IN THE SUPREME COURT OF FLORIDA



JOHNNY ROBINSON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 68,971

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ST. JOHNS COUNTY
FLORIDA

# INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On September 5, 1985, the Spring Term Grand Jury in and for St. Johns County, Florida, returned a four-count indictment charging the Appellant, JOHNNY LEARTICE ROBINSON, with first-degree murder, kidnapping, armed robbery, and sexual battery. (R1-2) An amended indictment was filed on May 6, 1985. (R10)

Appellant filed a motion in limine regarding testimony concerning a collateral crime. (R12-14) Appellant also filed a motion in limine regarding the suppression of testimony concerning the circumstances of his arrest. (R12-16)

Prior to jury selection, the Appellant and the State entered into a stipulation of facts which, in effect, resulted in the State agreeing to Appellant's motion in limine regarding evidence of the collateral crime. (R171-177) The State also agreed to Appellant's motion in limine regarding the circumstances surrounding his arrest.

Jury selection was conducted on May 27, 1986, before the Honorable Richard O. Watson, Seventh Judicial Circuit, in and for St. Johns County, Florida. (R178-389) During one portion of jury selection,the Appellant was absent from the courtroom. (R181-188) After the jury was sworn, the rule of sequestration of witnesses was invoked. (R386-393)

The trial court denied Appellant's request to prohibit the State from referring to Ms. St.George as a victim and from referring to the offense as a murder. (R393-394)

Prior to any testimony, the trial court warned counsel that all witnesses who might inadvertently mention an objectionable matter relating to the motions in limine should be cautioned prior to testifying. The prosecutor volunteered to make sure that this did not occur. (R177)

During the testimony of Charles West, a diagram was admitted over Appellant's objection. (R428-433) Mr. West also made reference in his testimony to a collateral burglary. Appellant's motion for mistrial based upon this testimony was subsequently denied. (R434-436,470-474)

Appellant's objection to the introduction of a photograph of a gun similar to the weapon used during the offense was sustained. (R435-436) Eventually, Appellant's objection to the photographs of the gun was overruled and the evidence was introduced. (R511)

A purse strap found at the scene of the crime was admitted into evidence over Appellant's timely and specific objection. (R449-450)

During the testimony of Deputy Glen Lightsey, Appellant objected to any mention of Bernard Fields, his co-perpetrator, based upon relevance. This objection was overruled. (R478-480)

Once it was determined that the victim's husband would not be called as a witness, the State excused Mr. St.George from his subpoena without objection. However, defense counsel did object to Mr. St.George remaining in the courtroom during the conclusion of the trial. (R488)

Defense counsel objected to the introduction of certain photographs of Appellant's automobile based upon relevance. This objection was overruled. (R510)

During the direct examination of Bernard Fields, Appellant objected to Mr. Fields' answer to a question as being unresponsive. This objection was overruled and the answer was allowed to stand. (R513-514)

Defense counsel also objected to testimony regarding a statement by the Appellant to Charles West. This objection was overruled. (R535) Appellant's objection to a question propounded to Mr. West was also overruled. (R535-536)

Following the conclusion of the State's case-in-chief, Appellant moved for a judgment of acquittal as to each of the four counts as well as the lesser included offenses in consecution based upon the failure of the State to establish a prima facie case. These motions were denied. (R547-554) Defense counsel also renewed his previous objections as well as his motions for mistrial. (R549-550) The Appellant presented no evidence at the guilt phase.

Appellant requested several special jury instructions on circumstantial evidence, intoxication, and excusable homicide. These requests were denied. (R554-564,700)

During final summation by the State, Appellant's objection to a portion of the argument was overruled. (R613-614) During final summation by defense counsel, the trial court, sua sponte, chastised Appellant's attorney in the presence of the jury. (R644) Additionally, the State's objection to a certain portion of Appellant's closing argument was sustained. (R654)

Following deliberation, the jury returned with verdicts of guilty as charged on all four counts. (R75-78,701-702)

At the penalty phase, Appellant's request for an opening statement was denied. (R706) Appellant objected to the jury being instructed and to the State arguing certain aggravating circumstances for a variety of reasons. These objections were overruled. (R710-721) These objections were renewed prior to the actual jury instructions. (R796-797)

During the testimony of a psychologist, the only defense witness, the Appellant requested, through counsel, that he be excused from the courtroom. This request was granted. (R754-757) During cross-examination, Appellant moved for a mistrial after the interjection of racism into a question. (R787-789) This motion was denied. Prior to closing argument, the trial court advised the State not to argue Appellant's racial prejudice. (R797) Appellant's motion for mistrial based upon the objectionable testimony was renewed and again denied. (R797-798)

During the testimony of Sergeant Edward O'Neil, defense counsel objected to testimony concerning Appellant's fingerprints. This objection was overruled subject to the State connecting up the evidence later on during the proceedings. (R805-807) Also at the penalty phase, Appellant objected to a document being admitted into evidence based upon the contention that it was not exemplified. (R811-812) This objection was also overruled and the evidence was admitted.

During closing argument by the State at the penalty phase, Appellant objected to the prosecutor arguing Appellant's lack of remorse. A motion for mistrial on this ground was denied. (R821-823)

Following deliberation, the jury returned with a nine to three recommendation for death. (R80-81,839-843)

On June 6, 1986, the Appellant appeared for sentencing on the three non-capital offenses. Defense counsel objected to a separate sentencing proceeding but was overruled. (R849-853) A sentencing guideline scoresheet was prepared resulting in a recommended guideline sentence of life imprisonment. (R96) Defense counsel objected to portions of the scoresheet based upon numerous contentions. (R855-864,884-887)

At sentencing, Appellant presented testimony from a guard at the St. Johns County Jail which revealed that he was an outstanding inmate and was responsible on four separate occasions for quelling possible disturbances in the jail. (R868)

The State requested that the trial court depart and sentence the Appellant to consecutive life sentences on each

count. (R865) The trial court adjudicated the Appellant guilty of all three offenses and sentenced the Appellant to life imprisonment on each count to run consecutively. The trial court allowed credit for 274 days previously served only as to the kidnapping sentence. (R90-95,871-872) The trial court waived court costs. (R875-876) Defense counsel objected that the consecutive nature of the sentences resulted in a departure without written reasons. This objection was overruled. (R874-876) Defense counsel also contended that the imposition of a life sentence under the guidelines violated Appellant's constitutional guarantee of equal protection. (R859-861)

Appellant's timely motion for a new trial was subsequently denied. (R87,887-888)

The Appellant appeared for sentencing on the capital offense on June 19, 1986. Appellant renewed his objections to several of the aggravating circumstances. The trial court adjudicated the Appellant guilty of first-degree murder and sentenced him to death. In doing so, the trial court found seven aggravating circumstances and one mitigating circumstance. (R144-148,881-899)

A timely notice of appeal was filed on June 26, 1986. (R149,151) This brief follows.

## STATEMENT OF THE FACTS

### GUILT PHASE

Beverly St.George left her home in Plant City at approximately 8:00 a.m. on August 11, 1985. She had approximately $200.00 in cash. Before leaving the house, she put her bills in a wallet, which she then placed in a black purse. Ms. St. George's intended destination was Quantico, Virginia for the purpose of a child custody hearing on August 13. Her planned route consisted of Interstate-4 to Interstate-95. Her 1968 green Plymouth had recently suffered from overheating problems. (R446-449)

On the morning of August 12, 1985, the body of Beverly St. George was found in Pellicer Creek Cemetery, in St. John's County, Florida. Ms. St. George was wearing blue jeans, tennis shoes, and knee-high hose. Several beer cans, a leather purse strap, and a Remington .22 shell casing was found nearby. The body had a wound to the lower left forehead and a second wound to the left cheek. (R415-431)

An autopsy revealed that Ms. St.George had died during the early morning hours of August 12, 1985. She died as a result of two gunshot wounds to her head. The wound to the cheek was a contact wound, that is, one resulting from discharge of a firearm at close range. (R437-438) The medical examiner was unable to determine the sequence of the two wounds. Either shot would have caused her death. The doctor opined that Ms. St.George would have died in a matter of seconds after the first shot. At any rate, she would have been rendered immediately unconscious.

