IN THE SUPREME COURT OF FLORIDA

BRYAN F. JENNINGS, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 68,835

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

BRYAN FREDERICK JENNINGS was initially charged by an indictment filed on May 16, 1979, in Brevard County. The indictment charged Jennings with the first-degree premeditated murder of Rebecca Kunash, with the first-degree felony-murder of Rebecca Kunash (during the course of a kidnapping with intent to commit sexual battery), with the first-degree felony-murder of Rebecca Kunash (during the course of a sexual battery), with the kidnapping of Rebecca Kunash, with three counts of capital sexual battery on Rebecca Kunash, with the burglary of the Robert Kunash dwelling with the intent to commit sexual battery or kidnapping and with an assault therein, and with the aggravated battery of Rebecca Kunash. Following a trial in February, 1980, Jennings was convicted of all nine counts and sentenced to death. The trial judge entered his findings of fact in support thereof. (R2725-2731) Appellant's convictions and sentences were

subsequently vacated by this Court, and the case was remanded for a new trial. (R2761-2771); Jennings v. State, 413 So.2d 24 (Fla. 1982).

On June 11, 1982, the Brevard County Grand Jury reindicted Jennings on the same charges. (R1039-1041) Following a jury trial in 1982, the jury returned with a verdict of not guilty as to Count VI (sexual battery) and guilty as charged on the other eight counts. (R2848-2856) The trial court again sentenced the Appellant to death and entered written findings. (R3016-3021) On direct appeal this Court affirmed Appellant's convictions and sentences. [R3024-3034; Jennings v. State, 453 So.2d 1109 (Fla. 1984)] Appellant subsequently petitioned in the Supreme Court of the United States for a Writ of Certiorari based upon a violation of Appellant's constitutional rights in obtaining his confession. On February 25, 1985, the United States Supreme Court rendered an order vacating this Court's decision in Jennings v. State, 453 So.2d 1109 (Fla. 1984). Subsequently, this Court remanded this cause for a new trial in accordance with Edwards v. Arizona, 451 U.S. 477 (1981). Jennings v. State, 473 So.2d 204 (Fla. 1985); (R3039-3043)

Prior to the commencement of the instant trial, the State announced a nolle prosequi as to count VII (one of the sexual battery charges) and count IX (aggravated battery). The State then proceeded to trial on counts I through V and VIII of the second indictment. (R2034)

Defense counsel filed numerous pre-trial motions, including a motion to suppress evidence (R3238-3243); a motion

for change of venue (R3248-3256); a motion in limine pertaining to the previously recorded testimony of Allen Kruger (R3349-3351); and a motion to declare Section 913.13, Florida Statutes, unconstitutional (R3388-3389).

Appellant's motion for change of venue was granted and the jury trial was held in the above-styled cause before the Honorable Charles M. Harris, Circuit Judge of the Eighteenth Judicial Circuit. The trial was held in Panama City, Florida, following an order designating Judge Harris with all the powers conferred upon a judge of the Fourteenth Judicial Circuit. (R3248-3251,3259-3260,3297)

During voir dire, Appellant's motion for mistrial was denied. (R63-64)

Appellant's objection to testimony about the victim's planned participation in a school play on the day of her death was overruled. (R341,490-492)

Appellant also objected to the introduction of certain evidence and testimony presented through a purported expert witness presented by the State. (R373,376-377,395-399)

Appellant's motion to suppress was denied following a hearing and evidence was introduced over his objection. (R842-843,864-865,950-956,3289-3290) A letter and testimony about that letter was also introduced over Appellant's objection. (R746-773)

Photographs of the victim were admitted over Appellant's objection. (R462-465,497-502A,928-930)

Photographs of Appellant's penis were admitted after the trial court denied Appellant's motion to suppress and overruled his objections. (R551-552)

Appellant sought to introduce certain documents into evidence but was repeatedly rebuffed by the trial court. (R678,1122-1128)

Appellant's motion in limine was denied and the previously recorded testimony of Allen Kruger was read into evidence over objection. (R904-922)

At the conclusion of the State's case, Appellant motion for a judgment of acquittal as to each count was denied. (R1054-1057)

The Appellant presented testimony of three witnesses during his case-in-chief. (R1062-1123) Appellant requested an instruction on circumstantial evidence which was denied by the trial court. (R1146-1149) Appellant's objection to a standard jury instruction was overruled. (R1140-1143) During the State's final summation, Appellant objected to the prosecutor dramatically reading certain letters that were in evidence to the jury. This objection was overruled. (R1249-1250)

Following six and one half hours of deliberation, the jury returned with a verdict of guilty as charged on all counts. (R1295-1301)

Approximately one week later, the penalty phase commenced. (R1311) Appellant's objection to the removal of Juror Milligan was overruled, his motion for mistrial was denied, and an alternate was seated for the penalty phase. (R1311-1319)

Upon the jurors' return for the penalty phase, the trial court with the attorneys' assistance conducted individual inquiries of each juror regarding their exposure to extra-judicial information concerning the case. Three jurors had learned certain information and Appellant objected to the retention of one of those jurors. This objection was overruled and the jury remained intact after Juror Milligan was removed and the alternate seated. (R1322-1336)

The parties stipulated below that the Appellant would not rely upon and the State would present no evidence to rebut the mitigating circumstance of no significant prior criminal history. (R1338-1339,3433-3434)

Appellant's motion to preclude the State's reliance upon the aggravating circumstance provided in Section 921.141(5)(i), Florida Statutes, was denied. (R1645-1647)

Appellant presented the testimony of two mental health professionals as well as the testimony of five lay witnesses at the penalty phase. The State presented the testimony of two psychiatrists. (R1342-1645)

Appellant's specially requested jury instructions were denied. (R1501-1503,1647-1654,3441-3444)

During closing argument by the State at the penalty phase, Appellant objected to certain "Golden Rule" arguments but was overruled. (R1658-1659)

After jury instructions at the penalty phase, the jury, along with one unauthorized alternate, retired to deliberate. The error was eventually realized and the alternate was retrieved and discharged. (R1703-1704)

During the jury's two hours and forty minutes of deliberation following the penalty phase, the jury submitted a written question which was answered by the trial court. Appellant moved for a mistrial based upon the jury question and was denied. (R1703-1705) The jury returned with an eleven to one recommendation for death. (R1706,3432) Appellant's motion that he be sentenced as a mentally disordered sex offender was denied following a hearing. (R2046-2087,2933-2937,3387, 3448-3449)

Appellant's motion for new trial as amended was denied following a hearing. (R1645,1711-1739,3429-3431,3435-3438) Appellant presented further testimony at the sentencing hearing. (R1739-1766) In sentencing Bryan Jennings to death for first-degree murder, the trial court entered written findings of fact and relied upon three aggravating circumstances and rejected all mitigating circumstances. (R3459-3464,1822-1833) The trial court adjudicated the Appellant guilty of the kidnapping, the sexual battery, and the burglary and sentenced him to consecutive life sentences on each count. A twenty-five year minimum mandatory sentence applies to the capital sexual battery. The trial court allowed Appellant credit for 2,542 days previously served on each of the three counts. (R3453-3458)

A timely notice of appeal was filed on May 23, 1986. (R3473) This brief follows.

STATEMENT OF THE FACTS

A. Guilt Phase

On May 11, 1979, Robert and Patricia Kunash awakened to find that their daughter, Rebecca Kunash, age six, was missing from her bedroom. The right bedroom window, which had been left unlocked, was open and the window screen was lying in the yard. (R327-345,354-355,367-371)

Police were summoned to the house. Conducting an investigation, they made a plaster cast of one footprint chosen from the thirty-seven footprints which were found in the coquina sand in the lot adjacent to the Kunash home. (R386-399,411) The consistency of the soil made it difficult to obtain a good impression. (R884-885) Police also recovered latent palm and fingerprints from the bedroom window sill. (R373-379) Several of these prints were determined to match those of Bryan F. Jennings. (R373-379,961-999) The plaster case of the footprint had the same general class characteristics as Jennings' right shoe which was obtained from his mother. (R838-843,850,865, 881-883)

At 2:15 P.M., the victim's body was discovered floating in a nearby canal by a boater. The police recovered the body from the water and transported it to the hosptial for an autopsy. (R432-467) There were injuries to the facial area of the deceased's head and evidence of trauma to the head. (R500-505,543) The medical examiner determined the cause of death to be asphyxia due to drowning. (R544)

The testimony indicated that the injuries to the head were sufficient in and of themselves to cause death. The injuries were consistent with being caused by the head striking a solid surface. (R543) The head injuries would have caused unconsciousness, followed by light coma which would gradually deepen prior to death. (R562-563)

The medical examiner also took swab samples from the victim's vagina, mouth and anus. (R520) A toxicologist's tests of the swabs from the vagina were positive for the presence of prostatic acid phosphatase. (R521-529,685-707) This was said to be indicative of sexual intercourse, although the reliability of the test for this purpose was substantially questioned. (R685-721,1062-1097) Trauma to the vagina occurred before or at the time of death. (R541) Appellant's penis exhibited abrasions which the pathologist believed were consistent with entering the victim's vagina. (R549-554)

At trial, the testimony of Allen Kruger was read into the record. (R909-922) Jennings told him that he (the defendant) had dropped the girl out of her window, picked her up by her legs, brought her up over his head and struck her head on the pavement. Kruger also stated that the Appellant claimed to have held the girl's head under water for ten minutes, leaving her in the water for the crabs, turtles and sharks.

On cross-examination, Kruger admitted that he was currently in state prison having completed three years of his sentence. He first approached the authorities with his story

while he was awaiting sentencing in 1979. He admitted that he failed to mention Jennings' statement during numerous previous interviews with authorities. Kruger denied receiving any benefits as a result of his cooperation with the state, in spite of the fact that he was currently serving his sentence at a minimum security facility. He finally admitted that he would volunteer information to the authorities if he thought it would benefit himself. (R013-917)

Clarence Muszynski, a four-time convicted felon, was incarcerated in the Brevard County Jail with the Appellant prior to Appellant's trial. Muszynski testified that the Appellant approached him in the jail and confessed in detail concerning this offense. According to Muszynski, Jennings broke the girl's bedroom window with a sea shell in order to gain entrance to the home. Musynzki had testified at a previous trial that Jennings told him that he had used a pebble to break the window. (R623-636,647-648) Of course, the evidence revealed that neither of the girl's windows was damaged. (R338-341,354-355,367-371) Muszynski also testified that Jennings told him that he kidnapped the girl and slammed her head on the curb outside the house before driving away. She remained unconscious the entire drive to the canal. Muszynski claimed that Jennings had intercourse with the girl prior to drowning her in the canal. (R637-640)

Muszynski admitted that he had been transferred from Florida State Prison, one of the worst institutions, to Avon Park, one of the best, in 1984 which was about one year after he

approached law enforcement officials with his story about Jennings. Muszynski also admitted that he had testified for the State in at least one other case. (R654-656) Muszynski also admitted telling complete and detailed lies in two motions for post- conviction relief that he had filed in 1981 and 1982. (R657-667) An inmate familiar with Muszynski's reputation for truth and veracity revealed that Clarence was dishonest. At one time, Muszynski approached this inmate and asked him to support a tale that Donald Robinson had made a jailhouse confession to Muszynski. (R1111-1121)

Certain incriminating letters which were purportedly written by Jennings to an old high school classmate were introduced at trial. (R746-838) Billy Ray Crisco Jr., another convicted felon, also testified that Jennings told him the details of his crime while the two were both in the Brevard County Jail. Crisco's account differed somewhat in the details from the account related by Clarence Muszynski. (R936-946) Crisco only came forward with this story as recently as October, 1985. (R946)

B. Penalty Phase

Doctor Michael Gutman, a psychiatrist, testified that Bryan Jennings suffered from a long-term personality pattern with character behavior disorders. These included a passive-aggressive personality and an anti-social personality. Doctor Gutman defined a passive-aggressive personality as one who would sabotoge their own efforts to succeed, namely by being

self-destructive. He defined an anti-social personality as a person who had a minimal conscience and was inclined to drug use. (R1347-1349,1363) Doctor Gutman was of the opinion that the amount of alcohol combined with Jennings' personality disorders resulted in a substantial impairment of Jennings' ability to conform his conduct to the requirements of law. Although Appellant's prognosis was not good, treatment was available for the disorders from which he suffered. (R1365-1366,1370-1371) While Gutman admitted that the character and emotional disorders which afflicted Jennings are not regarded as true mental illness, Jennings definitely suffered from some mental disturbance. (R1376)

Doctor Elizabeth McMahon, a clinical psychologist, administered the most extensive examination of Bryan Jennings. Her findings indicated that Bryan Jennings was immature, impulsive, had little insight and many underlying sexual problems. (R1411-1447) McMahon was of the opinion that Jennings suffered from a personality and character disorder consisting of immaturity and an anti-social personality. McMahon also admitted that Jennings' problems were more of an emotional than a mental disturbance. (R1452) Doctor McMahon's expert opinion was that Jennings' ability to conform his conduct to the requirements of the law was substantially impaired at the time of the offense. (R1447-1450)

Doctor Burton Podnos, a psychiatrist testifying for the state, examined Bryan Jennings one time in 1979. Doctor Podnos

concluded that Jennings suffered from a long-time character disorder which caused an inability to relate, lying, truancy, vandalism, poor judgment, lack of impulse control, and lack of responsibility. Doctor Podnos also testified that Jennings also suffered from an anti-social personality disorder. The doctor implied that this affliction was a mental illness, although not a major one. (R1504-1512)

Doctor Podnos was of the opinion that Jennings was not acting under an extreme mental or emotional disturbance at the time of the offense, nor was his capacity to appreciate the criminality of his conduct impaired. (R1513) Doctor Podnos did admit that the crime started as an impulse, but the doctor's opinion was that it turned into a deliberate act at some point. (R1513-1514) While the doctor also admitted that Jennings' lack of impulse would become more pronounced under the influence of the hallucinogen LSD, the doctor evidently refused to consider the possibility of the effects of such a drug in this particular scenario. (R1520,1528,1540-1544)

Doctor Lloyd Wilder, another psychiatrist testifying for the state called Bryan Jennings a likeable sociopath. Doctor Wilder agreed with Doctor Podnos that Jennings was not acting under an extreme mental or emotional disturbance nor was his capacity to appreciate the criminality of his conduct impaired. Doctor Wilder did not believe that Jennings' ability to conform his conduct to the requirements of the law was substantially impaired. (R1545-1552) Doctor Wilder did admit that Jennings

suffered from a disorder. When he was asked if the disorder could be classified a mental disease or defect, the doctor conceded that this point was debatable, but concluded that while the disorder was not normal, it was generally not regarded as a mental illness. (R1550-1551)

