden of proof is clearly on the State to show that the death was as a result of avoiding arrest. Hansbrough v. State, 12 F.L.W. 307 (Fla. June 26, 1987); Riley v. State, 366 So.2d 19 (Fla. 1978); and Menendez v. State, 368 So.2d 1278 (Fla. 1979). In Riley, this Court held that when the victim was not a law enforcement officer, it must be clearly shown that the dominant or only motive for the murder was to eliminate the witness in order to avoid arrest. Cited in, Menendez v. State, supra, at 1282. In the instant case, the only arguable proof of this motive comes from the Appellant's coerced confession, wherein he states that he told the victim to hang up the phone, and when she did not comply, he stabbed her. There was no evidence as to who the victim was talking to while on the phone, or that she was even aware of Appellant's presence. There exists again no evidence that the victim was attempting to call out for help.

Additionally, in Menendez, this Court held that:

> Were this argument accepted, then the perpetration of murder with a knife would similarly add an aggravating circumstance to the life-or-death equation, since it is less detectable than a firearm. This mechanical application of the statute would divert the life-and-death choice

> away from the nature of the defendant and the deed, as the statute seems to require. Id., at 1282, cited therein, Proffitt v. Florida, 428 U.S. 242, 96. S.Ct. 2960, 49 L.Ed.2d 913 (1976).

In the instant case, the fact that the Appellant allegedly used a knife to commit the murder, has no significance on the issue of avoiding arrest. As this Court held in Menendez, the Appellant's motive cannot be assumed. The burden is on the State to prove it, which they have not done. Id., at 1282.

Additionally, in a very recent decision by this Court, in Hansbrough v. State, supra, at 307, it was held that:

> In relying on committed to prevent or avoid arrest, the trial court found that Hansbrough had killed the victim to eliminate a witness, The mere fact that the victim might have been able to identify her assailant is not sufficient to support finding this factor. Cited therein, Bates v. State, 465 So.2d 490 (Fla. 1985).

It is clear that the facts of the instant case do not fit the intended use of F.S. 921.141(5)(e), and as such Appellant's death sentence must be vacated.

C. 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 stabbed serveral times in a frenzied attack. This gains support wherein the Appellant stated that he thought he stabbed the victim once.

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.

D. 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. According to Dr. Peterson, the court appointed expert designated to examine and evaluate the Appellant, it is clear that at the time of the actual homicide, the Appellant had a "mental breakdown" and had undergone an extreme mental or emotional disturbance. (R. 3806-7). As in the preceeding section, this again becomes evident through the fact that the Appellant thought he stabbed the victim once.

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.

Here again, this aggravating factor utilized by the lower court in its Sentencing Order is not valid, and as such the death sentence imposed on the Appellant must be vacated.

E. The death sentence must be vacated because the trial court did 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 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 say 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 and 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. 4661-62)

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 cause. 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 apparrant 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.

VII. THE TRIAL COURT ERRED BY ALLOWING THE STATE TO CROSS EXAMINE DR. PETERSON AS TO HIS CONTACT WITH ANOTHER CAPITAL DEFENDANT

During the Phase II proceedings, Dr. Peterson, the court appointed expert designated to examine and evaluate the Appellant, was cross-examined by the prosecutor reference an interview between him and Ontre Jones. (R. 3810-14). The prosecutor brought out the fact that Ontre Jones was also charged with capital murder, (R. 3812), and was represented by one of Appellant's co-counsels, Barry Krischer, Esquire. (R. 3810). Additionally, an unconstitutional inference was made during this examination that both the Appellant and Ontre Jones were both inmates of the County Jail. See, Estelle V. Williams, 425 U.S. 501, 96 S.Ct. 1691 (1976).

The Supreme Court held in Estelle V. Williams, supra, that it was reversible error to try a criminal defendant in prison clothing. It thus becomes likewise invalid to comment on the current jail status of a criminal accused, such as occurred in the instant case.

Allowing this form of cross-examination constituted reversible error, not only because of the total lack of relevancy, but also due to the grossly prejudicial impact on the jury which poisoned the Phase II proceedings.

Prejudice is evident in three different respects. First, it was highly prejudicial to inform the jury that Appellant's friend in the county jail was also charged with a separate unrelated capital murder. Second, it was also prejudicial to inform the jury that counsel for Appellant also represented another person charged with capital murder. Finally, gross prejudice resulted from informing the jury that the Appellant was still incarcerated in the county jail.

Based upon the foregoing, Appellant's death sentence must be vacated as a violation of the Due Process clause of the Fourteenth Amendment.