Other than the two gunshot wounds, Ms. St.George had suffered only a scratch on her right thumb. There was no evidence of any other injury. Although sperm was present, there was no injury to her vagina. There was also no evidence of alcohol in her blood, although the contents of her stomach were not examined. The medical examiner admitted that it was possible that the results of a blood alcohol test would have been different, if the blood sample had been taken from another part of her body. The doctor believed that the gun was in contact with Ms. St.George's cheek when it was fired. (R454-464) The wound to the forehead was caused by discharge of a gun that was six inches to two feet away from the skin. (R465)

On August 17, 1985, Deputy Glen Lightsey arrested Johnny Leartice Robinson, the Appellant, at Charlie T's Truck Stop, as Deputy Clarence Smith arrested Clinton Bernard Field, a black juvenile. Both were traveling in Appellant's car. Lightsey advised the Appellant of his constitutional rights at the scene and transported him to the criminal investigation unit at the St. John's Sheriff's Office in order to interview him. (R480-484) The Appellant cooperated with law enforcement authorities from the outset. He signed a rights waiver form at three o'clock that afternoon and a second one at approximately six o'clock that evening. Detective Charles West interviewed the Appellant before eventually reducing Robinson's statement to three pages of written detail. (R524-539)

Under oath, Robinson told Detective West that he had been at a party in Orange Mills throughout Sunday evening. He

had been drinking Hennessy Cognac, some gin or vodka, as well as a quantity of beer. He left the party at approximately 11:30 p.m. accompanied by Bernard Fields. The pair headed toward Orlando on I-95 in order to visit Appellant's girlfriend. On the way, they spotted a green Plymouth pulled over on the side of the road. Since Robinson had some mechanical expertise, he turned around and went to the woman's aid. She told him that she was simply tired and had stopped to rest. Robinson talked and joked with Ms. St.George. During the conversation, she noticed that he carried a gun and wished aloud that she had something similar to kill her ex-husband. Ms. St.George eventually accompanied Robinson and Fields in their car to Pellicer Cemetery. Once they arrived, Robinson and Ms. St.George began to engage in some consensual sexual activity on the hood of his car. During this activity, the Appellant took his gun out of his pants and placed it on the hood. Bernard expressed a desire to leave, but Robinson stated that he wanted to "...take the bitch back to the party!" (R33) She replied, "Who the fuck are you calling a bitch!" Appellant told her, "Shut up whore!". (R33) Bernard began to laugh and the woman began pawing at the Appellant. He picked up the gun and tried to push her back as she pressed up against him. The gun went off accidentally and hit her in the face. When Robinson realized what had happened, he shot her again. He became scared when he realized the credibility problem that he would face concerning the accidental shooting of a white woman. He drove away from the area before deciding to get rid of her belongings. He threw her pocketbook, blouse, and other

belongings out the car window. As dawn broke, he took Bernard home before heading for his own house. When he woke up the next morning, he partially destroyed the gun, using a screwdriver. He then carried the gun under the seat of his car for several days. As he was coming back from Orlando on the morning of August 17, 1985, he stopped the car on the interstate and threw the gun into the bushes. (R32-34)

There was some physical evidence that supported the Appellant's explanation that the killing was accidental. The medical examiner could not exclude the possibility that the shots were accidentally fired. (R468-469) The doctor had no idea what Ms. St.George's position was when the shots were fired. The contact wound could have been caused while Ms. St.George was moving toward the gun barrel, that is, while she was on the offensive. (R468)

At the time of his testimony, Clinton Bernard Fields, Appellant's accomplice, was awaiting sentencing following his convictions for first-degree murder, armed robbery, kidnapping, and sexual battery arising from this incident. Although he did go to trial on these charges, he avoided any possibility of a death sentence when he agreed to testify against Robinson. The only concrete promise made to Fields by the State was the prosecutor's agreement to try to obtain concurrent rather than consecutive sentences. The State also granted Fields immunity from prosecution for any other proceeding arising from his testimony or depositions. Fields admitted that he was looking and hoping for some, indeed any, benefit from the State resulting

from his testimony against Robinson. (R520-522) Additionally Fields planned to appeal his convictions and steadfastly maintained his own innocence in the affair.

For whatever reason, Bernard Fields' account of the death of Ms. St.George differed dramatically from that related under oath by the Appellant at the time of his arrest. Fields testified that the Appellant pulled out his gun as he got out of his car and walked up to Ms. St.George's car. He ordered her out of the car at gunpoint. Robinson and St.George got into the back seat of his car where he put handcuffs on her. Robinson took the woman's purse and threw it on the front seat. He ordered Fields to go through the purse, but Fields refused. Robinson then ordered Fields to drive to Charlie T's Truck Stop where Robinson took over the driving. From there Robinson drove to Pellicer Creek Cemetery where he took off the cuffs, had the woman undress and get onto the hood of the car. According to Fields, Robinson had sexual intercourse with the woman first and then ordered Fields to do likewise. Initially, Fields refused explaining that he had a steady sexual partner. However, when Robinson became angry and raised his voice, Fields feared for his life and reluctantly had intercourse with Ms. St.George. After Fields finished, Robinson once again had intercourse with the woman. (R497-502) When asked if the woman was agreeable to the sexual activity, Fields replied, "Well, in a way, she wasn't." (R502)

Fields testified that during the time that she was in their company, Ms. St.George asked on several occasions if they meant her any harm. Fields testified that he reassured her about

her safety. (R503) Fields further testified that, at the conclusion of the sexual activity, Robinson expressed his fear that the woman could identify both him and his car. Fields reportedly dismissed this possibility, pointing out that the cemetery was dark. Robinson then allegedly stated that the only way she could not make an identification was if she were dead. According to Fields, Robinson then walked up to the woman and put the gun to her cheek. Fields turned his head, heard a shot, and later saw the woman on the ground. Robinson then shot her a second time. The pair then drove to a desolate area where they burned all of Ms. St.George's property. It was at this point that Fields saw Robinson take the cash from her purse. Fields swore that he received none of the money. Fields stated that Robinson later threw the gun out of the car window somewhere along I-95. (R512)

During the entire incident, Fields considered an attempt to flee, but did not do so as a result of his alleged fear of Robinson as well as his inability to run well with one leg. He had lost a leg as a result of a motorcycle accident. (R495,505-508)

PENALTY PHASE

The State presented evidence that the Appellant was convicted of rape in 1979 in the State of Maryland. He was sentenced to ten years and was on parole at the time of this incident. (R799-812)

Doctor Harry Krop, a clinical psychologist specializing in the forensic field, was accepted as an expert witness without objection. He examined Johnny Robinson in great detail during a three hour period on March 4, 1986. He found Johnny to be somewhat depressed but cooperative and candid. Doctor Krop's examination was done at the request of defense counsel and was therefore confidential, until the defense elected to reveal the results. (R743-754)

The most significant finding of Dr. Krop concerned the fact that Johnny Robinson never knew his mother. He was raised by a man known as his father, although it was clear that he was not his biological father. The man who raised Johnny, physically abused him on a number of occasions using a large, leather strap. When Johnny was approximately ten years old, his sixty-year-old "father" married a girl who was approximately fourteen years old. This led to further difficulties and more beatings. The situation became so intolerable, Johnny ran away from home and lived on the streets. This led to antisocial activities and minor criminal offenses. He was in trouble with the law from the age of twelve. He was eventually locked up for breaking and entering at the age of thirteen. He was incarcerated in an adult prison

since, fearing a return to his home environment, he lied about his age. Since his first brush with the law, Robinson had spent approximately ten years of his life in prison. (R760-763) Dr. Krop estimated Robinson to be of low to average intelligence. (R760) Although Robinson only received six years of formal education, he later earned a GED and two years equivalency of college while in prison. (R763)

During the interview with Dr. Krop, Johnny Robinson broke down crying when he recalled the sexual abuse he received at the hands of his uncle. This abuse occurred when Johnny was approximately six years old. His uncle threatened him with violence from him as well as from his "father". He also warned Johnny that he would be labeled a "queer" if he revealed the incidents to anyone. (R763) Dr. Krop testified that familial homosexual rape is the most severe type of sexual trauma and is most likely to lead to adult criminal sexual behavior. (R766-767)

The only authority figures that Robinson had ever known had abused him. Dr. Krop testified that this frequently resulted in an antisocial personality. (R765) Dr. Krop diagnosed Johnny Robinson as suffering from a personality disorder with a sociopathic or antisocial personality. He also suffered from character as well as psychosexual disorders. This latter disorder led to Robinson becoming inappropriately involved in sexual activity. (R766)

Dr. Krop's interview also revealed that the Appellant had started drinking at approximately 9:00 p.m. that fateful

evening. He drank a cup of vodka and a pint of Canadian Mist. While he was driving in the car he consumed a six-pack of beer. Robinson consumed quite a bit of alcohol, particularly for someone like him who does not drink extensively. (R764-765) Dr. Krop was of the opinion that Robinson originally stopped his car to help Ms. St.George. He frequently made extra money as a mechanic. (R768) Dr. Krop was convinced that Robinson initially had no intent to harm Ms. St.George, but the subsequent sexual involvement and violence occurred as a result of poor judgment. (R768)

Dr. Krop conceded that he could not apply any statutory mitigating factors to Johnny Robinson. (R769) Krop did find six non-statutory mitigating circumstances. These included Robinson's severe intoxication which resulted in impaired judgment; the fact that he was emotionally deprived as a child without a mother figure; the physical abuse by his "father"; the sexual abuse by his uncle which led to Robinson's psychosexual disorder; and the emotional trauma that he suffered from his incarceration as an adult at the age of thirteen. (R770-773) Dr. Krop was of the opinion that Robinson's psychosexual disorder and his antisocial tendencies would probably "burn out" around the age of fifty-five. Since Robinson was thirty-three at the time of the offense, he could be released from prison, at the earliest, when he was approaching sixty. (R773-774) As such, he was a good risk under a life sentence.