As a result of Jennings' physical activity during the offense as well as his ability to recall, Doctor Wilder concluded that Jennings was not significantly impaired by alcohol and drugs. Doctor Wilder conceded that his opinion concerning the application of the two statutory mitigating circumstances would change if Jennings had in fact been impaired by chemicals. (R1570-1572) Doctor Wilder concluded that some people simply function better with higher levels of alcohol than others. (R1584)

Although all of the mental health professionals indictated that Bryan was perhaps slightly above average in intelligence, they all agreed that he was extremely immature for his age. Even Doctor Wilder admitted that Jennings is less mature than what a normal 20 year old should be. (R1593-1595)

Bryan Jennings never knew his natural father. His own mother admitted she was not sure who Bryan's father was. Bryan was a very hyperactive child who had life-long problems. He had mental problems from the time he was a toddler. Bryan was born prematurely which was probably the result of his mother changing a tire. He had one half-sister and no other siblings. Margaret Dana, Bryan's mother, met her husband, an alcoholic, while she

was in the hospital. The first five or six years of Bryan's life, he lived with his grandparents rather than his mother. He saw several father figures drift through the household, none staying any length of time. He was separated from his mother for extended periods of time at several points in his childhood. He was forced to transfer schools every two or three years as a result of his mother's work. (R1698-1611) From the age of twelve, Bryan was staying out until six o'clock in the morning in his mother's car. (R1435) He quit school in the tenth grade. The family doctor recognized Bryan's problems, but no one offered his mother any solutions. At one point, Bryan had been accepted at a mental institution in Boston, but he voiced a desire to enter the service instead. His mother became afraid that any length of stay at a mental institution would ruin any chance in the future of obtaining government employment, therefore, she cancelled the institutionalization and Bryan entered the service where his troubles continued. (R1608-1609)

The Facompre family testified about a side of Bryan that had not been revealed at trial. Their testimony showed Bryan to be a warm, generous and caring person and a very good friend. He was also a responsible individual and he could be relied upon. Mr. Facompre testified that Bryan was extremely frustrated about his inability to discover his father's identity. Bryan Jennings was the favorite of all of Mr. Facompre's children's friends. He found him to be polite, helpful, and trustworthy. Bryan had all of the desirable traits that Facompre looked for in a person and became like one of the family. (R1620-1644)

SUMMARY OF ARGUMENT

POINT I

Appellant contends that the photographs of his penis following his illegal confession were improperly admitted into evidence. The photographs were clearly the "fruit of the poisonous tree" of the confession which this Court ruled inadmissible in Jennings v. State, 473 So.2d 204 (Fla. 1985).

POINT II

Clarence Muszynski was the most critical witness against the Appellant at trial. As such, his credibility was crucial. The Appellant attempted to introduce into evidence two motions for post-conviction relief which Muszynski filed in 1981 and 1982. The trial court ruled the motions to be inadmissible. The motions contained evidence that Muszynski lied under oath and were improperly excluded.

POINT III

The crime involved in the instant case is the brutal rape and murder of a six-year-old. The state introduced testimony through two witnesses that the victim was supposed to be the narrator for the school May Day pageant on the day of her death. Appellant contends that this evidence was totally irrelevant, and any perceived relevance was completely outweighed by the extreme prejudice which resulted.

POINT IV

Appellant contends that the state failed to meet its burden of proof in establishing that a valid, outstanding warrant

for his arrest existed. No warrant was ever produced and all fruit from this illegal, warrantless arrest should have been suppressed. These included Appellant's shoes seized from his home as well as his fingerprints obtained during his booking. The photographs of his penis also stemmed from this arrest. Appellant also contends that Ms. Dana could not surrender Appellant's shoes, which are personal and exclusive in nature, to law enforcement officials.

POINT V

Appellant submits that the numerous photographs of the victim were inflammatory in nature. Any relevance was outweighed by the resulting prejudice.

POINT VI

During voir dire, the prosecutor made an indirect comment on Appellant's silence. The timely motion for mistrial should have been granted. The prosecutor was attempting to explain the use of circumstantial evidence to prove intent. The comment planted a seed in the jurors' minds that led them to expect Jennings to testify. Since he did not, the prejudice is obvious.

POINT VII

A letter allegedly written by the Appellant was introduced into evidence over objection. The copy of the letter was introduced without sufficient explanation of the absence of the original. Additionally, the state failed to properly authenticate the letter as being written by Jennings.

POINT VIII

Appellant asked for a modification of the standard jury instruction which stated that feelings of prejudice, bias or sympathy are not legally reasonable doubts. This instruction is skewed in favor of the state and should have been modified. It is obvious that feelings of prejudice, bias or sympathy are neither legally reasonable doubts nor are they legal means of conviction.

POINT IX

After the first morning of testimony, Juror Milligan came forward and informed the judge that she had decided that she could not vote to recommend a death sentence under any circumstance. The state considered moving for mistrial at that time but eventually acquiesced in her continued service. At the penalty phase, the trial court excused the juror over defense objection. Appellant submits that the state acquiesced in Juror Milligan's service for the entire trial. Especially since the advisory recommendation is the result of a majority vote and is advisory in nature, Juror Milligan should have been allowed to sit at the penaly phase. Furthermore, the state was at fault for failing to discover her "disqualifications" during voir dire.

POINT X

During closing argument at the penalty phase, the prosecutor made an improper golden rule argument. Appellant's timely and specific objection was overruled and the prosecutor continued by arguing a non-enumerated aggravating circumstance.

This tainted the jury recommendation of death. Appellant expresses his concern with this Court's recent trend of suggesting disciplinary by the Florida Bar for lawyers who engage in improper argument. Appellant submits that this procedure is obviously not working with continued and refuted misconduct. Appellant also submits that such a procedure is little consolation to one who is sentenced to death as a result of such improper argument.

POINT XI

During the intervening days between the guilty verdict and the commencement of the penalty phase, three jurors admitted that they had become privy to extrajudicial facts which indicated that Appellant had been tried for this offense on two previous occasions. The jurors believed that this knowledge would not interfere with their ability to deliberate as to a sentence recommendation. During deliberations, the jury filed a written inquiry as to reasons for the two retrials. Appellant moved for a mistrial based upon the obvious inability of the jury to follow the court's instructions. Appellant also pointed out that the jury was obviously considering improper matters in their deliberations.

POINT XII

Appellant contends that fundamental error occurred when an alternate retired with the rest of the jury for deliberations at the penalty phase. Berry v. State, 298 So.2d 491 (Fla. 4th DCA 1974).

POINT XIII

Numerous special jury instructions were requested by Appellant at the penalty phase. All of the instructions had a basis in the cited case law, and several were not adequately covered by the standard instructions. These instructions would have aided the jury in their deliberations and should have been given.

POINT XIV

The testimony in evidence was overwhelming that the Appellant fit the criteria set forth in the Mentally Disordered Sex Offender statute. The trial court abused its discretion in failing to certify the Appellant as an MDSO. As such, he was denied treatment which could have proved invaluable as mitigation.

POINT XV

The death sentence imposed by the trial court was improper for a variety of reasons. The trial court parroted the findings of fact made by Judge Johnson in the previous trial of this cause. The state failed to meet its burden of proof in establishing that the murder was committed in a heinous, atrocious, or cruel manner and also failed to prove that the murder was cold, calculated, and premeditated. The trial court ignored a plethora of valid mitigating circumstances which were established by the evidence. The death sentence in the instant case is disproportionate to life sentences imposed in other cases that this Court has reviewed.

POINT XVI

This point urges reconsideration of constitutional attacks on Florida's death sentence and procedure. These issues have already been rejected by this Court and are raised here for preservation purposes.

POINT I

THE TRIAL COURT ERRED IN ADMITTING, OVER DEFENSE COUNSEL'S OBJECTIONS, EVIDENCE WHICH WAS OBTAINED AS A DIRECT RESULT OF THE DEFENDANT'S INVOLUNTARY CONFESSION, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

Prior to trial, Appellant filed a motion to suppress evidence, including any and all photographs of the accused taken subsequent to his arrest on May 11, 1979. Appellant alleged, among other grounds, that the evidence was illegally obtained in contravention of Jennings' right to counsel since the items were fruits of the illegally obtained statement. (R3238-3242) A hearing on this motion was held prior to trial. (R1896-1996) The trial court granted the motion to suppress Appellant's confession to law enforcement officials as a direct result of this Court's ruling in Jennings v. State, 473 So.2d 204 (Fla. 1985). The trial court also ruled that the sweatshirt and the diagrams that Appellant drew were the result of the confession and would also be suppressed. However, the trial court ruled that Appellant's fingerprints, hair samples, and photographs of his penis would not be suppressed. The rationale for this ruling was stated as being that these items could be discovered at any time without the statement and their seizure did not violate Appellant's rights. (R1991,3289-3290) Photographs of Appellant's penis (which evidenced a small abrasion) were introduced at trial over a timely and specific objection. (R551-552)

This Court has already ruled that Jennings' confession was unconstitutionally obtained. Appellant contends that the photographs were clearly obtained as a direct result of the tainted confession and must be suppressed as a "fruit of the poisonous tree." Wong Sun v. United States, 371 U.S. 471 (1963).

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN IMPROPERLY RESTRICTING APPELLANT'S PRESENTATION OF EVIDENCE WHERE SUCH EVIDENCE WAS CRUCIAL TO HIS DEFENSE THEREBY RESULTING IN A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS.

Perhaps the most damaging evidence presented by the State was the testimony of Clarence Muszynski, a four-time convicted felon, and former cellmate of Jennings. (R623-684) Muszynski testified in great detail concerning a statement purportedly made to him by Jennings while they were both in the Brevard County Jail. This included a physical demonstration of the manner in which the Appellant picked up Kunash by her legs and swung her over his head in order to bash her head into the pavement several times. (R634-639) In light of his damaging testimony, the credibility of Clarence Muszynski was absolutely critical. In impeaching Muszynski, defense counsel did as competent a job as he was allowed by the trial court. (R647-678,681-684) The impeachment included two prior inconsistent statements concerning the incident as well as discrepancies between the account related by Muszynski and the physical evidence at the scene of the crime. (R647-649) In addition to other methods of discrediting Muszynski's testimony, Appellant cross-examined the witness about two motions for post-conviction relief that Muszynski had filed in 1981 and 1982. (R657-667) Muszynski admitted that he had alleged complete and total insanity at the time of each offense and each trial. Muszynski admitted that

this insanity claim was made under oath and was signed before a notary public. Muszynski did deny knowing that he was swearing to the truth of the contents of the motion by his signature. He also alleged in one motion that he was confined in a Houston mental ward less than one month prior to his 1979 trial. He claimed that he hallucinated and was treated with Thorazine while hospitalized. On the stand at Jennings' trial, Muszynski admitted that the allegations in the motions were completely false. (R657-667) Appellant sought to introduce the post-conviction motions into evidence, but the trial court refused to allow such a procedure during State's case-in-chief. (R678) At the close of Appellant's case-in-chief, defense counsel once again proffered the written motions for introduction into evidence. The State objected contending that the motions contained much irrelevant material and were not proper impeachment. After hearing brief argument, the trial court refused to allow the evidence to be introduced. (R1122-1128) At the hearing on the motion for new trial, Appellant contended that the evidence should have been admissible to prove that Clarence Muszynski was actually insane. (R1728-1729) Appellant contends that the trial court's refusal to allow the evidence to be introduced, violated his constitutional rights under the Fifth, Sixth and Fourteenth Amendments.

The right of an accused to present evidence to establish a defense is a fundamental element of due process of law. Washington v. Texas, 388 U.S. 14 (1967). Indeed, this right is a cornerstone of our adversary system of criminal justice. Both the accused and the prosecution present a version of facts to the

jury so that it may be the final arbiter of truth. Id. ; United States v. Nixon, 418 U.S. 683, 709 (1974). Subject only to the rules of discovery an accused has an absolute right to present evidence relevant to his defense. Campos v. State, 366 So.2d 782 (Fla. 3d DCA 1979); Roberts v. State, 370 So.2d 800 (Fla. 2d DCA 1979).

Although not squarely on point, a revealing case that relates to this issue is Robinson v. State, 438 So.2d 8 (Fla. 5th DCA 1983). Robinson was convicted of second-degree murder following a jury trial at which the very same Clarence Muszynski testified for the state. In Robinson, Muszynski portrayed a similar role to the one he played in Jennings' trial. Robinson's defense counsel sought to cross-examine Muszynski regarding allegations he made in a pending motion for post-conviction relief to the effect that he was totally incompetent at the time he committed the crime he was convicted of, at the time of his trial, and at the time his motion for post-conviction was filed in July, 1981. The purpose of the questioning was to attack Muszynski's credibility. The District Court of Appeal, Fifth District, held that it was error to preclude such questioning since Muszynski had claimed in a motion for post-conviction relief, filed just a few months before the time of his testimony, that he "was and still is totally incompetent." Id. at 10. This apparent contradiction would have been relevant as to Muszynski's truthfulness. Appellant contends that Robinson, supra, further illustrates Muszynski's lack of credibility as well as his proclivity for becoming a State witness willing to testify about "jailhouse confessions."

In State v. Smith, 377 S.W.2d 241 (Mo.1964) the defendant was on trial for throwing acid in the victim's face. The defendant had earlier told several people that he had committed this crime. Id. at 242-243. At trial he claimed his daughter had committed the crime. She took the stand to say that she had committed this offense. The Missouri Supreme Court held that it was reversible error not to allow the defendant to present evidence of previous sexual advances (by the victim) towards Smith's daughters. (The daughter had claimed such an advance on the day in question). The court held that this evidence was admissible to support the defendant's theory of the case, to explain his earlier false confession and to impeach a key prosecution witness.

In Commonwealth v. Graziano, 331 N.E.2d 808 (Mass. 1975) the Massachusetts Supreme Court dealt with a similar issue. The defendants were attempting to introduce evidence to contradict a key prosecution witness and to show that a third party had actually committed the crime. The court found reversible error in the failure to allow the defendants to bring out testimony that the alleged guilty party owned the gun, had ammunition for it, that he sold drugs, that the victim owed him money for drugs and that he acted suspiciously after the homicide. Id. at 811-812. The court held all of this evidence was admissible as either impeachment evidence or to show that a third party committed the crime. Id.

