IN THE SUPREME COURT OF FLORIDA

RUDOLPH HOLTON,

Appel1ant,

vs. Case No. 69,861

STATE OF FLORIDA,

Appellee. :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS CONTINUED

TABLE OF CONTENTS CONTINUED

TABLE OF CONTENTS CONTINUED

TABLE OF CONTENTS CONTINUED

TABLE OF CITATIONS

TABLE OF CITATIONS CONTINUED

TABLE OF CITATIONS CONTINUED

TABLE OF CITATIONS CONTINUED

STATEMENT OF THE CASE

On July 9, 1986, the Grand Jurors of Hillsborough County returned a three-count Indictment charging Rudolph Holton, appellant, with first-degree murder, sexual battery and first-degree arson (R794-795). Count Two of the Indictment was subsequently nol prossed and the same charge refiled by Information on October 30, 1986 (R3,870-871). The cases were then consolidated for trial, which was held before Circuit Judge Harry Lee Coe III and a jury on December 1 through 5, 1986 (R1-788).

At trial, during voir dire defense counsel objected to the prosecutor's use of peremptory strikes to excuse the black prospective jurors (R63,124). When the third black prospective juror was excused, the trial judge required the prosecutor to state reasons for the excusal (R124). The court ruled that there was no systematic exclusion of black jurors (R124).

Defense counsel's motions for mistrial based on the introduction of gory and lurid oversized photographs into evidence were denied (R247,252-253,275). The court denied appellant's motion for judgment of acquittal and the renewed motions (R409,590,630).

The prosecutor objected to allowing an undisclosed defense witness to testify where notice was given during trial (R410). The court ruled that the witness, Appellant's sister, could testify but limited the subject matter of her testimony (R413).

When an essential defense witness did not honor her subpoena, the trial judge denied a continuance (R534). The judge decided to summarize the witness's deposition and read this summary

to the jury (R536-590). Defense counsel objected, stating that live testimony was required in order to give Holton a fair trial (R536,562). A renewed motion for mistrial on this ground was denied during the jury's penalty phase deliberations (R783).

During the charge conference, Appellant requested that the court instruct the jury on Section 800.02, Florida Statutes (1985) (unnatural and lascivious act) as a lesser included offense of the sexual battery charge (R620). The court noted that the table of lesser offenses in the Standard Jury Instructions did not list this offense and denied the requested instruction (R625).

The jury returned verdicts finding Appellant guilty of premeditated murder, sexual battery with great force, and first-degree arson (R745,862-863,879).

In the subsequent penalty trial, defense counsel moved for a mistrial after the prosecutor elicited a statement that the victim was the mother of a baby (R76). The court denied this motion for mistrial and a renewed motion for mistrial (R783).

The jury, by a vote of 7-5, recommended that a sentence of death be imposed (R784,864). The trial judge proceeded to sentence Appellant to death with consecutive sentences of life and thirty years on the sexual battery and arson convictions (R787).

Appellant's Motion for New Trial was heard and denied December 30, 1986 (R867,985).

Written findings entitled "Sentence" were signed February 12, 1987 (R976-978, see Appendix). The court found four aggravating

circumstances applicable: prior conviction of violent felony [§921.141(5)(b)]; committed in the commission of a sexual battery [§921.141(5)(d)]; especiallyheinous, atrocious, or cruel [§921.141(5)(h)]; and cold, calculated and premeditated without pretense of justification [§921.141(5)(i)] . The findings specifically rejected Appellant's argued statutory mitigating circumstances of victim participant [§921.141(6)(c)] and substantially impaired capacity [§921.141(6)(f)]. The court concluded that the aggravating factors clearly outweighed all the mitigating evidence.

A timely Notice of Appeal was filed January 5, 1987 (R894). Court-appointed counsel was permitted to withdraw and the Public Defenders for the Tenth and Thirteenth Judicial Circuits appointed as appellate counsel (R980-981).

Pursuant to Article V, Section 3(b)(1) of the Florida Constitution and Fla.R.App.P. 9.030(a)(1)(A)(i), Rudolph Holton, Appellant, now takes appeal to this Court.

STATEMENT OF THE FACTS

A. Facts of the Homicide

On June 23, 1986, the Tampa fire department received a fire alarm at 6:33 a.m. (R205). At the scene, a vacant building located on East Scott Street, a small fire in one corner of a room was quickly extinguished (R208). The unclothed body of a black female, later identified as Katrina Graddy, was discovered in the fire (R208,217).

The victim was found lying on her back with a cloth tied around her throat and one of her wrists (R217). A circular burn pattern on the floor encompassed the body (R217-218). A trained fire investigator, G.K. Brown, gave his opinion that the fire was incendiary or intentionally started (R218). His investigation concluded that the fire could only have been caused by pouring a flammable liquid on the floor and igniting it. (R221). The fire would have burned for at least three hours before it was extinguished (R221).

The Chief Medical Examiner of Hillsborough County, Dr. Peter Lardizabal, was called to the scene of the homicide (R259). He examined the body and determined that the cause of death was strangulation by a cloth ligature (R268,274). He described the ligature as a piece of clothing made of a nylon-type fabric (R263-264). The same type of material was tied around the right wrist and the two ligatures could have been in one piece before the fire (R265,269). Dr. Lardizabal testified that the victim was already dead before the fire was started (R270).

Dr. Lardizabal also found the neck of a bottle partially inserted into the victim's anus (R266). His examination showed that there was no laceration or other injury to the anal orifice of the victim (R271). The bottle was inserted prior to the fire, but not necessarily before death (R272-273). Although the bottle was broken, the fire probably caused it to break (R273). Tests for sperm in the victim's mouth, vagina and anus were all negative (R271-272). Extensive tests for evidence of drugs in the victim's body were also negative (R277).

B. State's evidence against Holton

Three hairs removed from the homicide victim's mouth were examined by F.B.I. special agent John Lawrence Quill who was qualified as an expert in hair and fiber analysis (R313-316). He testified that the hairs weren't long enough to make any significant comparison with a particular individual (R317). He could only determine that one, a body hair, had Negroid racial characteristics (R316). On that basis, he could not exclude Holton (or any person with Negroid hairs) from being the source (R317,320). Tests conducted on a t-shirt seized from Holton revealed some animal fur hairs and Negroid hair fragments (R318).

When the firefighters arrived at the scene, a white man, Carl Schenck, was asleep in his car directly across from the burning house (R197,336). Tampa Police Detective Aubrey Black questioned Schenck immediately following discovery of the victim (R333,424).

Schenck said that the previous day, Sunday, he left his house in St. Petersburg to go fishing by the Gandy bridge (R325). During the afternoon, he drank heavily (R334-335). In the late afternoon, Schenck picked up a black male hitchhiker who said his name was Maurice or Ben (R325,328-329). The hitchhiker wanted to go to Tampa and told Schenck that he would help him buy some marijuana if Schenck would drive him to Tampa (R330).

Schenck agreed and followed the hitchhiker's directions to a black bar where they were able to purchase ten dollars worth of marijuana (R330). They drank a couple of beers in the bar, drove around in the rain while smoking some marijuana, and returned to the bar for a couple more beers (R331). Schenck testified that he didn't know how he "was even able to drive'' but he drove from the bar with the hitchhiker and parked around 10 or 11 p.m. under a streetlight across the street from the house which burned (R331-332). The hitchhiker exited, saying he was going to see his sister about "getting some more weed" (R332). Schenck rolled up his windows, locked his doors, and fell asleep until he was wakened by the fire engines (R332-334).

Detective Black testified that he took Schenck to practically all of the black bars in Tampa, but Schenck was unable to recognize any of them (R427). Schenck told the detective that the hitchhiker was wearing a red t-shirt, blue pants and a blue baseball cap with yellow trim (R425). However, at trial, Schenck identified Holton's white t-shirt as similar to what the hitchhiker wore (R326). A black shaving kit which the hitchhiker left in

Schenck's car was recovered by Detective Black and introduced into evidence *(R427-428,327)*. Schenck was shown a photopack of ''about six" black and white photos and selected one which seemed to most closely resemble the hitchhiker *(R342-343)*. Then he was shown a single color photograph *(R343-344)*. Schenck could not positively identify the photo, but said it "closely resembled" the hitchhiker *(R344-345)*. In court, Schenck couldn't make a positive identification but said Holton looked like the hitchhiker (R328).

Johnny Lee Newsome, a/k/a/ Georgia Boy, knew Holton from the time they had gone to school together *(R349-350)*. Newsome also knew the victim, Katrina Graddy, by sight (R350). Newsome testified at trial that on the night of the murder, he saw Holton and Graddy talking together at the side of the vacant house around 11 p.m. *(R350-351)*. He said Holton was holding the black shaving kit which Detective Black later seized from Schenck's car (R352).

Tampa Police Detective James Noblitt testified, however, that Newsome told him that Holton and Graddy were seen together just after it turned dark (R465). Newsome also told Noblitt that he saw Holton after daylight on the morning of the homicide still carrying his shaving kit (R465-466,603). Newsome, however, denied telling the police that he had seen Holton the next morning, saying they must be mistaken (R591).

Tampa Police Officer Kevin Durkin was the lead detective on the case *(R370-371)*. The day after the homicide, he questioned Holton in regard to it (R374). Holton said he hadn't been in the

vacant house where the homicide occurred for ten days prior to its occurance (R375). When Holton had entered the house on prior occasions, he stayed mostly in the rear of the house (R375). He denied having ever been in the front room where the homicide took place (R375). Holton said he was wearing a blue t-shirt and black shorts on the date of the homicide (R376). When Detective Durkin concluded the interview, Holton asked him to bring a pack of Kool cigarettes if he wanted to talk to him again (R377).

Detective Durkin returned to the crime scene and noted a pack of Kool cigarettes in the room next to the one where the body was found (R379). There were at least four or five different cigarette packs in the room, but only the Kool cigarette pack was seized from this room (R380,392). A latent fingerprint on this cigarette package was identified as Holton's (R405).

Detective Durkin again questioned Holton (R381). Holton denied being anywhere near the vacant house on the night of the homicide (R382). When confronted with Newsome's statement, Holton said he had seen Newsome at the house the mid-afternoon on the day in question (R382). He said that the Kool cigarette pack wasn't his (R382). When confronted with the fingerprint, Holton exclaimed, "Somebody put my fingerprints on there" (R472). During this interview, Holton also admitted that he had been in the front room where the body was found only a few days before the homicide and that he had left two hypodermic syringes behind (R383).

Holton was placed under arrest at this time (R385). Over defense objection, Detective Durkin was allowed to testify

that since Holton was arrested, no similar crimes have occurred (R385).

The State's star witness was Flemnie Birkins (R286-310). Birkins had known Holton for ten or fifteen years and was incarcerated in the Hillsborough County jail when Holton was arrested (R287-288). Birkins asked Holton what he was charged with and Holton replied, murder (R288). Later, according to Birkins, Holton said that he had strangled a girl (R289). Holton allegedly said he then went to the Star gas station on Nebraska Avenue, got a can of gas and returned to burn the house (R289).

Birkins confirmed that he told Detectives Noblitt and Childers that Holton said he strangled the girl with his hands but didn't mean to kill her (R296-297). However, he denied telling the detectives that his motivation for reporting Holton's alleged confession was because the victim was only seventeen (R296). Birkins said he didn't know how old the girl was because Holton didn't tell him and he hadn't read about the homicide in the newspaper (R296). Both Detectives Noblitt and Childers testified that Birkins mentioned the victim's age of seventeen (R456,463).

The prosecutor asked Detective Childers:

> "Did it appear that Mr. Birkins knew facts that only the murderer would have known?" (R459)

When the detective replied, "Yes", defense counsel made objection which the Court sustained (R459). Shortly thereafter the prosecutor again asked Childers whether Birkins "knew facts that only the murderer would have known'' (R460). The court interrupted and

prevented the witness from answering (R460).

C. Defense evidence

Star service station employee Paulette Leonard testified that she worked alone on the night shift (10 p.m. - 6 a.m.) the night of the homicide (R478-479,484). The next night, a police officer showed her a photograph of Holton and asked if he had purchased a container of gasoline the previous night (R480-481). She responded that only two individuals, neither of them Holton, had bought gasoline in a container the previous night (R481-482).

Holton repeatedly told the investigating detectives that he was living at "Red's" house and had come home to sleep around 11 p.m. or midnight the night of the homicide (R388,395, 432). When Detective Durkin went to this address, he seized the t-shirt of Holton's and spoke to "Red" Clemnons (R386-387). Clemmons also told the detective that Holton had been there on the night in question (R387).