Additionally, at sentencing, Appellant presented testimony from a guard at the St. Johns County Jail which

revealed that he was an outstanding inmate and was responsible on four separate occasions for quelling possible disturbances at the jail. (R868)

## SUMMARY OF ARGUMENT

POINT I:

During the general qualification of the venire, trial counsel waived Appellant's presence. This waiver was never personally ratified by Johnny Robinson. As such, error occurred. Amazon v. State, 487 So.2d 8 (Fla. 1986). Additionally, although Appellant apparently acquiesced in his absence from the courtroom during part of the penalty phase, personal ratification does not appear on the record. At the very least, this Court must remand for an evidentiary hearing on the waiver of Appellant's presence at critical stages during trial.

POINT II:

In order to ensure that the State did not attempt to introduce evidence of a collateral burglary, Appellant entered into a stipulation with the State that the Appellant had fired the two shots that killed the victim. In contravention of the trial court's ruling on Appellant's motion in limine, a State witness mentioned the collateral burglary. In light of the tremendous concession made by Robinson through the stipulation, Appellant contends that reversible error occurred when the jury was apprised of the burglary offense. Appellant disputes the trial court's conclusion that the remark was invited by the defense.

POINT III:

Appellant filed a written request for a special jury instruction on intoxication. Appellant submits that there was some evidence of his intoxication which is a defense to the

specific intent crimes with which he was charged. It was error for the trial court to deny the requested instruction since there was evidence to support the defense theory. Linehan v. State, 476 So.2d 1262 (Fla. 1985).

POINT IV:

During closing argument at the guilt phase, the trial court, sua sponte, interrupted and chastised defense counsel for referring to "prosecutorial tricks". Appellant contends that, given the position of the trial judge, fundamental error occurred as a result of this denigration of defense counsel in front of the jury at a critical stage.

POINT V:

During the penalty phase, the prosecutor argued Appellant's lack of remorse. This is clearly argument concerning a non-statutory aggravating circumstance which is expressly prohibited by the holdings of this Court. Pope v. State, 441 So.2d 1073 (Fla. 1983). The State also interjected the possibility that Johnny Robinson was a racist who liked to rape and kill white women. This undoubtedly inflamed the all-white jury and contributed to their recommendation to impose a death sentence. Appellant's motions for mistrial made at the time that the errors occurred should have been granted.

POINT VI:

A sentencing guidelines scoresheet was prepared on the three non-capital convictions resulting in a recommended guideline sentence of life imprisonment. The trial court imposed three consecutive life sentences on each of the three

convictions. The trial court erroneously concluded that the sentences did not constitute a departure. Rease v. State, 493 So.2d 454 (Fla. 1986) POINT VII:

The death sentence imposed by the trial court was improper for a variety of reasons. The State failed to prove that the victim knew of her fate beforehand. The killing was accomplished by a relatively quick single shot. The requisite heightened premeditation was not present to justify the finding that the murder was cold, calculated, and premeditated. The trial court engaged in impermissible doubling in finding that the murder was committed to avoid arrest. Additionally, the dominant motive of the killing was not pecuniary gain. The theft was merely an afterthought. The trial court ignored a plethora of valid mitigating circumstances which were established by the evidence. The death sentence in this case is disproportionate to life sentences imposed in other cases that this Court has reviewed.

POINT VIII:

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 CONDUCTING PORTIONS OF THE TRIAL WITHOUT APPELLANT'S PRESENCE THEREBY DENYING HIM HIS CONSTITUTIONAL RIGHT TO BE PRESENT AT ALL STAGES OF THE TRIAL GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

After the venire was sworn concerning their qualifications to serve as jurors, the trial court called both counsel to the bench where the following exchange occurred:

> THE COURT: Do you want your client in here during the general qualifications?
>
> MR. PEARL (defense counsel): No, sir. (R181)

Appellant was then noticeably absent from the courtroom during the venire's general qualifications. (R181-188) He was later apparently brought into the courtroom, apparently for the remainder of the guilt phase. (R188,194) The Appellant did not subsequently, personally ratify his counsel's waiver of his presence at this critical stage of the trial.

Additionally, at the penalty phase, Dr. Harry Krop testified for the defense. During direct examination, the following occurred:

> THE COURT: Come up to the Bench a minute, please.
>
> The defendant has requested the Bailiff to ask me whether or not he can leave the courtroom. Do you need to talk to him, Howard, about whether of not he wants to stay or whether he wants to leave?
>
> MR. PEARL: During this, you mean?
>
> THE COURT: Yeah. He asked that he be permitted to leave. But you need to talk to him about that.

> MR. PEARL: Okay. I don't know what effect it would have on the jury.
>
> THE COURT: I don't, either, but that's what you need to talk to him about. I'm going to put the jury in the jury room and then I want you to take him into the witness room and talk to him about it.
>
> MR. PEARL: Yes, sir.
>
> THE COURT: Okay. (R754)

After a brief recess, defense counsel returned:

> MR. PEARL: Your Honor, in talking to Mr. Robinson, at first he wanted -- what he wanted me to do was to stop Dr. Krop from talking about family and personal matters because they're deeply embarrassing and humiliating to him. Finally, after considerable tears, he finally said I can go ahead and present what I thought I had to present, but he requested leave to be absent from the courtroom during that testimony because he feels that he couldn't bear the humiliation.
>
> THE COURT: Do you want to leave him in the witness room while he's on?
>
> MR. PEARL: Yes, sir....(R755-756)

Appellant was then permitted to remain in the witness room while Dr. Krop testified. The trial court took great care, through defense counsel, to inform Robinson that he could return to the courtroom at any time. (R756-757) The record does not clearly reflect when or if Johnny Robinson ever returned to the courtroom. As in the first instance, there was no subsequent, personal ratification of Appellant's waiver of his presence (through counsel) at this similarly critical stage of the proceedings.

A criminal defendant has the constitutional right to be present at stages of his trial when fundamental fairness might be

thwarted by his absence. Snyder v. Massachusetts, 391 U.S. 97 (1934); Francis v. State, 413 So.2d 1175 (Fla. 1982). Just as an accused has the right to the assistance of counsel, he also has the right to assistance of counsel in conducting the defense. See Snyder v. Massachusetts, supra, and Faretta v. California, 422 U.S. 806 (1975).

Rule 3.180, Florida Rules of Criminal Procedure, states that a defendant shall be present, inter alia, at the beginning of trial during the examination, challenging, impanelling, and swearing of the jury and before the court when the jury is present. These are precisely the two situations which are presented in the instant case. Appellant submits that a defendant in a capital case has a per se right to be present at all stages, critical or not. Appellant submits that every stage is critical to a capital defendant. This arises from his right to participate, at least on a limited basis, in his defense. See Faretta v. California, 422 U.S. 806 (1975). This Court has held in the past that any communication with the jury outside the presence of the prosecutor, defendant and defense counsel is so fraught with potential prejudice that it cannot be considered harmless. Ivory v. State, 351 So.2d 26 (Fla. 1977). Ivory, supra, specifically overruled Kimmons v. State, 178 So.2d 608 (Fla. 1st DCA 1965), to the extent that it was in conflict with the Ivory opinion. Kimmons, supra, held that the sending of a written instruction to the jury in the absence of the defendant and his attorney is at most an irregularity which could not require reversal when no prejudice is shown to have resulted.

Bear in mind that this holding was specifically overruled by Ivory, supra.

This Court held in Francis, supra, that a defendant was entitled to a new trial where he was involuntarily absent during a portion of jury selection. It made no difference that counsel waived his presence, since Francis did not personally acquiesce in or ratify this waiver. This Court held in Herzog v. State, 439 So.2d 1372 (Fla. 1983), that the voluntary absence of a defendant during a defense motion to suppress certain photographs was not error where his presence was waived by counsel. In reaching this holding, this Court specifically declined to answer the question whether the defendant's involuntary absence, during a non-crucial stage of the trial for a capital offense would be error.

More recently, in Peede v. State, 474 So.2d 808 (Fla. 1985), this Court held that a defendant can waive his presence at a capital trial, provided that the waiver was knowing and voluntary and not due to illness or coercion of any nature. This Court pointed out that the trial court should carefully instruct the jury as to the defendant's absence so as to avoid any prejudice to the defendant for having made a voluntary decision to absent himself from the courtroom.