An analogous case in Florida is that of Tafero v. State, 406 So.2d 89 (Fla. 3d DCA 1981). There, the court held

that it would be error to exclude penalty phase evidence that a third person had confessed to a prior conviction considered as an aggravating circumstance. In fact, at the penalty phase a defendant may not be precluded from offering as a mitigating factor any aspect of his character and record. Perry v. State, 395 So.2d 170 (Fla. 1981).

To be relevant, and, therefore, admissible, evidence must prove or tend to prove a fact in issue. Coler v. State, 418 So.2d 238 (Fla. 1982). See also Stano v. State, 473 So.2d 1282 (Fla. 1985). It is clear that a trial court may not frustrate a defendant's legitimate right to present his defense by strict adherence to state evidentiary rules. Chambers v. Mississippi, 410 U.S. 284,302 (1973). No such rule prevails over the fundamental demand of due process of law in the fair administration of criminal justice. United States v. Nixon, supra, at 713.

Appellant contends that the trial court erred in refusing to admit the pertinent evidence below. In the instant case, the credibility of Clarence Muszynski was of paramount importance. Even though defense counsel successfully elicited much of the critical and impeaching evidence contained in the post-conviction motions, there is much to be said for the introduction of tangible evidence that the jury can take back to consider during deliberations. The parts which the State found objectionable could have been stricken and the pertinent portions would have remained. The Sixth Amendment right to present evidence is supreme, and any doubts must be resolved in favor of that fundamental right. The exclusion of the proffered testimony deprived Bryan Jennings of a fair trial.

POINT III

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL, THE TRIAL COURT ERRED IN OVERRULING TWO TIMELY AND SPECIFIC OBJECTIONS AND ALLOWING PREJUDICIAL AND IRRELEVANT TESTIMONY CONCERNING THE VICTIM.

The State presented the testimony of Patricia and Robert Kunash as their first two witnesses at the trial. Robert Kunash, the father of the victim, recounted the confusion and fear experienced when they discovered that Rebecca, their little six-year-old daughter, was missing from the home. Her absence was discovered at approximately 7:30 that morning. (R330) Her parents probably suspected that something was amiss due to the fact that one of Rebecca's bedroom windows was open and the window screen was on the ground outside. A trophy which customarily remained on the windowsill was next to the screen outside the home. (R340-341) In response to the State's question, Robert Kunash described how he frantically ran to Rebecca's school in his attempts to locate her. The State then asked if there was a particular reason why Mr. Kunash thought Rebecca might have gone to school early. (R341) Prior to Mr. Kunash's answer, Appellant objected at the bench on the grounds that the testimony was irrelevant, prejudicial under the circumstances, and speculation on the part of the witness. The trial court replied that the testimony could be highly relevant and overruled the objection. (R342) The following exchange then occurred:

Q. [By Mr. White]: Sir, could you

explain to us why you thought she might be at the school?

A. Becky was supposed to be the narrator of the first grade school play, because she learned how to read faster than anybody else, and she was really excited about it. I thought maybe there was some chance that, you know, she went there just, you know, because she told me all about the play and read me the whole story of it, and --

Q. When you went there, did you in fact find her?

A. No, sir, I didn't. (R341)

Not content with eliciting this highly prejudicial, inflammatory, and irrelevant testimony, the State later presented the testimony of Patricia Eyster, the principal of Audubon Elementary School where Rebecca Kunash had been enrolled. (R487-489) Ms. Eyster was presented pursuant to the requirement that a murder victim must be identified by someone other than a relative whenever possible. See Welty v. State, 402 So.2d 1159 (Fla. 1981). After she had fulfilled this purpose, the State elicited the fact that Ms. Eyster and the school janitor searched the school grounds the morning that Rebecca was reported missing. (R489-490) The State then asked Ms. Eyster, "[W]as there any particular activity going on in the school that day?" (R490) Prior to her answer, Appellant objected to the line of questioning as irrelevant and immaterial to the issue at hand, namely identification of the victim. Appellant contended that the sole purpose of the testimony concerning the school play would be to gain sympathy from the jury in an improper manner.

Appellant also objected to the testimony as cumulative to the testimony of Mr. Kunash on the same issue. The trial court overruled the objection and allowed the State to elicit the fact that Rebecca Kunash was involved in the annual May Day event at the school. Ms. Farmer, Rebecca's teacher, had organized a "little program" in which every first-grader was involved as part of the May Day festivities. (R491-492)

Appellant contends that the testimony regarding Rebecca Kunash's planned participation in the school play on the day of her murder was totally irrelevant, extremely prejudicial, and introduced solely for the purpose of inflaming the jury. Appellant concedes that all relevant evidence is admissible except as provided by law. §90.402, Fla. Stat. (1985). Relevant evidence is defined as evidence tending to prove or disprove a material fact. §90.401, Fla.Stat. (1985) (emphasis added). Section 90.403, Florida Statutes (1985) prohibits the introduction of even relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

Initially, Appellant points out that the evidence at issue is not relevant evidence. The fact that Rebecca's family and school officials may have searched for her at the school that morning might be termed relevant evidence. Appellant is of the opinion that a classification as relevant is probably stretching the point. Appellant fails to view that tangential, futile

search as being a material fact. Even if it could be considered relevant evidence, the sympathetic and inflammatory reason that her father thought she might be at the school cannot be called relevant under any circumstances. Even if it were relevant, certainly the accompanying prejudice would greatly outweigh any perceived relevance.

Welty v. State, 402 So.2d 1159 (Fla. 1981) pointed out that, in a murder prosecution, the identification of a victim by a family member is not permissible, where non-related, credible witnesses are available. The basis of this rule is to assure the defendant as dispassionate a trial as possible and to prevent interjection of matters not germane to the issue of guilt. Id. The major function of the corresponding federal rule has been to exclude matters of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial value. United States v. King, 713 F.2d 627,631 (11th Cir. 1983). Indeed, "unfair prejudice" within the context of the rule means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. Westley v. State, 416 So.2d 18, 19 (Fla. 1st DCA 1982).

Appellant submits that the crime for which he was charged was prejudicial enough by its very nature. To allow irrelevant and inflammatory evidence such as was permitted in the case at bar resulted in a deprivation of Appellant's constitutional right to a fair trial. This Court must bear in mind that the jury perceived Appellant's offense as being that of

a kidnap and brutal rape and murder of a six-year-old girl. Appellant submits that even this Court has expressed problems with the heinous nature of this particular offense. See Jennings v. State, 453 So.2d 1109 (Fla. 1984). This Court reviews captial cases on a regular basis, unlike the average juror. Appellant asks this Court to consider the revulsion of a jury in light of this Court's own problems with the instant set of facts. The interjection of the irrelevant testimony about little Rebecca Kunash's excitement about her participation as the narrator of the school play was an outright appeal to the jury's emotions. The fact that her excitement and promise as a human being was brutally snuffed out should not have been a basis for the jury's guilty verdict. The fact that the trial court allowed testimony in this regard, once from Rebecca's father and once from her principal, requires that the Appellant be given a new trial free from unfair prejudice.

POINT IV

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS, THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS AND ALLOWING INTO EVIDENCE ITEMS THAT WERE SEIZED AS A RESULT OF A WARRANTLESS ARREST.

Appellant filed a motion to suppress certain evidence, including Appellant's shoes seized from his home and fingerprint cards made at the time of his arrest. (R3238-3242) Appellant contended, inter alia, that the evidence was obtained as a direct result of his illegal, warrantless arrest for an alleged Orange County traffic offense. A hearing on the motion to suppress was held prior to trial. (R1896-1996) The trial court rendered an order denying the motion to suppress and found the following:

> (1) Testimony revealed that Jennings was arrested on an Orange County warrant for failure to appear on a driving without a license charge.
>
> (2) At the time of the arrest, the arresting officers did not have a copy of the warrant in hand, but instead relied on a computer check printout.
>
> (3) The issue... appears to be... whether or not, in fact, there was an outstanding warrant authorizing the arrest....
>
> (4) The burden of proving that the outstanding warrant existed is on the State.
>
> (5) ...[T]he State introduced the testimony of the officer who requested the computer check...verifying that a "hit" had come back prior to the arrest and then introduced a certified copy of the Orange County docket sheet

> reflecting the outstanding warrant during the appropriate period of time. An actual copy of the warrant was not found. (R3289-3290)

The trial court found that the docket sheet reflected the existence of an outstanding warrant and was sufficient proof to justify the arrest of Jennings. The court specifically found that the State would have discovered the items taken from the home of Jennings' aunt even had the initial conference between Agent Porter and Jennings not taken place. (R3290)

The testimony at the suppression hearing indicated that numerous law enforcement personnel were searching and canvassing the area surrounding the Kunash home shortly after the girl's disappearance was discovered. Jennings and a friend, Raymond Facompre, were seen in the general vicinity that morning pushing a motorcycle. Agent Wayne Porter of the Brevard County Sheriff's Department directed Deputy Craig Cain to conduct a routine field interrogation of these two individuals. During subsequent discussion among law enforcement personnel, Jennings' name was mentioned as one of the individuals who had been seen in the general vicinity that morning during the search for the girl. One officer recognized Jennings' name as an individual who had had a prior brush with the law. Jennings' name was then run through the NCIC computer which resulted in a "hit" based upon an alleged failure to appear on a no valid driver's license charge in Orange County. Based upon this computer information, an officer was dispatched to Appellant's home to arrest him on the Orange County case. Appellant was eventually arrested for the

Orange County offense at Raymond Facompre's home. Deputy James Bolick, the arresting officer, admitted that he had never seen a warrant or a teletype. The Orange County capias was reportedly returned unexecuted on February 13, 1980, eight months after Jennings' arrest. In fact, no warrant was ever found in spite of dilligent efforts by the state. (R1899-1900) The case number on the docket sheet from Orange County did match the warrant number written on the arrest card by Brevard County deputies. The state never could produce a warrant for Jennings' arrest. A copy of the teletype was never produced by the state. (R897-996)

Homicide agent Wayne Porter interviewed Jennings at the Rockledge precinct following his arrest. Without advising Jennings of his constitutional rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), Porter questioned Jennings, found out where he was living and the fact that he had been in a certain bar the prior evening. Jennings told Porter that he had become intoxicated and, as a result, gotten his clothes wet from a quick, drunken swim in the ocean. (R1925-1931) After the interview, Agents Porter and Hudepohl went to Appellant's home where he was staying with his mother, Margaret Dana, his aunt, Catherine Music, and his half-sister. Catherine Music, the owner of the home, signed a consent to search form. Both Dana and Music were extremely cooperative with the officers. When asked about the whereabouts of Jennings' clothes that he had worn the night before, Mrs. Dana replied that they had been wet and were currently located in the dryer. She went and retrieved

Jennings's shoes from the dryer at the agents' request. (R1931-1934)

Agent Porter knew that a plaster cast had been taken of one of the footprints found at the scene of the abduction. (R1932) Porter compared the plaster cast with Jennings' shoe that had been seized from his home and determined that, in his admittedly lay opinion, they were similar. (R1937) Approximately two hours later, Porter went to interview Jennings, who had been transferred to the Brevard County Jail in Titusville. (R1937-1938) Prior to that interview, Agent Plowden told Porter that latent palm and fingerprints from the bedroom window matched prints obtained from Jennings when he was booked following his arrest on the Orange County offense. (R1938) The testimony regarding the comparison of the fingerprints as well as Jennings' shoes were introduced at trial over objection. (R729-732,864-865,881-882,947-956,978-981)

The requirement of the Fourth Amendment that no warrant shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the person or things to be seized, applies to arrest as well as search warrants. Diordenello v. United States, 357 U.S. 480 (1958). Appellant submits that the state failed to meet its burden of proof in establishing that his arrest was pursuant to a valid warrant.

Although no cases appear to be directly on point, a helpful case is Albo v. State, 477 So.2d 1071 (Fla. 3d DCA 1985).

Albo was stopped for a traffic infraction for which he would have otherwise been merely given a ticket. When a routine computer check effected through the police radio indicated that Albo's license was under suspension for failing to pay a traffic fine, he was arrested for driving with a suspended license. Incident to the arrest, a concealed weapon was seized from under the automobile's armrest. A motion to suppress was based on the admitted fact that the information provided by the computer was incorrect. Albo had paid the fine and his license had been reinstated. The hearing revealed that police computers had not been updated to reflect these facts for a period of several months before the stop. In the instant case, Agent Wayne Porter admitted that the information in the computer was sometimes incorrect. (R1975-1976)

The District Court of Appeal, Third District, held that the trial court erred in denying Albo's motion to suppress. The trial court based its ruling on the fact that the arresting officer had acted in "good faith". Albo, supra at 1072. The District Court held that suppression of the gun was required on the ground that the arrest was illegal and the "good faith" exception did not apply to the instant facts. The Court concluded that law enforcement authorities, considered collectively, had no objective cause to believe that Albo's license was suspended so as to justify his arrest. The police may not rely upon any incorrect or incomplete information when they are at fault in permitting the records to remain uncorrected. Id.

Appellant concedes that the information received by the police in the instant case was not demonstrated to be outdated or incorrect. However, Appellant contends that the police failed to meet their burden of proof in establishing that a valid warrant existed to justify his arrest. Since Jennings' arrest was unlawful, all that flowed therefrom was unlawfully gained, and any evidence developed as a result thereof is inadmissible. Wong Sun v. United States, 371 U.S. 471 (1963) and Walker v. State, 433 So.2d 644 (Fla. 2d DCA 1983).

Appellant also points out that the agents' seizure of his shoes was not justified under the law. While it is clear that the owner of the home gave her consent to search and Jennings' mother cooperated by handing Jennings' shoes over to police, Appellant submits that the very nature of the shoes demonstrate an expectation of privacy. Appellant submits that Margaret Dana had no authority to give Appellant's shoes to law enforcement officials. Appellant analogizes the personal nature of his shoes with a situation involving an exclusive zone of privacy within premises shared by two people. In such a situation, it is necessary to consider the consenting party's authority over the particular area searched or, Appellant submits, the particular personal item seized as in the instant case. State v. Evans, 45 Haw. 622, 372 P.2d 365 (1962) held that a wife could not consent to a search of personal items found in a cuff link case located in her husband's dresser drawer. Appellant submits that Ms. Dana's delivery of his shoes to police

was similarly unauthorized. As such, the seizure of the shoes constituted a breach of the Fourth Amendment to the United States Constitution. The evidence should have been suppressed on that basis.