At trial, "Red" Clemnons testified that he had lived in his house behind the Red Top Bar for 38 years (R491). He had known Holton for many years through Holton's uncle who was president of the banana union hall (R492-493). Holton was residing at the witness's house during the month of June, 1986 (R493-494).

Clemmons testified that Holton had come in the night of the homicide and went to his bedroom to go to sleep (R494-495). He was not sure of the time, but guessed that it was between 9

and 10 p.m. (R495). He next saw Holton, sleeping in his bed, around 6 a.m. the next morning (R496,515).

Clemmons said that Holton did not have a key to the house (R500). Clemmons had a dog, which he described as "very mean,'' also living in his house (R497). If anyone moved around in the house, especially after dark, the dog would "raise cane'' [sic] (R498). The dog did not "raise cane" [sic] on the night in question (R499).

In rebuttal to Holton's alibi, the State called Carrie Nelson, who testified that she knew Rudolph Holton for five or six years (R592-593). On the night of June 22, she was sitting on her porch around 11 p.m. when she saw Holton walk alone through an alley and go into the vacant house where the homicide occurred (R593-596). On cross-examination the witness admitted that Holton had burglarized her house on four occasions but maintained that she didn't "hate him" (R594-495). She also admitted that a charge of aggravated assault was pending against her (R595).

The victim's mother, Eva Graddy Lee, testified €or the defense that Katrina Graddy had been at home on Sunday evening before the homicide until approximately 10 to 10:30 p.m. (R524). Bernard Johnny Black, who had lived for seven years in the same household as the victim and her mother, testified that Katrina left the house about 11 p.m. (R526-528).

The key defense witness, Pamela Woods, had been subpoenaed and further advised by defense counsel's investigator as to the time she should report to court (R487). The court denied

defense counsel's request to send the bailiffs out to her residence to bring her into court (R489-490). The trial judge did authorize defense counsel's investigator to bring her in under order of the court (R489-490). Pamela Woods did not appear by the time the other defense witnesses had concluded their testimony (R530).

Denying defense counsel's request for a continuance, the trial judge decided to summarize a limited portion of the witness' deposition (R533-536). The judge refused to include several of the details from Pamela Woods' deposition which defense counsel requested (R545,548,550,551,556,559,560,568,579). The court then read the edited summary of Pamela Woods' expected testimony to the jury (R587-590).

The substance of this summary was that Pamela Woods was a known prostitute who saw the victim, Katrina Graddy, get into an automobile around midnight on the night of the homicide (R587-588). The driver was a black male other than Rudolph Holton (R588). Woods never saw Katrina Graddy again (R588).

It should be noted that Pamela Woods did appear in court on the following day while the jury was deliberating (R783).

D. Prosecutor's closing argument

In his final argument, the prosecutor accused defense counsel of "deception and dishonesty" in her closing argument (R703). Defense counsel was further accused of arguing facts not in evidence (R704).

Th prosecutor then told the jury that tate witness Flemnie Birkins was telling the truth (R716). He told the jury, "I'm going to tell you how this crime happened" (R716). The prosecutor quoted Holton as saying to the victim that he would give her some drugs in exchange for sex (R717). The prosecutor quoted the victim as agreeing to return to the vacant house to meet Holton between 2 and 3 a.m. (R717). The prosecutor was not sworn as a witness.

The prosecutor continued by stating that Holton didn't bring the drugs he promised (R717-718). The prosecutor testified that a struggle began and Holton ripped the clothes off the victim (R718). He suggested that Holton strangled the victim with his hands and then put on the ligature to make certain she was dead (R718). The prosecutor further testified that Holton was unable to consummate the sexual act and killed the victim for this reason (R719).

Although Holton did not take the stand, the prosecutor commented extensively on his demeanor in the courtroom (R719-721). Over defense objection, he labeled a drawing seized from Holton evidence of a "twisted mind" (R720). Again over objection, the prosecutor reiterated that no similar crime occurred after Holton was arrested (R720). Commenting that the state's evidence was "a strong case", the prosecutor asked the jury to "wipe that smirk" off Appellant's face by finding him guilty (R721).

E. Penalty phase

The state introduced into evidence a certified copy of Holton's prior conviction for attempted robbery (R750,961-962).

Bernard Johnny Black, who was related to the victim as a stepfather, testified as a defense witness (R751-753). He said that he had known Rudolph Holton for fifteen or sixteen years and never knew him to do any violent act (R752). While acknowledging that Holton was "a thief and a dope user", Black said that he doubted Holton committed the homicide (R752).

On cross-examination, the prosecutor asked the witness whether he had ever molested his stepdaughter (R753). Black replied that he never had (R753).

Calvin Mack, longshoreman's union local president and Holton's uncle, testified that Holton had been employed on the banana docks (R754-755). Holton was a good worker (R755). Holton's father died when he was eleven or twelve years old (R755). His mother was also dead (R755). Holton was the father of two children (R756). Mack never knew Holton to hurt anybody (R756).

On cross-examination, the witness was asked if he knew that the victim had a baby (R756). Defense counsel objected and moved for a mistrial (R756). The court called the question improper but denied the motion for mistrial (R756-757).

Holton's sister, Annie Ballenger, testified that Rudolph was her older brother (R757-758). While they were growing up, Rudolph took responsibility for picking her up from school

since their mother worked (R758). Holton worked at a grocery store while he was in school (R758).

The witness never knew Rudolph to hurt anybody (R759).

Sandravetta Holton, Appellant's fifteen year old daughter, testified that her father had remained in contact with her (R759-761). He talked about his drug usage, saying that he wanted to quit (R760).

Rudolph Holton took the stand in his own defense (R761-769). He admitted to thirteen prior convictions and having been in prison (R762).

He described the circumstances of his attempted robbery conviction (R762-763). He was gambling in a dice game and had won $20 from the alleged victim (R762). When he asked for his money, the alleged victim pushed him down (R762). Holton responded by hitting him (R762-763).

Holton testified that he didn't kill Katrina Graddy (R763). He did not know her and could not remember having seen her (R764-765). Holton said he had known Flemnie Birkins all his life, knew his reputation for being a snitch, and didn't tell him anything concerning Katrina Graddy (R763-764).

Holton said that he had sought treatment for his drug problem but had been unable to pay $80 to get into the DACCO program (R764).

On cross-examination, the prosecutor individually named the witnesses at trial and asked Holton if each was "lying too" (R766-767). Mentioning Holton's thirteen felony convictions,

he asked Holton to explain the circumstances of a 1981 grand theft conviction (R767).

In his penalty phase closing argument, the prosecutor stressed Holton's twelve felony convictions in addition to the conviction for attempted robbery (R772). While acknowledging that the other twelve convictions were not an aggravating factor, the prosecutor urged the jury to question Holton's credibility on this basis (R772). The prosecutor also told the jury that by their verdict for premeditated murder in the guilt or innocence phase, they had already found the cold, calculated and premeditated aggravating circumstance (R773).

Urging a sentence of death, the prosecutor remarked that Holton "wants another chance. He has had thirteen" (R773).

SUMMARY OF ARGUMENT

After exercise of a third peremptory strike against black prospective jurors, the trial court required the prosecutor to explain his reason. The reason given, the prospective juror's attitude toward divorce was not bona-fide because no similar questions were posed to white prospective jurors.

The prosecutor asked Detective Childers to give his opinion of whether the jailhouse informant "knew facts that only the murderer would have known". This was not only impermissible as a lay opinion, it was also impermissible as the detective's opinion suggested to the jury that there was evidence not presented at trial which would support this conclusion.

The prosecutor was also allowed to elicit testimony from Detective Durkins that no similar crimes had occurred since Holton was arrested. In closing argument, the prosecutor offered this irrelevant fact as proof of Holton's guilt.

The prosecutor's final argument in guilt or innocence phase was a virtual encyclopedia of prosecutorial misconduct. Among other things, the prosecutor falsely accused defense counsel of dishonesty, argued extensively from facts not in evidence, commented upon the defendant's demeanor in the courtroom (Holton did not testify in this phase of the trial), vouched for the credibility of his star witness, gave his professional opinion that he had "a strong case", and distorted the burden of proof by arguing that the defendant was required to prove his alibi beyond a reasonable doubt.

When defense counsel added a new witness during trial, the trial court limited the subject of this witness' testimony as a sanction for violation of discovery rules. This ruling prejudiced Holton and denied him Sixth and Fourteenth Amendment rights to compulsory process and to present a defense at trial,

Gruesome and inflammatory photographs of the victim's body were unreasonably enlarged by the prosecutor simply to shock the jury. The State did not enlarge the other photographs in evidence which were not lurid.

When an essential defense witness failed to honor her subpoena, the trial court denied a continuance. Instead, the court read an edited summary of her prior deposition to the jury. Under the circumstances, the court's action was a violation of the defendant's Sixth and Fourteenth Amendment rights to compulsory process and due process of law.

The evidence did not support a verdict of premeditated murder because the sole evidence relied upon was the strangulation of the victim. While the length of time involved in strangling a victim to death would be sufficient to permit deliberation, there is no evidence of actual deliberation.

The evidence did not support a verdict of first-degree arson because the victim was already dead before the fire started. A dead body cannot be used for proof of the arson statute's element requiring occupancy of the structure by "a human being'.'.

The evidence did not support a verdict of sexual battery with great force because there was no proof that the

victim did not consent to the specific act alleged as the sexual battery. Also, there was no proof as to whether the victim was alive or dead when the sexual battery occurred.

The trial court erred by rejecting defense counsel's request for a jury instruction on Section 800.02, unnatural and lascivious act, as a lesser-included offense to the sexual battery count. Under the allegations of the Information and the evidence produced at trial, this was a permissive lesser-included offense.

During penalty phase, the prosecutor improperly cross-examined defense witnesses when he insinuated that one defense witness had molested the victim, elicited from another witness that the victim was the mother of a baby, and required the defendant to give his opinion on the credibility of several of the state witnesses.

During penalty phase closing argument, the prosecutor urged the jury to sentence Holton to death because he had thirteen prior felony convictions, only one of which qualified as a violent felony. The prosecutor also misstated the law in regard to the cold, calculated and premediated aggravating circumstance. These errors were not harmless under the circumstances.

The trial judge sentenced Holton to death without identifying the aggravating and mitigating circumstances he considered. There is no showing that he conducted an independent weighing. Also, the trial judge sentenced Holton to statutory maximum terms on the sexual battery and arson convictions without benefit of a guidelines scoresheet.

The written "Sentence" erroneously found four aggravating circumstances. The court also erred by failing to consider the statutory mitigating circumstances of impaired capacity on the ground that it did not apply when a defendant maintained his innocence.

ARGUMENTS

ISSUE I.

THE TRIAL COURT ERRED BY ACCEPTING THE PROSECUTOR'S EXPLANATION FOR USE OF PEREMPTORY STRIKES AGAINST ALL THE BLACK PROSPECTIVE JURORS ON THE PANEL.

Rudolph Holton, Appellant, is black. Of the venire, three prospective jurors, Mrs. Blue, Mr. Lampley and Mrs. Crawford, were black (R63,124). All were struck by the prosecutor's exercise of peremptory strikes (R63,124).

When the prosecutor excused Mrs. Blue and Mr. Lampley, defense counsel objected, charging a systematic exclusion of blacks from the jury (R63). The court overruled the objection, noting that both prospective jurors had expressed opposition to the death penalty but could not be excused for cause (R63).

When the prosecutor exercised a peremptory against Mrs. Crawford, defense counsel again objected that prospective jurors were being excluded on the basis of race (R123-124). The court then required the prosecutor to state his reason for excusal of Mrs. Crawford:

> THE COURT: Why are you striking this juror?
>
> MR. EPISCOPO: Number 1, I said if a battered woman came to you and told you her husband was beating her, would you recommend a divorce, and she said no.
>
> THE COURT: What does that have to do with this case?

MR. EPISCOPO: Well, we have a woman who is a prostitute. Some people may think she put herself in that situation. She has no sympathy whatsoever for our victim. That is the way I look at it.

THE COURT: I will note the objection. I will overrule it. It's not a systematic exclusion based on one juror being excused. I think clearly she could have been excused by the State.

(R124)

The trial judge's ruling appears to have two separate rationales; (a) improper exclusion of one juror does not prove systematic exclusion of jurors on a racial basis, and (b) the prosecutor's reason was acceptable. Each rationale will be examined separately.

A. Improper Exclusion of One Juror is Sufficient to Require Reversal

In Batson v. Kentucky, 476 U.S. ___, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment forbids prosecutorial exercise of peremptory challenges to discriminate against jurors on racial grounds. When the trial judge notes that the prosecutor's use of peremptory challenges gives rise to an inference of discrimination, the State must come forward with a neutral explanation for challenging black jurors.