VIII. THE TRIAL COURT ERRED BY IMPOSING THE DEATH PENALTY WITHOUT REGARD TO APPELLANT'S MENTAL ILLNESS

It is well settled law in Florida that emotional conditions, such as mental illness, of defendants in murder cases can be a basis for mitigating punishment. Jones v. State, 332 So.2d 615 (Fla. 1976); and, F.S. 921.141(6). This Court held, in Jones v. State, supra, that:

> ... the principle determinative fact directing the judgement of this Court is that the Appellant had a paranoid psychosis which was undenied and unrefuted, the degree of which no one can fully know... The testimony makes it clear that Appellant suffered a paranoid psychosis to such an extent that the full degree of his mental capacities at the time of the murder is not fully known, but it is reasonable to assume that his mental illness contributed to his strange behavior. at 619.

In the instant cause, the court appointed Dr. Peterson to examine and psychologically evaluate the Appellant. (R. 3798). It was the unrefuted expert opinion and diagnosis of Dr. Peterson that the Appellant suffered from Schizophrenoform disorders, which results in a mental breakdown or loss of control of his actions. (R. 3801-4). Dr. Peterson further testified that it was his opinion that the Appellant had undergone a mental breakdown at the time of the homicide. (R. 3806-7).

The sentencing judge did not follow the controlling mandate set forth in F.S. 921.141(6)(e), which states:

> (6) Mitigating circumstances shall be the following:
> (e) The defendant acted under extreme duress....

The Death Order of the lower court never addressed Appellant's Schizophrenoform disorder diagnosis as required by F.S. 921.141(6).

It becomes apparent that based on the numerous invalid and improper aggravating circumstances found by the sentencing court, and the failure by the same court to consider mandatory mitigating circumstances, that Appellant's sentence of death must be vacated.

IX. THE TRIAL COURT ERRED BY ALLOWING THE VICTIM'S MOTHER TO TESTIFY BEFORE THE JURY

During the State's case in chief, Carolyn Slattery, the mother of the victim, was called to testify by the prosecution. (R. 3212-3217). This witness was called by the State to create improper sympathy for the victim's family through a display of emotion, something that cannot be reproduced in an appellant record. This type of emotional display could not be corrected by any instruction by the trial judge. The United States Supreme Court has previously ruled that in capital cases, death sentences must "be, and appear to be, based on reason rather than caprice or emotion". Gardner V. Florida, 430 U.S. 349, 358 (1977).

Additionally, the testimony given by the victim's mother was entirely irrelevant to the issues before the jury. This witness was not present during the crime! and the items that she was to identify had already been stipulated into evidence.

This form of testimony is violative of the Eighth Amendment to the United States Constitution as it has most recently been interpreted by the Supreme Court in Booth V. Maryland, _____U.S._____, 55 L.W. 4836 (June 16, 1987), wherein it was held that:

> 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 4838.
>
> * * *
>
> We nevertheless find that because of the nature of the information contained in a (victim impact statement), it creates an impressionable risk that capital sentencing decision will be made in an arbitrary manner. Id.
>
> * * *
>
> Certainly the degree to which a family is willing and able to express its grief is irrelevant to the decision whether a defendant ... may live or die. Id.

The facts of the instant case go much further than those presented in the Booth decision where the High Court was dealing with a poisoned jury in the Phase II portion of the trial. In the case at bar, the jury was poisoned in the actual guilt portion of the trial, and as such, the Appellant must be afforded a new trial.

X. 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 the death penalty in the instant cause, which were all summarily denied by the court. Appellant re-raised these motions prior to the commencement of Phase II and in his Motion For a New Trial, section 31, again all were summarily denied.

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 a 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 any last words.

Some men confess, others proclaim one last time that they are innocent. Some ask their God to have mercy on their souls. 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 sewn 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 the thick rubber gloves at some point. They serve but one purpose. Sometimes the cap slips 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 or 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 is 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 this 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 Power and Light Company to kill a human being.