POINT V

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE PHOTOGRAPHS OF THE SIX YEAR OLD VICTIM WHICH HAD THE EFFECT OF INFLAMING THE JURY THEREBY DENYING APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Several photographs of the victim were introduced at trial over defense objection. (R462-465,497-516) One of the photographs depicted the girl lying on the river bank after being pulled from the river. The photograph clearly depicted a large blob of foam which had drained from the victim's nostrils. (R501) This photograph was purportedly introduced for identification purposes. (R487-489) Two other photographs were offered to illustrate the pathologist's testimony regarding the trauma to the victim's vagina. (R506-516) One other photograph showing injury to the girl's back was introduced over objection. (R926-930) This photograph was taken at the hospital, the scene of the autopsy.

The initial test for the admissibility of photographic evidence is one of relevance. Straight v. State, 397 So.2d 903 (Fla. 1981); Bauldree v. State, 284 So.2d 196 (Fla. 1973); Young v. State, 234 So.2d 341 (Fla. 1970). However, even "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice." §90.403, Fla.Stat. (1985). Thus, even though technically relevant, before photographs can be admitted into evidence, "the trial judge in the first instance and this Court on appeal must determine whether the gruesomeness of the portrayal is so inflammatory as

to create an undue prejudice in the minds of the jury." Leach v. State, 132 So.2d 329, 332 (Fla. 1961).

Here the probative value of the photographs was slight. The picture offered for "identification" purposes was not a scene that the witness had even viewed. Furthermore, it is somewhat surprising that the witness could be sure of the identification, since the girl's face is so obscured by foam oozing from her nostrils. (R487-489,497-503)

Likewise, the damage to the victim's vagina was well documented through the pathologist's testimony. The pictures fail to illustrate the facts as well as the testimony does. In fact, Appellant specifically objected to one picture of the victim with the vaginal lips spread open by the pathologist's fingers. (R511-516) Defense counsel pointed out that the picture of the opened vagina resulted in a distortion of the wounds by making them appear even more egregious than they actually were. The other photograph could be classified as an autopsy photograph. The trial court still allowed the photographs to be introduced into evidence.

The photographs added nothing and were "so shocking in nature", see, Alford v. State, 307 So.2d 433, 440 (Fla. 1975), that admission into evidence was erroneous since the probative value was outweighed by the prejudicial effect. Even the trial court became somewhat alarmed about the State's zealousness and ruled one picture inadmissible as being cumulative. (R509-516) Appellant is entitled to a new trial not tainted by this prejudicial, inflammatory evidence. Amend. V, VI and XIV, U.S. Const.; Art. I, Sec. 9 and 16, Fla. Const.

POINT VI

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, THE TRIAL COURT ERRED IN DENYING THE MOTION FOR MISTRIAL FOLLOWING A COMMENT BY THE PROSECUTOR DURING VOIR DIRE THAT REFERRED TO THE FAILURE OF THE APPELLANT TO TESTIFY.

During voir dire, the prosecutor was questioning the prospective jurors about their ability to use circumstantial evidence to infer intent. (R63-64) The prosecutor included in his question:

> Intent is a matter of a person's mind and thoughts, and there are ways to perhaps determine that. One might be by that person's explanation to you in person, what his thoughts were -- (R63-64)

At that point, defense counsel moved for a mistrial contending that the prosecutor's remarks were an indirect comment on Jennings' right to remain silent. Defense counsel pointed out that, ". . .there is no way I can get around that without putting my client on the stand, . . ." (R64) The court was of the opinion that the damage could be cured by the general instructions and the prosecutor promised to stay away from any further such comment. (R64)

Appellant contends that the comment was such that it placed a seed in the jurors' minds which led them to expect Jennings to testify at trial. Since he failed to testify at either stage of the proceedings, the prejudice is obvious. A new

trial is warranted. See United States v. Hasting, 461 U.S. 499 (1983); Amend. V, VI, and XIV, U.S. Const.

POINT VII

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS AND ALLOWING INTO EVIDENCE A LETTER PURPORTEDLY WRITTEN BY THE APPELLANT.

Lorraine Sylvain, an old high school classmate of Jennings, testified that she corresponded with him after his arrest. In 1982, she turned the incriminating letters over to Deputy Porter who made copies of them. Porter then returned the originals to her and she, "believed" that she destroyed them after that. Although she never saw Jennings actually write, she was of the opinion that the letters were in his handwriting since they were in response to letters that she wrote him. At trial, a copy of one of these letters was introduced into evidence over objection. Appellant objected that the document was not an original and that there was insufficient predicate that the witness was familiar with Jennings' handwriting. These objections were overruled and the letter was introduced. (R746-773) The letter became critical when the State handwriting expert used that particular letter as his primary basis for testifying that Jennings wrote other letters which contained extremely incriminating material. (R780-838)

Generally, an original writing is required in order to prove the contents thereof. §90.952, Fla.Stat. (1985). An original is not required if all originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith.

§90.954, Fla.Stat. (1985). A duplicate is admissible to the same extent as an original unless a genuine question is raised about the authenticity of the original or any other document or writing. §90.953, Fla.Stat. (1985). A duplicate may also be excluded if it is unfair, under the circumstance, to admit the duplicate in lieu of the original. Id.

Appellant submits that he was denied due process of law and a fair trial by the trial court's admission of the disputed copy. Initially, Appellant points out that the destruction of the original was not sufficiently documented. Lorraine Silvain was not even certain that she had destroyed the letters. (R772-773) Appellant also submits that the State failed to establish a sufficient predicate for Ms. Silvain's familiarity with Jennings' handwriting. (R750-764) A continuing objection by defense counsel was allowed by the trial court. (R761) The critical nature of the letter became apparent when the document examiner for the State admitted that his primary source of comparison was the letter to Lorraine Silvain. Without that particular letter, Special Agent Mathis would have been unable to formulate an opinion concerning the identification of the questioned documents except for one word on one of the questioned documents. (R819-820,836-838) Special Agent Mathis also admitted that an original is always preferable to a copy for purpose of comparison. (R821-822) The letter should not have been admitted over objection. Amend. V and XIV, U.S. Const.

POINT VIII

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO A FAIR TRIAL, THE TRIAL COURT ERRED IN FAILING TO MODIFY A STANDARD JURY INSTRUCTION WHICH WAS SKEWED IN FAVOR OF THE STATE.

The Florida Standard Jury Instructions contain the following rule for deliberation:

> Feelings of prejudice, bias or sympathy are not legally reasonable doubts and they should not be discussed by any of you in any way. Your verdict must be based on your views of the evidence, and on the law contained in these instructions. (emphasis added)

Fla.Std.Jury Instr. (Crim.) 2.05 (8). During the charge conference, Appellant requested a modification of this standard jury instruction with the omission of the words "are not legally reasonable doubts and they. . . ." Defense counsel contended below that the instruction was erroneous since it is obvious that feelings of prejudice, bias or sympathy are neither legally reasonable doubts nor are they legally reasonable means for conviction. Appellant contended that the objectionable portion impermissibly skewed the instruction against the defense, especially in a case such as the one at bar where the jury is obviously going to have sympathy for the victim and her family. (R1140) Although the trial court apparently agreed with defense counsel's assessment of the law and its application to the phrase at issue, the modification was denied following argument. (R1140-1143) The offending instruction was read in its entirety to the jury. (R1288)

The trial court appeared very reluctant to modify any language contained in a standard jury instruction, even though the court did acknowledge that such a modification was permissible. Appellant points out that standard jury instructions have been stricken and/or modified through appellate court decisions. See e.g. Yohn v. State, 476 So.2d 123 (Fla. 1985); Harich v. State, 437 So.2d 1082 (Fla. 1983); and Way v. State, 458 So.2d 881 (Fla. 5th DCA 1984). Appellant submits that the instruction is clearly erroneous on its face and skews the instructions in favor of the State. This is especially true in a case involving the kidnap, rape, and murder of a six-year-old girl. A new trial with proper jury instructions is necessary. Amend. V, VI, and XIV, U.S. Const.

POINT IX

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AT THE PENALTY PHASE, EXCUSING A JUROR AT THE STATE'S REQUEST, AND SEATING AN ALTERNATE JUROR OVER OBJECTION.

Jury selection in the instant case completely consumed the first day of trial, March 24, 1986. (R1-309) Following their selection, the jury was sworn and were read the preliminary instructions. (R303-309) The jury returned the next day, March 25, 1986, and heard the testimony of Patricia Kunash Merrill, Robert Kunash, Deputy J.C. Hall, and Deputy Dennis Croft prior to breaking for lunch that day. (R309-415) At some point in the lunch break, the trial court announced that Juror Milligan had indicated that she may not have accurately reflected her feelings on the death penalty during voir dire examination. (R416) The juror was brought into chambers where she was examined by the court and counsel. (R416-424) Juror Milligan did not believe that she could consider voting for a death recommendation regardless of the facts presented in the case. Juror Milligan made it absolutely clear that these feelings would not affect her ability to render an impartial verdict at the guilt phase. On the morning of March 27, 1986, the State, prompted by questioning from the court, withdrew any objection to Juror Milligan sitting in the guilt phase. The State announced its intention to request her removal from the jury prior to the penalty phase. (R872-874)

Defense counsel refused to stipulate to her removal at the penalty phase and requested that a hearing be held. Prior to the commencement of the penalty phase, the court granted the State's request, excused Juror Milligan from any further service, and seated an alternate over Appellant's objection. At that point, Appellant moved for a mistrial as to the penalty phase. (R1311-1319)

Section 913.13, Florida Statutes (1985) states:

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

Juror Milligan was clearly not disqualified under the above statute. She stated clearly that her problems with a recommendation of death would have no effect on her ability to deliberate fairly and impartially during the guilt phase.

Rule 3.310, Florida Rules of Criminal Procedure (1985), states:

> The State or defendant may challenge an individual prospective juror before the juror is sworn to try the cause; accept that the court may, for good cause, permit it to be made after the juror is sworn, but before any evidence is presented. (emphasis added)

Appellant recognizes that a trial court has broad discretion in removing a juror. Wiley v. State, 427 So.2d 283 (Fla. 1st DCA 1983). Appellant also recognizes that it has been held that removal of a juror upon learning that she had not been candid on voir dire as to the number of times she had been

arrested was not an abuse of discretion. State v. Tresvant, 359 So.2d 524 (Fla. 3d DCA 1978).

However, Appellant submits that a bifurcated capital proceeding is unique, even in this respect. Appellant can find no law which encompasses the situation that occurred below. This is due to the unique form of Florida's bifurcated system for capital trials. In a non-capital setting, Appellant recognizes that when a juror on voir dire conceals material information which could have resulted in excusal on peremptory challenge or for cause, a mistrial is indicated unless there is available an acceptable alternate juror to sit as replacement. State v. Tresvant, supra. However, it has also been held that allowing a juror who realized in the midst of trial that he was acquainted with the alleged rape victim to remain on the jury was not error. Porter v. State, 214 So.2d 73 (Fla. 2d DCA 1967). It is also true that once the jury retires to consider its verdict, an alternate juror is a stranger to the deliberations and will not be permitted in the jury room during the jury's consideration of the case. Berry v. State, 298 So.2d 491 (Fla. 4th DCA 1974).

In that regard, the removal of juror Milligan and the seating of an alternate for the penalty phase changes the entire composition of the jury. The new alternate had no part in the six and one half hours of deliberations at the guilt phase. As such, Appellant contends that it was error to remove Juror Milligan at the point, when she was not legally disqualified to sit at the penalty phase. While she did express definite

reservations about being able to recommend a death sentence, this Court must remember that the jury's recommendation is by majority vote only and, additionally, is merely advisory in nature. Appellant submits that the State had a clear and early opportunity to move for mistrial once Juror Milligan's doubts surfaced. They chose not to do so. In light of this acquiescence, the State was estopped from requesting her removal after she had conscienciously and successfully (at least from the State's perspective) deliberated at the guilt phase. In this regard, the State failed to comply with Florida Rule of Criminal Procedure 3.310 in an egregious manner.

Not only did the State fail to discover Juror Milligan's "disqualification" prior to the swearing of the jury, the State compounded the problem by acquiescing in Juror Milligan's jury service. Schofield v. Carnival Cruise Lines, Inc., 461 So.2d 152 (Fla. 3d DCA 1984), held that there must be a material concealment of some fact by a juror upon his voir dire examination in order to require a new trial. Furthermore, the failure to discover this concealment must not be due to the want of diligence of the complaining party. Hence, Appellant submits that the lack of diligence on the part of the State during voir dire should result in a bar to the offending juror's removal.

Additionally, Appellant contends that the composition of a jury is, in a sense, "magical". This characteristic springs from the unfettered exercise of peremptory challenges which a party may exercise at any time until the jury is sworn. As Judge

Hurley stated so eloquently in his special concurrence:

> The right to the unfettered exercise of peremptory challenges - which, I believe, includes the right to view the panel as a whole before the jury is sworn - is an essential component of the right to trial by jury, a right that "is fundamental to the American scheme of justice." Duncan v. Louisiana, 391 U.S. 145 (1968). (emphasis added)

Grant v. State, 429 So.2d 758, 760-761 (Fla. 4th DCA 1983). From this rationale comes the line of cases which condemns a trial judge's procedure which restricts a lawyers right to backstrike jurors during voir dire. See King v. State, 461 So.2d 1370 (Fla. 4th DCA 1985).

A juror's incompetency to serve must be of such a character that it would defeat a fair and impartial trial before a trial court can interfere after that juror has been sworn. State v. Madoil, 12 Fla. 151 (1868). The death-qualification process of a jury is a complex one which is filled with vagaries and miscalculations. The United States Supreme Court has recognized that most juror responses to death-qualifications will be ambiguous, in large part because "veniremen may not know how they will react when faced with imposing the death sentence. . ." Wainwright v. Witt, ___ U.S. ___ 83 L.Ed.2d 841, 852 (1985). In allowing more ambiguity in a prospective juror's answer concerning his ability to vote for imposition of the death penalty, the Court pointed out:

> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these

> veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings.

Id. In light of the Supreme Court's recognition of the almost inherent inability to clarify a venireman's true feelings on the issue due to the venireman's inability to do so in a hypothetical situation, Appellant submits that the trial court erred in reversing its initial finding as well as both counsel's belief that Juror Milligan was qualified to serve. Her subsequent excusal over Appellant's objection was error and resulted in an unfair sentencing phase. Amend. V, VI, and XIV U.S. Const.