Subsequently, the Eleventh Circuit noted in United States v. Gordon, 817 F.2d 1538 (11th Cir. 1986) that application of the Batson rationale required finding a violation of the Equal Protection Clause when any black juror was struck for a racial reason

regardless of whether other black jurors were seated or struck for valid reasons.

The situation presented here can be compared to cases where capital punishment opponents have been improperly excluded for cause from juries. In State v. Adams, 76 Wash.2d 650, 458 P.2d 559 (1969), the Washington Court held that the improper exclusion of one potential juror did not require reversal of the death sentence imposed because exclusion of one juror did not amount to systematic exclusion. The United States Supreme Court summarily reversed. Adams v. Washington, *403* U.S. 947 (1971). The Court then explained in Davis v. Georgia, 429 U.S. 122 (1976) that erroneous excusal of a single juror for cause was reversible error. The harmless error doctrine is not applicable. See Gray v. Mississippi, 481 U.S. , 107 S.Ct. , 95 L.Ed.2d 622 (1987).

Accordingly, this Court should reject the first prong of the trial court's ruling (exclusion of one juror is not systematic exclusion) as this violates Holton's constitutional rights under the Equal Protection Clause of the Fourteenth Amendment. This Court should reach the question of whether the prosecutor's excusal of Mrs. Crawford had a legitimate, non-racial basis.

B. The Prosecutor s Exnlanation for His Peremptory Excusal of Prospective Juror Crawford Was Not a Bonafide Race-Neutral Explanation

In his initial voir-dire examination of prosective juror Mrs. Crawford, the prosecutor learned that she was employed as an investigator of employment discrimination charges (R66). When a complaint of employment discrimination was received, her duty was to *go* into the field, question people, and make a recommendation to her supervisor (R67). She also conducted hearings where the person accused of discrimination was given an opportunity to defend (R68).

Later, the prosecutor inquired:

> Q. Do you ever get involved with battered women?
>
> A. I can't think of a instance where I have.
>
> Q. If a woman came to you and said that her husband was beating her, would you recommend that she get divorced?
>
> A. No.
>
> Q. You would not?
>
> A. No. She would not come to me in my job.
>
> Q. But if a woman did come to you and asked you about that, would you recommend that?
>
> A. No.

(R118)

The first significant aspect of the prosecutor's hypothetical question is that it was not suggested by anything in Mrs. Crawford's background or employment. It was simply a question

out of the blue. The second significant aspect is that the prosecutor did not ask Mrs. Crawford what advice she would give to a battered woman; he only asked if she would recommend divorce. He did not ask, for instance, whether she would urge the battered woman to contact law enforcement authorities.

If the prosecutor truly intended to gauge a prospective juror's potential "sympathy" for the victim by the juror's attitude toward divorce, it would seem that the prosecutor would have directed similar inquiries to other prospective jurors. He might have inquired of prospective jurors if they were Catholic or whether their religious beliefs influenced their attitude toward divorce. The prosecutor did none of these things. Needless to say, he did not pose the hypothetical question about a battered woman to any other prospective juror.

In State v. Neil, *457* So.2d *481* (Fla. 1984), this Court, relying upon the Florida Constitution, Article I, Section 16 right to an impartial jury, held that once a party shows a strong likelihood that peremptory challenges have been exercised soley on the basis of race, the trial judge must inquire of the party who exercised the peremptories. The Neil court declared that the burden was then upon that party to demonstrate that the questioned challenges "were not exercised solely on the basis of race." *457* So.2d at *488.*

The Third District interpreted the Neil decision as requiring the trial judge to evaluate the explanation even when it appears race-neutral on its face. Slappy v. State 503 So.2d 350

(Fla.3d DCA 1987)[1/]. The trial judge must "make a reasoned determination that the prosecutor's facially innocuous explanations are not contrived to avoid admitting acts of group discrimination." 503 So.2d at 356.

The Slappy court identified five factors which "weigh heavily against the legitimacy of any race-neutral explanation". 503 So.3d at 355. One of these is particularly relevant to the facts at bar:

> 3) disparate examination of the challenged juror, i.e., questioning challenged venireperson so as to evoke a certain response without asking the same question of other panel members....

503 So.2d at 355.

As mentioned above, the prosecutor at bar did not question any other panel members about the advice they would give to a battered woman. No questions were asked that might disclose any other juror's attitude toward divorce. Plainly the prosecutor did not consider this subject to be of any importance when white jurors were examined.

Moreover, we might consider what would have happened had Mrs. Crawford replied that she would recommend divorce. A facially race-neutral ground for striking her might be that the State would prefer jurors who would advise battered women to contact law enforcement. Another facially reasonable ground would be a preference for jurors who deeply value the sanctity of the family because they would be more sympathetic to the victim.

1/ This Court has granted review. State v. Slappy, Case No. 70,331.

The point is that when a black prospective juror is questioned differently than white prospective jurors, there is a definite possibility that both "yes" and "no" are wrong answers. When a party intends to strike on the basis of race, disparate questioning offers an opportunity for subterfuge. Disparate treatment of individuals of different races is a central concern of the Fourteenth Amendment's Equal Protection Clause.

Accordingly, when a party explains peremptories exercised to strike black prospective jurors the explanation should not be accepted where the party does not apply the same criteria to white prospective jurors. The prosecutor's strike of Mrs. Crawford at bar does not satisfy this standard. Holton was denied his right to an impartial jury under Article I, Section 16 of the Florida Constitution. The exercise of a peremptory strike on racial grounds by the prosecutor also violated the Equal Protection Clause of the Fourteenth Amendment, United States Constitution. A new trial should be ordered.

ISSUE II.

APPELLANT'S DEFENSE WAS IRREPARABLY PREJUDICED BY THE PROSECUTOR'S ASKING DETECTIVE CHILDERS ON CROSS-EXAMINATION FOR HIS OPINION AS TO WHETHER FLEMNIE BIRKINS "KNEW FACTS THAT ONLY THE MURDERER WOULD HAVE KNOWN.''

The State's star witness, Flemnie Birkins, testified that he was incarcerated in the Hillsborough County Jail when Holton was arrested. Birkins and Holton had known each other for many years (R287-288) Birkins asked Holton what charges were against him and Holton replied "murder" (R288-289). According to Birkins' trial testimony, the following transpired:

> Q. What else did he say?
>
> A. Then he told me that he had killed a girl, that he had strangled her.
>
> Q. What else did he say he did?
>
> A. That he had went to the Star Service Station on Nebraska and got a can of gas.
>
> Q. And did what?
>
> A. And came back to the house and sat [sic] it on fire.

(R289)

Birkins specified on cross-examination that Holton said he strangled the victim with his hands and didn't intend to kill her (R296-297).

To begin with, the details which Holton allegedly confessed to Birkins were not corroborated at trial. Medical Examiner Peter Lardizabal unequivocally stated that the cause of death was strangulation from "constriction produced by that (nylon) ligature" (R268, 274). There was no physical evidence of manual strangulation. The Star Service Station attendant, Paulette Leonard, was "positive" that

only two persons, neither of them Holton, had purchased gasoline in a container on the night in question (R481-482). Therefore, the only fact in the alleged confession supported by the evidence was a fire of incendiary origin.

Birkins himself was extensively impeached at trial. On direct examination, he testified that he had been sentenced on his pending burglary and grand theft charges to three years (R291). His coming forward to testify against Holton was not taken into consideration (R291). However, on cross-examination, after Birkins said he had been sentenced three months ago (R292), he had to admit that he had only entered a guilty plea to the charges, but was still awaiting sentencing (R293). He was aware that he could be treated as an habitual offender (R301).

At trial, Birkins admitted that he had been convicted of a felony "about eight times" (R291). However, when he was deposed under oath, Birkins could only "recall" two felony convictions (R299). This was despite going to prison four times (R300).

Birkins also testified that he hadn't asked for anything in return for his testimony (R290). When confronted with a pro se motion for release on recognizance, Birkins admitted that he "probably did" file it (R302-303). He admitted that in the motion he declared that he was a State witness and could produce "several members of law enforcement" to testify in his behalf. (R304,963-967).

There were also contradictions between Birkins' trial testimony and what Detectives Childers and Noblitt remembered him saying when they interviewed him five days after the alleged confession. Birkins said at trial that Holton confessed while they were at the

jail clinic (R288). He denied telling Detectives Noblitt and Childers that the conversation had taken place while Holton and he were on a bench in the central area of the jail awaiting return to their cells (R295). However, Detective Noblitt testified that Birkins mentioned conversations at two locations (in the hallway leading to the infirmary and in the central area, first floor) when he was interviewed on July 1, 1986 (R462-463).

Even more destructive to Birkins' credibility was the testimony of both Detectives Childers and Noblitt that Birkins originally said his motivation for talking to the police was the victim's youthful age of seventeen (R456,463). At trial, Birkins not only denied telling the detectives that the victim was seventeen, but also admitted that Holton said nothing concerning the victim's age (R296).

In this context, the prosecutor was attempting to rehabilitate Birkins in his cross-examination of Detective Childers. The following occurred:

> *Q.* And isn't it unusual in this case that Mr. Birkins didn't ask for anything?
>
> A. In my opinion.
>
> MS. MORGAN: Your Honor, I object to him giving an opinion.
>
> THE COURT: I will sustain the objection.
>
> BY MR. EPISCOPO:
>
> *Q.* Did it appear that Mr. Birkins knew facts that only the murderer would have known?
>
> A. Yes, sir.
>
> MS. MORGAN: Your Honor, I object to the conclusion as to that, too.

THE COURT: Well, I'11 let the jury decide that. I'11 sustain the objection. The jurors heard the alleged statement. They can decide that for themselves.

(R458-459)

On redirect examination, defense counsel elicited from Detective Childers acknowledgement that there was television coverage of this homicide and that there were televisions in the jail (R459-460). The prosecutor's recross-examination followed:

Q. Well, in this television coverage, did they put all the evidence on television?

A. No, sir.

Q. Isn't it true that the police generally hold back certain facts so that it doesn't get publicized?

A. Yes, sir.

THE COURT: Any further questions?

MR. EPISCOPO: Now, Your Honor, I believe she has opened the door and I can ask the question.

BY MR. EPISCOPO:

Q. Isn't it true that he knew facts that only the murderer would have known?

THE COURT: Well, excuse me. I will let the jury decide that. You may step down.

(R460)

The question posed by the prosecutor, "isn't it true that he knew facts that only the murderer would have known'' is clearly objectionable on the grounds presented at trial. A non-expert witness may not express opinions or conclusions which the jury could draw from the evidence. Mills v. State, 367 So.2d 1068 (Fla. 2d

DCA 1979); Section 90.701, Florida Statutes (1985). In Holiday v. State, 389 So.2d 679 (Fla.3d DCA 1980), it was held reversible error to permit testimony from the victim's psychiatrist that the victim was "not a pathological liar". Particularly when police officers comment on the credibility of a witness, the air of authority and legitimacy which surrounds their testimony may be highly prejudicial and require reversal. See, Bowles v. State, 381 So.2d 326 (Fla.5th DCA 1980).

At bar, however, the prosecutor's improper cross-examination of Detective Childers was even more fundamentally prejudicial because the question and answer suggested that the prosecutor and Detective Childers had access to evidence not produced at trial which supported their conclusion that Birkins "knew facts that only the murderer would have known". Although no evidence was produced to show the scope of the television coverage of this homicide, Detective Childers was permitted to answer that the police held back certain evidence. The unmistakable inference is that Rirkins was a credible witness because he told the police some details of the homicide which were not revealed to the public. Yet the jury never heard a single underlying fact to support this conclusion; consequently, they could only conclude that they were being asked to trust in the State's assertion.

The United States Constitution, Amendments VI and XIV as well as the Florida Constitution, Article I §§9 and 16 guarantee an accused the right to a trial which is fundamentally fair. An essential aspect of these constitutional guarantees is

a defendant's right to be tried solely on the evidence presented to the jury. United States v. Garza, 608 F.2d 659 (5th Cir. 1979); Gradsky v. United States, 373 F.2d 706 (5th Cir. 1967). The United States Supreme Court stated in Berger v. United States, 295 U.S. 78 (1935) in discussing the prosecutor's influence on the jury by virtue of his official position:

> Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to to carry much weight against the accused when they should properly carry none. (emphasis supplied)

295 U.S. at 88.

In Duque v. State, 498 So.2d 1334 (Fla.2d DCA 1986)[2/], the same assistant state attorney described a defense witness in his closing argument as "the type of person, characterized around this courthouse as a scum bag". 498 So.2d at 1337. The Second District noted that this expression of the prosecutor's opinion was not only improper but even more prejudicial because it implied that others would share this opinion.