The system is automated. All the man in the black vestments has to do is flip the 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 2,250 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 usually 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 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 is 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 ~~Contitution~~ 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 charge was ordered after Governor George Wallace rejected an argument that the first two amounted to unconstitutionally cruel and unusual punishment and that 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 reevaluated and rejected as a method of execution for several reasons:

Electrocution is cruel because it may inflict excruciating pain. Many experts agrue that electrocution amounts to

excruciating torture. See: Gardner, Executions and Indignities - An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment, 39 OHIO STATE L.J. 96, 125 n. 217 (1978) (hereafter 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 OF 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 phsyical violence to and mutilation of the body which occurs during electrocution. As summarized by Gardner,

> "Sometimes the victim's eyeballs fall from the sockets. He urinates and defacates, 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: 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, and have adopted lethal injections as the method of execution under their capital sentencing statutes. With the addition of these states thirteen states have now adopted lethal injection (the latest states have joined 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 violates the Eighth Amendment, for it is unnecessarily cruel. See: Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In re Kemmler, 136 U.S. 436, 447 (1890); Louisiana ex rel. Francis v. Resweber, supra, 329 U.S. at 463-464, 473-373; 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. Moveover, 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 is no less effective in accomplishing the two principle societal goals of the death penalty -- "retribution and deterrence of capital crimes by prosepective 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 impositon 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 and 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 Florida State Constitution. Florida Statutes 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 but 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 or record, and to the circumstances of the offense, that the defendant proffers as a basis for a sentence.

The instruction on the statutory mitigating circumstances could easily lead the jury to denigrate the importance of nonstatutory mitigating circumstances; as only the statutory mitigating circumstances are listed in the Standard Jury Instructions. Florida Standard Jurv 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. The 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 circumstance is limited by modifiers

"extreme," "substantial," or "substantially."

This limiting language could lead a jury to give absolutely 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 and thus give it absolutely no weight. This directly violates the requirment that the sentencer 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); Eddinas 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 circumstance (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, Sections 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 or the unlawful throwing, placing, or discharging of a 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. ___, 103 S.Ct. 2733, 2743 (1983).

The Court in Zant went on to state that:

> An aggravating circumstance must genuinely narrow 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. Greaa v. Georgia, 428 U.S. 153, 188-189 (1979); Furman v. Georaia, 408 U.S. 238 (1972). The Court in Gregg interpreted the mandate of Furman to impose these severe limits because of the uniqueness of 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. California v. Englert, 647 P.2d 76 (Cal. 1982); Arnold v. Georaia, 224 S.E.2d 386 (Ga. 1976).

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

All of the felonies listed in aggravating circumstance (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.

This 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 "genuniely 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 the 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. North Carolina v. Cherry, 257 S.E. 551, 567-568 (N.C. 1979). The Court specifically held that the underlying felony could not be used 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 conviction. On the other hand, a defendant convicted of a premeditated and deliberated killing, nothing else appearing, enters the sentencing phase with no strikes against him. This is highly incongruous, particularly in light on 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 or sentence. Neither do 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 captial 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 trial the aggravating circumstance concerning the underlying felony.
>
> 275 S.E.2d at **567-560.**

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 circumstance "genuinely narrow" the class. This circumstance wholly fails 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 occured (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, 336 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 an 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 these 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 Amendments' 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 us 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 sentencing 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 in 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 sentence in Florida.

XI. 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 that 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

Amendment.

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 violates 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 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 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, any 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 qualifies 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 conviced that the requirement has solid foundation, **419** U.S. at **503.**

Duren v. Missouri, **439** U.S. **357 (1979)** 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 in 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 from 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 not 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, or the person on 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 soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of 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 of 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 determinaton 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 than the social cost of an erroneous sentence of life imprisonment. See, 4 W. Blackstone, Commentaries on the Laws of England, 358 (better that ten guilty men to 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, Teddler 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 recommendaton, 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 the jury's recommendation on the life or death question is still 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 captial 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 guilty or innocence.

XII. THE TRIAL COURT ERRED BY DENYING TO GIVE THE REQESTED JURY INSTRUCTION DURING PHASE II

The law in Florida is clear that a defendant i entitled to a requested jury instruction when there is some evidence which supports said instruction. Palmes v. State, 397 So.2d 648 (Fla. 1981); Heddleson v. State, 12 F.L.W. 1502 (Fla. 4th D.C.A. June 26, 1987); Hudson v. State, 408 So.2d 224 (Fla. 4th D.C.A. 1981); Dudley v. State, 405 So.2d 1236 (Fla. 4th D.C.A. 1981); and, William v. State, 395 So.2d 1236 (Fla. 4th D.C.A. 1981). These courts have gone on to hold that failure to give the requested instruction was per se reversible error. The Williams Court went so far as to hold that:

> A defendant is entitled to have the jury instructed on the law applicable to his theory of defense if there is any evidence introduced to support the instruction, however disdainfully the trial judge may feel about the merits of such defense from a factual standpoint. Id., at 1238.

