IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,919

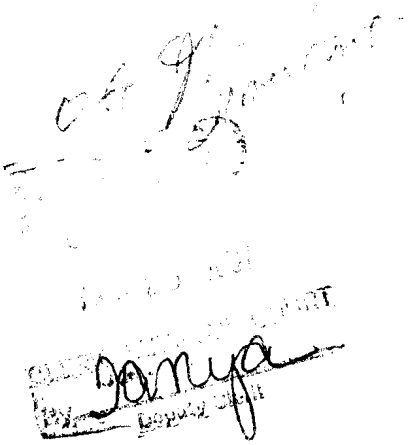
JESUS SCULL,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.



APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

This is an appeal from convictions of two counts of first-degree murder and sentences of death. Appellant Jesus Scull was the defendant in the trial court and in this brief, he will be referred to by name or as he stood below. The symbol "R." refers to the record on appeal; the symbol "T." refers to the separately bound transcripts of proceedings before the trial court; the symbol "S." refers to the supplemental record, the letter made part of the record of the hearing on the defendant's motion to discharge counsel; and the symbol "SR." refers to the supplemental record, the jury's advisory sentences.

STATEMENT OF THE CASE

On motion of defense counsel (R.141-42) the following related offenses were consolidated for trial.

In Case No. 83-26696, Jesus Scull was charged by information with possession of cocaine. (R.1-2). In Case No. 83-26753, he was charged by information with leaving the scene of an accident and reckless driving. (R.21-23). In Case No. 83-29461, Scull was charged by indictment returned on January 14, 1984 with two counts of first-degree murder (Counts I and II); first-degree arson (Count III); robbery with a deadly weapon (Count IV); armed burglary with intent to commit murder (Count V); and possession of a weapon while committing a felony (Count VI). Scull was adjudged insolvent, and the Public Defender was appointed to represent him. (R.4).

The insert sheets of the closed court file reflect the declaration of a conflict of interest by the Public Defender in this case and the appointment of Michael Von Zamft, a private attorney, on November 6, 1984. On November 26, 1985, the trial court held a brief hearing, which was not attended by court-appointed counsel, and denied Jesus Scull's motion to discharge his attorney. (T.303-13).[1] Prior to trial, the court denied the defendant's motions to suppress statements (R.76-77A) and

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[1]. There is no written motion for discharge in the closed court file although the participants in the hearing proceeded as though there was one. (T.305-06). The insert sheets reflect the denial, on November 26, 1985, of a pleading entitled, "Motion for certification of conflict of interest between counsel and defendant" and the court, itself, labelled the proceeding, "on motion to withdraw as attorney of record." (T.305).

physical evidence (R.143-44A) after a hearing at which both the lead investigator and the defendant testified. (T.321-72).

Trial by jury commenced on March 3, 1986 before Circuit Judge Theodore G. Mastos. (R.49). On March 7, 1986, the jury returned verdicts of guilty as charged in the indictment.[2] (R.236-40, 250; T.1255-56). In addition, the jury found the defendant guilty of possession of cocaine and leaving the scene of an accident involving property damage; the court had entered a judgment of acquittal of reckless driving at the close of the state's case. (R.33,37; T.1114, 1256-57).

The court granted defense counsel's motion for continuance of the penalty phase, and sentencing was set for April 17, 1986. (T.1259-84). Counsel was authorized to expend funds for a background investigation in Cuba, Scull's native country, and for an evaluation as to his mental condition. The court ordered a presentence investigation, as well. (T.1274-75; R.34, 253-55).

As soon as the jurors were excused for the recess, it was brought to the court's attention that the foreman had engaged in unauthorized contact with the victims' relatives. (T.1284). After hearing from two corrections officers, the defense investigator, and two family members, the court determined to conduct individual voir dire of the jurors when they returned for sentencing in six weeks. (T.1288-94).

A motion to discharge sentencing jury was filed on May 2,

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2. On the verdict form as to Count V, the jury found that the burglarized dwelling was occupied, and the defendant made an assault while armed with a dangerous weapon. (R.240, 248).

1986 on the grounds that the conduct of the foreman and other jurors was so improper as to taint the entire panel and render it unable to return a fair recommendation of penalty. (R.256-60A). On the morning of the penalty phase, May 6, 1986, the members of the jury were questioned individually; only the foreman was discharged. He was replaced by an alternate, over defense objection. (T.1295-1339).[3]

The state presented no testimony; it rested its case on the evidence adduced at trial and the verdict forms of guilt. (T.1349). The defense presented the testimony of Jesus Scull, who told the jury that he was 24 years old at the time of the offense, he had never been convicted of a crime before, and he was innocent. (T.1350-51).

By an 8-to-4 vote, the jury returned advisory sentences of death. (SR.; T.1384-87). The court adjudicated the defendant guilty and imposed consecutive sentences of death. The court imposed consecutive sentences of 134 years as to Counts III through V of the indictment, and 15 years as to Count VI. Sentence was suspended on the offenses charged by information. (T.1393-94; R.11-12, 35-36, 284-96).

The trial court denied the defendant's motion for new trial (R.251-252A) on June 6, 1986 (T.1395-1400) and filed its written order imposing death on July 24, 1986. (R.301-302).

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[3]. Outside the presence of the jury, defense counsel volunteered to the court that his investigator's efforts to go to Cuba were unsuccessful, and he had no mental mitigating evidence to present, since the defendant insisted on maintaining his innocence and had "essentially" failed a polygraph. (T.1340-45).

Notice of appeal was timely filed on June 6, 1986. (R.13).

STATEMENT OF THE FACTS

A. Defendant's Motion to Discharge Counsel

At the outset of the hearing on Scull's motion to discharge (see n.1), the court found, in effect, that the motion was not a dilatory tactic; Scull had been quite satisfied with the representation of his original counsel. (T.305). The prosecutor noted that this was the second motion regarding counsel; that the problem might be one of scheduling because of counsel's recent venture into civil private practice; and that he had discussed the motion with counsel, who would abide by the court's decision. (T.306). Counsel did not appear at this hearing. A letter from counsel to Scull was made part of the record. (T.306-07; S.).

Prior to the court's concluding the hearing by ordering a psychological evaluation of the defendant, the following occurred:

* * *

> THE COURT: Mr. Scull, why do you feel that it's necessary that Mr. Van Zamft no longer represents you?
>
> THE DEFENDANT: (Through the Interpreter) He said that he could not come to see me. I feel that I have a right to be able to see him whenever I need him and he has--
>
> THE COURT: Well, sir, he is not a servant; he is not your personal servant, Mr. Scull. He is not at your beck and call.
>
> The law requires you to have an attorney, but he does not have to come and see you every time that you snap your fingers over there.
>
> Now, the man is a competent lawyer.
>
> THE DEFENDANT: I know that.

THE COURT: Now, you have two choices. Let's get something very clear, let's get something very clear and straight.

Either Mr. Van Zamft is going to represent you or you are going to try this case by yourself. So you had better make up your mind about the facts of life here.

Do you want to represent yourself?