At bar, the prosecutor was bolstering the credibility of a key state witness instead of attacking the credibility of a defense witness. He injected the opinion that Birkins "knew facts that only the murderer would have known'' into cross-examination instead of his closing argument. However, the result is equally improper and prejudicial to the defendant. In both cases, the jury was asked to judge the credibility of a witness on the

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2/ This appeal was from a retrial ordered in Duque v. State, 460 So.2d 416 (Fla.2d DCA 1984) because the prosecutor's closing argument went beyond the evidence presented to the jury.

basis of the prosecutor's opinion allegedly shared by others (courthouse regulars in Duque, Detective Childers at bar).

In Duque, the Second District Court found the comment fundamental error which deprived the defendant of a fair trial. The same rationale should be reached at bar.

It cannot be over-emphasized that the credibility of Flemnie Birkins was the essential issue at trial. Holton's fingerprints on a Kool cigarette package found in an adjacent room of the vacant house did not prove very much because there was no evidence when the fingerprints were left. See Jaramillo v. State, 417 So.2d 257 (Fla. 1982). Numerous other cigarette packages were in this room as well as the room where the victim was found (R379,392-393). The vacant house was regularly employed by drug users to inject or smoke drugs (R354).

Nor does Holton's denial that the cigarette package was his carry any weight in proving the state's case. In Ivey v. State, 176 So.2d 611 (Fla.3d DCA 1965), the defendant's fingerprint was found on a jalousie in the door of a store despite the defendant's claim that he had never been in the town where the store was located. The inconsistent statement did not cure the original insufficiency of the fingerprint evidence to prove a burglary.

State witnesses Carl Schenck, Johnny Lee Newsome and Carrie Nelson tended to contradict rather than corroborate each other. Viewing their testimony collectively in the light most favorable to the State could only establish at most that Holton was at the vacant house several hours before the homicide occurred

and may have been seen talking to the victim.

Clearly the credibility of Flemnie Birkins' testimony about Holton's alleged confession was the critical issue at trial. When the prosecutor bolstered Birkins credibility by suggesting that there was evidence not presented to the jury which would indicate that Birkins knew facts that only the murderer would have known, he deprived Holton of his rights to due process of law under the Fourteenth Amendment, United States Constitution and Article I, section 9, Florida Constitution as well as his right to a fair trial under the Sixth Amendment, United States Constitution and Article I, section 16, Florida Constitution. Holton should now be given a new trial.

ISSUE III.

THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO ELICIT AN IRRELEVANT AND PREJUDICIAL STATEMENT FROM DETECTIVE DURKIN THAT NO SIMILAR CRIMES HAD OCCURRED SINCE HOLTON WAS ARRESTED AND TO ARGUE TO THE JURY THAT THIS WAS EVIDENCE OF HOLTON'S GUILT.

On direct examination of Detective Durkin, the following testimony was elicited:

> Q. Are you familiar with the homicides that generally occur in the Tampa area as a homicide detective?
>
> A. Yes, sir.
>
> Q. When was the defendant arrested?
>
> A. On the 26th of June of this year.
>
> * * *
>
> Q. Well, since that time to the present have there been other homicides where a woman has been burned and raped with a bottle and strangled?
>
> MS. MORGAN: Your Honor, I would object as to relevancy.
>
> THE COURT: Overrule the objection.
>
> BY MR. EPISCOPO:
>
> Q. Since that time, since the defendant was arrested, have there been any other homicides following this pattern?
>
> A. No, sir.

(R385)

A. Admission of Evidence that No Similar Crime Had Been Committed Since Holton's Arrest Was Irrelevant to Any Issue of Material Fact and Suggested to the Jury a Propensity to Commit Similar Crimes.

The issue for the jury's resolution at bar was the identity of the perpetrator. Evidence that no similar crime had been committed since Holton's arrest would be relevant only if it tended to prove or disprove a material fact relating to the identity of the perpetrator. See Section *90.401,* Florida Statutes *(1985).* Since the evidence was irrelevant to identity, it was inadmissible.

Moreover, the prosecutor's line of questioning might well have been interpreted by a reasonable juror in a manner exceedingly prejudicial to Holton. If there had been a pattern of similar crimes over a period of time, one might infer that the crimes would continue until the perpetrator was arrested. Conversely, a single unrelated homicide does not raise an inference that similar homicides would follow. Consequently, the prosecutor's line of questioning suggested that a serial pattern of prior homicides might have existed and Holton might have committed those also. At the minimum, the prosecutor's questioning suggested to the jury that Holton had a propensity to commit similar homicides and would have committed more had he not been arrested.

Evidence suggesting a defendant's propensity to commit crime is clearly inadmissible. Section *90.404,* Florida Statutes *(1985).* In Jackson v. State, *451* So.2d *458* (Fla. 1984), the defendant objected on relevancy grounds when the State introduced testimony that prior to the homicide in question, the defendant

had boasted of being a "thoroughbred killer". This Court held that the objection was adequately specific. This Court further noted that the testimony's suggestion that the defendant had killed in the past was prejudicial, but irrelevant, to any material fact in issue.

When state witnesses have made comments which suggested that the defendant committed prior similar crimes, Florida courts have not hesitated to reverse. See, Dibble v. State, 347 So.2d 1096 (Fla.2d DCA 1977)(comment by detective that defendant "hit the wrong guy this time"); Long v. State, 407 So.2d 1018 (Fla.2d DCA 1981)(characterizing defendant as a "shoplifting suspect"). At bar, testimony that no similar crimes were committed after Holton's arrest might infer propensity to commit future crimes more than commission of prior crimes; nevertheless, it is equally irrelevant and prejudicial.

B. The Trial Court's Ruling that Defense Counsel Invited the Prosecutor's Line of Questioning Is Not Supported by the Record.

After the State rested its case, the trial judge re-visited his ruling allowing the prosecutor's question to Detective Durkin about similar crimes since Holton's arrest. The court stated:

> The reason I allowed the question on any crimes, burning and rape, since his arrest, I thought it was invited by cross-examination. I will deny the motion.

(R409-410)

Since the response was elicited from Detective Durkin on direct examination, evidently the trial judge was referring not to the cross-examination of Detective Durkin, but to the cross-examination of State witness Johnny Newsome. During that cross-examination, defense counsel was exploring why Newsome had previously denied that there were any charges pending against him. The witness, Newsome, then explained:

> A. Well, it wasn't a charge. See, it was, well, see, I am a witness for another murder case, too, see, and this -- it was a setup for me, see. I am a witness for another charge against a murder case, and these individuals, you know, I would still like to discuss that issue with my lawyer, too.

(R359)

The cross-examination proceeded:

> *Q.* What about the murder case that you are a witness on that you don't want to talk about?
>
> A. No fire involved in that.

(R360)

On recross-examination, defense counsel returned to the other homicide where Newsome was a witness:

> Q. That other case you are a witness in --
>
> A. Uh-huh.
>
> * * *
>
> *Q.* That case involves a fire and a body being found in that house, doesn't it?
>
> A. No.
>
> * * *

Q. Where did that murder occur?

A. At the Red Top Bar.

Q. Not over at a house on Estelle Street?

A. No. I done supposed to be the victim of that but I wasn't. I am supposed to have been burnt up in the house on Estelle Street, but I wasn't. Everybody thought it was me burnt up in the house. That is how that came about.

(R368-369)

Defense counsel's questioning of Newsome was directed at his credibility. While testimony came out about a homicide involving a fire and a body being discovered in the burned house, there was nothing to suggest that this occurred after Holton's arrest. Certainly, no reasonable juror could have interpreted this testimony to indicate that there was a pattern of homicides, similar to the one Holton was charged with, which continued after Holton's arrest.

Had defense counsel suggested such a pattern continuing after Holton's arrest, the trial judge's ruling of invited questioning might be correct. But since defense counsel in no way suggested another similar homicide occurring after Holton's arrest, the ruling of the trial judge was error.

C. The Prosecutor Used Detective Durkin's Comment in His Closing Argument as Proof of Holton's Guilt.

In his final argument, the prosecutor told the jury:

Detective Durkin, Tampa PD, homicide, says there hasn't been any similar

> crime since his arrest, just a little circumstance.

(R720)

When defense counsel immediately objected, the trial court interrupted and "noted" the objection. (R720).

Even if the trial court correctly ruled that the "no similar crime'' testimony was invited, clearly the prosecutor misused the testimony in final argument. In no way can the prosecutor's comment be interpreted as rebutting a defense contention; rather, the prosecutor specifically argued the "no similar crime'' evidence as circumstantial proof of Holton's guilt. As set forth in subsection A. supra, the "no similar crime" evidence was irrelevant as circumstantial proof of guilt, but was highly prejudicial to Holton.

Accordingly, Holton's conviction should be reversed and a new trial ordered.

ISSUE IV.

THE PROSECUTOR'S REMARKS IN CLOSING ARGUMENT (GUILT OR INNOCENCE PHASE) WERE SO IMPROPER AND PREJUDICIAL THAT HOLTON WAS DENIED HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL.

At the outset, it must be noted that defense counsel objected only twice during the prosecutor's final argument (R720). Defense counsel never moved for a mistrial based on the prosecutor's improper argument. However, in a close case, the prosecutor cannot be permitted to push the jury to render a guilty verdict with improper comments *so* prejudicial as to amount to fundamental error. Ryan v. State, 457 So.2d 1084 (Fla.4th DCA 1984), rev. den., 462 So.2d 1108 (Fla. 1985). If the essential fairness of a criminal trial is destroyed, the ends of justice require a new trial regardless of the lack of objection. Dukes v. State, 356 So.2d 873 (Fla.4th DCA 1978). The test is whether the comments are "*so* prejudicial to the defendant that neither rebuke nor retraction may entirely destroy their influence in attaining a fair trial." Wilson v. State, 294 So.2d 327 (Fla. 1974).

In Pollard v. State, 444 So.2d 561 (Fla.2d DCA 1984), the court recognized that improper argument by the prosecutor should be weighed in its cumulative effect to determine whether essential fairness is compromised. The Fourth District considered the cumulative effect of what it termed a "mail order catalog of prosecutorial misconduct" in Peterson v. State, 376 So.2d 1230 at 1233 (Fla.4th DCA 1979), cert. den., 386 So.2d 642 (Fla. 1980). Accordingly, the virtual encyclopedia of

prosecutorial misconduct presented at bar should be reviewed for its cumulative effect on Holton's trial.

A) The Prosecutor's Attack on the Honesty of Defense Counsel was Both False and Grossly Prejudicial.

The prosecutor commenced his final closing argument to the jury as follows:

> The first I have to point out to you is that one thing that has been made clear in this case is that the evidence indicates that the defendant has been deceptive and dishonest, and that deception and dishonesty has come out in the closing argument of the defendant.
>
> Let me just highlight some of those points. For example, things not in evidence have been brought out. You recall the testimony the best you can, but I don't know where it came out that everybody that graduated from Gibbs High was black. What is that? Where did that come from? This business about Red's dog biting someone and him getting rid of it, that is not in evidence, things not in evidence being argued by the defendant in his closing argument. If his defense is so strong, why are things being argued that are not in evidence? Further deception.

(R703-*704)*

To begin with, the attack on defense counsel was totally unwarranted because these facts were in evidence. Detective Black testified regarding Gibbs High School: "I am familiar that when he would have been going to high school, it would have been an all black high school" (R429). Red Clemmons testified regarding his dog: "it's bit a lady since, since that time, and that's why I don't have that dog today." (R504-505)

As explained by the Illinois Supreme Court in People v. Bean, 109 Ill.2d 80, 485 N.E.2d 349 (1985), an accusation of defense deception substantially prejudices a defendant because it invites the jury to judge the defendant not on the merits of the case, but upon the prosecutor's opinion of defense counsel's ethics. Florida courts have similarly reversed convictions where the prosecutor has attacked defense counsel in closing argument. See Adams v. State, 192 So.2d 762 (Fla. 1966) (comment that defense lawyer "violated his oath as a lawyer ... and as a human being"); Carter v. State, 356 So.2d 67 (Fla.1st DCA 1978) (calling defense lawyer "almost criminal"); Jackson v. State, 421 So.2d 15 (Fla.3d DCA 1982) (asking jurors whether they would buy a used car from defense lawyer); Peterson v. State, supra. (police have to put up with people like defense lawyer).

The above-quoted excerpt from the prosecutor's final argument was sufficient in itself to violate Holton's fundamental constitutional right to a fair trial. Amends. VI and XIV, U.S. Constitution; Article I, sections 9 and 16, Florida Constitution.

B) The Prosecutor's Final Argument Went Beyond the Evidence Produced at Trial.