Most recently in Amazon v. State, 487 So.2d 8 (Fla. 1986), this Court dealt with Amazon's contention that fundamental error occurred where the trial court accepted the waiver by his attorneys. This Court relinquished jurisdiction for an evidentiary hearing on the circumstances surrounding the waiver. The

trial judge concluded that Amazon "knowingly and intelligently" waived his presence. Id. at 10. This Court held that counsel may waive his client's presence, "provided that the client, subsequent to the waiver ratifies the waiver either by examination by the trial judge, or by acquiescence to the waiver with actual or constructive knowledge of the waiver." Id. at 11. This Court pointed out that Amazon knew of his counsel's waiver, since he had been consulted by his attorneys and advised to waive his presence. He thereafter authorized his attorneys to make the waiver. Due to his subsequent acquiescence without actual notice, Amazon could not now complain on appeal.

Johnny Robinson did not voluntarily and specifically absent himself from jury selection. Furthermore, there is no indication that he was even aware of his trial counsel's waiver of his presence. As such, a new trial is mandated as a result of his absence from the courtroom during jury selection. At the very least, this Court should remand for an evidentiary hearing on this point. As to Robinson's absence during the penalty phase, Appellant concedes that the record appears to reflect his knowledge of trial counsel's waiver. However, no personal waiver or ratification by Robinson affirmatively appears on the record. Therefore, an evidentiary hearing is required on the knowing and voluntary nature of Robinson's absence from the courtroom during this critical stage. Furthermore, in spite of this Court's holding in Amazon, supra, Appellant still maintains that a defendant must be present during the critical stages of a capital trial. See Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984),

and Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), modified on reh'g, 706 F.2d 311 (11th Cir. 1983). A new trial is required. Amends. VI and XIV, U.S. Const.

## POINT II

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AFTER EVIDENCE OF A COLLATERAL CRIME WAS ADMITTED IN VIOLATION OF A PRETRIAL RULING.

Prior to jury selection, the Appellant and the State entered into a stipulation of facts as follows:

### STIPULATION OF FACTS

> That JOHNNY LEARTICE ROBINSON did on or between August 11-12, 1985, at Pellicer Creek Cemetery within St. Johns County, Florida, have in his possession the .22 caliber Ruger pistol with which BEVERLY ST.GEORGE, a human being, was fatally shot. The .22 Long Rifle Remington shell casing found at the cemetery was fired in and ejected by the said firearm. That JOHNNY LEARTICE ROBINSON did fire the said firearm twice and that both shots struck the said BEVERLY ST.GEORGE in the head, fatally wounding her. The State of Florida has never found and recovered the said firearm used by JOHNNY LEARTICE ROBINSON.
>
> This Stipulation shall not be construed, in and of itself, as an admission that the homicide of BEVERLY ST.GEORGE was unlawful. (R21)

The above stipulation was signed by the prosecutor, the defense counsel, and the Appellant. When the trial court asked defense counsel about the purpose of the stipulation, defense counsel pointed out his pending motion in limine regarding suppression of testimony concerning the burglary as a collateral crime. Defense counsel stated that, without the stipulation, the State would, in his opinion, be entitled to present evidence of Appellant's burglary of a residence on August 5, 1985, during which three

firearms were taken. Defense counsel stated that the State had circumstantial evidence that the firearm used in connection with the death of Ms. St.George was stolen in this burglary by Johnny Robinson. Defense counsel expressed his concern that this evidence would become a feature of the trial resulting in prejudice to Johnny Robinson. As a result of the stipulation, the State acquiesced in Appellant's motion in limine. (R171-176)

After both parties had entered into the stipulation, the trial court stated:

> THE COURT: Let's just make sure, gentlemen, before we put any officers on the witness stand that may inadvertently say something I ruled out, that somebody ask that the jury be sent out before the State puts them on the witness stand so I can caution them.
>
> MR. ALEXANDER (prosecutor): I will do that, Judge. (emphasis supplied) (R177)

The first witness to testify for the State was Detective Charles West of the St. Johns County Sheriff's Office. (R415) During direct-examination, the State attempted to introduce a photograph of a .22 bull-barreled Ruger target pistol which was of the same type as the weapon believed to have killed Ms. St.George. No one disputed the fact that the actual murder weapon had never been recovered. (R434-435) Appellant's objection to the introduction of the photograph was sustained, since the photograph did not depict the actual murder weapon. (R435-436) However, during the State's attempt to introduce the photograph of the similar weapon, the following occurred:

> MR. ALEXANDER (prosecutor): I'm going to show you what's been previously marked

as State's Exhibit C for identification and tell me if you recognize that item.

DETECTIVE WEST: This is a photograph of a .22 caliber pistol.

MR. ALEXANDER: What type of pistol?

DETECTIVE WEST: That is a -- referred to as a bull barreled Ruger. It's a target pistol.

MR. ALEXANDER: Are you familiar with type of weapon that was used to kill Mrs. St.George?

DETECTIVE WEST: Yes, sir. We believe it was a .22 caliber bullbarrel.

MR. ALEXANDER: Exactly like this one, right?

DETECTIVE WEST: Yes, sir.

MR. ALEXANDER: Did you ever find the exact murder weapon?

DETECTIVE WEST: No, sir, we never did.

MR. ALEXANDER: Your Honor, the State would offer this into evidence as the next respective exhibit.

MR. PEARL (defense counsel): Objection. The witness says that this is not the weapon. It is merely representative of its type. For example, Detective West, you don't know if the weapon was exactly like this or a different length barrel, do you?

DETECTIVE WEST: The weapon -- it's reported on the stolen list, the burglary list, yes, sir, and we have a description of the weapon and I can give you a serial number.

MR. PEARL: Your Honor, I didn't invite that.

THE COURT: Yes, you did. I'll give you an opportunity, at the appropriate time, to do whatever you need to do to keep the record straight. If ever anything

> was invited, Mr. Pearl, that was invited. (R435-436)

When defense counsel was later allowed to place his objection and motion on the record, he pointed out that Detective West's answer was not responsive to the question. Appellant contended that, "It was not necessary to bring that out in response to my question, and having not been responsive, was not invited." (R471-472) Appellant renewed his objection and moved for a mistrial. The State had no argument. The trial court stated its belief that West's reference to the burglary "went right over the jury's head." (R472) The trial court also concluded that, while the testimony was improper, it was invited and also probably harmless. (R473) Defense counsel also argued:

> I wanted to point specifically that all I asked Detective was whether he knew that the barrel length of the pistol was the barrel length of the weapon shown in State's Exhibit C for identification, and that's why I say his answer was not responsive, that he should not have given that answer, since I assume he has been cautioned by the State prior to this trial not to refer to the Cogburn burglary, since that was the substance of the stipulation and this Court's ruling on my Motion in Limine. (R474)

The trial court responded that Detective West was not instructed on this issue, since neither side anticipated that the subject would come up in his testimony. (R474) Appellant's objection was overruled and the motion for mistrial was denied.

Initially, Appellant points out the immensity of his concession below by entering into the stipulation. Simply by reading the stipulation, one can see how important it was to

defense counsel to exclude all references to this collateral crime of burglary. In the stipulation, Appellant admits to firing both shots that struck and killed Beverly St.George. The only element of the murder omitted by the stipulation relates to Robinson's intent while wielding the pistol. (R21) As a result of this tremendous concession by the Appellant at trial, this Court should apply special scrutiny to the objectionable testimony.

This Court is well aware of the prejudicial nature of collateral, uncharged crimes. This Court's holding in Williams v. State, 110 So.2d 654 (Fla. 1959) has been codified in the Florida Evidence Code as Section 90.404(2), Florida Statutes. In order to introduce evidence of another crime, not only must the requirements of Section 90.404(2)(a) be satisfied, but the state must also prove the collateral crime by clear and convincing evidence and a connection between the defendant and that crime. Chapman v. State, 417 So.2d 1028 (Fla. 3d DCA 1982). Additionally, Section 90.404(2)(b) requires that the state notify the defendant no fewer than ten days before trial of its intent to offer such evidence. The statute requires describing the evidence with particularity. The statute also requires the trial court to, if requested, charge the jury on the limited purpose for which the evidence is received. The codified requirements for this type of evidence are indicative of the inherent prejudice that can arise from its introduction. Appellant contends that the state witness appriing the jury that the Appellant had committed a prior burglary during which the murder weapon was

stolen was extremely inflammatory and resulted in a denial of his right to a fair trial. Art. I, §§9 and 16, Fla.Const. and Amends. V, VI, and XIV, U.S. Const.