POINT X

APPELLANT WAS DENIED DUE PROCESS OF LAW BY THE TRIAL COURT'S ACTION IN OVERRULING A TIMELY AND SPECIFIC OBJECTION AND PERMITTING THE PROSECUTOR TO ENGAGE IN IMPROPER ARGUMENT AT THE PENALTY PHASE THEREBY PREJUDICING APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The transcript reveals that within three pages of the beginning of final summation at the penalty phase, the prosecutor engaged in improper argument. It began with an explanation of aggravating circumstances and their role in capital cases:

> MR. HOLMES (prosecutor): . . .These are aggravating circumstances. Because each one of those crimes are there to protect the things in society that we hold the most dear. What is more important than the security of a person's home, where parents can raise their children and have a safe place for them to sleep at night? What do we hold more dear? But yet in this case, that right, the right of the Kunashes to have this protection, the right of the child to be left alone in her home was violated by the act of the defendant.
>
> Does that aggravate? Is that an aggravating circumstance? Does that make the killing a more serious killing than under other circumstances, without there being a burglary?
>
> Let's take this a step farther. The kidnapping, again, what do we hold more dear than our freedom? Not to be confined, taken places where we don't want to go when a person has no lawful authority to do that. Here again, the defendant's acts violated these rights.
>
> What else? Sexual battery. Each of us, man and woman has the right not to be sexually abused or sexually violated without their consent.
>
> MR. HOWARD (defense counsel): Your Honor, I must raise an objection. I

> think Mr. Holmes is coming perilously close to the Golden Rule argument, in that statement.
>
> THE COURT: I think it's a proper argument. Overrule the objection.
>
> MR. HOWARD: Very well, Your Honor.
>
> MR. HOLMES: And this is a right that society recognizes and protects. And did the defendant violate that right? Absolutely. And not only that, who did he violate that right with? A six year old child. And who in society, who does society try to protect more than a child? Are these aggravating factors? Are these strong? Is this a strong aggravating factor? Because, see, you only have to have to meet this aggravating factor. You only have to have the crime committed in the course of one felony. One felony. But here, clearly you have it committed in the course of three. (R1657-1659) (emphasis added)

Appellant contends that the prosecutor's remarks were improper, inflammatory, and calculated to prejudice the jury. Their cumulative effect was a deprivation of Appellant's right to a fair trial at the penalty phase.

The entire tenor of the prosecutor's argument prior to the objection focused on an impermissible "Golden Rule" argument. The prosecutor told the jury that Jennings' crimes violated laws which were there "to protect the things in society that we hold the most dear." The prosecutor went on to ask the jurors what was more important than the security of our homes where we can raise our children and have a safe place for them to sleep at night. (R1658) The prosecutor went on to condemn the crime of kidnapping by reminding the jurors that "we" hold nothing more

dear than our freedom. As to sexual battery, the prosecutor pointed out that, "Each of us, man and woman have the right not to be sexually abused. . ." (R1658) It was at this point that defense counsel objected based upon the allegation that the prosecutor was engaging in impermissible "Golden Rule" argument. The court overruled the objection. Once he was given full reign as a result of the court's ruling, the prosecutor continued his improper argument by emphasizing the fact that the Appellant had violated these sacred rights that society recognizes and protects with a six-year-old-child. The prosecutor then argued that the age of the victim, in and of itself, was an aggravating circumstance. "And who in society, who does society try to protect more than a child?" (R1659) This constitutes clearly impermissible argument of non-statutory aggravating factors. The prosecutor was allowed to make this improper argument with impunity once Appellant's objection was overruled.

Although a jury's sentencing recommendation is only advisory, it is an integral part of the death sentencing process and cannot properly be ignored, and prosecutorial overkill will mandate a retrial on the sentence. Teffeteller v. State, 439 So.2d 840 (Fla. 1983). Teffeteller, supra, also involved improper argument on a non-statutory aggravating circumstance, i.e. the possibility that he would be paroled and would kill again. This Court is well aware that consideration of an argument about a non-enumerated aggravating circumstance results in reversible error. See Riley v. State, 366 So.2d 19 (Fla. 1978)

It is a well-settled rule that a prosecutor must refrain from making arguments that are inflammatory and abusive. Collins v. State, 180 So.2d 340,343 (Fla. 1965). Once it is established that a prosecutor's remark is offensive this Court in Pait v. State, 112 So.2d 380, 385 (Fla. 1959) emphasized that "the only safe rule appears to be that unless this Court can determine from the record that the conduct or improper remarks of the prosecutor did not prejudice the accused, the judgment must be reversed." Such an inflammatory comment is violative of an accused's fundamental right to a fair trial free of argument condemned. Pait, supra.

The tenor of the prosecutor's argument is an obvious appeal to the emotions and fears of the jurors. "These considerations are outside the scope of the jury's deliberation and their injection violates the prosecutor's duty to seek justice, not merely 'win' a death recommendation. Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985). In that opinion, this Court expressed deep disturbance by the continuing violations of prosecutorial duty, propriety and restraint. Indeed, in Jennings' previous trial, this Court determined that certain remarks made by the prosecutor during final summation were improper. Jennings v. State, 453 So.2d 1109,1113-1114 (Fla. 1984). This Court ultimately determined that the remark was not so prejudicial that a mistrial was required. A similar conclusion was reached in Bertolotti, supra. But see Teffeteller v. State, 439 So.2d 840 (Fla. 1983).

Appellant finds this latest trend reflected most clearly in Bertolotti, supra, to be disturbing. This Court concluded that individual professional misconduct should be punished at the attorney's expense rather than the citizens' expense. This would be accomplished through professional sanction. Id. at 133. Appellant is extremely concerned that such misconduct results in punishment of the individual who is sentenced to death as a result of a tainted jury recommendation extracted, at least in part, by illicit means. Appellant urges this Court to reconsider the Bertolotti decision, and not hastily conclude that the instant remarks did not sufficiently taint the validity of the jury's recommendation. The fact that a prosecutor has been disiplined by the Florida Bar for improper argument is little consolation to one sentenced to death, at least, in part as a result of that offensive argument.

By engaging in an improper "Golden Rule" argument and by unethically arguing a non-enumerated aggravating circumstance, the prosecutor sought to prejudice Appellant's right to a fair trial. Since the trial court allowed this to occur by overruling Appellant's timely and specific objection, the State's efforts were successful. The resulting death sentence is constitutionally infirm. Art. I, §§ 9 and 16, Fla. Const.; Amends. V, VI, VIII, and XIV, U.S. Const.

POINT XI

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE TRIAL COURT ERRED IN DENYING THE MOTION FOR MISTRIAL WHEN IT BECAME CLEAR THAT THE JURY WAS CONSIDERING IMPROPER MATTERS DURING DELIBERATIONS AT THE PENALTY PHASE.

At defense counsel's request, the penalty phase was scheduled to commence one week after the conclusion of the guilt phase. When the jurors returned for the penalty phase, the trial court conducted an individual inquiry of each juror regarding their exposure to information they may have obtained outside the courtroom concerning the case. (R1322-1336) Three jurors admitted learning that this cause had been tried previously on at least one occasion. Juror Chamberlain stated that she had learned this fact as a result of a comment by a co-worker who stated his belief that it had been a waste of time to try Jennings once again. Under questioning, Juror Chamberlain stated that she did not think that she felt the same way. Juror Daugherty's daughter had made a comment which revealed the prior trials. Juror Borovich heard similar information from a neighbor. Jurors Chamberlain and Borovich stated that they had suspected that a previous trial had been held due to some of the evidence. Of course, all three jurors responded that the ex parte information would have no effect on their ability to deliberate as to the appropriate sentence. (R1322-1336) Defense

counsel did object to any further service by Juror Daugherty contending that her exposure to extrajudicial matters was more extensive than the other two jurors. This objection was overruled. (R1327-1330,1336)

The information regarding the extraneous information received by these three jurors became critical after they retired to deliberate as to the recommendation concerning the death sentence. At some point during their two hours and forty minutes of deliberations, the jury sent a written question to the court asking, "Are we permitted to know the basis of the first retrial and this retrial, if so, what are they?" The judge answered the question, "The answer to this question, should not be considered by you in your deliberations, and therefore the question will not be answered." (R1704) At this point, defense counsel requested a mistrial based upon the obvious fact that some of the jurors "have been talking about this despite the Court's admonition not to." (R1705) The trial court denied the mistrial and expressed the hope that the jury would follow his instruction. (R1705) The jury later returned with an eleven to one recommendation to impose a sentence of death. (R1706)

Appellant contends that he was denied his constitutional rights to due process of law and to a fair trial where the jury obviously considered irrelevant and prejudicial information that was gleaned from out-of-court statements by various relatives, co-workers and neighbors. The trial court's denial of the motion for mistrial at the penalty phase violated Appellant's

constitutional rights to due process of law and to a fair trial. Amed. V, VI, and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const. The resulting death sentence is unconstitutional. Amend. VIII and XIV, U.S. Const.

Appellant contends that the jury refused to follow the initial instructions of the trial court and considered improper factors during its deliberation as to the sentence. It is just as unlikely that the jury followed the reinstruction by the trial court contained in his answer to their question. Since it is clearly evident that the jury considered improper factors during deliberations, a new penalty phase is warranted.

This Court stated in Russ v. State, 95 So.2d 594 (Fla. 1957), that:

> It is improper for jurors to receive any information or evidence concerning the case before them, except in open court and in the manner prescribed by law. [citations omitted]
>
> Arguments of jurors should not be based on assertion of facts not in evidence before them. Evidence to prove guilt may not be supplied by what a juror knows or believes independent of the evidence properly received in the course of the trial. The jury should confine their consideration to the facts and evidence as weighed and interpreted in the light of common knowledge. They must not act on the special and independent knowledge of any of their members.
>
> Where a juror on deliberation relates to the other jurors material facts claimed to be within his personal knowledge, but which are not adduced in evidence, and which statements are received by the other members of the jury and considered in reaching their verdict it is misconduct which may vitiate the verdict, if resulting prejudice is shown. [citations

omitted](emphasis added)

Id. at 600. This Court went on to hold that the juror misconduct in that case was of such character as to raise the presumption of prejudice.

Russ, supra, is an interesting case upon which Appellant relies since the jury initially voted eight to four for a finding of guilty of murder in the first-degree with a recommendation of mercy. It was then that a member of the minority stated that he could never accept such a verdict because he had personal knowledge that the Appellant had severely beaten and threatened to kill the deceased victim on numerous occasions. After relating further details of these facts which had not been heard in evidence on the trial, the jury returned its verdict of guilty of murder in the first-degree without a recommendation of mercy. This resulted in a conviction and sentence of death. Appellant submits that the similarities with the instant case are obvious. In spite of the trial court's explicit instructions, the jury considered and talked about Appellant's first two trials and wondered aloud about the reasons for the two retrials. This information was clearly the product of the three jurors who had obtained this irrelevant and prejudicial information through extrajudicial conversations between the time of the verdict and the commencement of the penalty phase.

Consideration by a jury of matters not in evidence requires a new trial. Nelson v. State, 362 So.2d 1017 (Fla. 3d DCA 1978). Some case law on this issue does exist although it is

scant. The scarcity of appellate cases on the issue is probably a result of the failure of these types of situations to surface outside the confines of the jury room. In Nelson, supra, the court ordered a new trial where the jury drew adverse inferences from the absence of an explanation of certain evidence. With the resulting eleven to one recommendation for a sentence of death, it is clear that the jury also drew adverse inferences in the instant case from the fact that they were relitigating Appellant's guilt and sentence for the third time.

Where it appears that the jury may have considered improper matters during the deliberative process, new trials have been mandated. See State ex. rel. Prior v. Smith, 239 So.2d 85 (Fla. 1st DCA 1970). In reversing for new trial, Nelson, supra, relied upon Russ v. State, 95 So.2d 594 (Fla. 1957). See also Flowers v. State, 152 Fla. 649, 12 So.2d 772 (1943).

In this case, it is apparent on the face of the record that the jury did consider matters not properly before them. Appellant's counsel moved for a mistrial at the penalty phase due to the apparent inability of the jury to follow the instructions of law concerning the deliberations as well as their consideration of improper matters. In spite of their demonstrative inability to follow instructions, the trial court concluded that the jury would follow instructions if instructed yet again. The jury's misconduct resulted in a denial of due process and a fair trial guaranteed Appellant by the United States Constitution and the Constitution of the State of Florida. This Honorable Court should vacate the sentence of death and remand for a new penalty phase.

POINT XII

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL, THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN FAILING TO TIMELY DISCHARGE AN ALTERNATE JUROR AND IN ALLOWING THAT JUROR TO RETIRE WITH THE REST OF THE JURY AT THE PENALTY PHASE.

Following jury instructions at the penalty phase, the jury retired for consideration of its advisory verdict. After the jury retired, the prosecutor pointed out that an alternate juror had retired in addition to the regular jury. The trial court expressed its thanks to the prosecutor and the alternate juror was retrieved from the jury room and he was discharged. (R1703-1704) It is unclear from the record how long the alternate was in the jury room or whether or not he participated in any deliberations. No objection was voiced by defense counsel nor did the trial court ask either party if they desired a mistrial. (R1703-1704)

Florida Rule of Criminal Procedure 3.280 provides in part:

> [A]lternate jurors, and the order in which they are impanelled shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. . . .an alternate juror, who does not replace a principal juror, shall be discharged at the same time the jury retires to consider its verdict.

The provision of the rule requiring that an alternate juror be discharged at the same time the jury retires to deliberate has been interpreted strictly where an alternate juror is permitted

to accompany a jury into the jury room during deliberations. See e.g. Lamadrid v. State, 437 So.2d 208 (Fla. 3d DCA 1983). A violation of that provision to that extent has been raised to the level of fundamental error. Berry v. State, 298 So.2d 491 (Fla. 4th DCA 1974).

In Berry, supra, the court permitted the alternate juror to accompany the jury to the jury room upon the admonition not to participate in the deliberations. The defendant's counsel did not object to this procedure. Upon appeal following conviction, the Appellate court pointed out that Fla.R.Crim.P. 3.280 specified that an alternate juror must be discharged at the time the jury retires to consider its verdict. The court held that failing to discharge the alternate and permitting him to accompany the jury to the jury room during deliberations constituted fundamental error. The court in Fischer v. State, 429 So.2d 1309 (Fla. 1st DCA 1983), reversed a conviction because an alternate was inadvertently permitted to sit through the entire jury deliberations.