As mentioned previously, the Second District has previously reversed the same case twice for prosecutorial argument which went beyond the evidence presented at trial. See Duque v. State, 460 So.2d 416 (Fla.2d DCA 1984), rev. den., 467 So.2d 1000

(Fla. 1985) (Duque I); Duque v. State, 498 So.2d 1334 (Fla.2d DCA 1986). (Duque II). At bar, the prosecutor's argument was even more egregious.

In referring to state witness Johnny Newsome, the prosecutor commented:

> *So,* what is his motive to lie? He is not fingering this guy for a motive and that muder didn't happen at that time. That was when they were meeting and discussing their future get-together later.

(R710) (e.s.)

Newsome was the only witness to testify that Holton had been seen on the evening prior to the homicide talking to the victim by the side of the vacant house where the crime occurred. Newsome did not claim to know what Holton and the victim were allegedly talking about.

From this lead-in, the prosecutor proceeded to dramatize a wholly imaginary account of the homicide. Needless to say, the prosecutor was not sworn as a witness and Holton was not permitted to cross-examine. The prosecutor told the jury:

> I'm going to tell you how this crime happened based upon the evidence and the testimony.
>
> The defendant has access to dope. He is known as an addict. The victim, seventeen years old, takes dope, exchanges dope for sex. She has been arrested for prostitution.

(R716-717)

* * * * * *

> *So* they met somewhere around midnight, eleven o'clock, and the deal is struck. "I'11 *go* get some dope," says the defendant.

"You give me some sex." 1 / "Okay," says Katrina. "I'm going to go off and do some tricks. You go get the dope. We will meet back here later when these people on this porch out here at Carrie's go to bed." 2 /

(R717)

* * * * * *

At twelve o'clock, Katrina is off in a car somewhere. She got picked up at the corner of Scott and Nebraska, right down here, with some unknown black male. So, it's the State's theory that sometime, 2:00, 3:00 in the morning, whatever, they met. 3 / They went into the house and something went wrong. Could the defendant have used all the dope because he couldn't get enough? 4 / Could she have protested, "Hey, the deal is off"? 5/

5'6", a hundred seventeen pounds. "The deal is off my eye! You are here, I am here, nobody else is here." 6 / So, it starts. Her clothes are ripped off. 7 / There's a fight. 8 / He sustains a cut that he lied about. "I cut it on a window. I cut it in fight." Well, maybe he didn't lie about it. Maybe he did cut it in a fight. Obviously, there

---

1 / No such statement by the defendant was in evidence.

2 / No such statement by the victim was in evidence.

3 / This "theory" has no support from the evidence before the jury.

4 / This speculation is entirely beyond the record.

5 / This alleged statement by the victim is beyond the evidence.

6 / This alleged statement by the defendant is beyond the evidence.

7 / There is no evidence that the victim's clothes were "ripped off".

8 / There is no evidence of a "fight."

is a struggle. 9 / You saw Mrs. Graddy's fingernails. You saw how pointy they were but not that long.

Now, I want you to pay attention to this, ladies and gentlemen. She is tied at her wrists and her neck. Sometime during the struggle she gets tied. 10/ This hand is free. It's free. It's always been free. There is no evidence of it being tied and sometime during that struggle while he is on top of her, 11/ that free hand scratched him, 12/ and thirty-six hours later that superficial scratch was healing when this photo was taken.

In this rage or whatever it was, maybe he didstrangle her with his hands and somehow she died; 13/ and now that she is dead, you make sure they are dead and you tie it tighter. 14/ Where is the evidence of semen, and it was interesting when the defendant argued, semen, ejaculate, sperm. What is that? They are all the same damn thing. Semen, where is it? He couldn't ejaculate. 15/ He is a rapist, isn't he? He is raping her. 16/

---

9 / There is no evidence of a "struggle".

10/ Id.

11/ There is no evidence alleging that the defendant was "on top of her".

12/ There is no evidence that the victim's ''free hand" scratched Holton.

13/ Dr. Lardizabal unequivocally attributed death to strangulation with the ligature.

14/ This comment has no basis in the evidence.

15/ Id.

16/ There was no evidence of any rape or that Holton was ever a rapist.

> He doesn't like this woman. 17/ He hates this woman. 18/ Why does he hate this woman? Because you can see what he did with this bottle. 19/ That's the charge he has been charged with. That's right. Thre is no evidence of semen. But that was because our big-shot 20/ over here couldn't do it, 21/ and he killed her because he couldn't, because she wouldn't help him, because she wouldn't satisfy him. 22/ Maybe she hurt him with that free hand. Maybe she grabbed him somewhere and squeezed him. Maybe he lost his temper.
>
> In any event after he killed her, being a burglar, he decided that he was going to burn her fingerprints. 23/ Fingerprints, the thing that sets him off the most, the thing that set him off in this courtroom during this trial. 24/

(R717-719)

It is axiomatic that a prosecutor must confine his closing argument to evidence adduced at trial and reasonable inferences from that evidence. See e.g., Thompson v. State, 318 So.2d 549 (Fla.4th DCA 1975); Carter v. State, 332 So.2d 120 (Fla.2d DCA 1976). The prosecutor's argument at bar was

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17/ This comment has no basis in the evidence.

18/ Id.

19/ See subsection E infra regarding misstatement of the evidence.

20/ This characterization is objectionable. See Duque II; Green v. State, 427 So.2d 1036 (Fla.3d DCA 1983).

21/ This comment has no basis in the evidence.

22/ Id.

23/ This attribution of motivation has no basis in the record.

24/ See also subsection C infra.

was permeated with r nk fiction tot 11y 1 cking in any basis from the record. Indeed, there is no testimony which even hints at the reason for the victim's presence at the vacant house. Nor is there any testimony alluding to what transpired in the house during the commission of the homicide.

The prosecutor's pornographic dramatization was so prejudicial to Holton's right to a fair trial before an impartial jury that a new trial should be awarded on this basis alone. United States Constitution, Amends. IV and XIV; Florida Constitution, Article I, sections 9 and 16.

C) The Prosecufor Improper1y Commented Upon Holton s Demeanor in the Courtroom Where Holton Did not Take the Stand, Nor Did He Put His Character Into Evidence.

In the guilt or innocence phase of his trial, Holton exercised his Fifth Amendment right not to be compelled to take the witness stand. Nonetheless, the prosecutor made Holton's credibility, character and courtroom demeanor a central feature of his final argument. The prosecutor commented:

> That's right, ladies and gentlemen. Everything you see in this courtroom is evidence and what was the big laugh he had when we said, "What do you want, some Kools?" He had a big laugh out of that.
>
> Look at this, ladies and gentlemen, his drawing 25/ while he is being questioned. Kools. Kools. And you can take a look at the rest of the twisted mind that drew this.

(R719-720)

25/ The prosecutor was apparently referring to State's Exhibit #43 (R959) admitted into evidence at R439-440.

t this point, defense counsel objected to the improper argument (R720). The court noted the objection, saying that the jury "will decide for themselves" (R720).

Earlier in his final argument, the prosecutor commented extensively upon Holton's credibility in a manner that highlighted his failure to take the stand. Thus, in regard to whether the witness Carrie Nelson saw Holton go into the vacant house, the prosecutor commented:

> Now, all this little deception that the defendant put forward in closing argument about whether he went in there or not is a lot of baloney.

(R711)

And, referring to Holton's fingerprint on the Kool Milds cigarette package, the prosecutor argued:

> Today in his closing argument, in his closing argument, he says they are his prints because we got him, but who knows how old it is?
>
> Is his argument today, six months after finding out about that print, susceptible of a reasonable construction that that was there left a long time ago, that it was there weeks ago, that I don't know what I smoke when I get high? Or is his lie the circumstance that makes him guilty of this crime?

(R715)

Finally, as a parting shot to the jury, the prosecutor declared:

> We gave you lies but now it's in your hands, and he is not guilty until you tell him he is guilty and you remember it's in evidence, all your observations of his demeanor, how cocky he has been, how he has laughed at inappropriate times.

> You come on back here and you tell him he is guilty, and you just wipe that smirk right off his face.

(R721)

There are three distinct reasons why prosecutorial comment on the courtroom demeanor of a non-testifying defendant is error. First, under Chapter 90.404(1)(a) of the Florida Evidence Code, evidence of a defendant's bad character (at bar, a so-called "twisted mind") is not admissible unless offered in rebuttal to a defendant's good character evidence. See, VonCarter v. State, *468* So.2d *276* (Fla.1st DCA *1985).*

Secondly, commenting upon courtroom demeanor violates a defendant's Fourteenth Amendment right under the federal constitution and his corresponding right under Article I, section 9 of the Florida Constitution not to be convicted except on the basis of evidence adduced as proof at trial. Clearly, the prosecutor urged the jury to attach probative force of guilt to Holton's courtroom behavior and the so-called "twisted mind" allegedly discernible from his drawing. In United ~~States~~ v. ~~Pearson~~, *746* F.2d *787* (11th Cir. 1984), the court agreed that prosecutorial remarks about the defendant's demeanor were beyond the evidence. The Pearson court stated:

> In overruling Petracelli's objection and in failing to give a curative instruction, the court, in effect, gave the jury an incorrect impression that appellant's behavior off the witness stand was evidence in this instance, upon which the prosecutor was free to comment.

746 F.2d at *796.*

The same prejudicial error is present at bar.

Third, the prosecutorial comment on Holton's courtroom behavior impinged upon his right under the Fifth Amendment, U.S. Constitution and Article I, section 9, Florida Constitution not to be compelled in any criminal matter to be a witness against himself. Clearly Holton was placed in a position where there was pressure to explain his courtroom demeanor to the jury and to rebut the "twisted mind" accusation. Holton had a Sixth Amendment right to be present at his trial; he should not lose the full protection of his right not to be a witness against himself by his mere presence at trial. See United States v. Schuler, 813 F.2d 978 (9th Cir. 1987).

Finally, the prosecutor's references to "deceptions" in the defendant's closing argument are susceptible to being construed as referring to Holton's failure to testify. Indeed, the prosecutor urged the jury to find Holton's alleged "lie" regarding the fingerprint on the cigarette package as "the circumstance that makes him guilty of this crime" (R715). Had Holton testified, he would have put his credibility in issue. However, credibility is properly irrelevant when a defendant does not take the stand. Accordingly, the prosecutor's extensive attack on Holton's credibility only served to highlight his failure to testify.

D) The Prosecutor Improperly Vouched for the Credibility of State Witness Flemnie Birkins and Gave His Opinion that the State Presented "A Strong Case".

Under Rule 4-3.4(e) of the Florida Rules of Professional Conduct, a lawyer is instructed not to "state a personal opinion as to ... the credibility of a witness." At bar, the prosecutor tcld the jury in final argument that Flemnie Birkins was:

> telling the truth because, ladies and gentlemen, this is a horrible crime that even a fellow black inmate will not tolerate.

(R716)

Besides being distasteful, this comment was objectionable as an expression of opinion as to the credibility of a witness.

Other remarks in the prosecutor's final argument were objectionable not only because they related to Birkins' credibility, but also because they went beyond the evidence and consisted of unsworn testimony by the prosecutor. For instance, the prosecutor declared regarding Birkins:

> And he still came into court yesterday or the day after yesterday and, under oath from this stand, told you the exact same account that he told those, the deputy and the detectives months ago.

(R706) (e.s)

While the variations between Birkins' in-court account and whet the detectives recalled was subject to extensive exploration at trial, "the deputy" was not a witness at trial at all. The prosecutor simply bolstered Birkins' credibility by attributing a past con-

sistent statement by him to "the deputy'' which was entirely outside the evidence presented at trial.

Later in his final argument, the prosecutor simply testified to the jury:

> When you look at Flemnie Birkins' motion for ROR, the thrust of this is not, first of all, it's not even being presented until October. It's not being presented to Judge Coe. It's being presented to Judge Evans. It's not being sent to me. I never saw it until we started this trial.
>
> You could tell by the way I looked at it.

(R715)

The prosecutor was not sworn as a witness and was not subject to cross-examination.

Finally, the prosecutor told the jury:

> Ladies and gentlemen, that's our case. We don't apologize for it. We think we presented a very good case and we presented a strong case.

(R721)

This comment by the prosecutor giving his opinion of the quality of his evidence is highly prejudicial. Its thrust is to place the prosecutor's experience and position before the jury and asks them to accept him as an expert witness on the defendant's guilt or innocence. Particularly where, as here, the evidence is conflicting and dependent upon an alleged confession of very questionable reliability, to call the evidence strong is misleading.

In United States v. McKoy, 771 F.2d 1207 (9th Cir. 1985), the defendant's conviction was reversed because a government attorney

gave his opinion that the prosecution had "an extremely str ng case". The same result is warranted in this case at bar.