Additionally, Florida courts have held that a conviction, or in the instant cause the sentence, was based upon erroneous jury instructions and was grounds for reversal as a due process violation. Ray v. State, 403 So.2d 956 (Fla. 1981); and Williamson v. State, 12 F.L.W. 1656 (Fla. 4th D.C.A. July 17, 1987).

In the instant case, the trial judge conducted a charge conference for the Phase II proceedings at the insistence of counsel for Appellant. (R. 3682). The primary concern was

that the standard jury instructions would leave the jury with the impression that their activities were meaningless. Appellant's counsel proposed a jury instruction which had previously been approved by Circuit Judge Mounts, Fifteenth Judicial Circuit, in the capital case of State of Florida vs. Ontra Jones. The pertinent portion of the instruction requested was:

> Advisory verdicts are very important to the court. The court cannot override a verdictof life imprisonment without possibility of parole for twenty-five (25) years and impose death unless the court finds that there is no reasonable basis for such a verdict, that is, no reasonable person would disagree with the court's override of the life sentence verdict. (R. Supplemental Record on Appeal, July 29, 1987)

This requested instruction was a correct statement of the law, and in fact the trial judge never disagreed with the instructions. The trial judge simply refused to add to or modify the standard instructions and specifically ruled that:

> There is still an advisory verdict to the Court. The Court still makes the ultimate decision. (R. 3687)

This logic by the trial court flies squarely in the face of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), which held that:

> ... it is constitutionally impermissible to rest a death sentence on a determination

> made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. at 2639.

Although the Caldwell decision involved prosecutorial comments during closing argument, a recent Eleventh Federal Circuit decision, reviewing a Florida death case, applied the Caldwell principle to judges as well. Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986). The Adams court held that:

> ... The judge clearly told the jurors that he was the one assigned this decision... Indeed, because it was the trial judge who made the misleading statements in the case, representing them to be an accurate description of the jury's responsibility, the jury was even more likely to have believed that its recommended sentence would have no effect and to have minimized its role than the jury in Caldwell. Id., at 1532.
>
> * * *
>
> As in Caldwell, the real danger exists that the judge's statements caused Adams's jury to abdicate its "awesome responsibility" for determining whether death was the appropriate punishment in the first instance. Id., at 1533.

In the instant cause, the trial judge violated the Appellant's Eighth Amendment's rights as interpreted by Caldwell v. Mississippi, supra, and Adams v. Wainwright, supra, many times over. During the Phase II proceedings, the jury was instructed by the trial

judge not less that twelve times that their recommendation was nothing more than a advisory sentence. (R. 4041-47). Additionally, the judge went so far as to instruct the jury specifically that:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge. (R. 4041)

These comments by the sentencing judge are in direct conflict with a very recent Eleventh Circuit case which affirmed Adams v. Wainwright, supra, by holding that in Florida:

> ...the trial court must give great weight to the jury's recommendation McCampbell V. State, 421 So.2d 1072, 1075 (Fla. 1982)(per curiam), and may reject the jury's recommendation only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975)(per curiam). Consequently, the jury plays a "critical" role in determining the appropriateness of death. Adams v. Wainwright, 804 F.2d 1526, 1529, (11th Cir. 1986). Mann v. Dugger, 817 F.2d 1471, 1983 (11th Cir. 1987).

The Eleventh Circuit quoted the trial judge's instructions which advised the jury that:

> The final decision as to what punishment shall be imposed rests solely with the judge of this court. Id., at 1483.

The Mann Court found this comment to be error of such a nature

as to make the jury's recommendation and the actual sentence unreliable. Id., at 1483. The cause was thus remanded for a resentencing.

It is clear that the Appellant had an absolute right to the requested jury instruction as to the actual importance of their verdict during the Phase II proceedings. Failure to give this instruction mandates that Appellant's sentence of death be vacated.

It is likewise clear that the jury instruction actually given by the trial judge violated the Eighth Amendment to the United States Constitution as interpreted by Caldwell v. Mississippi, supra, Mann v. Dugger, supra, and Adams v. Wainwright, supra. As such the Appellant's sentence of death must be vacated.

CONCLUSION

F r 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,

BARRY E. KRISCHER, ESQUIRE

MICHAEL SALNICK, ESQUIRE

THEODORE S. BOORAS, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, this 19th day of August, 1987, to Ms. Georgina Jimenez-Orosa, Esquire, Attorney General's Office, 111 Georgia Avenue, Room 204, West Palm Beach, Florida, 33401, and to Duane Owen, 8101660, Florida State Prison, P.O. Box 747, Starke, Florida, 32091.

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