Even the trial court agreed that the testimony was improper. However, the trial court was of the opinion that the jury was not affected by the testimony. Appellant submits that the trial court's "hunch" should not be determinative of the issue. Appellant cannot conceive of a jury in a capital case being unmoved by evidence that the defendant stole the murder weapon in a prior burglary. The evidence of this collateral crime was not admitted with the requisite safeguards provided by Section 90.404, Florida Statutes (1985). As such, the prejudice was compounded.

Appellant contends that he went to great lengths to exclude any reference to this collateral crime. Indeed, Appellant chose to stipulate to most of the elements that the State was required to prove to convict on the murder charge. Especially in light of this vast concession on the part of defense counsel, Appellant submits that the objectionable evidence was extremely prejudicial. Despite the trial court's finding, Appellant submits that the remark was not invited. The witness' answer was patently unresponsive to defense counsel's question. The question called for an answer in the affirmative or the negative without the "volunteered" reference to the collateral crime. Appellant respectfully submits that the trial court was incorrect in its conclusion on this issue. This Court must not make the same mistake. Reversal is required.

## POINT III

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW, THE TRIAL COURT ERRED IN REFUSING TO GIVE A REQUESTED INSTRUCTION ON THE AFFIRMATIVE DEFENSE OF VOLUNTARY INTOXICATION WHERE THERE WAS EVIDENCE PRESENTED AT TRIAL IN SUPPORT THEREOF.

Appellant was charged with premeditated first-degree murder, kidnapping, armed robbery, and sexual battery. (R10-11) Appellant filed, in writing, a requested instruction on the defense of intoxication. (R36) The request included an instruction on partial intoxication. The trial court denied the instruction in its entirety. (R36,561-564)

It is well-established law that voluntary intoxication is a defense to any crime requiring specific intent. Gardner v. State, 480 So.2d 91 (Fla. 1985); Linehan v. State, 476 So.2d 1262 (Fla. 1985); Gentry v. State, 437 So.2d 1097 (Fla. 1983); Garner v. State, 28 Fla. 113, 9 So. 835 (1891). This Court has recently held that voluntary intoxication is a defense to the specific intent crimes of first-degree murder and robbery. Linehan v. State, supra. It is therefore clear that voluntary intoxication is an affirmative defense thereto, and the requested instruction should have been given.

Recently, this Court has twice addressed the issue of voluntary intoxication as an affirmative defense to specific intent crimes. Linehan, supra, and Gardner, supra. In both cases this Court recognized that voluntary intoxication is an affirmative defense to specific intent crimes. In Gardner, this Court stated that a defendant has a right to a jury instruction on the

law that is applicable to his defense where any trial evidence supports the theory.

In reading the above-cited Supreme Court cases, it appears that, in order to be entitled to an instruction on voluntary intoxication, the defendant must come forward with evidence of intoxication at the time of the offense sufficient to establish that he was unable to form the intent necessary to commit the crime charged. See also Link v. State, 429 So.2d 836 (Fla. 3d DCA 1983). This evidence may be elicited during cross-examination of prosecution witnesses, as well as during the presentation of defense witnesses. Gardner, supra. Finally, it is important to note that the evidence so presented need not be convincing to the trial court before the instruction of the law applicable to the defense of voluntary intoxication can be submitted to the jury. It is sufficient if the defense is merely suggested by the testimony, since it is the jury's duty to weigh the evidence in support of the defense, not the trial court's. Pope v. State, 458 So.2d 327 (Fla. 1st DCA 1985), Gardner, supra at 93.

The evidence of intoxication in the instant case is equal to the amount of evidence presented in Harich v. Wainwright, 484 So.2d 1237 (Fla. 1986). There, this Court distinguished the case from Gardner, supra, on the grounds that Gardner requested an intoxication instruction and did not take the stand to deny his participation in the offense. In contrast, Harich denied the murder and attempted murder and failed to request an instruction on voluntary intoxication. Harich, supra

at 1238. Gardner, supra, rather than Harich, supra, is on point with the case at bar.

The State introduced Appellant's voluntary statement made shortly after his arrest. (R32-34) In that statement, the Appellant admitted to drinking cognac, gin or vodka, and beer. The consumption of this quantity of alcohol extended over a three hour period. Even his accomplice admitted that Robinson had been drinking during the evening. (R497-498) It is clear that the Appellant continued drinking at the cemetery where Ms. St.George was shot. Several fresh beer cans were found in the area. (R432-433). The testimony of the psychologist at the penalty phase revealed the large quantity of alcohol consumed that night. Robinson drank a cup of vodka and a pint of Canadian Mist. While he was driving in his car prior to the offense, he consumed a six-pack of beer. Dr. Krop opined that Robinson consumed quite a bit of alcohol that evening, particularly for someone like him who does not drink extensively. (R764-765) Dr. Krop concluded that Robinson's severe intoxication resulted in impaired judgment which, in part, led to the unfortunate chain of events. Krop concluded that this was definitely a mitigating factor in the offense. (R770-773)

Appellant contends that it was error for the court to refuse to give the requested instruction in light of the evidence of Appellant's alcohol consumption at the time of the offense. There was evidence to support the theory, and whether or not the judge was convinced that the Appellant was under the influence of alcohol to the degree necessary for an instruction, the Appellant

was clearly entitled to it. Again, it was not the judge's duty to weigh the sufficiency of the evidence presented, and the court's refusal to give the instruction effectively usurped the jury's duty to do so. Amends. V, VI, and XIV, U.S. Const.

## POINT IV

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL, THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY CHASTISING DEFENSE COUNSEL DURING CLOSING ARGUMENT IN THE PRESENCE OF THE JURY.

During summation at the guilt phase, defense counsel argued:

> Now I could attack the State's case as Mr. Alexander has attacked the Defendant's case by saying things like ludicrous, bologna (sic), never happened, James Bond. But, I have been taught that it is often better to remain silent than to say nothing and when Mr. Alexander makes attacks like that, he is saying nothing. He's trying to enlist some reaction from you. Prosecutor's trick. It's okay if you don't get caught.
>
> THE COURT: Mr. Pearl, we'll not refer to tricks. Fair argument of counsel by either side are not tricks.
>
> MR. PEARL: Thank you, Your Honor. I withdraw the comment. I have been properly chastised and I apologize. (R644)

Appellant contends on appeal that the trial court's action in, sua sponte, interrupting defense counsel during closing argument for purpose of chastisement in the presence of the jury constituted reversible fundamental error. This resulted in a denial of Appellant's constitutional rights to due process of law and to a fair trial guaranteed by the United States Constitution. Amends. V, VI, and XIV, U.S. Const.

It is clearly established that an accused has a fundamental right to a fair trial free from improper comments by a judge or prosecutor. Stewart v. State, 51 So.2d 494 (Fla. 1951).

That a presiding judge in a criminal trial has a duty to protect the rights of the accused is obvious.

> It is the duty of the trial judge to carefully control the trial and zealously protect the rights of the accused so that he shall receive a fair and impartial trial. The trial judge must protect the accused from improper or harmful statements . . . during the course of the trial.

Kirk v. State, 227 So.2d 40, 42-43 (Fla. 4th DCA 1969).

Since the judge is the vortex of the entire judicial proceeding, he must at all times maintain an appearance of impartiality. Weems v. State, 143 So.2d 484 (Fla. 1962). The court should refrain from any comments which could possibly be interpreted by the jury as a departure from his neutrality and as a comment on the weight of the evidence.

> The dominant position occupied by a judge in the trial of a cause before a jury is such that his remarks or comments especially as they relate to the proceedings before him, overshadow those of the litigants, witnesses and other court officers. Where such comment expresses or tends to express the judge's view as to the weight of the evidence, the credibility of a witness, or the guilt of an accused, it thereby destroys the impartiality of a trial to which the litigant or accused is entitled.

Hamilton v. State, 109 So.2d 422, 424-425 (Fla. 3d DCA 1959). Even where the comment of a judge does not amount to any preference, or even an indication of such, if the comment could have been so interpreted by a jury, a new trial is necessary. Robinson v. State, 161 So.2d 578 (Fla. 3d DCA 1964). Ehrhardt, Florida Evidence, §106.1, p. 22, states:

> During a jury trial, the judge occupies a dominant position. Any remarks and comments that the judge makes are listened to closely by the jury and are given great weight. Because of the credibility that the comments are given and because they would likely overshadow the testimony of the witnesses themselves and of counsel, Section 90.106 recognized that a judge is prohibited from commenting on the weight of the evidence, or the credibility of the witness, and from summing up the evidence to the jury. If such comment in summing up were permitted, impartiality of the trial would be destroyed. (Footnotes omitted)

It was not proper for the trial court to depart from his role as impartial conductor of the trial proceedings. See Gamble v. State, 492 So.2d 1132 (Fla. 5th DCA 1986). The trial court did not step in when the prosecutor was ridiculing the defense.