THE DEFENDANT: I accept what he[4] says.

THE COURT: Okay, so Mr. Van Zamft will continue to be your lawyer.

* * *

THE COURT: In his letter to you, the only real gripe that you have is that he does not come over to see you every time that you snap your fingers. Well, the game is not played that way, Mr. Scull.

THE DEFENDANT: No, no, I am not saying that.

THE COURT: I'm just telling you, pal, that you have two choices.

Now, either you accept Mr. Van Zamft or you are going to trial by yourself. So you make the choice.

* * *

THE DEFENDANT: I have two years and three days waiting for this.

THE COURT: Well, Mr. Scull, the wait is almost over.

Mr. Van Zamft is going to represent you.

THE DEFENDANT: If I wait another year it does not matter.

THE COURT: Well, Mr. Van Zamft is going to represent you and that's the last that I want to hear about it. Thank you.

MR. NOVICK (The Prosecutor): All right, Judge. I

---

3. The defendant, speaking through an interpreter, was probably referring to the court. (See T.1269).

will go ahead and telephone Mike for you, Judge.

THE COURT: Fine, thank you.

THE DEFENDANT: Now, if I go ahead and accept him to represent me because I cannot represent myself because I know nothing about law--

THE COURT: Well, that's the choice, Mr. Scull. You've got two choices. You can have Mr. Van Zamft represent you.

THE DEFENDANT: Is that the option?

THE COURT: Yes, that's the option.

THE DEFENDANT: Then go ahead and condemn me. Sentence me if that is the option that I have.

THE COURT: Well, sir, that's what the bottom line is going to be.

THE DEFENDANT: I am telling you that I am going to accept him whatever he says.

THE COURT: Well, that's what I am saying, Mr. Scull and he is a good lawyer. He will represent you very fairly.

* * *

THE DEFENDANT: I am not harassing, but I have never called him. This man has seen me twice already; that's all. I don't bother him.

THE COURT: Fine, we will make sure that he gets over to see you. We will get this case ready to go. I am not going to appoint another lawyer so you can just forget about that.

THE DEFENDANT: I don't want this lawyer. I don't want him; take him off the case.

THE COURT: Why?

THE DEFENDANT: Because I understand that he is not going to defend me. I have a year with him already. He said that the Judge had denied all the motions. Why, why deny the motions? I have been here for two years and three days waiting. So he is going to tell me something else now.

* * *

THE DEFENDANT: Whom do I see in order to have another lawyer? I don't want this lawyer; I will not accept him.

* * *

(T.307-12).

B. The Evidence at Trial

Between 5:30 a.m. and 5:45 a.m. on Thanksgiving morning, 1983, Trooper Cain of the Florida Highway Patrol was dispatched to the scene of an accident, northbound on I-95 at 62nd Street. (T.763-64). Two vehicles were overturned. The officer spoke with the occupants of one of the vehicles. The other vehicle, a white Ford Mustang, was abandoned. The keys were inside, and the car had been left in the drive position. (T.764-66, 768).

The officer ran the tag and VIN numbers and learned that the car was registered to a Raphial Villegas of Southwest 71st Street, Miami. Inside the car was an envelope addressed to a Lourdes Villegas at 1306 Southwest 12th Street. (T.766-67). The trooper arranged to have the car towed and proceeded to the address of Lourdes Villegas, the closer of the two. (T.769-72). Fire trucks and police officers were there. (T.772).

The City of Miami Fire Department had received a report of the fire at 6:07 a.m. By 6:08 a.m., fire apparatus had been dispatched, and Willie Pugh and his crew of four were on their way to the scene. (T.670, 713). It took them approximately four minutes to arrive and another two or three minutes to get inside and start putting out the fire. (T.745).

The front door was bolted; Pugh and another firefighter

entered through an unlocked sliding glass door that was slightly open. (T.672-74). The door led to the living room. There was no fire in that room, but it was smokey. They worked their way to the bedroom and saw a little fire on a mattress and in the closet. The fire had "pretty much burned itself out." (T.674-75). They quickly "knocked the fire down." Pugh used a baseball bat he found near his feet to break out the window for ventilation. (T.675-76).

They searched the bedroom thoroughly for signs of smoldering, opening drawers and pulling the walls down a bit in the closet. (T.676-77, 691). Beneath the bedroom window, they found two bodies clinging in an embrace. (T.677-78). The bodies were lying head-to-toe. (T.699). They were identified by stipulation at trial as Miriam Mejides and Lourdes Villegas. (T.1038).

Fire Investigator Larry Weintraub testified as an expert. (T.705-06). The building he examined was a two-story duplex of CBS (concrete block structure) construction. It was located in a residential area. (T.714). The second floor was a separate unit. (T.713-14). No one was living there. (T.777, 786).

Investigator Weintraub conducted his inspection in conjunction with a homicide investigator and the medical examiner. He determined that the origin of the fire was in the bedroom. (T.724-26). He noted the position of the bodies and concluded they were deliberately placed like that. (T.721-22). Based on his expertise and his meticulous examination of the

scene (T.727-31), Weintraub opined that the fire originated on the bed; that there may have been a secondary point of origin on the floor; that the fire was man-made; and that an unidentifiable accelerant had been used. (T.728, 731-37). The accelerant could have been ether, a chemical used in the free basing of cocaine. (T.753-54). The fire had burned for approximately one hour, with the longest and hottest point of burning in the center of the queen size bed. (T.733-34, 737, 755).

There were piles of debris in the bedroom, and there had been rummaging in the dresser drawers. (T.928). The sliding glass door to the living room was partially open during the fire. (T.738). The wood baseball bat that was found halfway under the bed, State's Exhibit 23, was partly burned. It appeared to have blood and fingerprints on it. (T.739, 831).

The baseball bat was tested by an expert in forensic serology and by an expert latent prints examiner, who had used sophisticated laser technology. Their tests showed that the stain adjacent to the fingerprint was human blood; that the fingerprint was that of Jesus Scull; and that, presumptively, there was blood on the finger before it touched the bat. (T.982-83, 983-85, 995-96, 1024-33).

When Technician Garcia, crime scene section, arrived at the scene, he had a preliminary discussion with detectives before conducting his search for evidence. (T.774-79). He started in the front yard of the house, which is enclosed by a wooden fence. The gate was open. There was no lock on the gate, just hinges.

(T.780). Inside the courtyard is a front door, a sliding glass door, and a little area that leads to the back. (T.781). Entry to the second floor apartment is through a separate foyer area. The deadbolt on the door to that apartment had been removed; it was found downstairs on the ground. (T.783-84).

The technician collected no evidence from the living room, dining room, or kitchen. The rooms were basically neat except for smoke damage. (T.787-89). There were no signs of a struggle. (T.858-59). He proceeded to the bedroom, where he observed that the mattress and boxspring had been removed. (T.789). He collected and preserved the baseball bat for processing. (T.791). He found a bloodstained clock on the floor atop a pile of burnt papers and other refuse. (T.791-92). The clock was later determined to have Type O blood on it, consistent with that of Lourdes Villegas. (T.979-80). He processed the doors, the deadbolt lock, and the clock for fingerprints. (T.794-97).