In Sloan v. State, 438 So.2d 888 (Fla. 2d DCA 1983), the District Court of Appeal, Second District, distinguished Berry, supra, and Fischer, supra, based upon the fact that Sloan's defense counsel was specifically asked his position with respect to allowing the trial to proceed. Defense counsel affirmatively announced that he would not move for a mistrial. He continued by stating that he was willing to waive his objections to the alternate's presence in the jury room upon his

understanding that the alternate did not participate in any of the deliberations. Upon this basis, the Sloan court concluded that it would be manifestly unfair to permit the Appellant to choose that the jury continue its deliberations in hopes of a favorable verdict and yet be entitled to obtain a new trial before another jury if the verdict proved adverse. Sloan emphasized that defense counsel affirmatively elected not to move for a mistrial.

The instant case presents no such affirmative election on the part of the Appellant or his counsel. Berry, supra, is directly on point. Appellant concedes that it probably would have been better for defense counsel to move for a mistrial. However, it was the duty of the trial court to recognize a violation of Fla.R.Crim.P. 3.280 and determine what action to take after consulting with both parties. This was not done. Appellant submits that fundamental error has occurred and he is entitled to a new penalty phase. Amend. V, VI, VIII, and XIV, U.S. Const.

POINT XIII

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS, THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED JURY INSTRUCTIONS AT THE PENALTY PHASE.

Defense counsel filed numerous written requests for special jury instructions at the penalty phase. (R3440-3444) All of the instructions had a basis in the cited case law, and several were not adequately covered by the standard instructions. Over objection, the trial court denied (both orally and in writing) all of the requested instructions. (R1647-1653,3441-3444)

Due process of law applies "with no less force at the penalty phase of a trial in a capital case" than at the guilt determining phase of any criminal trial. Presnell v. Georgia, 439 U.S. 14, 16-17 (1978). Amend. V, U.S. Const. The need for adequate instructions to be given to a jury to guide its recommendation in capital cases was expressly noted by the Court in Gregg v. Georgia, 428 U.S. 153, 192-193 (1976):

> The idea that a jury should be given guidance in its decision making is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. See Gasoline Products Co. v. Camplin Refining Co., 283 U.S. 494, 498, 75 L.Ed. 1188, 51 S.Ct. 513 (1931); Fed.Rul.Civ.Proc. 51. When erroneous instructions are given,

> retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

The information received by Appellant's jury in the form of instructions on the law to be followed in making a penalty recommendation was far from adequate to avoid the infirmities in this death sentence that inhered in death sentences imposed under the pre-Furman statute. Furman v. Georgia, 408 U.S. 238 (1972). Appellant's death sentence rests in part on the jury's recommendation to the trial judge that the death penalty be imposed. LeDuc v. State, 365 So.2d 149 (Fla. 1978).

In Godfrey v. Georgia, 446 U.S. 420, 428-429 (1980), the Supreme Court vacated a death sentence imposed under Georgia's statute that rested upon an aggravating factor almost identical to Florida's Section 921.141(5)(h). The Court said:

> In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was "outrageously or wantonly vile, horrible and inhuman." There is nothing in these few words standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of §(b)(7)'s terms. In fact, the jury's interpretation of §(b)(7) can only be the subject of sheer speculation.

Two of Appellant's requested instructions dealt directly with the aggravating factor set forth in 921.14(5)(h). (R1135-1136) The instructions specifically defined the circumstance as set forth in the case law. In State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), this Court defined the aggravating circumstance of heinous, atrocious and cruel as follows:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. 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 torturous to the victim.

This Court indicated in State v. Dixon, supra at 8, that a definition of the aggravating circumstance of "heinous, atrocious or cruel" was necessary because:

> To a layman, no capital crime might appear to be less than heinous. . . .

The instructions should have been given as requested. The jury, having no definition, was left to speculate as to the meaning of that factor.

Although this Court has held that a jury recommendation for life imprisonment is not binding, it is entitled to great weight. Tedder v. State, 322 So.2d 908 (Fla. 1975); Lamadline v. State, 303 So.2d 17 (Fla. 1974). Thus errors of such magnitude as the failure to define the aggravating circumstances and the weighing process of aggravating against mitigating in the in-

structions to the jury at the penalty phase of Appellant's trial requires either reduction of the sentence to life imprisonment or no less than that a new penalty recommendation be obtained. In Messer v. State, 330 So.2d 137, 142 (Fla. 1976), the Court stated:

> It is clear that the Legislature in the enactment of Section 921.141, Florida Statutes, sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part. The validity of the jury's recommendation is directly related to the information it receives to form a foundation for such recommendation.

Accordingly, this Court should reduce the sentence or remand to the trial court with instructions that a new penalty recommendation be obtained. The trial court's error violated Appellant's constitutional rights. Amend. V, VI, VIII and XIV, U.S. Const.; Art. I, Sec. 9, Fla. Const.

POINT XIV

THE TRIAL COURT ERRED IN FAILING TO CERTIFY THE DEFENDANT AS A MENTALLY DISORDERED SEX OFFENDER.

The instant crimes were committed in May 1979, prior to the 1979 amendment to Chapter 917, which took effect July 1, 1979. The defendant, therefore, was entitled to have the law as it existed in the 1977 MDSO statute applied to his case. See Durbin v. State, 385 So.2d 172, 175 (Fla. 4th DCA 1980); Strachen v. State, 380 So.2d 487 (Fla. 3d DCA 1980); Article X, Section 9, Florida Constitution. See also Weaver v. Graham, 450 U.S. 24 (1981); Whatley v. State, 46 Fla. 145, 35 So. 80 (1903); Castle v. State, 305 So.2d 794 (Fla. 4th DCA 1975).

Under the pre-1979 statute, it was a matter within the sound discretion of the court to certify the defendant and hold a special hearing on the defendant's mental status. §917.14, Fla.Stat. (1977). If at the special hearing it is determined that the person is a mentally disordered sex offender, the statute directs that the court "shall commit the defendant" for treatment. §917.19, Fla.Stat. (1977). This Court has held that Chapter 917 is equally applicable in capital cases. LeDuc v. State, 365 So.2d 149 (Fla. 1978); Huckaby v. State, 343 So.2d 29, 32-33 (Fla. 1977).

Appellant filed a motion to certify the defendant as a Mentally Disordered Sex Offender following his conviction in 1982. (R2933-2937) In the instant trial, Appellant filed a renewal of all motions previously filed by any defense counsel in this cause. (R3387) A hearing on the motion for certification

was held on April 22, 1986. (R2046-2087) On April 23, 1986, the trial court rendered an order denying Appellant's motion. (R3448-3449) The trial court considered testimony of Doctors Wilder, Podnos, Gutman and McMahon at the penalty phase. The court found the following facts:

> (1) In the process of a burglary, the defendant kidnapped the victim, sexually battered her and murdered her.
> (2) The defendant was found guilty of all charged offenses.
> (3) The defendant is competent but suffers from a behavioral disorder, i.e., sociopathic personality.
> (4) There is no effective treatment of this disorder.
> (5) The sexual battery was a "sex offense" within the meaning of Section 917.13, Florida Statutes (1979), and the burglary and kidnapping may have been sexually motivated; the murder was committed to conceal the crime by disposing of the witness and was not influenced by sexual aberration.
> (R3448-3449)

The trial court declined to certify the Appellant as a Mentally Disordered Sex Offender for three reasons:

> (1) The murder is not the type of crime contemplated by Section 917.13(4) or 917.18, Florida Statutes (1979), since it was not motivated by sexual gratification.
> (2) The disorder suffered by the defendant is not the type contemplated by Section 917.13(1), Florida Statutes (1979) in that the disorder is likely to cause him to commit more than just sex offenses if he remains at liberty. A limited treatment program would be inconsistent with his condition and ineffective in protecting the public.
> (3) There is no known effective means of treating the defendant's disorder.
> (R3449)

This Court considered this particular point in the previous appeal of this cause. At that particular proceeding, the testimony was in conflict and the trial judge expressly relied on the testimony presented by the psychiatrist who testified for the State. This Court concluded that there was substantial competent evidence in the record to support the finding of the trial judge. Jennings v. State, 453 So.2d 1109, 115 (Fla. 1984).

No such conflict exists in the evidence considered by the trial court at this trial. The trial judge apparently realized this as revealed in his order, since a conflict of evidence was not relied upon as the previous trial court had done. Four psychiatrists testified at the penalty phase and were asked about Appellant's qualifications pursuant to the MDSO classification. When confronted with the criteria set forth in the statute, Doctors Gutman, McMahon, and Wilder had little or no hesitation in pronouncing Bryan Jennings a Mentally Disordered Sex Offender. It does not appear that Doctor Podnos was ever questioned about the statute's applicability to Jennings. (R1504-1544) Appellant submits that substantial, competent, and even overwhelming evidence exists on the record to establish that Jennings fits the statutory criteria.

The tenor of the trial court's order seems to suggest that he is rejecting a finding that Jennings is an MDSO based upon the court's belief that the murder was not sexually motivated even though the sexual battery, burglary and kidnapping were. The trial court concludes (erroneously) that the murder was

committed to conceal the sexual offense by disposing of the witness. (R3449) Appellant points out that the trial court did not find the aggravating circumstance that would have applied if this had been proven (§ 921.141(5)(e), Fla.Stat.). In fact, the trial court specifically found this aggravating circumstance not present in this case. (R3461) In this same vein, although the State charged the Appellant with premeditated as well as two counts of felony-murder, the verdict as to the premeditated murder could easily have stemmed from the jury finding of premeditation in connection with the felonies committed in the course of the murder.

Even if this Court finds that the MDSO statute is not applicable to this particular murder, Appellant submits that it is certainly clear that the trial court should have applied the statute to the offenses which were sexually motivated even in the trial court's opinion, i.e. all of the crimes except for the murder. Appellant still maintains that the statute should apply to the murder as well since the evidence is overwhelming that the murder was in fact a product of a sexual aberration.

An analogous factual situation arose in Sullivan v. State, 413 So.2d 152 (Fla. 4th DCA 1982), in which Sullivan was convicted on three counts of burglary, sexual battery, and attempted murder. These charges stemmed from an incident in which Sullivan raped a seventy-year old female, and thereafter stabbed her fourteen times. But for her survival, Appellant submits that the instant case contains no differences. In view

of the overwhelming and uncontradicted evidence that Sullivan qualified as a Mentally Disordered Sex Offender, the trial judge could not simply ignore the program because it has not appeared successful in his experience. The District Court of Appeal, Fourth District, reversed and remanded with directions to commit Sullivan for treatment as an MDSO. See also Gerardo v. State, 383 So.2d 1122 (Fla. 2d DCA 1980) and Donaldson v. State, 371 So.2d 1073 (Fla. 3d DCA 1979).

Appellant submits that the trial court violated the mandatory provisions of Section 917.19, and the court erred (or at least abused its discretion) in failing to declare the defendant an MDSO, since the testimony was overwhelming that Bryan Jennings clearly was a Mentally Disordered Sex Offender. Hendricks v. State, 360 So.2d 1119, 1124-1125 (Fla. 3d DCA 1978); Cook v. State, 357 So.2d 462 (Fla. 2d DCA 1978). See also Huckaby v. State, supra at 33.

The trial court thus erred in failing to declare the defendant to be a mentally disordered sex offender. This violated Appellant's constitutional rights of due process. Amend. V, VI, VIII, and XIV, U.S. Const.; Art. I, Sec. 9 and 16, Fla. Const. The sentencing proceedings should have been stayed and the defendant committed to the Department of Health and Rehabilitative Services for treatment. Following such treatment, the defendant could then be brought back for a new sentencing hearing. O'Steen v. State, 366 So.2d 844 (Fla. 1st DCA 1979). If any progress in treatment were made, this could prove invaluable as mitigation evidence. See Gonsovowski v. State, 350 So.2d 19 (Fla. 2d DCA 1977).

POINT XV

IN CONTRAVENTION OF APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE SENTENCE OF DEATH IMPOSED UPON APPELLANT IS NOT JUSTIFIED IN THAT IT IS BASED UPON INAPPROPRIATE AGGRAVATING CIRCUMSTANCES, ADDITIONAL MITIGATING CIRCUMSTANCES SHOULD HAVE BEEN FOUND, AND THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES.

Following presentation of evidence at the penalty phase, the jury returned an advisory recommendation that the death penalty be imposed. (R3432) On April 28, 1986 Judge Harris entered his written findings of fact in support of the imposition of the death penalty. (R3459-3464) In imposing the death penalty, the trial court found three aggravating circumstances: (1) that the murder was committed in the course of a burglary, sexual battery and kidnapping; (2) that the murder was especially heinous, atrocious and cruel; and (3) that the murder was committed in a cold, calculated and premeditated manner. The court further found that no mitigating circumstances were present.

The death sentence imposed upon Bryan Jennings must be vacated. The trial court found improper aggravating circumstances and failed to consider relevant mitigating factors. A proper weighing of all the factors must result in a life sentence.

INTRODUCTION:

Initially, Appellant wishes to register some general problems with the trial court's findings of fact. A mere glance at the written findings of fact filed by Judge Johnson in the previous trial in this cause reveals that Judge Harris simply repeated Judge Johnson's findings of fact practically verbatim. (R3016-3021,3459-3464) The only noticeable differences are the elimination of Judge Johnson's reference to Appellant's confession to law enforcement officials and the omission of Judge Johnson's reference to the mentally disordered sex offender statute. (R3020,3463) The trial court's action in parroting the previous judge's findings of fact clearly reveals the failure of the trial judge in the instant case to individually review the evidence and make particularized findings of fact regarding each aggravating and mitigating circumstance. By simply reiterating word for word the findings of the prior judge, Judge Harris totally abdicated any responsibility regarding his legal duty. This renunciation on the part of the trial court is further evidenced by the recitation in the written findings of facts not supported by the instant record on appeal. These will be addressed individually in the argument regarding each circumstance. It is clear from the trial court's action that he chose to avoid his statutory responsibility. See Palmes v. State, 397 So.2d 648 (Fla. 1981).

Another indication of the trial court's abdication of his duty in this regard is the trial court's heavy reliance upon

this Court's two prior opinions in this same case. The trial court expressed concern about such reliance at the sentencing (R1815), but ultimately made many of the same rulings as the prior trial judges. The almost identical findings of fact are evidence of this.