Appellant contends that fundamental error occurred. In this regard, it is important to note that the trial court, sua sponte, chastised defense counsel. As such, defense counsel undoubtedly felt constrained from objecting, since the trial judge had already made his ruling clear. In Castor v. State, 365 So.2d 701 (Fla. 1978), this Court pointed out that the requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. Its purpose is to place the trial judge on notice that error may have been committed and to provide him an opportunity to correct it at an early stage of the proceedings. In the instant case, the trial court was obviously aware of its action, but did not consider it to be error. An objection by defense counsel would have been a useless act at that point. Appellate courts may

notice fundamental error in the interest of justice. Jefferson v. City of West Palm Beach, 233 So.2d 206 (Fla. 4th DCA 1970). Appellant submits that such notice is required in the instant case.

Appellant recognizes that comments on opposing lawyers' techniques have been held to be both improper and unethical. Wilson v. State, 371 So.2d 126 (Fla. 1st DCA 1978). However, Appellant submits that defense counsel engaged in fair argument. As defense counsel pointed out, the prosecutor called Appellant's theory of defense ludicrous and suggested that it was baloney. The prosecutor argued that a woman in Ms. St.George's situation would not have accompanied even James Bond much less Johnny Robinson. In this regard, Appellant contends that the State invited defense counsel's argument in response thereto.

Appellant concedes that trial counsel did not formerly object to the trial court's chastisement and, probably acquiesced in it. However, Appellant submits that the trial court improperly denigrated defense counsel in front of the jury. This occurred during a critical stage of the trial and without prompting from the state. Appellant submits that fundamental error occurred. As such, Appellant submits that he was denied due process of law and a fair trial. Amends. V, VI, and XIV, U.S. Const.

## POINT V

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AT THE PENALTY PHASE WHERE THE STATE INJECTED NON-STATUTORY AGGRAVATING FACTORS.

Appellant submits that, on two separate occasions, the State impermissibly injected argument and evidence concerning non-statutory aggravating factors. This violated Appellant's constitutional rights to due process of law and to a fair trial. The resulting, tainted jury recommendation of death culminated in a constitutionally infirm death sentence. Amend. VIII, U.S. Const. Appellant will discuss the two errors separately.

### A. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AT THE PENALTY PHASE WHERE THE STATE ARGUED LACK OF REMORSE TO THE JURY.

During closing argument to the jury at the penalty phase, the prosecutor stated:

> One thing to know about Dr. Krop's testimony is the Defendant suffers from antisocial tendencies. He has a total indifference as to who he's hurt, as to killing Beverly St.George. He really doesn't care that much. He showed no remorse, according to Dr. Krop. (emphasis supplied)(R821)

Defense counsel immediately objected and correctly pointed out that the prosecutor was improperly arguing a non-statutory aggravating circumstance. The trial court sustained the objection but, in clarifying his ruling at side-bar, stated:

> THE COURT: Although you've got to remember, you did not make any objection to it when it was asked of Dr. Krop. So, it is in evidence and it is before

> the jury. MR. PEARL: Yes, sir, but my contention is that on final argument by the State, the State is restricted solely and exclusively to statutory aggravating circumstances and may not argue anything else.
>
> THE COURT: Well, I disagree with this to this extent, that you've got carte blanche authority to get up there and argue all of these things that Dr. Krop has testified about in his background. One of the things that the State, one of the things that Mr. Alexander is obviously arguing is one of the effects of an antisocial personality; that is, a fellow who has no remorse, a fellow who has no conscience. Why can't he properly comment on what the Doctor's actually testified to? That's all he's doing. (R822)

At this point, defense counsel moved for a mistrial which was denied. (R822-823) Appellant contends that the State's improper argument regarding a non-statutory aggravating circumstance resulted in a denial of his right to a fair trial, in a tainted jury recommendation, and in the unconstitutional imposition of a death sentence.

In Sireci v. State, 399 So.2d 964 (Fla. 1981), this Court held that lack of remorse may be considered in finding that a murder was especially heinous, atrocious and cruel. As a result of the 1981 revision of the standard jury instructions in criminal cases as well as the consistent misapplication of the Sireci holding, this Court held that any consideration of a defendant's remorse was extraneous to the question of whether the murder of which he was convicted was especially heinous, atrocious or cruel. See Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983). This Court has previously held that lack of remorse is

not an aggravating factor in and of itself. McCampbell v. State, 421 So.2d 1072 (Fla. 1982). Pope, supra, pointed out that remorse is "an active emotion in its absence, therefore, can be measured or inferred only from negative evidence. This invites this sort of mistake which occurred in the case now before us - inferring lack of remorse from the exercise of constitutional rights." Pope, supra at 1078. This Court held, "that henceforth lack of remorse should have no place in the consideration of aggravating factors. Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor." Id.

B. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHERE THE STATE INTERJECTED APPELLANT'S "RACISM."

During cross-examination of Dr. Krop, the prosecutor suddenly asked:

> MR. ALEXANDER: Would you say, Doctor, that it's a fair statement that the Defendant, Mr. Robinson, is prejudiced toward white people, specifically, women?
>
> DOCTOR KROP: I don't know if he's prejudiced against them in the way we typically think of prejudice in terms of feeling like whites are worse than blacks or blacks are worse than whites. I think he has probably a lot of hostility built up. I don't know enough about his history in terms of whether there were racial prejudices which occurred substantially in his own background which would back that up, but I think he just has a lot of difficulty with women in general and I really can't say whether it's necessarily a racial hostility. MR. ALEXANDER: In regard to

one of the answers you gave Mr. Pearl, you noted the Defendant had told you about several victims in the past in regard to sexual encounters. Are you familiar with the gender and the race of those particular victims?

DOCTOR KROP: I believe that Mr. Pearl indicated that they were white.

MR. ALEXANDER: Do you know if they were male or female?

DOCTOR KROP: I probably don't know for sure. I presume they were white females.

MR. ALEXANDER: And you know the victim in this case also was a white female, do you not?

DOCTOR KROP: Yes, I do. (R787-788)

At this point, defense counsel approached the bench and objected to the line of questioning. Defense counsel moved for a mistrial based upon his contention that the jury had been inflamed and prejudiced. Counsel pointed out that Johnny Robinson, a black man, was being tried by an all-white jury for the abduction, rape, robbery, and murder of a white woman. (R788-789) Although the trial court suggested that the prosecutor steer away from the area, the court denied Appellant's motion for mistrial. (R789) Appellant later renewed the motion for mistrial which was again denied. (R797-798) Prior to closing argument, the trial court warned the prosecutor to stay away from the subject of racial prejudice. (R797)

This Court is well aware of the sensitive status that race currently holds in the capital sentencing area. Numerous studies have shown that a defendant, whether black or white, is much more likely to be sentenced to death where the victim is

white. See McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) and Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985). In fact, this issue is currently pending before the Supreme Court of the United States. McCleksey v. Kemp, 106 S.Ct. 3331 (July 7, 1986), and Hitchcock v. Wainwright, 106 S.Ct. 2888 (June 9, 1986).

Appellant submits that in a case like the one at bar, evidence, even though unfounded, that Johnny Robinson made a habit of preying on white women does irreparable damage. This is especially true when one remembers that Robinson is a black male being tried by an all-white jury for the abduction, rape, robbery, and murder of a white woman. This clearly non-statutory aggravating circumstance was inappropriately elicited by the State on cross-examination of a defense witness at the penalty phase. The question assumed facts not in evidence and was therefore objectionable in that regard. When one focuses on the gist of the questioning by the prosecutor, the outrage of defense counsel and the jury can be understood. The trial court should have granted Appellant's motion for mistrial and reconvened another jury for the penalty phase. Appellant submits that the irreparable damage caused by the State denied him a fair penalty phase. Amends. V, VI, VIII, and XIV U.S. Const.

## POINT VI

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW, THE TRIAL COURT ERRED IN DEPARTING FROM THE RECOMMENDED GUIDELINE SENTENCE WITHOUT STATING CLEAR AND CONVINCING REASONS.

The Appellant appeared for a separate sentencing proceeding on the three non-capital offenses. Defense counsel's objection to a separate proceeding was overruled. (R849-853) A sentencing guideline scoresheet was prepared resulting in a recommended guideline sentence of life imprisonment. (R96) The State requested that the trial court depart and sentence the Appellant to consecutive life sentences on each count. (R865) The trial court adjudicated the Appellant guilty of all three offenses and sentenced the Appellant to life imprisonment on each count to run consecutive to each other. (R90-95,871-872) Defense counsel objected that the consecutive nature of the sentences resulted in a departure without written reasons. This objection was overruled. (R874-876) The trial court apparently did not believe that the imposition of consecutive sentences was a departure. The court stated:

> If life is life under your argument and I think it's supposed to be under the Guidelines, then how has he gotten any more time by consecutive life sentences?
>
> * * *
>
> It's my opinion, after looking at the Guideline law, that consecutive life sentences can only affect him in one way and that is if one sentence is set aside. (R875)

The trial court's imposition of consecutive life sentences on each count is clearly a departure. As such, it was error for the trial court to sentence the Appellant without stating clear and convincing reasons for departing from the guidelines. This issue was squarely addressed in Rease v. State, 493 So.2d 454 (Fla. 1986). This Court concluded that the trial court did deviate from the recommended sentence of life imprisonment by adding consecutive sentences on other counts arising from the same incident, when those convictions were taken into account in computing the recommended sentence. Since the trial judge failed to set forth proper reasons for his departure in Rease, supra, the district court decision was quashed with instructions to remand for resentencing. The situation at bar is identical, and this Court must reach the same conclusion as it did in Rease, supra.