On the same date, he examined the white Mustang in the City of Miami motor pool. (T.798-99). He observed possible blood on the charm part of the key chain. The charm bore the initial "L." (T.802). The forensic serologist determined that the stain on the charm was Type A blood, consistent with the blood of Miriam Mejides. (T.968-72). The technician retrieved a combination lock from under the front passenger seat. It had two attached

wires which appeared to have been cut. (T.804).[5] The technician lifted a fingerprint from inside the window of the driver's door. (T.806-08, 810). Sometime later, he took standard fingerprints from Jesus Scull. (T.810-11).[6] An expert determined that Scull's thumbprint matched the print found in the Mustang. (T.996, 1016-17).

The technician recalled that he impounded an orange tackle box which had been found inside the dining room credenza. (T.822, 829, 859-60). The tackle box contained paraphernalia used in the free basing of cocaine. (T.822, 1098). No drugs were found. (T.861).

The lead investigator was Detective Nelson Andreau. (T.856-57). On the afternoon of the fire, he went to an apartment in northwest Miami accompanied by another detective and a uniformed officer; he had been furnished with the fingerprint comparison from the Mustang. (T.864-65).

The officers were invited inside the apartment by Lazaro Hernandez. Hernandez told them that Jesus Scull was taking a shower. Scull had arrived a half-hour earlier, at 2:45 p.m. (T.867).

Scull was not in the shower. He was found standing in a

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5. It was the expert opinion of the tool mark examiner that the cables on the combination lock were damaged by a double bladed instrument, such as pliers or a bolt cutter, and the lock had been worked back and forth until the cables parted. (T.852). The tool damage did not render the lock inoperable. (T.853).

6. The fingerprint cards were imprinted with the words "Court Order." They were admitted in evidence over defense objection as State's Exhibit 30. (T.811-16).

closet opposite the bathroom wearing a pair of Hernandez's jeans. (T.868). Scull complied with the detective's request for the clothes he had been wearing. Scull's shirt and light colored slacks looked blood-stained. The cuff of one pants leg had the tip of a shoelace fused to it. (T.869-74). The shoelaces looked melted or fused; on one of the shoes, where the sole meets the canvas, the area looked charred. (T.876).[7]

Scull wore his white tennis shoes to the police station, where he voluntarily gave them up. (T.863-71, 873-74). He also waived his constitutional rights and gave a statement to Detective Andreau, who was permitted to relate to the jury the substance of his interview with Scull over defense objections (T.877-87).

Scull told Andreau that he had known both of the victims a long time. He was working on a cocaine deal with them. (T.887, 903). Scull was given permission to use the Mustang. He had received the keys several days before. (T.888). He was last inside the apartment a week to ten days previously. (T.889-90). He never saw or touched a baseball bat in the victims' apartment. (T.890).

Scull was last outside the apartment between 5:00 and 5:30

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7. The clothing was given to the fire investigator for analysis. (T.876) He opined that the frayed part of one sneaker had been singed in a flash type of fire, consistent with how the fire burned in the bedroom. (T.930-32). He reached the same conclusion as to the fused laces and the shoelace tip on the pants cuff. (T.932-34). The only tool used by the investigator in this analysis was a magnifying glass. (T.938). He could not determine whether the damage to the sneakers occurred at the same time, or when the damage was done. (T.940-41).

and again at approximately 6:15 that morning. He saw a light on in the bedroom and knocked on the door, but he did not go in. (T.887-88, 904). He left to drive to his place of employment, a glass manufacturing plant in North Miami. (T.888). When the white Mustang overturned, Scull fled from the accident because he did not have a driver's license. (T.889, 891). He went to Lazaro Hernandez's apartment to shower and change clothes. (T.891-92).

Jesus Scull maintained his innocence throughout the interview, which Detective Andreau conducted in Spanish. (T.912-13). The detective did not use a stenographer or a tape recorder, and he did not take notes. The other officer in attendance did not understand Spanish. (T.899-903). Sometime during this interview, Scull was told to empty the pockets of the pants he had borrowed from Hernandez. The detective seized a small container of cocaine and a gold colored bracelet. (T.916-20). The bracelet resembled jewelry that victim Lourdes Villegas sometimes wore. (T.956-58).

Lillian Villegas last saw her older sister the Sunday before she got killed. (T.945-47). Lourdes had driven the Mustang to their parents' home. Lourdes was very particular about her car; she would not let anyone drive it, except in an emergency. (T.947-50).

Lillian saw the car when she stopped at her sister's apartment at 9:30 p.m. on the evening of November 23, 1983. It was parked on the open driveway and in perfect condition.

(T.955-56, 959). She noticed, though, that the gate door to the yard was open. This was unusual, since the roommates had two locks for it. (T.951-54). Lillian knocked at the front door. No one answered. (T.956). She went around the side of the house and looked through the sliding glass door, but she did not knock on it. (T.960).

The next morning, the bodies of Lourdes Villegas and Miriam Mejides were observed in their bedroom by an associate medical examiner. (T.1039, 1044-49). The preliminary examination by Dr. Ronald Suarez confirmed that the bodies were badly burnt. The body of Lourdes Villegas was partly obscured by open dresser drawers. (T.1050). When the doctor turned over the bodies, he saw that each had severe injury to the head and face. (T.1051).

The autopsy of Lourdes Villegas showed four, separate areas of injury to her head. There was a large tear of the skin on the forehead. The bone underneath was broken, as was the nose. The eyes were black. There were bruises and tears in the skin on the side of the head. There was an irregular tear of the skin on the back of the head. (T.1054-56).

Beneath these external injuries were multiple skull fractures. Beneath the fractures were several areas of bleeding and bruising of the brain. (T.1058). The brain had been pushed downward and compressed at the bottom. The injuries sustained by Lourdes Villegas were the result of blunt trauma to four different areas of the head. (T.1058-59). Internal damage underneath the jaw near the voice box was consistent with a

forceful gripping of the neck. Dr. Suarez opined that the head was in motion as it was being struck. (T.1060-61). The baseball bat in evidence certainly could have caused the injury. (T.1061).

Dr. Suarez submitted a heart blood sample to the toxicology laboratory for testing. There was no alcohol or drugs in the blood of Lourdes Villegas. The absence of carbon monoxide in the blood and soot in the airways established that all of the burns happened after she was dead. (T.1063-65). Dr. Suarez found a latex phallus in the rectum of Lourdes Villegas. This object was placed there after her death. (T.1069-70). Lourdes Villegas died as a result of head injury. The fire occurred after she was dead. (T.1065).

The autopsy of Miriam Mejides revealed that one forceful blow to the head caused very extensive damage. The blow was lethal, and there would not have been a struggle. (T.1101). There was a large gash on the scalp in the left front area of the head, and she had two black eyes. (T.1076-77). The black eyes were the result of blood seepage. (T.1079). There were skull fractures beyond count as a result of the one exterior injury; one fracture extended along the middle of the head, all the way to the back, ending in little pieces on the floor of the skull. (T.1079-80). There was hemorrhage around and about the brain, and part of the brain had turned to pulp. (T.1050).