E) The Prosecutor's Closing Argument Misstated the Evidence, Urged Irrelevant Matters as Proof of Guilt, and Distorted the Burden of Proof Compromising the Defendant's Presumption of Innocence.

In his closing argument while referring to the sexual battery charge, the prosecutor told the jury:

> Ladies and gentlemen, I'm not going to spend a lot of time arguing whether Katrina Graddy consented to be assaulted with that bottle. Obviously, we have a record of a prostitution arrest but that doesn't translate over into consent to have herself mutilated by that bottle.

(R646-647)

This was a gross misstatement of the evidence. The medical examiner testified that he found no evidence of any injury in the victim's anus (R271,272). The bottle neck was inserted into the victim's anus prior to the fire and probably was broken due to the fire (R272-273).

Clearly, rather than attempt to prove the element of non-consent, the prosecutor merely misstated the evidence and hoped that the jury would accept the false version. This professional misconduct directly prejudiced Holton in regard to the sexual battery count. It also indirectly prejudiced Holton because the misstatement of the evidence was inflammatory and may have caused the jury to render verdicts on all counts which were based more on emotion than reason.

As previously mentioned in Issue III, the prosecutor also offered an irrelevant circumstance to the jury as proof of guilt. The prosecutor stated:

> Detective Durkin, Tampa PD, homicide, says there hasn't been any similar crime since his arrest, just a little circumstance.

(R720)

Defense counsel immediately objected to this prejudicial argument but the court did not attempt any curative instruction. (R720)

Perhaps most damaging of all the prosecutor's distortions was his distortion of the burden of proof. Holton's defense was alibi. In closing argument, defense counsel correctly told the jury that if they found "a reasonable doubt as to whether Rudolph Holton was at the crime scene when this crime occurred, you must find him not guilty'' (R658). The prosecutor proceeded in rebuttal argument as follows:

> You were told by the defendant that his circumstances don't have to be proved beyond a reasonable doubt. That's not what the instruction says.
>
> The instruction says: Circumstantial evidence is governed by the following rules:
>
> 1. The circumstances themselves must be proved beyond a reasonable doubt. Well, that applies to the State and to the defendant when he elects to put in circumstantial evidence.
>
> 2. If the circumstances are susceptible of two reasonable constructions, you have to look at the one that has been shown beyond a reasonable doubt and disregard the ones that haven't, including the ones by the defendant,

(R704-705)

This argument could be interpreted by a reasonable juror as placing the burden of proof upon the defendant and doing away with the presumption of innocence. In effect, the jury was told that unless the defendant proved his alibi beyond a reasonable doubt, the jury should disregard it.

In Taylor v. Kentucky, 436 U.S. *478* (1978), the United States Supreme Court held that denigrating an accused's presumption of innocence is a violation of the right to a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment. When applied to prosecutorial comment, the Fourth District Court of Appeal wrote in Romero v. State, 435 So.2d 318 (Fla.4th DCA 1983):

> Thus, a comment that indicates to the jury that the defendant has the burden of proof on any aspect of the case will constitute reversible error.

435 So.2d at 319.

Finally, the prosecutor urged a unique interpretation of the reasonable doubt standard of proof while again commenting on the credibility of a state witness. The prosecutor argued:

> Mr. Schenck, a very interesting witness. His credibility is reenforced by the fact that he can't make a positive ID.
>
> * * * * * *
>
> It's not a positive ID but beyond a reasonable doubt it looks like him.

(R708-709)

In conlcusion, although most of the prosecutor's prejudicial remarks were not objected to at trial, their cumulative effect totally destroyed Holton's right to a fair trial before

an impartial jury as guaranteed by the United States Constitution, Amends. V, VI and XIV and the Florida Constitution, Article I, sections 9 and 16. Holton's conviction must be reversed and a new trial held.

ISSUE V.

THE TRIAL COURT DENIED HOLTON HIS SIXTH AMENDMENT RIGHT TO COMPULSORY PROCESS AND HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO PRESENT A DEFENSE WHEN IT EXCLUDED RELEVANT TESTIMONY OF A DEFENSE WITNESS SOLELY AS A SANCTION FOR NON-COMPLIANCE WITH DISCOVERY RULES.

After the trial had commenced, defense counsel gave notice to the State of an additional defense witness, Annie Ballenger, Rudolph Holton's sister (R410). The prosecutor objected to adding a witness during the trial (R410).

Defense counsel noted two reasons which became apparent only during the State's case which made the witness important to the defense. First, state witness Schenck testified that when the black hitchhiker got out in front of the vacant house, he told Schenck he was going to see "his sister about getting some more weed" (R332). Mrs. Ballenger would be able to testify that she was Holton's only sister and that she lived in a different neighborhood (R410).

The second reason for adding the witness was defense counsel's surprize upon seeing the blowups of scratches on Holton's chest which were introduced at trial (R410) Only small photographs had been seen previously and the scars did not stand out on these (R410-411).

The prosecutor objected to her testimony on the ground that the prospective witness could not testify as to where Holton got these scars (R412). However, as defense counsel pointed out,

the witness could testify that Holton had these scars for a number of years (R412-413).

The court allowed the witness to testify regarding her relationship to Holton and where she lived (R413). The witness was not permitted to testify regarding the scars as a sanction for failure to comply with the discovery rules (R413).

Potentially the excluded testimony could have influenced the verdict because the prosecutor contended in final argument that the scratches were evidence that the victim scratched Holton when the homicide took place (R718).

In Chambers v. Mississippi, 410 U.S. 284 (1973), the United States Supreme Court held that a mechanistic application of state evidentiary rules violated an accused's rights under the Due Process Clause of the Fourteenth Amendment. The Chambers court called the right to defend at trial by calling witnesses against the state's accusations essential to due process.

The Fifth Circuit, in United States v. Davis, 639 F.2d 239 (5th Cir. 1981), relied upon the Compulsory Process Clause of the Sixth Amendment to hold that otherwise admissible evidence may not be excluded solely as a sanction to enforce discovery rules against criminal defendants.

Recently, the United States Supreme Court heard arguments in Taylor v. Illinois, Case No. 86-5963. The question presented in Taylor is whether a defense alibi witness was properly excluded from testifying at trial because of defense counsel's failure to comply with state discovery rules.

This Court should hold that, at least in the absence of bad faith attributable to the defense, exclusion of otherwise admissible testimony as a discovery violation sanction is not constitutionally permissible. Accordingly, Holton should be granted a new trial.

ISSUE VI.

THE TRIAL COURT ERRED BY ADMITTING GRUESOME AND INFLAMMATORY PHOTOGRAPHS OF THE VICTIM'S BODY WHICH WERE UNREASONABLY ENLARGED TO HEIGHTEN THEIR PREJUDICIAL IMPACT.

At trial, Holton objected to introduction of several gruesome photographs and slides taken by the medical examiner. Some of these photographs were 16" x 20" color enlargements, specifically State exhibits #s 4,5,10-A,10-B,19 and 42-A. These photographs were objected to (R188,192-194) and two motions for mistrial were denied (R247,275).

This Court has repeatedly stated that the test of admissibility of gruesome photographs is relevancy rather than necessity. Bush v. State, 461 So.2d 936 (Fla.1984), cert. den., 106 S.Ct. 1237 (1986). The only requirement is that the photograph not be so shocking as to outweigh the value of its relevancy. Id. at 940.

At bar, many of the 16" x 20" color photographs are especially lurid because the victim had been partially burned after death. State Exhibit 1/19 is a closeup, almost life-size, depiction of the victim's head showing the ligature around the neck and the victim's tongue sticking out. Exhibit 1/19 is nearly identical to one of the medical examiner's slides, Exhibit #28-C [1/], so it is also repetitive.

However, probably the most objectionable aspect of these photographs is their sheer size. The other photographic

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1/ Also objected to and subject of a motion for mistrial. (R252)

exhibits at trial produced by the State are much smaller; some are even black and white photographs. Clearly, the prosecutor selected the most gruesome of the photographs for enlargement to the 16" x 20" size.

The jury did not need such extreme enlargements in order to see the relevant subject matter of the photographs. The purpose of the enlargement was simply to shock the jury and inflame them. In this case, the shocking nature of these extreme enlargements did outweigh their relevancy value; the trial court erred in admitting them.

Appellant is aware that similar sized enlargements were admitted into evidence in Funchess v. State, 341 So.2d 762 (Fla. 1976), cert. den., 434 U.S. 878 (1977). Justice England's concurring opinion in Funchess discussed the photographs, saying that "the state went to the limit of what would be permissible without tainting the entire trial." 341 So.2d at 764. Justice England admonished prosecutors to "strive for a system in which juries convict alleged criminals solely on the basis of proof, without resort to the horror of particular crimes." 341 So.2d at 765.

The photographs at bar exceeded this upper limit of permissibility. The potential for prejudice was very great because the State's case rested upon the severely impeached testimony of a jailhouse informant. Where the record shows that lurid photographs were unreasonably enlarged simply to inflame the jury, this Court should find error. Even if this error alone would be insufficient for reversal, when considered cumulatively with the other errors at Holton's trial, reversal for a new trial is warranted.

ISSUE VII.

THE TRIAL COURT ERRED BY FAILING TO GRANT A CONTINUANCE TO ALLOW AN IMPORTANT DEFENSE WITNESS, PAMELA WOODS, TO TESTIFY.

Pamela Woods was a key defense witness because she was with Katrina Graddy, the victim, up until midnight on the night of the homicide. Both Woods and the victim were street prostitutes and often looked out for each other.

At trial, defense counsel advised the court that Woods had failed to honor her subpoena (R487). Defense counsel requested the court to send out bailiffs to the witness' home (R489). The trial judge instead authorized the defense investigator to bring in Woods as an officer of the court (R489-490).

When the other defense witnesses had finished testifying, Pamela Woods had not yet appeared (R530). The trial court asked to see the deposition Woods had given (R530). Defense counsel stated that the witness was essential for a fair trial (R534). The court became impatient:

> THE COURT: What am I supposed to do, declare a mistrial because we can't find her and we go two weeks and we have another mistrial, another mistrial, another mistrial, another mistrial, another mistrial, and another mistrial, and another mistrial, and another mistrial?

(R534)

The court refused to consider a continuance, saying "we are moving on" (R536). Defense counsel's objection was noted (R536).

The trial judge decided to boil down the deposition given by Pamela Woods into a brief statement which would be read to the jury (R536). After extensive discussion and numerous

defense requests to include material deleted from the deposition testimony (R545,548,550,551,556,559,560,568,579), a summarized version of Pamela Woods' deposition was read to the jury (R587-590).

The jury apparently regarded the testimony of Woods to be critical to the verdict. During deliberations, the jury's only request was for a copy of the court's statement of Pamela Woods' expected testimony (R744).

After the verdict and after the jury had retired for penalty phase deliberations, defense counsel noted for the record that the witness, Pamela Woods, did appear in court after the jury commenced the guilt or innocence phase deliberations (R783). Defense counsel moved for a mistrial based upon violation of the constitutional right to compulsory process by substitution of an edited deposition for live testimony by the witness (R783). The court denied the motion for mistrial (R783).

The general rule, of course, is that granting a motion for continuance is within the sound discretion of the trial judge. However, as discussed by the Eleventh Circuit in Dickerson v. Alabama, 667 F.2d 1364 (11th Cir. 1982), a defendant's Sixth Amendment right to have compulsory process to obtain defense witnesses may take precedence. The Dickerson court held that the trial court's failure to grant a continuance to allow the defendant opportunity to compel the presence of a credible alibi witness violated the Sixth and Fourteenth Amendments, United States Constitution.

The Second District in Hawkins v. State, 326 So.2d 229 (Fla.2d DCA 1976) considered a factual scenario where the State rested its case in the afternoon and a defense witness would have become available to testify the following morning. Although not relying upon constitutional grounds, the Hawkins court found that the trial court erred in failing to grant a reasonable request to present the witness at trial the following morning.

The facts at bar show that defense counsel diligently subpoenaed Pamela Woods and requested the court's assistance in securing her presence at trial. It was clear that her testimony was unique and favorable to Holton. It was also shown that there was a reasonable probability of locating the witness and procuring her presence in court within a reasonable time. In fact, she appeared in court during the jury's deliberations.

While the court's procedure of reading a statement which summarized some of the facts which defense counsel wanted to elicit gave the defense, in effect, half a loaf, the irregular procedure was insufficient to preserve Holton's Sixth and Fourteenth Amendment rights to compulsory process and due process of law. It was essential that the jury be able to view the demeanor of Pamela Woods because the jury's fundamental determination at bar was whether Woods was a credible witness or whether Johnny Newsome and Flemnie Birkins were credible. The violation of Holton's constitutional rights by the the trial court's failure to grant any continuance requires that Holton be given a new trial.