## POINT VII

IN CONTRAVENTION OF APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE TRIAL COURT ERRED IN IMPOSING THE SENTENCE OF DEATH WHICH 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 (nine to three) that the death penalty be imposed. (R80-81) In imposing the death penalty, the trial court found seven aggravating circumstances: (1) the capital felony was committed by a person under sentence of imprisonment; (2) the Appellant was previously convicted of a felony involving the use of violence or threat of violence; (3) the capital felony was committed while the Appellant was engaged in the commission or the attempt to commit sexual battery and kidnapping; (4) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; (5) the capital felony was committed for pecuniary gain; (6) the crime was especially wicked, evil, atrocious or cruel; and (7) the crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The court concluded that no statutory mitigating circumstances applied. However, the trial court did find that one non-statutory mitigating circumstance had been established, i.e., that Johnny Robinson did have a difficult childhood. (R144-147) Appellant contends that the death sentence imposed upon Johnny

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

A. THE TRIAL COURT ERRED IN FINDING THE INAPPROPRIATE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS AND CRUEL.

In finding that this aggravating circumstance had been proved by the State beyond a reasonable doubt, the trial court stated:

> Defendant jammed the pistol into the face of Beverly St.George and fired. Prior to her execution she had begged Defendant not to harm her. She was obviously terrorized - having been taken out of her automobile at gun point in the middle of the night by two strange men, handcuffed, taken to a remote cemetery, sexually assaulted three times and shot. Her fear of harm or death during the commission of the crimes and prior to her death was proved beyond and to exclusion of reasonable doubt.
>
> This murder was especially wicked, evil, atrocious and cruel. This aggravating circumstance was proved. (R145)

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

> 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, that is, only to 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, supra at 9. The factor must be proved beyond a reasonable doubt by the state. See e.g. Lewis v. State, 377 So.2d 640 (Fla. 1979) and Kampff v. State, 371 So.2d 1007 (Fla. 1979). In light of this, the facts enumerated by the trial court do not support the finding of this factor.

The trial court's written finding of fact regarding this circumstance is incorrect. The trial court states, "Prior to her execution she had begged defendant not to harm her." (R145) This statement is simply not supported by the evidence. While she may have expressed some fear during the incident, the State's case showed that she was constantly reassured that no harm would befall her. (R503) There is absolutely no evidence that she did not believe these reassurances by Fields. Indeed, the fact that she apparently cooperated during the sexual acts, implies belief on her part. The evidence to support the trial court's finding of this aggravating factor is simply not present in the record.

Even taking the evidence in the light most favorable to the state rather than the applicable standard of "beyond reasonable doubt," this aggravating circumstance has not been established. The only direct evidence of the incident came from the

testimony of Bernard Fields, the co-perpetrator, and from the Appellant's own statement against interest made following his arrest. Robinson's statement related in detail how the spur-of-the-moment, accidental shooting occurred. (R32-34)

Fields' testimony provided the only evidence that the shooting was intentional. However, even Fields' testimony established that the shooting was not heinous, atrocious, and cruel. When the state attempted to establish that Ms. St.George was raped and terrorized, Fields testified regarding her lack of consent, "Well, in a way, she wasn't [agreeable]." (R502) Fields testified that Ms. St.George asked several times if any harm would come to her. Fields' testimony revealed that he reassured her each time that no harm would come to her. (R503) Hence, there is absolutely no evidence that Ms. St.George knew her final fate after the first shot, which she could not have known was coming. She was rendered immediately unconscious if not instantly dead. (R458-459,469-470) Hence, the scenario proven by the state is practically indistinguishable from a single-shot homicide of an unsuspecting victim. See e.g. Teffeteller v. State, 439 So.2d 840 (Fla. 1983)

This Court also found this aggravating circumstance unsupported by the evidence where, during a robbery, the defendant told the victim not to try anything and he would not get shot. The defendant then fired two shots resulting in the victim's death. Randolph v. State, 463 So.2d 186 (Fla. 1984). The finding of this circumstance was also disapproved in Blanco v. State, 452 So.2d 520 (Fla. 1984), where the victim surprised a

burglar. During the ensuing scuffle, the victim was shot and landed on a nearby bed. Blanco then shot the victim six more times before fleeing.

Appellant submits that the State has failed to establish that this capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies. Even Bernard Fields' testimony fails to establish that Ms. St. George was unnecessarily tortured. The state has failed to prove this aggravating circumstance beyond a reasonable doubt. The trial court's finding regarding this factor must be rejected by this Court.

B. THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING FACTOR OF COLD, CALCULATED, AND PREMEDITATED.

In finding this circumstance, the trial court stated:

> Beverly St.George was shot in the side of the face at point blank range. Prior to the first shot Defendant informed his accomplice of his intent to kill Beverly St.George and his reason for doing so. After the first shot Defendant fired a second shot into her head while she lay on the ground (and probably still alive) to ensure that she was dead.
>
> The murder was completely unjustified. Except as a witness Beverly St.George was no threat to Defendant. There is no credible evidence to support Defendant's theory of accident. Defendant's statements and actions exhibit a heightened premeditation.
>
> The Court finds beyond a reasonable doubt that this murder was cold, calculated and premeditated; and without any pretense of moral or legal justification. (R146)

The facts surrounding the death of Ms. St.George do not support a finding of Section 921.141(5)(i), Florida Statutes

(1985). In Combs v. State, 403 So.2d 418 (Fla. 1981), this Court indicated that Section 921.141(5)(i), Florida Statutes, authorizes a finding in aggravation for premeditated murder where the premeditation is "cold, calculated and. . .without any pretense of moral or legal justification." Id. at 421. This Court indicated that "paragraph (i) in effect adds nothing new to the elements of the crime for which petitioner stands convicted, but rather adds limitations to those elements for use in aggravation, limitations which inure to the benefit of a defendant." 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. The State has failed to prove this aggravating circumstance.

The testimony of Doctor Krop at the penalty phase clearly reveals that Robinson began driving that night with no specific goal in mind. (R767-768) Dr. Krop was convinced that Robinson originally had no intent of harming Ms. St.George. He

stopped his car with the idea that he might earn some extra money if she were having mechanical difficulties. (R768) The entire incident mushroomed at a point much later in time. Even the testimony of Fields indicates that the Appellant made the decision to kill the victim only seconds before the actual shot was fired. (R503-505)

In the instant case, Appellant submits that the state failed to establish beyond a reasonable doubt the requisite heightened premeditation. If this Court upholds the finding of this circumstance under the instant facts, any premeditated murder would support a finding of this circumstance. This was not the legislature's intent, and this Court must not broaden the statute to allow such a result.

C. THE TRIAL COURT ERRED IN FINDING THAT THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN.

In finding the establishment of this factor beyond a reasonable doubt, the trial court stated:

> The evidence proves that one of the reasons murder was committed was for robbery. Defendant took the money from the purse of Beverly St.George. This aggravating circumstance was proved. (R145)

The trial court's finding of this factor is simply not supported by the evidence.

Case law indicates that this aggravating factor is limited in its application to situations where the sole or primary motive for the killings is monetary gain. See Simmons v. State, 419 So.2d 316, 318 (Fla. 1982); State v. Dixon, supra at 9. This Court has approved the finding of pecuniary gain only in

cases in which an actual robbery was occurring or at least being attempted, or in which the defendant received something of value during the crime. See e.g., Bolender v. State, 422 So.2d 833 (Fla. 1982)(murder during robbery and torture of cocaine dealers); Ross v. State, 386 So.2d 1191 (Fla. 1980)(killed burglary victim and ransacked house for valuables); Antone v. State, 482 So.2d 1205 (Fla. 1980)(contract killing); Hargrave v. State, 366 So.2d 1 (Fla. 1979)(robbery of a convenience store).