The laceration on the head was the result of blunt trauma caused by a blunt instrument, consistent with State's Exhibit 23, the baseball bat. (T.1080-82). The multiple fractures and brain

damage were "intimately radiated" to it. (T.1081). There was a laceration on the back of Miriam Mejides' left hand. There was at least a 50 percent chance that it was a defensive wound. (T.1086, 1103).

As with Lourdes Villegas, the thermal injuries to the body of Miriam Mejides occurred after her death. (T.1088-89). The women died within eight hours of the examiner's arrival at the scene at 10:30 a.m. (T.1071-74).

C. Juror Misconduct: Post Verdict Hearing

At the conclusion of the first phase of trial, the trial court granted defense counsel's written and oral motions to postpone sentencing. (R.149-50; T.1259-77). The court informed the jurors of the reasons for the six-week delay. (T.1278).

The court reminded the jurors, including the alternates, of their continuing obligations:

* * *

> Okay, folks, this is really going to be hard, since we are going on to phase two of, I am going to ask you not to discuss this case with anybody at home or any of the personnel or anything like that.
>
> I know you have discussed it with each other, of course, to arrive at a verdict, but this is what you were told to do. But we have to begin again on that second part and if you have discussed it or made, you know, formed a definite or fixed opinion well, then the process is filled with problems. So I know it's going to be hard, your family members are going to want to know what in the world went on.

* * *

(T.1281).

Notwithstanding the court's instructions, one of the jurors broke the rules as soon as the jury was excused for the recess.

Two corrections officers told the court that Juror Carcases, the foreman, had approached the victims' relatives and had spoken with them. (T.1284-86). Officer Jenkins heard Carcases say "something to the effect that it was hard." He did not hear the family member's response. (T.1285). Officer Carnevale did not hear too much, but he had remarked to his fellow officer, "It looks like they are friends." (T.1286).

The defense investigator verified that Juror Carcases had approached the family. (T.1287). The investigator saw three other members of the panel with Carcases as he said something in Spanish to the mother of the deceased. He embraced her, and the mother gave him a kiss. Carcases said something else in Spanish before stating in English, "We are going to have to come back, but we will give it to him in the death penalty." (T.1288).

After hearing this testimony, the court reached a tentative decision to voir dire the jurors individually when they returned in six weeks. (T.1288). Defense counsel argued that the juror's clear violation of the court's instructions tainted the whole panel. (T.1289). The court agreed that Juror Carcases had violated its order no matter what was said. (T.1290). The court then questioned the mother of Miriam Mejides and the sister of Lourdes Villegas. (T.1290).

According to Mrs. Mejides, the juror spoke in Spanish and said, "Take it easy, take it easy." The juror did not mention the death penalty. He made some physical contact. (T.1291).

Ms. Villegas denied that Juror Carcases talked with her:

"All he did was an expression on his face." Ms. Villegas understood the juror's hand gesture and facial expression to mean, "What can I do?" or "What can I say?" (T.1293-94).

D. Juror Misconduct: Pre-Sentencing Hearing

Court proceedings did not resume until May 6, 1986, when the court heard the defendant's motion to discharge sentencing jury. (R.256-60; T.1295). The court gave a preliminary statement of its views:

* * *

> THE COURT: . . .Although unsubstantiated at this time as to the exact nature of the contact, none the less there was some contact. Certain aspects of it have already been recorded on March 7. So Mr. Von Zamft in the pleading filed with this Court has raised a question of a taint, to the point where he wants the Court to strike this entire jury panel and either reconvene a new jury and or I guess sentence him to life in prison as opposed to death.
>
> This Court has had a great deal of time to think and research this, and this Court is of the opinion that we must go forward. This Court is of the opinion that to stop at this point would give a message to anyone who wish[es] to test the will of this Court, that I could never get to the death penalty phase of any case.
>
> Well, the word will be sewn [sic] and sounded to this community that this judge will complete both phases of a trial.

* * *

(T.1298-99).

The individual voir dire of the jurors is summarized below.

JUROR DAVIDSON: Davidson recalled the judge's parting admonition on March 7th. (T.1303). He did not actually observe the foreman of the jury have contact with the family, but: "(I) saw a commotion, and after I presume it occurred and I just

inquired what happened, and I was told that he was speaking with one of the relatives and he was told to not do so." (T.1303-04).

Davidson did not know the contents of the conversation, and the fact of the conversation would not affect his ability to recommend punishment. (T.1304-05). Davidson did not talk to any family members, but he did talk to the foreman after the incident about what happened.

JUROR CARCASES: The foreman admitted that he had initiated a conversation with the family of the decedents in this case. (T.1307). The foreman had stated, in English:

> I said out loud, not really toward anyone, I first said out loud, I said well, I said well, I just hope we do the right thing. Not in my eyes but in the eyes of God. In my opinion I thought I did the right thing.

(T.1308).

He denied saying anything about the death phase. (T.1308-09).

On examination by defense counsel, Carcases acknowledged that he had contact with the family of the deceased, but denied that he spoke to them out in the hall:

* * *

> [JUROR CARCASES]: No, I did not speak. The mother came out and hugged me before I knew what was going on but I did not speak.
>
> [DEFENSE COUNSEL]: There was physical contact between you and at least the mother?
>
> A. Yes, sir.
>
> Q. A couple of other jurors came over when that was going on?
>
> A. I walked out with two jurors. The first one

that came in, I am not sure at all if that is the one that sat in this chair originally. The other one I cannot remember his name but he is wearing jeans and stripped yellow shirt.

Q. There were at least two of them with you at the time the mother gave you a hug?

A. Yes, sir.

Q. Did she speak to you at all when she gave you a hug?

A. Not that I know of.

Q. Did she speak to you in Spanish?

A. My Spanish is terrible. That is the truth.

* * *

(T.1311).

JUROR PARIS: Paris saw the foreman have contact with the family of the deceased. She heard the conversation, but it was in Spanish. (T.1313). Only the foreman spoke. (T.1317). She did not think that any other jurors were with the foreman at the time, but somebody else came out and saw what happened. (T.1315).

Nothing about the incident would affect her ability to make a recommendation to the court; she was prepared to keep an open mind and listen to the evidence and testimony. (T.1313-14).

JUROR SANCHEZ: Sanchez saw the foreman of the jury have contact with the family of the deceased. (T.1317-18). The contact was physical. (T.1319). Sanchez told the foreman that "he shouldn't have done it." (T.1319). It is "kind of hard", but he has lived up to the court's instruction not to form any fixed opinion. (T.1318).

JUROR GREEN: Green did not see any contact between the foreman and the family. She did not discuss the case with anybody. (T.1320).

JUROR BROWN: Brown did not see foreman Carcases have contact with the family. (T.1321). She did not leave the building immediately. Juror Carcases and one of the other young jurors walked her to the car lot. (T.1321). She did not discuss the case with anyone, and nothing happened that would prevent her from sitting as a juror for the rest of the case. (T.1321).