ISSUE VIII.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A VERDICT OF PREMEDITATED MURDER.

The jury at bar returned a specific verdict of guilt for premeditated first-degree murder (R745,862). The only direct evidence produced by the State, Flemnie Birkins account of the alleged confession by Holton, negated the element of premeditation. Birkins testified that Holton said he didn't mean to kill the victim (R306).

Premeditation can, of course, be proved by circumstantial evidence. Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. den., 456 U.S. 984 (1982). The pivotal question posed by the facts at bar is whether strangulation with a ligature is in itself sufficient evidence of premeditation given the other circumstances surrounding the homicide.

In State v. Bingham, 40 Wash.App. 553, 699 P.2d 262 (1985), the court considered a homicide committed by manual strangulation during the course of a rape. The Bingham court first noted that in order to cause death by strangulation, three to five minutes of continuous pressure on the windpipe would be required. This would be sufficient time to permit deliberation but insufficient evidence to prove that the assaillant actually deliberated. The court concluded:

> The fact of strangulation, without more, leads us to conclude that the jury only speculated as to the mental process involved in premediation. This is not enough.

699 P.2d at 265.

The Supreme Court of Washington, En Banc, approved the holding of the Court of Appeals. State v. Bingham, 105 Wash.2d 820, 719 P.2d 109 (Wash. 1986). In its opinion, the court stressed that "to allow a finding of premeditation only because the act takes an appreciable amount of time obliterates the distinction between first and second degree murder." 719 P.2d at 113. The court further questioned the ability to deliberate while engaged in sexual activity. Opportunity to deliberate is insufficient evidence to support a finding of premeditation.

Turning to the facts at bar, there is nothing in the evidence to suggest that the victim, Katrina Graddy, did not enter the vacant house voluntarily. She was known to be a prostitute and may well have entered the vacant house specifically to engage in sexual activity. She may also have consented to unorthodox sexual practices. While the victim certainly didn't consent to be strangled to death, there is nothing in the evidence to disprove a conclusion that she agreed to participate in an act involving bondage and constriction of her windpipe.

Her killer may have intended nothing more than a deviate sex act. There are no other injuries to the victim which occurred prior to her death. Thus, there is a reasonable possibility that the killer did not intend to kill the victim and never deliberated on the victim's death.

Accordingly, if Holton is to be retried, first degree premeditated murder should not be a possible verdict. If his conviction is otherwise affirmed, it should be reduced to second-degree murder. See Hall v. State, *403* So.2d 1319 (Fla 1981).

ISSUE IX.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A VERDICT OF GUILT TO FIRST DEGREE ARSON.

Th Indictment charged Holton in Count Three with Ars n in the First Degree (R794-795). The jury found Holton guilty as charged (R863).

The pertinent subsection of Section 806.01, Florida Statutes (1985) provides:

> 806.01 Arson.--
> (1) Any person who willfully and unlawfully, by fire or explosion, damages or causes to be damaged:
>
> * * * * * *
>
> (c) Any other structure that he knew or had reasonable grounds to believe was occupied by a human being, is guilty of arson in the first degree ...

The evidence at trial showed that the vacant house, routinely used by drug addicts, was clearly a structure and that the fire was of incendiary origin. The question is whether it was occupied by "a human being."

Dr. Lardizabal, the Medical Examiner, testified at trial that he had tested the victim's blood for carbon monoxide (R270). The test results were negative (R270). Dr. Lardizabal concluded that these results proved that the victim was dead before the fire started (R270).

To Appellant's knowledge, there is no legal authority for defining the term "human being" as including dead bodies. Indeed, the legislative intent behind the arson statute, 5806.01, appears to be a differentiation between arsons which reasonably

pose a threat to human life and those which don't. Those which threaten human life are classified as first degree arson, while arson of a structure under circumstances where only property damage is likely is second degree arson.

Because Katrina Graddy was already dead when the arson occurred, there was no longer a threat posed to human life. The legislative purpose would not be served by failing to distinguish between an arson where a live person was threatened and an arson where only a dead body was present.

Accordingly, if Holton is to be retried, the charge should be reduced to arson in the second degree. If Holton's conviction is otherwise affirmed, the judgment and sentence for first degree arson should be vacated and reduced to second degree arson.

ISSUE X.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A VERDICT OF GUILT TO SEXUAL BATTERY WITH GREAT FORCE.

Count Two of the Grand Jury Indictment was nol prossed by the State (R3,794-795). However, the sexual battery charge was later filed against Holton by Information (R870). The jury returned a verdict of guilty as charged.(R879).

The pertinent portion of Section 794.011(3), Florida Statutes (1985) reads as follows:

> (3) A person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof ... uses actual physical force likely to cause serious personal injury is guilty of a life felony....

Clearly, one essential element of this offense is proof of non-consent. A fair reading of the statute also suggests that it applies only when the sexual battery occurs on a living person.

The specific act Holton was charged with was penetrating the anus of Katrina Graddy with a bottle (R870). The State's proof at trial showed that Graddy's body was found with the neck of a bottle partially inserted into her anus (R266). The medical examiner's examination showed no injury to the victim's anus (R270-271). The medical examiner also testified that the bottle might have been inserted after the victim was already dead (R272). It could only be established that the bottle neck was inserted prior to the fire (R272).

Although the strangulation of the victim qualifies as "actual physical force likely to cause serious personal

injury", it is not clear that the strangulation was in any way related to the penetration of the victim's anus with the bottle. Since the victim was a prostitute, it is very conceivable that she might have consented to insertion of the bottle into her anus. Since there was no injury to the anus, nor to the rest of the victim's body with the exception of her neck, the evidence suggests a reasonable hypothesis that the victim consented to the sexual act.

Alternatively, the medical examiner's inability to determine whether the insertion of the bottle occurred prior to Graddy's death makes the evidence insufficient to prove a violation of §794.011(3). As mentioned previously, use of the word "person" in the statute should be interpreted to mean a live person, not a dead body. If the bottle neck was inserted after death, the conviction cannot stand.

Accordingly, if Holton is to be retried, he should not be required to defend against a charge of sexual battery. If his other convictions are affirmed, the judgment and sentence for life felony sexual battery should be vacated.

ISSUE XI.

THE TRIAL COURT ERRONEOUSLY DENIED DEFENSE COUNSEL'S REQUEST FOR A JURY INSTRUCTION ON SECTION 800.02, FLORIDA STATUTES (1985) AS A LESSER-INCLUDED OFFENSE TO THE SEXUAL BATTERY CHARGE.

During the charge conference, defense counsel requested the trial judge to instruct the jury on Section 800.02, Florida Statutes (1985) (Unnatural and lascivious act) as a lesser-included offense of the sexual battery charge (R620,623). The prosecutor noted that the table of lessers in the Florida Standard Jury Instructions did not include $800.02 in either category 1 or 2 (R623). The trial court agreed that the evidence produced at trial supported this instruction (R624-625). However, the court stated that the Information made no allegation of an unnatural or lascivious act (R624). Consequently, the court denied the requested instruction (R625).

Historically, Section 800.02 was a necessarily included lesser offense to Fla.Stat. 800.01 (abominable and detestable crime against nature). When Fla.Stat. 800.01 was declared unconstitutionally vague by this Court, the trial court was directed to enter a judgment of guilt to Fla.Stat. 800.02. Franklin v. State, 257 So.2d 21 (Fla. 1971).

Subsequently, the legislature repealed much of the law concerning sexual offenses and created Section 794.011, Florida Statutes. See Chapter 74-121, Laws of Florida. Section 800.02 was one exception to the general repeal of the prior Chapters 794 and 800.

Section 794.011, Florida Statutes (1985) now includes within the definition of sexual battery, "anal ... penetration by ... the sexual organ of another or ... anal ... penetration of another by any other object." Section 794.011(1)(h). It follows that Section 800.02, Florida Statutes (1985) remains a lesser included offense to certain conduct now proscribed under §794.011.

At bar, the Information alleged that Holton committed the sexual battery on Katrina Graddy "by penetrating her anus with a bottle" (R870). Had the jury concluded that Graddy consented to the penetration, a verdict of guilt to an unnatural and lascivious act, j800.02, would have been appropriate.

In Wilcott v. State, 509 So.2d 261 (Fla. 1987), this Court recently reaffirmed the principle that "permissive lesser included offenses must be instructed upon when the pleadings and the evidence demonstrate that the lesser offense is included in the offense charged." 509 So.2d at 262. Accordingly, the trial court's failure to grant Holton's requested jury instruction on Section 800.02, Florida Statutes (1985) was reversible error. A reasonable view of the evidence would support both an acquittal of the life felony sexual battery charge and a conviction on the lesser, unnatural and lascivious act.

ISSUE XII.

THE PROSECUTOR'S IMPROPER CROSS-EXAMINATION OF DEFENSE WITNESSES DURING PENALTY PHASE DENIED HOLTON A FAIR PENALTY TRIAL.

Two of Holton's penalty phase witnesses, Bernard Johnny Black and Calvin Mack, were improperly cross-examined by the prosecutor. When Holton testified in his own behalf, he was also subjected to improper cross-examination. Each witness will be treated separately, but the errors should also be considered cumulatively for their prejudice to a fair penalty trial.

A) Bernard Johnny Black

Bernard Johnny Black lived in the same household as the victim, Katrina Graddy, and her mother for seven years (R751-752). He had known Rudolph Holton for fifteen or sixteen years (R752). The substance of Black's direct testimony was that he knew Holton was a thief and a drug user but doubted that Holton would do a violent act like the homicide (R752). On cross-examination, the following exchange occurred:

BY MR. EPISCOPO:

Q. You've never molested Katrina, have you?

A. Never have.

Q. Are you still living in her home?

A. No, I am not.

Q. Why not?

A. Me and her mother separated.

Q. Why?

A. We are not together.

Q. Why?

A. Personal reasons.

Q. What was it?

A. Ask her.

MR. EPISCOPO: No further questions.

(R753)

Under the Florida Evidence Code, the credibility of a witness may be impeached by an attack on his character only where the evidence refers to either reputation for truthfulness or conviction for certain crimes. Sections 90.608(1)(c), 90.609, 90.610, Florida Statutes (1985). A witness cannot be impeached by prior acts of misconduct. Fulton v. State, 335 So.2d 280 (Fla. 1976).

At bar, the prosecutor's insinuation that Black molested Katrina Graddy was without any apparent foundation. The sole purpose of this questioning was to humiliate the witness in front of the jury and to introduce sympathy for the victim. ABA Standard 3-5.7(d) states:

> It is unprofessional conduct for a prosecutor to ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.

This improper conduct may well have prejudiced Holton in the jury's penalty recommendation since the vote was a bare majority of 7-5 for death.

B) Calvin Mack

Mack testified on direct examination that Rudolph Holton was the father of two children (R756). On cross-examination, Mack was asked by the prosecutor if he knew the victim and if he knew that she had a baby (R756). Mack replied in the affirmative to both questions (R756).

Defense counsel objected and moved for a mistrial (R756). The court called the question improper, but denied the motion for mistrial (R756-757).

The prosecutor's elicitation of the fact that Katrina Graddy, the victim, had a baby was wholly irrelevant to the penalty trial and could only evoke sympathy for the victim and prejudice Holton. As this Court stated in Rowe v. State, 120 Fla. 649, 163 So. 22 at 23 (1935):

> The fact that deceased may have had a family is wholly inmaterial, irrelevant, and impertinent to any issue in the case.

Moreover, the injection of this information about the victim was violative of the Eighth Amendment, United States Constitution. In Booth v. Maryland, 482 U.S. ___, 107 S.Ct. ___, 96 L.Ed.2d 440 (1987) the Court held that the victim's personal characteristics are not a proper consideration in regard to penalty in a capital case. Accordingly, Holton's sentence of death was unconstitutionally imposed and must be vacated. U.S. Const., Amends. VIII and XIV.

C) Rudolph Holton

On direct examination in penalty phase, Rudolph Holton continued to maintain his innocence. He accused Flemnie Birkins

of telling a lie (R766). The prosecutor, on cross-examination, followed up by listing six witnesses who testified at trial and asking Holton if each of them was "lying too" (R766-767).

This cross-examination was improper because it called for one witness (Holton) to give his opinion concerning the truthfulness of other witnesses' testimony. The jury is the sole arbiter of the credibility of a witness. Bowles v. State, 381 So.2d 326 (Fla.5th DCA 1980).

In Boatwright v. State, 452 So.2d 666 (Fla.4th DCA 1984), the court held this type of cross-examination improper. It is also prejudicial because it isolates and thereby discredits the witness.