In Young v. Zant, 506 F.Supp. 274, 280-281 (M.D.Ga. 1980), the court rejected a finding that the murder was committed during the course of a robbery and for pecuniary reasons in a similar situation. There, the court held:

> Having carefully considered all of the evidence presented at trial, the court finds that the evidence was not legally sufficient to support the jury's finding beyond a reasonable doubt that the murder was committed in the course of an armed robbery or for the purpose of obtaining money. The only relevant evidence presented at trial indicated that petitioner did not contemplate the taking of any money until after the shots had been fired and the blows had been struck, i.e., after the murder had been committed.... Based on the evidence presented at trial, that petitioner prior to the commission of the murder had any intent to rob the victim is only speculation. Certainly the evidence does not prove these aggravating factors beyond a reasonable doubt.

Id. at 280-281.

Here, the intent to deprive Ms. St.George of her money did not occur until after the incident was over. As such, the murder was not committed "while the defendant was engaged in a robbery." The taking of her purse and other property was an

afterthought. No pecuniary motive was present during the shooting. It is clear that the state failed to meet its burden of proof in establishing this aggravating factor.

D. THE TRIAL COURT ERRED IN FINDING THAT THE CAPITAL FELONY WAS COMMITTED IN ORDER TO AVOID ARREST.

In finding this aggravating circumstance, the trial court stated:

> Defendant's accomplice testified that Defendant told him he had to kill Beverly St.George because she could identify him and his automobile. There was no other reason to kill her. The evidence clearly supports the State's contention that Defendant's motive in killing Beverly St.George was to eliminate a witness. The aggravating circumstance was proved. (R145)

As with all aggravating circumstances, this one must be proven beyond a reasonable doubt. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). This aggravating circumstance is typically found where the evidence clearly demonstrates that the defendant killed a police officer who was attempting to apprehend the defendant. See e.g. Mikenas v. State, 367 So.2d 606 (Fla. 1978); Cooper v. State, 336 So.2d 1133 (Fla. 1976). However, the circumstance is not limited to those situations and has been found to exist where civilians have been killed. Riley v. State, 366 So.2d 19 (Fla. 1978). This Court in Riley, supra, held that an intent to avoid arrest is not present, at least when the victim is not a law enforcement officer, unless it is clearly shown that the dominant or only motive for the murder was the elimination of witnesses.

In Menendez v. State, 368 So.2d 1278 (Fla. 1979), appeal after remand 419 So.2d 312 (Fla. 1982)(footnote 2), this

Court rejected the application of this aggravating circumstance, despite the fact that the murder was committed with a pistol equipped with a silencer, the purpose of which may have logically been to avoid arrest and detection. In Armstrong v. State, 399 So.2d 953 (Fla. 1981), this Court rejected an application of this circumstance despite a finding by the trial court based upon the pathologist's testimony that the victims, after the initial shooting, were laid out prone and then "finished off."

Appellant concedes that the State did present some evidence (through the testimony of the co-perpetrator, Bernard Fields) that the shooting occurred shortly after Appellant stated his intent to prevent his subsequent identification. However, close scrutiny of the trial court's written findings of fact reveals that the trial court engaged in impermissible doubling. The written findings supporting this aggravating circumstance are practically indistinguishable from the ones utilized by the trial court in support of its finding that the murder was cold, calculated and premeditated. (R145-146) In both of these written findings, the trial court focuses on the trial court's belief that the shooting was accomplished to eliminate a witness. This constitutes clearly impermissible doubling disapproved by this Court in Provence v. State, 337 So.2d 783 (Fla. 1976). As such, the trial court's finding of this circumstance must be stricken.

E. THE TRIAL COURT ERRED IN FINDING ONLY ONE MITIGATING FACTOR.

The trial court rejected all of the possible statutory mitigating circumstances. The court found that, out of all the non-statutory mitigating circumstances of which the Appellant

offered proof, only one had been established, i.e. that Johnny Robinson had a difficult childhood. (R146) The trial court rejected Dr. Krop's opinion that intoxication was a mitigating circumstance at the time of the offense. The trial court concluded, "...there is evidence that although drinking, Defendant was not intoxicated. The Court does not believe that Defendant's capacity to conform to the law was impaired by alcohol." (R146)

In rejecting intoxication as a non-statutory mitigating circumstance, it is clear from the trial court's language that the trial court applied an erroneous standard. In referring to the impairment of Appellant's "capacity to conform to the law," the trial court is rejecting the statutory mitigating circumstance set forth in Section 921.141(6)(f), Florida Statutes, which provides:

> The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

Appellant presented evidence concerning intoxication as a non-statutory mitigating circumstance. Appellant submits that a lesser degree of intoxication was established by the evidence than that set forth in Section 921.141(6)(f).

Additionally, the evidence that this circumstance applied is practically unrefuted. Dr. Krop testified that Appellant's intoxication was a mitigating factor. Johnny Robinson had started drinking at nine o'clock that evening. He consumed a cup of vodka, a pint of Canadian Mist, and a six-pack of beer in transit to and at the scene of the killing. The

amount of alcohol that he consumed undoubtedly affected him, especially considering the fact that he did not habitually drink large quantities of the drug. (R764-765,769-773) Although Robinson's accomplice testified that Robinson did not seem extremely intoxicated that evening, Dr. Krop's expert testimony revealed that the alcohol would have affected Robinson psychologically, intellectually, and mentally more than physically. (R775-776)

Dr. Krop also testified about Johnny Robinson's psychosexual disorder which resulted from his childhood sexual abuse at the hands of his uncle. Dr. Krop concluded that this was definitely a contributing factor in the offense. Familial homosexual rape is the most severe type of childhood sexual trauma. It is most likely to lead to adult criminal sexual behavior. (R763,767-768)

Dr. Krop also diagnosed Johnny Robinson as suffering from a personality disorder consisting of a sociopathic or antisocial personality. (R766) In addition to his difficult childhood, Johnny Robinson spent much of his adolescence in adult prison. (R760-763) In spite of his rocky beginnings, Robinson had earned a high school equivalency diploma in addition to two years of college. All of this was accomplished while he was incarcerated. (R763)

At the sentencing hearing, the defense presented testimony from a correctional officer who told the court that Johnny Robinson was an outstanding inmate in the county jail. On four separate occasions, Robinson was credited with being

directly responsible for quelling possible disturbances in the jail. (R868) Dr. Krop opined that Robinson's psychosexual disorders and antisocial tendencies would "burn out" in his mid-fifties. Since he was thirty-three at the time of the offense, a twenty-five year minimum mandatory would keep him incarcerated at least beyond this critical age. (R773-774)

The trial court clearly erred in finding that the defense had established only one mitigating circumstance. Appellant submits that he presented evidence which established at least six non-statutory mitigating factors. The trial court's rejection of this evidence constituted an abuse of discretion. This is especially true in light of the lesser burden of proof required to establish mitigating circumstances. "If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Fla.Std.Jury Inst. (Crim.) p.81

Appellant submits that the mitigating circumstances outweigh the aggravating circumstances. Appellant contends that the murder at issue does not rise above the norm of capital crimes. Murders with surrounding circumstances far more heinous and aggravating have resulted in life sentences. Since the trial court found one mitigating circumstance and findings of several of the aggravating circumstances are infirm, this Court must at least remand for resentencing. See Oats v. State, 446 So.2d 90 (Fla. 1984)(where sentence of death was set aside and case remanded because the judge weighed three impermissible aggravating factors, in addition to the three permissible ones, against the single mitigating factor of Oats' age).

## POINT VIII

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." Further, the statute 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.

concurring). 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 Eighth and Fourteenth 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.

Additionally, although admittedly not raised below, Appellant contends that Florida's death penalty is unconstitutionally applied in cases such as the one at bar where the victim is white. See McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) and Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985). While Appellant concedes that the current state of law is adverse to his position, this issue is currently pending before the Supreme Court of the United States. McClesky v. Kemp, 106 S.Ct. 3331 (July 7, 1986), and Hitchcock v. Wainwright, 106 S.Ct. 2888 (June 9, 1986).

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 Court grant the following relief:

As to Point I, vacate the judgments and sentences and remand for a new trial or, in the alternative, remand for an evidentiary hearing;

As to Points II through IV, vacate the judgments and sentences and remand for a new trial;

As to Point V, reduce Appellant's death sentence to a life sentence or, in the alternative, remand for a new penalty phase;

As to Point VI, vacate Appellant's three consecutive life sentences and remand for resentencing within the guidelines;

As to Point VII, reduce Appellant's death sentence to a life sentence; and

As to Point VIII, declare Florida's death penalty statute to be unconstitutional.

Respectfully submitted,

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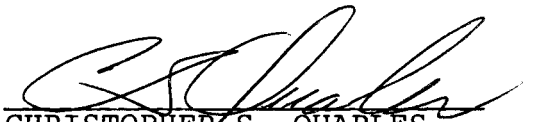
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Florida 32014 and to Mr. Johnny L. Robinson, #102767 P.O. Box 747, Starke, Florida 32091 on this 12th day of November 1986.



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