JUROR VILLALOBOS: Villalobos saw the unauthorized contact. He did not hear anything that was said, he just saw the foreman talking to the lady. (T.1322). Villalobos did not try to stop the foreman or to separate them; he was told not to get involved. (T.1323). There is nothing about the incident that would affect his ability to be fair and listen to the rest of the case. (T.1322).

JUROR BLUM: Blum did not see any contact. (T.1324).

JUROR HORIGAN: Horigan did not see the incident. (T.1325).

JUROR SMITH: Smith did not see the incident and does not know anything about it. (T.1326).

JUROR VENTO: Vento did not see the unauthorized contact. He does not know anything about what took place, but he "heard something." He heard a "couple of stories." He heard that "somebody embraced one of the jurors." (T.1326-27). The unauthorized contact would not affect his ability to be fair and impartial in this phase. (T.1327).

JUROR EBER: Eber was still in the courtroom when the defense investigator came back inside. The judge had already left the bench. (T.1328). The incident would not affect her ability to be fair and impartial. She did not discuss the case with anyone. (T.1328).

ALTERNATE JUROR FINNERAN: Finneran did not see the unauthorized contact, but she heard about it. She heard that the mother came up to Juror Carcases and hugged him. (T.1329).

Finneran considers herself fair and impartial. Nothing about the incident bothered her. (T.1330).

ALTERNATE JUROR BURDICK: Burdick did not see the contact; she heard about it, but she heard that the foreman hugged the family member, not vice versa. (T.1332). She thinks that it was Juror Paris who told her about it when they were leaving. Juror Paris told Burdick that she had heard a conversation in Spanish but did not know what it was. (T.1333).

At the conclusion of the voir dire examination, the trial court denied the motion to strike the panel. (T.1334-35).

Defense counsel objected to the court's expression of a fixed opinion and moved, in the alternative, for the discharge of Jurors Carcases, Villalobos, Paris and Sanchez. (T.1336). The court denied the motion. The state would agree only to the discharge of the foreman. (T.1336). The foreman was excused. (T.1337). Alternate Juror Finneran replaced him. (T.1346-47). Although the jurors were sworn to "consider the evidence given and recommend an advisory sentence according to the law and

instructions," they were given no admonishment regarding their consideration of the evidence adduced in the first phase of trial on which the state was resting its case for the death penalty.

E. Death

The jurors deliberated less than an hour before recommending, by an 8 to 4 vote, that the trial court impose sentences of death. (T.1383-87). The trial court gave defendant Scull an opportunity to speak. Scull professed his innocence. (T.1389). The court then spoke:

* * *

> Well, Mr. Scull, I don't know if you had the benefit of watching the television the last couple of nights as you were a resident of the Dade County Jail, but I understand that they have cable television over there now.
>
> * * *
>
> But again we may quarrel. Some people may have liked the Bundy show and others may not have. But I think that it illustrated an phenomena in what we have seen here today, and that is you are a psychopathic killer. You have no conscience. You have no feeling neither for the consequences of what you have done or the wreckage that you have left behind.
>
> The victims and their families, their lives will never be the same because of what you did. There is no question in my mind, sir, that this case was fully tried, very capably tried. Your attorney did an excellent job, but he has been in this business long enough to know that we are only lawyers and underneath this vestment I am a lawyer as well.
>
> We are lawyers. We are not magicians. Sometimes you just cannot work, cannot do much with these facts.
>
> For the benefit of the jury since you are sitting here listening to this, Mr. Von Zamft attempted to have him analyzed by a psychologist. He was polygraphed. He flunked. He denied any involvement to the psychologist.

> You know, to begin to treat somebody or help somebody there must first be an admission that there is in fact a problem. And that is why I classified him as a complete and total psychopath. He does not have any feeling. He has no conscience. Accordingly, this Court is satisfied that the aggravating factors rather heavily out weigh the mitigating factors in this case.
>
> * * *

(T.1389-90).

The trial court found the following aggravating circumstances as to each count: the defendant knowingly created a great risk of death to many persons by setting a fire; the capital felony was committed while the defendant was engaged in. . .robbery, sexual battery, arson, burglary, kidnapping, "et cetera"; the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; the capital felony was committed for pecuniary gain; the capital felony was especially heinous, atrocious, or cruel; the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (T.1390-92). The court saw two mitigating circumstances: the defendant has no significant history of prior criminal activity and the age of the defendant at the time of the crime. (T.1392). The court's written findings are similar to its oral recitation of the statutory factors. (R.301-02).

SUMMARY OF ARGUMENT

When a defendant in a criminal prosecution expresses dissatisfaction with appointed counsel, the trial court is required to examine the reasons. A defendant is entitled to counsel with whom he has no conflict. In this case, the court's inquiry was not adequate to protect the defendant's right to conflict-free counsel. The expressions of hostility by counsel towards the defendant throughout his representation demonstrate that there was a real risk of conflicting interests. The trial court's denial of the defendant's motion to discharge was per se reversible error.

The defendant established, and the trial court so found, that after the verdicts were returned there was unauthorized contact between the jury foreman and the victims' family. The state did not sustain its burden of demonstrating that the contact was not prejudicial. The jurors were not questioned about the incident until eight weeks later, on the morning of sentencing; most had either witnessed or heard about the incident but had failed to report it; and the trial court failed to take adequate precautions regarding its substitution of the disqualified foreman with the alternate. Given the nature of the proceeding and the critical role the jury plays in it, the trial court's failure to discharge the panel prejudiced the defendant's right to a fair capital sentencing hearing.

The trial court committed numerous errors in imposing the sentences of death. The defendant had not placed his mental

condition in issue, but the trial court determined that he was a psychopath who showed no remorse. The defendant persisted in maintaining his innocence but the trial court considered defense counsel's assertion that the defendant had flunked a polygraph test, thus penalizing him for going to trial. These nonstatutory factors were expressly given great weight by the judge. The trial court also gave improper consideration to several statutory factors in aggravation which were not supported by the evidence. Since the court found the existence of two mitigating circumstances, the defendant's sentences of death must be vacated and the cause remanded for a new sentencing hearing.

ARGUMENT

I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISCHARGE COUNSEL WHERE IT FAILED TO CONDUCT AN ADEQUATE INQUIRY AND THERE WAS A RISK OF CONFLICTING INTERESTS, IN VIOLATION OF THE DEFENDANT'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Sixth Amendment guarantees: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." Where the accused voices objections to appointed counsel, the trial court is obligated to inquire into the reasons for the dissatisfaction. Thomas v. Wainwright, 767 F.2d 738, 741 (11th Cir. 1985); Johnston v. State, 497 So.2d 863, 867 (Fla. 1986).

In this case, the trial court purported to conduct such an

inquiry, but it was not sufficiently adequate to protect defendant Scull's right to counsel.