A. The Trial Court Erred In Finding The Inappropriate Aggravating Circumstance Of Heinous, Atrocious, And Cruel.

This Court has defined "heinous, atrocious, and cruel in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) as such:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

Recognizing that all murders are heinous, in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this Court further refined its interpretation of the legislature's intent that this aggravating circumstance only apply to crimes especially heinous, atrocious and cruel. In light of this, the facts enumerated by the trial court do not support the finding of this factor.

The fact that the victim was a small child and had been subjected to rape does not necessarily support a finding of this aggravating factor. In fact, the state failed to prove beyond a reasonable doubt that the rape occurred prior to death. The pathologist testified that the injuries to the vaginia occurred before or at the time of death. (R541) As such, the state failed to meet its burden of proof as set forth in State v.

Dixon, supra.

In Purdy v. State, 343 So.2d 4 (Fla. 1977), this Court reversed the imposition of the death penalty despite a finding by the trial court that the rape of a six-year-old child was especially heinous, atrocious, and cruel. As this Court noted, the act of rape is always so reprehensible as to cause outrage, but without more, the the mere act of rape is not especially heinous atrocious and cruel. Accord Shue v. State, 366 So.2d 387 (Fla. 1978)

From the moment of the initial abduction, the victim was unconscious. (R574-575,634-639,909-913,936-946) Being unconscious, the victim's feelings and sensations were affected such that there was no cognizance of pain. (R564-565,574-575) The pathologist admitted that the pain center on the left side of the victim's brain's would have ceased operation. (R564) This fact was strangely overlooked in the trial court's findings of fact. Although the cause of death was drowning, the medical examiner further testified that death would have eventually resulted from the head injuries inflicted prior to drowning. (R562-563) Therefore, the murder was not "unnecessarily torturous to the victim" as is required by Dixon, supra and Tedder, supra.

It is the duty of this Court to review the case in light of other decisions and determine whether or not the punishment is too great. State v. Dixon, supra at 10; McCaskill v. State, 344 So.2d 1276,1278-1279 (Fla. 1977). A comparison to

other cases wherein this Court has reduced death sentences to life imprisonment reveals that the instant crime was no more shocking than the norm of capital felonies.

In Halliwell v. State, 323 So.2d 557 (Fla. 1975), the defendant beat the victim's skull with lethal blows from a 19-inch breaker bar and then continued beating, bruising, and cutting the victim's body with the metal bar after the first fatal injuries to the brain. The Halliwell crime is surely more brutal than that of the instant case, yet this Court found in Halliwell's conduct "nothing more shocking in the actual killing than in a majority of murder cases reviewed by this Court." Halliwell, 323 So.2d at 561.

Similarly, the cases of Burch v. State, 343 So.2d 831 (Fla. 1977)(36 stab wounds during frenzied attack); Chambers v. State, 339 So.2d 204 (Fla. 1976)(severely beat girlfriend to death -- victim bruised over her entire head and legs, had a deep gash under her left ear; her face was unrecognizable, and she had several internal injuries); and Jones v. State, 332 So.2d 615 (Fla. 1976) (thirty-eight "significant" lacerations on rape victim), involve similar or more gruesome killings. In each of these cases, however, this Court has vacated the death sentences. The Appellant's death sentence must likewise be vacated. Were the imposition of life sentences in these and other similar or more heinous cases to be ignored, Florida's death penalty statute could not be upheld under the requirements of Proffitt v. Florida, 428 U.S. 242 (1976), and Furman v. Georgia, 408 U.S. 238

(1972). See also Godfrey v. Georgia, 446 U.S. 420 (1980).

In considering the pain and suffering of the victim, the trial court clearly applied the wrong standard. At the sentencing hearing, defense counsel pointed out the variations in the state's case depending on which inmate you believed. Defense counsel pointed out that Muzynski's testimony revealed that any fear by the victim would have lasted for approximately thirty seconds. The trial court stated that the evidence did not establish the exact time of the injuries, only that they were sustained during the period of time that the Apppellant was with the victim. (R1776) This shows a lack of understanding by the trial court as to the proper standard to apply. The court clearly was not requiring the state to prove this aggravating circumstance beyond a reasonable doubt. See State v. Dixon, supra.

Even if this Court does find sufficient factual basis for the aggravating factor of heinous, atrocious and cruel, the finding is still improper because the judge failed to consider and weigh the fact that at the time these acts were committed, Appellant was acting under the influence of extreme mental and emotional disturbance which prevented him from exercising the ability to conform his actions to the requirements of the law. (See argument, Section D, infra). This Court has recognized the causal relationship between these aggravating and mitigating circumstances in Huckaby v. State, 343 So.2d 29 (Fla. 1977) and in Miller v. State, 373 So.2d 882 (Fla. 1979).

In Huckaby v. State, supra at 34, this Court held that although the aggravating and mitigating circumstances were equal in number, the mitigating circumstances (which had not been found by the trial judge) must outweigh those in aggravation because the heinous nature of the crime was the direct consequence of the defendant's mental problems Similarly, in Miller v. State, supra at 886, this Court again noted that the heinous nature of the offense resulted from the defendant's mental impairment. See also Jones v. State, 332 So.2d 615, 619 (Fla. 1976).

Since the evidence failed to show that the murder in the instant case was especially heinous, atrocious and cruel under the Dixon, supra and Tedder, supra standards, the court's finding should be stricken.

B. The Trial Court The Aggravating Factor Of Cold, Calculated And Premeditated.

It cannot be disputed that the trial judge failed to find this aggravating circumstance following Appellant's first trial on these charges. (R2725-2731) By failing to make such a finding, this circumstance was implicitly rejected at the first trial. The state should not now be permitted to argue and the trial court allowed to find that this circumstance supports the imposition of the extreme penalty. To permit this to occur would constitute a violation of Appellant's constitutionally protected right against double jeopardy. Amend. V and XIV, U.S. Const.; Art I, Sec. 9, Fla. Const.

This Court has declared that the aggravating circumstances set forth in the statute "actually define those crimes"

punishable by death, and thus "must be proved beyond a reasonable doubt." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). In this respect, aggravating circumstances under Florida's death penalty system are analogous to individual offenses. By failing to find the circumstance at the first trial, Appellant was acquitted of that particular factor. To allow the trial judge at the second trial and at the instant trial to use this factor in support of a death penalty would violate the dictates of North Carolina v. Pearce, 395 U.S. 711 (1969). Bullington v. Missouri, 451 U.S. 430 (1981), also supports Appellant's contention. Bullington barred the imposition of a death sentence following a retrial after a defendant's appeal where the jury's verdict at the first trial fixed the punishment as life. The Court pointed out that double jeopardy applied, since the sentencing portion of the trial was like the trial on the question of guilty or innocence. In Bullington the court stated that it did not matter whether the state would seek to rely on the same or additional evidence holding that "[h]aving received one fair opportunity to offer whatever proof it could assemble, Burks v. United States, 437 U.S., 1, 16, (1977), the State is not entitled to another." Bullington v. Missouri, supra at 446. An acquittal, regardless of how obtained, constitutes an absolute bar to relitigation. Sambria v. United States, 437 U.S. 54 (1978).

The situation presented here is analogous to one involving an accused on trial for burglary. Burglary of a dwelling is normally a felony of the second degree in Florida,

but Section 810.02(2), makes it a felony of the first degree if the perpetrator is armed or assaults someone during the burglary. Mills v. State, 400 So.2d 516 (1981). Hence, these factors, if present, aggravate the crime as well as the possible punishment. In the hypothetical trial, evidence is revealed that, during the course of the burglary the perpetrator stole a loaded gun. If the jury convicted the defendant of simple burglary, he appealed and won a new trial, the state could not then retry him for armed burglary.

A parallel situation occurred in the case at bar. The instant case is obviously different but would still be prohibited, especially in light of the fact that findings of aggravating circumstances are generally mixed questions of law and fact. See State v. Dixon, supra. The improperly found aggravating circumstance must be stricken on these grounds.

This circumstance must also be stricken for other reasons. In Combs v.State, 403 So.2d 418 (Fla. 1981), this Court indicated that Section 921.141(5)(i), Florida Statutes (1981) authorize a finding in aggravation for premeditated murder where the premeditation is "cold, calculated and...without any pretense of moral or legal justification." Id. (emphasis supplied). In Jent v. State, 408 So.2d 1024, 1032 (Fla. 1982), this Court noted that:

> The level of premeditation needed to convict in the [guilt] phase of a first degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the

> elements of the premeditation aggravating factor - "cold, calculated ... and without any pretense of moral or legal justification."

Subsequently, in McCray v. State, 416 So.2d 804 (Fla. 1982), this Court noted that (5)(i) "ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not meant to be all inclusive." Id at 807.

Additionally, application of this aggravating circumstance to this particular defendant is violative of his constitutional protections against ex post facto, since the crime was committed in May of 1979 and, while the statute was amended in July of 1979. Amend V, VIII, and XIV, U.S. Const.; Art. I, §9 and Art. X, §9, Fla. Const. This contention is raised notwithstanding this Court's holding to the contrary in Combs v. State, 403 So.2d 418 (Fla. 1981).

The trial court's finding of this circumstance purports to rely upon certain physical acts of Jennings which led up to the murder. (R3461) The trial court relies upon the fact that Jennings stopped by the house earlier in the evening and returned a short time later. (R3461) Appellant submits that this reliance is misplaced as clearly revealed by the expert testimony at the penalty phase.

Doctor McMahon's testimony demonstrated that alcohol affects the frontal lobe of the brain first and works its way back. The frontal lobes are those areas of the brain which are used to form judgments about our behavior and evaluate our

behavior. The last portion of the brain the alcohol affects is the brain stem which is critical to physical actions. This explains why people can have blackouts while intoxicated and still perform quite well physically. The next day they are unable to remember their activity as a direct result of the manner is which alcohol affects the brain. (R1483-1484)

Defense counsel cogently argued at sentencing that Jennings' actions did not reflect the hightened premeditation required for the finding of this circumstance. No weapon was used and no plan was ever articulated. Most of the experts agreed that the murder was not planned, but rather, occurred as an impluse after the sexual battery. It is therefore clear that the trial court erroneously relied upon this evidence in finding this aggravating circumstance.

C. The Trial Court Erred In Finding The Aggravating Factor That The Murder Was Committed During The Commission Of A Felony.

In light of the impropriety in finding that the aggravating factors of heinous, atrocious and cruel and cold, calculated and premeditated were applicable (See arguments, Sections A and B, supra), the sole remaining aggravating factor found to apply by the trial judge is (d) that the murder occurred in the commission of a burglary, sexual battery and kidnapping. The trial judge relied on the jury's verdicts on the two counts of felony-murder in support of this finding. (R3460)

The use of the underlying felony as an aggravating circumstance would apply to every felony-murder situation and defeat the function of the statutory aggravating circumstances to

confine and channel capital sentencing discretion, and thus would violate the principles enunciated in Furman v. Georgia, 408 U.S. 238 (1972). A death sentence for a felony-murder cannot be supported by an aggravating circumstance which takes into account the same underlying felony in which the murder was committed. Certainly, all felony-murders do not, and constitutionally cannot, mandate the death penalty. To the extent a death sentence is founded upon automatic aggravating circumstances, it is unconstitutional. Woodson v. North Carolina, 428 U.S. 280 (1976). To uphold a death sentence simply because a murder was committed in the course of another felony would leave judges and juries with unfettered, unchanneled discretion, would provide no meaningful basis for distinguishing between those felony-murder cases which receive the ultimate penalty and those that receive life, and would render the Florida death penalty statute arbitrary and capricious as applied. Cf. Proffitt v. Florida, 428 U.S. 242 (1976); Godfrey v. Georgia, 446 U.S. 420 (1980)

Applying such reasoning, the North Carolina Supreme Court invalidated the use of the underlying felony as an aggravating circumstance. State v. Cherry, 257 S.E. 2d 551 (N.C. 1979). The Cherry court found that the death penalty in a felony-murder case would be disproportionately applied due to the "automatic" aggravating circumstance, and thus struck the use of the underlying felony as an aggravating circumstance. Likewise, in Keller v. State, 380 So.2d 926 (Ala.Ct.Cr.App. 1979) app. after remand 380 So.2d 938, writ. den. 380 So.2d 938 (Ala. 1980)

and in Bufford v. State, 382 So.2d 1162 (Ala.Ct.Cr.,App. 1980), writ. den. 382 So.2d 1175 (Ala. 1980), the court held that the underlying felony of robbery could not be used as an aggravating circumstance to support the imposition of the death penalty.

D. The Trial Court Erred In Finding No Mitigating Factors Present.

In the findings of fact in support of the imposition of the death sentence, the trial court made references to each of the statutory mitigating factors, rejecting each, and then concluded no mitigating factors, statutory or otherwise exist. (R3461-3463) The trial court erred in rejecting three of the statutory mitigating circumstances and in rejecting or not considering the existence of several non-statutory factors in mitigation. Appellant concedes that trial counsel stipulated that the defense would not rely upon statutory mitigating circumstance (a); no prior significant criminal history. (R3461)

Because they are interrelated, Section 921.141(6)(b) and (f), Florida Statutes (1979) will be discussed together. See Burch v. State, 343 So.2d 831 (Fla. 1977) and Miller v. State, 373 So.2d 882 (Fla. 1979). In the instant case there was both lay and expert testimony to support this in mitigation.