The prosecutor's cross-examination also exceeded the bounds of propriety when he attempted to explore the nature of Holton's prior convictions. Holton, on direct examination, admitted to thirteen prior felony convictions (R762). Only one of them, attempted robbery, was relevant to the prior violent felony aggravating circumstance. Holton had specifically waived the mitigating factor of no significant prior criminal history [§921.141(6)(a)] (R748, 865-866). Nonetheless, the prosecutor asked Holton, "How about the grand theft in 1981?" (R767)

When a witness admits the correct number of prior convictions, no further inquiry is permitted. Fulton v. State, 335 So.2d 280 (Fla. 1976). The crime for which the witness was convicted cannot be named. Id.

Accordingly, the prosecutor's mention that Holton was convicted of grand theft in 1981 was error. Considered in

combination with the prosecutor's other improprieties during penalty phase cross-examination of witnesses, Holton's sentence of death should be vacated and a new penalty trial held.

ISSUE XIII.

THE PROSECUTOR'S REMARKS DURING CLOSING ARGUMENT (PENALTY PHASE) WERE SO IMPROPER THAT THE CAPITAL SENTENCING PROCEEDING DID NOT MEET THE EIGHTH AMENDMENT STANDARD OF RELIABILITY.

As previously mentioned, Holton's thirteen prior felony convictions came into evidence when he testified as a penalty phase witness. During the penalty phase closing argument, the prosecutor commented on these convictions. At first he mentioned them within the context of a correct statement of the law:

> Now, his other convictions cannot be considered in that sense. His only [sic] convictions go to his credibility. The other twelve convictions give you an opportunity to question whether he is telling the truth, and you may consider that in judging his credibility when he took the stand.
>
> It's not an aggravating factor, but it goes to his credibility. Twelve other felony convictions, and it can also be argued he now has two additional felony convictions, a sexual battery, for which you find him guilty, simultaneously occurring during the crime, and an arson, endangering a human being.

(R772)

This argument is subject to attack on the basis that the prosecutor is really using the back door of credibility to comment on what would otherwise be inadmissible evidence. Compare, Robinson v. State, 487 So.2d 1040 (Fla. 1986).

The prosecutor's true purpose for mentioning the prior convictions was revealed later on. The prosecutor commented:

> You can't get up there on the stand and say, "I'm a doper" and avoid the punishment that you got to get for this. You can't do that. That's not the way it works. It's too late. It's too late to get up there now and deny it. That's right. He wants to live and that little talk about the electric chair, trying to make you feel like it's such a bad thing, he wants another chance. He has had — thirteen.
>
> * * *
>
> Ladies and gentlemen, this is what the death penalty is all about, this kind of crime. There is no rehabilitation here, none at all, and it's just too late at this stage of the game.

(R773-774)

The prosecutor basically urged the jury to sentence Holton to death on the ground that he was not likely to be rehabilitated, having had thirteen prior chances. Clearly, the jury was being asked to consider Holton's convictions for more than impeachment of his credibility on the witness stand. Indeed, they were offered as the most compelling reason that a death sentence should be imposed.

The prosecutor also told the jury:

> The fourth aggravating factor, the crime for which the defendant is to be sentenced was committed in a cold, calculated, premeditated manner without any pretense of moral or legal justification. Cold, calculated, premediated.

You've already found that beyond a reasonable doubt.

You've come back Murder I.

(R773)

This is a misstatement of the law. This Court has repeatedly said that the cold, calculated and premeditated aggravating factor requires a "heightened" premeditation, substantially greater than that necessary to sustain a conviction for premeditated murder. See e.g., Nibert v. State, 508 So.2d 1 (Fla. 1987).

Because the jury's death recommendation was by a bare 7-5 majority, there is a reasonable probability that the prosecutor's misstatement of law and misleading use of Holton's prior convictions infected the weighing process. Had the jury returned a life recommendation, the Tedder [1/] standard for appellate review of a life override could not have been met. Cf. Valle v. State, 502 So.2d 1225 (Fla. 1987).

Under these circumstances, the constitutional mandate of the Eighth Amendment that the sentencing determination in capital cases meet a heightened standard of reliability was not satisfied. The prosecutor's improper comments during penalty phase arguments may have tainted the jury recommendation. Holton should now be given a new penalty phase proceeding before a new jury.

1/ Tedder v. State, 322 So.2d 908 (Fla. 1975).

ISSUE XIV.

> THE TRIAL COURT ERRED BY IMPOSING A SENTENCE OF DEATH WITHOUT CONDUCTING AN INDEPENDENT WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES AS REQUIRED BY SECTION 921.141, FLORIDA STATUTES (1985). THE COURT ALSO ERRED BY SENTENCING HOLTON ON THE SEXUAL BATTERY AND ARSON CONVICTIONS WITHOUT BENEFIT OF A GUIDELINES SCORESHEET.

After the jury returned its penalty recommendation, the trial court proceeded immediately to sentencing. After defense counsel declined the opportunity to make further comments, the court announced:

> THE COURT: It's the judgment, order and sentence of this Court that the defendant be sentenced to die in the electric chair on the murder in the first degree with consecutive life on the sexual battery and a consecutive thirty on the arson.

(R787)

This oral pronouncement of sentence took place December 5, 1986. The written "Sentence" was not signed by the trial judge until February 12, 1987 (R976-978, See Appendix). Although the record on appeal does not indicate who prepared the written findings, it has been the customary practice of this circuit judge to delegate preparation of written finding in capital cases to the assistant state attorney who prosecuted. See, Nibert v. State, 508 So.2d 1 (Fla. 1987).

Recently in Patterson v. State, Case No. 67,830 (Fla. October 15, 1987) [12 FLW 529], this Court discussed the responsibility of the trial judge in regard to findings in

support of a death sentence. Like the trial judge in Patterson, the trial judge at bar did not specifically identify applicable aggravating and mitigating circumstances when pronouncing sentence.

It should also be noted that the record on appeal in this case was certified by the Clerk of Circuit Court on February 6, 1987 (Following R975). This was several days prior to eventual filing of the written "Sentence" (R976-978, See Appendix). Cf., VanRoyal v. State, 497 So.2d 625 (Fla. 1986).

Accordingly, Holton's sentence of death should be vacated.

Turning next to the court's imposition of sentences on the sexual battery count and the arson count, there is no indication that the trial judge considered a guidelines score-sheet. Because there is no guidelines scoresheet in the record, it is not possible to state authoritatively that the sentences imposed were guidelines departure sentences. What is certain is that both the life sentence on the sexual battery count and the thirty year sentence on the arson countwere statutory maximum sentences. They were ordered to run consecutively (R787,861,877-878).

Fla.R.Crim.P. 3.701(d) sets forth the procedure which the trial court must follow when sentencing for offenses falling within the sentencing guidelines. At a minimum, the trial court must consider a guidelines scoresheet providing a presumptive sentence before pronouncing sentence on a defendant. Doby v. State, 461 So.2d 1360 (Fla.2d DCA 1984). Since the record does not

reflect that a scoresheet was prepared or considered, Holton's sentences on the sexual battery and arson counts must be vacated.

ISSUE XV.

THE TRIAL COURT'S WRITTEN FINDINGS ERRONEOUSLY WEIGHED UNSUPPORTED AGGRAVATING CIRCUMSTANCES AND FAILED TO CONSIDER APPLICABLE MITIGATING EVIDENCE.

In the written "Sentence", the trial court found four aggravating circumstances applicable and rejected three statutory mitigating circumstances offered by Holton (R976-978, see Appendix). Some non-statutory mitigation was found by the court (R977-978, see Appendix).

A) The Trial Judge Erred in Finding the Prior Conviction of Violent Felony Aggravating Factor

The written "Sentence" relied upon Holton's contemporaneous convictions of sexual battery and arson to prove the aggravating factor of Section 921.141(5)(b), Florida Statutes (1985). Under this Court's decision in Wasko v. State, 505 So.2d 1314 (Fla. 1987), contemporaneous convictions for other violent felonies committed upon the homicide victim cannot be used to support this aggravating circumstance.

Appellant must concede that use of his prior conviction for attempted robbery could establish this aggravating factor. However, because of the circumstances (a fight over money occuring during a dice game - see R762-763) of the attempted robbery, very little weight could be given to the aggravating factor absent the improperly used contemporaneous convictions.

B) The Trial Judge Erred in Finding that the Capital Felony Was Committed in the Course of a Sexual Battery

As explained supra in Issue X, the evidence was insufficient to support a conviction for sexual battery. Accordingly, it was error to find the aggravating circumstance of Section 921.141(5)(d).

C) The Trial Judge Erred in Finding the Heinous, Atrocious or Cruel Aggravating Factor Applicable

The written findings in support of this aggravating circumstance read:

> The victim was a 17 year old female who had been tied up while being sexually assaulted anally with a bottle. She was circled with a flammable liquid and set on fire. The body burned for 3 hours before being discovered.

(R976, see Appendix)

First, the trial judge apparently relied in part on the fact that the victim was "a 17 year old female". In Jackson v. State, 498 So.2d 906 (Fla. 1986) this Court held that a victim's lifestyle, character traits and community standing are completely irrelevant to whether a homicide is especially heinous, atrocious or cruel. By analogy, a victim's age and gender are equally irrelevant.

The other facts detailed in the written findings either definitely occurred after death or may have. The medical examiner testified unequivocally that the victim was dead prior to the fire (R270). Dr. Lardizabal was unable to conclude

whether the bottle was inserted in the victim's anus before or after her death (R272).

This Court has previously declared that actions occurring after the victim becomes unconscious or dies cannot support the aggravating circumstance of Section 921.141(5)(h). Jackson v. State, 451 So.2d 458 (Fla. 1984); Halliwell v. State, 323 So.2d 557 (Fla. 1975).

For these reasons, the court's finding that this homicide was especially heinous, atrocious or cruel should be struck.

D) The Trial Judge Erred in Finding the Cold, Calculated and Premeditated Aggravating Factor

The written findings were as follows:

> The jury was provided with a separate ballot for First Degree Premeditated Murder and Felony Murder. The jury found the defendant guilty of First Degree Premeditated Murder. Katrina Graddy was strangled to death both by hand and ligature by the defendant. It appears that she refused to sexually gratify the defendant so he murdered her and set her on fire.

(R977, see Appendix)

As mentioned above in Issue XIII, a jury finding of guilt to premeditated murder is insufficient to prove the heightened premeditation requisite for the cold, calculated and premeditated aggravating factor. See e.g., Nibert v. State, supra.

The facts at bar can be compared to those in Herzog v. State, 439 So.2d 1372 (Fla. 1983). In Herzog, the defendant first attempted to smother the victim with a pillow. When this

failed, the defendant proceeded to strangle the victim to death by using a telephone cord. The body was disposed of by taking it to a remote location, drenching it with gasoline and setting it on fire. The Herzog court found these acts considered in conjunction with prior threats did not establish the aggravating factor of Section 921.141(5)(i), Florida Statutes.

Since the facts at bar are less compelling than those in Herzog, it follows that the cold, calculated and premeditated aggravating factor was also improperly found in the case at bar.

E) The Trial Judge Erred in Failing to Consider the Statutory Mitigating Factor of Impaired Capacity

Evidence was presented to show that Holton's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law may have been substantially impaired because of his use of drugs. The trial judge refused to consider this evidence in mitigation because Holton "still maintained his innocence of these offenses" (R977, see Appendix).

Holton exercised fundamental constitutional rights when he pled not guilty and was tried by a jury. United States Constitution, Amends. V, VI and XIV. Furthermore, the United States Supreme Court has held that the sentencer cannot refuse to consider any evidence presented in mitigation in a capital case. Eddings v. Oklahoma, 455 U.S. 104 (1982); Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). A sentence of death imposed where the sentencer has erroneously failed to consider relevant mitigating evidence violates the Eighth Amendment. Id.

Accordingly, the trial court's errors in finding inapplicable aggravating circumstances and failing to consider a relevant statutory mitigating circumstance solely because Holton maintained his innocence makes the weighing process in the case at bar unreliable. Holton's sentence of death should be vacated and this case remanded for reweighing by the trial judge.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Rudolph Holton, appellant, respectfully requests this Court to grant him the following relief:

Issues I through VII - a new trial on all charges.

Issue VIII - reduction of his conviction for first-degree murder to second-degree murder.

Issue IX - reduction of his conviction for first-degree arson to second-degree arson.

Issue X - vacation of his conviction and sentence for sexual battery.

Issue XI - a new trial on the sexual battery charge.

Issues XII and XIII - a new penalty trial before a new jury.

Issues XIV and XV - remand for resentencing before the trial judge.

Respectfully submitted,

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