At the outset of the hearing on Scull's motion to discharge counsel/motion for certification of conflict of interest between counsel and defendant (see n.1), the court agreed that Scull was not being dilatory. Scull had been quite satisfied with the representation of his original counsel. (T.305). The court read a letter that had been written by defense counsel to his client; the letter was made part of the record. (T.306-07; S.). The court then inquired of the defendant:

* * *

> THE COURT: Mr. Scull, why do you feel that it's necessary that Mr. Van Zamft no longer represents you?
>
> THE DEFENDANT: (Through the Interpreter) He said that he could not come to see me. I feel that I have a right to be able to see him whenever I need him and he has--
>
> THE COURT: Well, sir, he is not a servant; he is not your personal servant, Mr. Scull. He is not at your beck and call.
>
> The law requires you to have an attorney, but he does not have to come and see you every time that you snap your fingers over there.
>
> Now, the man is a competent lawyer.
>
> THE DEFENDANT: I know that.
>
> THE COURT: Now, you have two choices. Let's get something very clear, let's get something very clear and straight.
> Either Mr. Van Zamft is going to represent you or you are going to try this case by yourself. So you had better make up your mind about the facts of life here.
>
> Do you want to represent yourself?
>
> THE DEFENDANT: I accept what he says.

THE COURT: Okay, so Mr. Van Zamft will continue to be your lawyer.

* * *

(T.307-08) (e.s.)

THE COURT: In his letter to you, the only real gripe that you have is that he does not come over to see you every time that you snap your fingers. Well, the game is not played that way, Mr. Scull.

THE DEFENDANT: No, no, I am not saying that.

THE COURT: I'm just telling you, pal, that you have two choices.

Now, either you accept Mr. Van Zamft or you are going to trial by yourself. So you make the choice.

* * *

(T.308) (e.s.)

* * *

THE DEFENDANT: I have two years and three days waiting for this.

THE COURT: Well, Mr. Scull, the wait is almost over.

Mr. Van Zamft is going to represent you.

THE DEFENDANT: If I wait another year it does not matter.

THE COURT: Well, Mr. Van Zamft is going to represent you and that's the last that I want to hear about it. Thank you.

MR. NOVICK (The Prosecutor): All right, Judge. I will go ahead and telephone Mike for you, Judge.

THE COURT: Fine, thank you.

THE DEFENDANT: Now, if I go ahead and accept him to represent me because I cannot represent myself because I know nothing about law--

THE COURT: Well, that's the choice, Mr. Scull. You've got two choices. You can have Mr. Van Zamft represent you.

THE DEFENDANT: Is that the option?

THE COURT: Yes, that's the option.

THE DEFENDANT: Then go ahead and condemn me. Sentence me if that is the option that I have.

THE COURT: Well, sir, that's what the bottom line is going to be.

* * *

(T.309-10)

The court resolved Scull's dissatisfaction with his counsel by summarily ordering the defendant's removal from the courtroom for a psychological evaluation. (T.311-12). The court committed reversible error.

The court did not permit the defendant, who spoke through an interpreter, to elaborate on his reasons for wanting another attorney. The court did not inquire of court-appointed counsel because counsel did not bother to appear. The prosecutor suggested a possible explanation; counsel was pursuing his civil practice of law. (T.306).

The letter which counsel wrote to the defendant indicates frustration and hostility on both "sides." The letter not only refers to Scull's demand to see his attorney on a certain day, but it addresses Scull's assertion that counsel had acted in a way to injure his case. (S.). Scull's reasons were sufficient. The animosity reflected by the letter shows the existence of a

risk of conflicting interests.[8] Compare Johnston, supra, where the Court deemed it significant that neither defendant nor counsel alleged any conflict of interest, and an open line of communication existed throughout trial.

A criminal defendant is entitled to counsel whose undivided loyalties lie with his client. Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); United States v. Jeffers, 520 F.2d 1256, 1263 (7th Cir. 1975).

The trial court's perfunctory inquiry of the reasons underlying the defendant's motion to discharge counsel, in light of the circumstances disclosed during the hearing and at trial violated the defendant's Sixth Amendment right to conflict-free representation. The error is per se reversible. Holloway v. Arkansas; Strickland v. Washington, 466 U.S. 668, 692, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

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8. Indeed, the record affirmatively demonstrates the actualization of that risk. Counsel complained of his inability to communicate with the defendant and threatened to quit after the verdicts were returned. (T.1265-66, 1272). At the beginning of Scull's capital sentencing hearing, counsel informed the court that his client had flunked a polygraph test, and there was nothing to mitigate the offenses. (T.1340-45, 1390).

II

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISCHARGE SENTENCING JURY AND IN REPLACING THE DISQUALIFIED JUROR WITH AN ALTERNATE WHERE (1) THE MISCONDUCT INVOLVED UNAUTHORIZED CONTACT BETWEEN THE FOREMAN AND THE VICTIMS' FAMILY, (2) THE STATE FAILED TO DEMONSTRATE THAT THE CONDUCT WAS NOT PREJUDICIAL, AND (3) THE COURT FAILED TO FOLLOW PROCEDURAL SAFEGUARDS, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The defendant's right to an impartial jury is fundamental, and it is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Florida Constitution. Livingston v. State, 458 So.2d 235 (1984). A capital defendant's right to an impartial sentencing jury is further guaranteed by the Eighth Amendment. Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). The jury plays a critical role in Florida's capital sentencing scheme. See Adams v. Wainwright, 764 F.2d 1356, 1364 (11th Cir. 1986); Livingston v. State.

Under the unusual facts of this case, the trial court's failure to discharge the entire panel for sentencing deprived the defendant of his right to a fundamentally fair capital sentencing hearing.

There is no question that the foreman of the jury initiated physical and verbal contact with the victims' family. This post verdict contact occurred right after the court had informed the jurors of the necessity for a six-week continuance of the penalty phase and had instructed them not to discuss the case. (T.1278-

94). Although the court heard testimony about the incident from court personnel, the defense investigator, and the family members involved (T.1284-91), it made no inquiry of the jurors until eight weeks later, on the morning of the defendant's capital sentencing hearing.

Since the defendant proved extrinsic contact at the post verdict hearing (T.1289-94), the burden was on the state to demonstrate that the contact was not prejudicial. United States v. Phillips, 664 F.2d 971, 999 (5th Cir. 1981). Any off-the-record contact with a jury is presumptively prejudicial, and the burden is heavy; if the state cannot meet this burden, a new sentencing proceeding is required. United States v. Forrest, 620 F.2d 446, 457 (5th Cir. 1980). The individual voir dire of the jurors was not sufficient. Of those who witnessed the unauthorized contact of the foreman with the victim's mother, each one saw and heard something different. (T.1303-06, 1313, 1317-19). There was not even a consensus as to the language used. The mother said the juror spoke in Spanish, while the juror said he spoke in English. (T.1291, 1308). Nor was there a consensus of the jurors who only heard of the incident. (T.1326-27, 1329).

No juror reported the incident to the court, but each juror, who was asked, said the incident would not affect the ability to recommend penalty. (T.1304-05, 1308-09, 1313-14, 1318, 1321, 1322, 1327, 1328). These protestations of impartiality are not sufficient to overcome the presumption of prejudice. Singer v.