Doctor Michael Gutman, a psychiatrist, testified that Bryan Jennings suffered from a long term personality pattern with character and behavior disorders. These included a passive-aggressive personality and an anti-social personality. Doctor Gutman defined a passive-aggressive personality as one who would sabotoge their own efforts to succeed, namely by being

self-destructive. He defined an anti-social personality as a person who had a minimal conscience and was inclined to drug use. (R1347-1349,1363) Doctor Gutman was of the opinion that the amount of alcohol combined with Jennings' personality disorders resulting in a substantial impairment of Jennings' ability to conform his conduct to the requirements of the law. Although Appellant's prognosis was not good, treatment was available for the disorders from which he suffered. (R1365-1366,1370-1371) While Gutman admitted that the character and emotional disorders which afflicted Jennings are not regarded as true mental illness, Jennings definitely suffered from some mental disturbance. (R1376)

Doctor Elizabeth McMahon, a clinical psychologist, administered the most extensive examination of Bryan Jennings. Her findings indicated that Bryan Jennings was immature, impulsive, had little insight and many underlying sexual problems. (R1411-1447) McMahon was of the opinion that Jennings suffered from a personality and character disorder consisting of immaturity and an anti-social personality. McMahon also admitted that Jennings' problems were more of an emotional than a mental disburbance. (R1452) Doctor McMahon's expert opinion was that Jennings' ability to conform his conduct to the requirements of the law was substantially impaired at the time of the offense. (R1447-1450)

Doctor Burton Podnos, a psychiatrist testifying for the state, examined Bryan Jennings one time in 1979. Doctor Podnos

concluded that Jennings suffered from a long-time character disorder which caused an inability to relate, lying, truancy, vandalism, poor judgment, lack of impulse control, and lack of responsibility. Doctor Podnos also testified that Jennings also suffered from an anti-social personality disorder. The doctor implied that this affliction was a mental illness, although not a major one. (R1504-1512)

Doctor Podnos was of the opinion that Jennings was not acting under an extreme mental or emotional disturbance at the time of the offense, nor was his capacity to appreciate the criminality of his conduct impaired. (R1513) Doctor Podnos did admit that the crime started as an impulse, but the doctor's opinion was that it turned into a deliberate act at some point. (R1513-1514) While the doctor also admitted that Jennings' lack of impulse would become more pronounced under the influence of the hallucinogen LSD, the doctor evidently refused to consider the possibility of the effects of such a drug in this particular scenario. (R1520,1528,1540-1544)

Doctor Lloyd Wilder, another psychiatrist testifying for the state called Bryan Jennings a likeable sociopath. Doctor Wilder agreed with Doctor Podnos that Jennings was not acting under an extreme mental or emotional disturbance nor was his capacity to appreciate the criminality of his conduct impaired. Doctor Wilder did not believe that Jennings' ability to conform his conduct to the requirements of the law was substantially impaired. (R1545-1552) Doctor Wilder did admit that Jennings

suffered from a disorder. When he was asked if the disorder could be classified a mental disease or defect, the doctor conceded that this point was debatable, but concluded that while the disorder was not normal, it was generally not regarded as a mental illness. (R1550-1551)

As a result of Jennings' physical activity during the offense as well as his ability to recall, Doctor Wilder concluded that Jennings was not significantly impaired by alcohol and drugs. Doctor Wilder conceded that his opinion concerning the application of the two statutory mitigating circumstances would change if Jennings had in fact been impaired by chemicals. (R1570-1572) Doctor Wilder concluded that some people simply function better with higher levels of alcohol than others. (R1584)

In State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), this Court interpreted these mitigating circumstances, stating:

> Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered a mitigating circumstance.... Like subsection (b), this circumstance (f) is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.

The evidence clearly showed that alcohol and LSD were definitely contributing factors in the commission of this crime. As Justice Ervin noted in his dissenting opinion in Gardner v. State, 313 So.2d 675, 679 (Fla. 1975)(death sentence later reversed by the United States Supreme Court and, upon remand, the

defendant was resentenced to life imprisonment), the more enlightened perspective on heavy alcohol use is that it is no longer considered simply an emotional weakness, but rather a form of disease, which, like other physical and mental ailments, can cause aberrant behavior and require treatment. The heavy consumption of alcohol, when coupled with the personality and psychological disorders noted by the doctors clearly establishes the mitigating circumstances of mental and emotional disturbance as well as inability to conform one's conduct to the requirements of law. §§ 921.141(6)(b) and (f), Fla. Stat. (1985); See Jones v. State, 332 So.2d 615 (Fla. 1976). In Jones, supra, wherein evidence indicated the defendant had consumed large amounts of alcohol, this Court approved of this mitigating circumstance, stating that "extreme emotional conditions of defendants in murder cases can be a basis for mitigating punishment." Jones v. State, supra at 619; see also Gardner v. Florida, 430 U.S. 349, 352 (1977)(wherein intoxication was held to establish the mental mitigating circumstances).

Section 921.141(6)(g), Florida Statutes (1979), provides that the age of the defendant at the time of the offense can be considered in mitigation. In its consideration of this factor, the trial court made this finding:

> Section 921.141(6)(g), Fla.Stat.: The Court finds that the Defendant was twenty (20) years of age at the time of these offenses. He was home on leave from overseas assignment in Okinawa with the United States Marine Corps. Though of fairly young age, he was an adult of above average intelligence, and had accepted the obligations of adulthood by

> his Military Service. The Court finds that the Defendant's age is not a Mitigating Circumstance in this case. (R3462-3463)

However, the information that "inadvertently" came out at the previous trial through the testimony of Dr. Wilder clearly shows that despite his service in the Marine Corps, Appellant simply did not "accept the obligations of adulthood." Jennings v. State, 453 So.2d 1109,1114 (Fla. 1984). This testimony, which should also be reflected in the pre-sentence investigation report, reveals that the Appellant committed certain minor crimes while he was in the military. Therefore, it is shown that Appellant had refused to accept the obligations of adulthood, or in all probability, could not accept them; thus age would certainly be a mitigating factor in this case.

This Court has held on several occasions that a young age is mitigating, especially where coupled with other mitigating circumstances. See Sullivan v. State, 303 So.2d 632 (Fla. 1974)(Overton, J. Concurring: age 25 with no prior record); Swan v. State, 322 So.2d 485 (Fla. 1975)(age 19); Thompson v. State, 328 So.2d 1 (Fla. 1976)(age 17 with no prior record); Meeks v. State, 336 So.2d 1142 (Fla. 1976)(age 21 coupled with dull-normal intelligence); Hoy v. State, 353 So.2d 826 (Fla. 1978)(age 22 with no prior record); Jackson v. State, 366 So.2d 752 (Fla. 1978)(age 18 with no prior record); Mikenas v. State, 367 So.2d 606 (Fla. 1979)(age 22); Brown v. State, 381 So.2d 690 (Fla. 1980)(age 23); Neary v. State, 389 So.2d 197 (Fla. 1980)(age 26), and King v. State, 390 So.2d 315 (Fla. 1980)(age 23).

Although all of the mental health professionals indicated that Bryan was perhaps slightly above average in intelligence, they all agreed that he was extremely immature for his age. Even Doctor Wilder admitted that Jennings is less mature than what a normal 20 year old should be. (R1593-1595) In the instant case, Appellant's age of 20, coupled with his mental condition and history of prior problems in general requires that it be found in mitigation.

In addition to the statutory mitigating factors clearly present in this case, the trial court erred in rejecting other matters in mitigation. In rejecting Appellant's age of 20, as a mitigating factor, the trial court placed great emphasis on the fact that Jennings was serving in the Marine Corps. In this respect the trial court should have considered this in mitigation. In Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975), this Court recognized that service in the armed forces can be a valid, albeit nonstatutory mitigating factor.

The trial judge rejected the contention that Jennings was a mentally disordered sex offender. The evidence clearly and unequivocally showed that Appellant met all the statutory criteria for certification as a mentally disordered sex offender under Chapter 917, Florida Statutes (1977). See Point XIV supra. The very definition of mentally disordered sex offender indicates that it is a person who is not insane but has a mental disorder and is considered dangerous to others because of a propensity to commit sex offenses. See Section 917.13, Florida Statutes

(1977). The trial court's statements at sentencing reveal that an incorrect standard was applied in rejecting this valid non-statutory mitigating circumstance. The court assumed that its denial of the motion to sentence Appellant as a MDSO was also a rejection of this as mitigation. (R1802) This was clearly error.

The trial court also failed in rejecting in mitigation the unstable family life of Appellant. Bryan Jennings never knew his natural father. His own mother admitted she was not sure who Bryan's father was. Bryan was a very hyperactive child who had life-long problems. He had mental problems from the time he was a toddler. Bryan was born prematurely which was probably the result of his mother changing a tire. He had one half-sister and no other siblings. Margaret Dana, Bryan's mother, met her husband, an alcoholic, while she was in the hospital. The first five or six years of Bryan's life, he lived with his grandparents rather than his mother. He saw several father figures drift through the household, none staying any length of time. He was separated from his mother for extended periods of time at several points in his childhood. He was forced to transfer schools every two or three years as a result of his mother's work. (R1598-1611) From the age of twelve, Bryan was staying out until six o'clock in the morning in his mother's car. (R1435) He quit school in the tenth grade. The family doctor recognized Bryan's problems, but no one offered his mother any solutions. At one point, Bryan had been accepted at a mental institution in Boston,

but he voiced a desire to enter the service instead. His mother became afraid that any length of stay at a mental institution would ruin any chance in the future of obtaining government employment, therefore, she cancelled the institutionalization and Bryan entered the service where his troubles continued. (R1608-1609)

The trial court chose to completely ignore the testimony presented at the penalty phase regarding Bryan Jennings' intoxication at the time of the offense. Two witnesses offered substantial evidence that Bryan was extremely intoxicated and impaired the night of the crime. (R1611-1619) Even if the trial court was not of the opinion that the impairment reached the level of the statutory mitigating circumstances, intoxication certainly could be considered a mitigating factor since it results in a diminished capacity.

The trial court also ignored the testimony of the Facompre family, who testified about a side of Bryan that had not been revealed at the trial. Their testimony showed Bryan to be a warm, generous and caring person and a very good friend. He was also a responsible individual and he could be relied upon. Mr. Facompre testified that Bryan was extremely frustrated about his inability to discover his father's identity. Bryan Jennings was the favorite of all of Mr. Facompre's children's friends. He found him to be polite, helpful, and trustworthy. Bryan had all of the desirable traits that Facompre looked for in a person and became like one of the family. (R1620-1644)

The trial court reviewed Appellant's prison record since his initial incarceration for this offense. (R1808) In over seven years, Appellant has had only one disciplinary report. Appellant submits that this is an amazing statistic while on death row at Florida State Prison. It was error for the trial court to reject this valid non-statutory mitigating circumstance.

E. Summary.

The evidence is strong: the trial court impermissibly found three aggravating circumstances, which are not supported by law. Additionally, the trial court erroneously rejected all the statutory mitigating factors and ignored the plethora of non-statutory mitigating factors. Justice demands that Bryan Jennings' sentence of death be vacated and a life sentence imposed.

POINT XVI

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. The issues are presented in a summary form in recognition that this Court has specifically or impliedly rejected each of these challenges to the constitutionality of the Florida statute and that detailed briefing would be futile. However, Appellant does urge reconsideration of each of the identified constitutional infirmities.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 685 (1975), and does not define "sufficient aggravating circumstances." The statute, further, does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). This leads to arbitrary and capricious imposition of the death penalty.

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, 446 U.S. 420 (1980); Witt v. State, 387 So.2d 922, 931-932 (Fla. 1980) (England, J. concur-

ring). Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J. concurring in part and dissenting in part).

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and factors. See Lockett v. Ohio, 438 U.S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

The failure to provide the defendant with notice of the aggravating circumstances which make the offense a capital crime and on which the State will seek the death penalty deprives the defendant of due process of law. See Gardner v. Florida, 430 U.S. 349, 358 (1977); Argersinger v. Hamlin, 407 U.S. 25, 27-28 (1972); Amend. VI and XIV, U.S. Const.; Art. 1, §§ 9 and 15(a), Fla. Const.

Execution by electrocution imposes physical and psychological torture without commensurate justification and is therefore cruel and unusual punishment. Amend. VIII, U.S. Const.

The Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law.

The Florida capital sentencing system allows exclusion of jurors for their views on capital punishment which unfairly

results in a jury which is prosecution prone and denies the right to a fair cross-section of the community. See Witherspoon v. Illinois, 391 U.S. 510 (1968).

The Elledge Rule [Elledge v. State, 346 So.2d 998 (Fla. 1977)], if interpreted to automatically hold as harmless error any improperly found aggravating factor in the absence of a finding by the trial court of a mitigating factor, violates the Eighth and Fourteenth Amendments to the United States Constitution.

The amendment of Section 921.141, Florida Statutes (1979) by adding aggravating factor 921.141(5)(i) (cold and calculated) renders the statute unconstitutional in violation of the 8th and 14th Amendments to the United States Constitution because it results in arbitrary application of this circumstance and in death being automatic unless the jury or trial court in their discretion find some mitigating circumstance out of an infinite array of possibilities as to what may be mitigating. The conclusory finding by the Court of a cold, calculated and premeditated killing demonstrates the arbitrary application of this aggravating circumstance.

Additionally, a disturbing trend has become apparent in this Court's decisions and its review of capital cases. This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction. Quince v. Florida, 414 U.S. 185 (1982)(Brennan and Marshall, J.J.,

dissenting from denial of cert.); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Appellant submits that such an application renders Florida's death penalty unconstitutional.

In rejecting a constitutional challenge to the statute, The United States Supreme Court assumed in Proffitt v. Florida , 428 U.S. 242 (1976), that this Court's obligation to review death sentences encompasses two functions. First, death sentences must be reviewed "to insure that similar results are reached in similar cases." Proffitt, supra at 258. Secondly, this Court must review and reweigh the evidence of aggravating and mitigating circumstances to determine independently whether the death penalty is warranted. Id. at 253. The United States Supreme Court's understanding of the standard of review was subsequently confirmed by this Court when it stated that its "responsibility [is] to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." Harvard v. State, 375 So.2d 833, 834 (Fla. 1978) cert. denied 414 U.S. 956 (1979) (emphasis added).

In view of this Court's abandonment of its duty to make an independent determination of whether or not a death sentence is warranted, the constitutionality of the Florida death penalty statute is in doubt. For this and the previously stated arguments, Appellant contends that the Florida death penalty statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Based upon the foregoing cases, authorities, and policies, Appellant respectfully requests that this Honorable Court grant the following relief:

1. As to Points I through VIII, vacate the judgments and sentences and remand for new trial;

2. As to Points IX through XIII, reduce Appellant's death sentence to a life sentence or, in the alternative, vacate Appellant's death sentence and remand for a new penalty phase;

3. As to Point XIV, vacate Appellant's sentences and remand for sentencing as a mentally disordered sex offender;

4. As to Point XV, reduce Appellant's death sentence to a life sentence; and

5. As to Point XVI, declare Florida's death penalty statute unconstitutional.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to the Honorable Jim Smith, Attorney General, 125 Ridgewood Ave., Daytona Beach, FL 32014 and to Bryan

Jennings, #073045, Florida State Prison, P.O. Box 747, Starke, FL 32091, on this 2nd day of October, 1986.

CHRISTOPHER S. QUARLES
CHIEF, CAPITAL APPEALS