State, 109 So.2d 7, 22-23 (Fla. 1959); Armstrong v. State, 426 So.2d 1173 (Fla. 5th DCA 1983). And, under the circumstances of this case, the decision to replace the disqualified juror with the alternate did not obviate the prejudice.

There is authority for the trial court's action, Fla.R.Crim.P. 3.280, but only if adequate procedural safeguards are followed. United States v. Phillips, supra; United States v. Kopituk, 690 F.2d 1289 (11th Cir. 1982); McGill v. State, 468 So.2d 356 (Fla. 3d DCA 1985). The most important of these safeguards is ensuring that the jurors will begin their deliberations anew by careful questioning and by special instructions. Phillips, 664 F.2d at 991, Kopituk, 690 F.2d at 1308-09. The trial court in this case did nothing to ensure that the remaining regular jurors would be able to begin their deliberations anew. This error was extremely prejudicial, since the state rested its case for the death penalty on the evidence adduced at trial. (T.1349). The jurors deliberated for less than an hour before advising the court to impose two sentences of death. (T.1383-87). The prejudice to defendant Scull is apparent on the face of the record. A new sentencing hearing is required.

III

THE APPLICATION OF FLORIDA'S CAPITAL SENTENCING STATUTE TO JESUS SCULL UNDER THE FACTS OF THIS CASE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

In Florida, no defendant can be sentenced to death unless the aggravating factors outweight the mitigating factors. Alvord

v. State, 322 So.2d 533, 540 (Fla. 1975). Since the aggravating circumstances set forth in Section 921.141(6) actually define those capital crimes to which the death penalty is applicable, they must be proven beyond a reasonable doubt before being considered by judge or jury. State v. Dixon, 283 So.2d 1, 8-9 (Fla. 1973). The statutory aggravating circumstances are exclusive, and no other circumstances may be used to tip the balance in favor of death. Miller v. State, 373 So.2d 882, 885 (Fla. 1979).

In imposing the death penalty in this case, the trial court violated these principles by relying on aggravating circumstances not established by the evidence, and by using a nonstatutory aggravating factor as determinative of its weighing process. Because the trial court also found the existence of two mitigating circumstances, the defendant's death sentences must be vacated for a new sentencing hearing. Elledge v. State, 346 So.2d 998 (Fla. 1977).

A. The Aggravating Circumstance Of Creating Great Risk Of Death To Many People Is Not Applicable Here.

The trial court found that the defendant knowingly created a great risk of death to many persons by setting a fire in the victims' home. (T.1390-91; R.301-02). This finding is supported by language in King v. State, 390 So.2d 315 (Fla. 1980), where this Court held that an arson committed in connection with capital murder satisfied Section 921.141(c) even though only the victim was in the dwelling:

[W]hen the appellant intentionally set fire to the

> house, he should have reasonably foreseen that the blaze would pose a great risk to the neighbors, as well as the firefighters and the police who responded to the call.

Id. at 320. This language, however, cannot be construed to authorize a finding of aggravating circumstance (c) whenever an arson is committed in a capital case. To do so would violate the mandate of the Eighth Amendment to consider the circumstances particular to each case. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 2966-69, 49 L.Ed.2d 913 (1976), Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976).

Here, the fire was set in the bottom apartment of a two-story duplex in a residential neighborhood. The top apartment of the concrete block structure was vacant. (T.713-14, 777, 786). The fire was confined to the bedroom, with the longest and hottest point of burning in the center of the queen size bed. (T.733-34, 737, 755). The firefighters responded to the scene and began putting out the fire within six or seven minutes of the call. (T.670, 713, 745). By then, the fire had "pretty much burned itself out" and the men quickly "knocked the fire down." (T.674-75).

It cannot be disputed that fires are dangerous and that firefighters and police officers have dangerous occupations. In this case, however, there was no showing, let alone proof beyond a resonable doubt, that the arson caused a great risk of death to many persons. Compare Welty v. State, 402 So.2d 1159, 1164 (Fla. 1981) (this circumstance properly found where the defendant set

fire to the victims' bed and six elderly persons were asleep in the same building); Way v. State, 496 So.2d 126, 128 (1986) (this circumstance properly found where the defendant used gasoline to set a fire in his garage which contained numerous combustible materials; he prevented access to the area; his youngest daughter was playing inside the house; and five police and firemen were endangered in their attempt to rescue the victims before the arrival of fire apparatus) with Lucas v. State, 490 So.2d 943, 946 (Fla. 1986) (upon reconsideration, this circumstance is not applicable to a homicide committed during a "raging gun battle" where only the victim and her two friends were involved).

B. The Trial Court Improperly Found The Aggravating Circumstance Of Avoiding Arrest.

In Riley v. State, 366 So.2d 19 (Fla. 1978), this Court held:

> [T]he mere fact of death is not enough to invoke this factor when the victim is not a law enforcement officer. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases.

Id. at 22. Further, the mere fact that the victim might be able to identify an assailant is insufficient. It must be "clearly shown that the dominant or only motive for the murder was the elimination of" the witnesses. Bates v. State, 490 So.2d 490, 492 (Fla. 1985); Menendez v. State, 368 So.2d 1278 (Fla. 1979); See also Dufour v. State, 495 So.2d 154, 163 (1986).

In Bates, for example, the victim was not a police officer, and she did not know her assailant. This Court found the consideration of the avoid arrest circumstance improper where it

was based on mere speculation. 465 So.2d at 493.

In this case, no showing was made that the dominant or sole motive for the murders was the elimination of witnesses. The victims were not police officers, and the only evidence that they knew the defendant was his statement to the police - - he knew both women, he was involved in a cocaine deal with them, he had the use of the victim's car, he never touched a baseball bat in their home (T.887-904) - - which the jury obviously did not believe.

This factor was improperly found.

C. The Trial Court Erred In Considering The Aggravating Circumstance For Pecuniary Gain.

The wording of this aggravating circumstance constitutes an inherent limitation. §921.141(f). The language evinces a legislative intent to limit application of this circumstance to those capital murders primarily motivated by a desire for pecuniary gain. See Peek v. State, 395 So.2d 492 (Fla. 1981).

In Peek, the defendant was convicted of capital murder, sexual battery, grand larceny and burglary. The defendant had ransacked the victim's purse and "made off with her automobile", which was later found abandoned with the keys inside. But, there was no evidence that any money or household belongings were taken. This Court held:

> The record does not support the conclusion that Mrs. Carlson was murdered to facilitate the theft, or that appellant had any intention of profiting from his illicit acquisition. The more reasonable inference is that appellant stole the car in order to quicken his escape from the scene of the murder. Considering all the circumstances, the evidence linking the murder to a

> motive for pecuniary gain is insufficient to establish this aggravating factor beyond a reasonable doubt.

395 So.2d at 499.

The same conclusion must be made here. Although the dresser drawers in the victims' bedroom had been ransacked, the bodies were almost underneath the open drawers and there was no showing that any money or household goods were taken. It appears that the rummaging was an afterthought, rather than the motive for murder, Parker v. State, 458 So.2d 750, 754 (Fla. 1984), and the car was stolen in order to facilitate escape from the scene. Peek. This factor was improperly found.

D. The Capital Murder Of Miriam Mejides, Though Reprehensible, Was Not Especially Heinous, Atrocious, Or Cruel.

This circumstance was given a limited construction by this Court in its first decicion on Florida's death penalty statute:

> . . .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.

State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); accord, Simmons v. State, 419 So.2d 316, 318-19 (Fla. 1982); Herzog v. State, 439 So.2d 1372, 1380 (Fla. 1983).

This circumstance does not apply where there is no evidence that the victim was subjected to repeated blows while living, or where death is most likely instantaneous or nearly so. See

Simmons (evidence that victim was struck twice on the head with a roofing hatchet insufficient to support this circumstance where either of the blows could have caused instantaneous death).

This circumstance does not apply where the victim is not clearly cognizant of the likelihood of her death. Jackson v. State, 451 So.2d 458, 463 (Fla. 1984) (although victim was shot in the back, put in a car trunk while still alive, wrapped in plastic bags, and shot again while still alive, it was error to find this circumstance in the absence of evidence that victim "remained conscious more than a few moments after he was shot in the back the first time, and he therefore was incapable of suffering to the extent contemplated by this circumstance"). See also Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1983) ("The criminal act that ultimately caused death was a single sudden shot from a shotgun. The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies.").

In this case, Miriam Mejides died from a single blow to her head which caused massive brain damage. This blow was "absolutely" lethal; it would have rendered her unconscious, and there would have been no further struggle, if any, on her part. (T.1076-77, 1101). The additional fact that there was a 50 percent chance that the laceration on the back of her hand was a defensive wound is not sufficient to establish this circumstance beyond a reasonable doubt when applied to the murder of Miriam

Mejides.

Moreover, to the extent that the trial court may have considered the thermal injuries she sustained after death, in finding this circumstance, the court committed error. See Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975) (hideous and gruesome post death conduct, the dismemberment of victim's body hours after killing, may not be considered in applying this aggravating circumstance); Simmons v. State, supra (trial court erred by finding in support of this factor that "the defendant endeavorded to conceal, or otherwise hide, the product of his premeditated murder by an unsuccessful attempt to burn the body of his victim in the victim's own truck.").

And, to the extent that the trial court accorded weight, in support of this factor, to its finding - - "[Scull] does not have any feeling. He has no conscience." (T.1390) - - the trial court committed error. Pope v. State, 441 So.2d 1073, 1078 (Fla. 1984) (lack of remorse may not be weighed either as an aggravating factor or as an enhancement of an aggravating factor).

E. The State Failed To Show Beyond A Reasonable Doubt That These Murders Were Committed In A Cold, Calculated And Premeditated Manner.

This aggravating circumstance is generally found only in murders which, by their nature, exhibit a heightened degree of premeditation, such as contract or execution style murders. McCray v. State, 416 So.2d 804, 807 (Fla. 1982). This circumstance places a limitation on the use of premeditation as an aggravating circumstance; there must be a showing of some

quality setting the crime apart from mere ordinary murder. This Court has found such crucial added quality of heightened premeditation where, for example, the defendant engaged in a "lengthy series of events" including beating, transporting, gang raping and setting live victim on fire, Jent v. State, 408 So.2d 1024 (Fla. 1981); where the victims were stripped, beaten and tortured over a period of hours; Hill v. State, 422 So.2d 816 (Fla. 1982); and where the defendant sat for hours holding a shotgun and thinking about killing the victim, Middleton v. State, 426 So.2d 548 (Fla. 1982).

In this case, the state failed to prove beyond a reasonable doubt the critical, additional quality of heightened premeditation. Bates v. State, 465 So.2d 490, 493 (Fla. 1985).

F. The Trial Court Improperly Used A Nonstatutory Aggravating Factor As A Controlling Circumstance In Its Weighing Process.

In sentencing Jesus Scull to death, the trial court said to him:

> [Y]ou are a psychopathic killer. You have no conscience. You have no feeling neither for the consequences of what you have done or the wreckage that you have left behind.
>
> The victims and their families, their lives will never be the same because of what you did. . . .
>
> For the benefit of the jury since you are sitting here listening to this, Mr. Von Zamft attempted to have him analyzed by a psychologist. He was polygraphed. He flunked. He denied any involvement to the psychologist.
>
> You know, to begin to treat somebody or help somebody there must first be an admission that there is in fact a problem. And that is why I classified him as a complete and total psychopath. He does not have any

> feeling. He has no conscience. Accordingly, this Court is satisfied that the aggravating factors rather heavily out weigh the mitigating factors in this case.
>
> * * *

(T.1389-90).

The trial court's diagnostic finding makes clear that it improperly considered the defendant's mental condition, which was not placed in issue and for which there is no evidentiary support, as an aggravating factor. The court compounded the error by relying on the defendant's imagined psychopathology as determinative of the weight to be accorded the statutory circumstances. Miller v. State, 373 So.2d 882, 885 (Fla. 1979).

In Miller the trial court properly found two mental mitigating circumstances based on the defendant's history of mental illness and his behavior at the time of the offense. The court, however, used the fact that the defendant's illness was incurable to justify its decision to impose death instead of life. This Court reversed:

> It is clear from the trial judge's sentencing order that he considered as an aggravating factor the defendant's allegedly incurable and dangerous mental illness. The use of this nonstatutory aggravating factor as a controlling circumstance tipping the balance in favor of the death penalty was improper. The aggravating circumstances specified in the statute are exclusive, and no others may be used for that purpose.

Id. at 887.

Even more egregious was the trial court's consideration of the defendant's alleged failure to pass a polygraph test in conjunction with its reliance on lack of remorse. Defendant Scull denied committing the acts, and he persisted in maintaining

his innocence, from arrest through sentencing. It can only be concluded that the trial court aggravated the defendant's sentence for failing to admit his guilt. The court erred in punishing the defendant for exercising his constitutional right to a trial by jury. Hubler v. State, 458 So.2d 350 (Fla. 1st DCA 1984); see also Pope v. State, 441 So.2d 1073, 1078 (Fla. 1984).

G. Jesus Scull Is Entitled To A New Sentencing Hearing.

The record reflects that the trial court improperly found several statutory aggravating circumstances, and it improperly accorded controlling weight to nonstatutory factors. But the trial court also found two mitigating circumstances. (T.1392; R.301-02). Accordingly, this Court must vacate the death sentences and remand to the trial court for a new sentencing proceeding. Elledge v. State, 346 So.2d 998, 1002-03 (Fla. 1977); Bates v. State, 465 So.2d 490, 493 (Fla. 1985).

CONCLUSION

For the reasons given and upon the authorities cited, the appellant requests this Court to reverse the judgment and sentence of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the office of the Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128, on this 24th day of April, 1987.

BY: ROBIN H. GREENE