IN THE SUPREME COURT OF FLORIDA

MELVIN TROTTER,

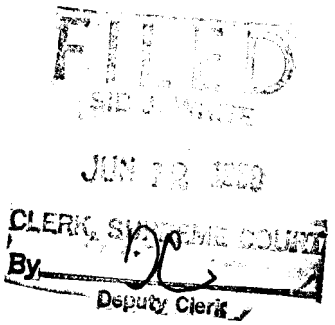
Appellant,

vs.

Case No. **70,714**

STATE OF FLORIDA,

Appellee.



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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. **0143265**

DOUGLAS S. CONNOR
ASSISTANT PUBLIC DEFENDER

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL **33830**
(813) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

APPENDIX

CERTIFICATE OF SERVICE

TABLE OF CITATIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE

A Manatee County grand jury returned an indictment on June 20, 1986 charging Melvin Trotter, appellant, with first degree murder in the stabbing death of Vergie Langford. (R2621-2) Prior to trial, Appellant moved to disqualify one of the assistant state attorneys who was prosecuting the case because the attorney had previously defended Appellant in a different case. (R2750-1) After a hearing on March 19, 1987 (R2229-57), this motion was denied. (R2257)

Trial was held before Acting Circuit Judge Alan R. Dakan and a jury on March 30 through April 9, 1987. (R1-2223) During voir dire, the court denied Appellant's motion for change of venue. (R326) Defense counsel challenged four prospective jurors for cause based upon their exposure to prejudicial publicity. (R90, 447, 540-2, 754-5) These challenges for cause were denied. (R91, 448, 543, 755) Eleven prospective jurors were excused on State challenges for cause based upon their attitudes concerning the death penalty, most notably prospective juror Burse. (R139)

At trial, Appellant's motions for judgment of acquittal were denied. (R1742, 1747) Two of the special jury instructions requested by the defense were given and a third was rejected. (R1743-4) A motion for mistrial during the prosecutor's closing argument was denied. (R1775-6) The jury returned a verdict of guilty as charged. (R1870, 2825)

In the subsequent penalty proceeding, the judge sustained the State's objection to allowing Trotter's artwork into evidence. (R1923) After the jury had retired for deliberations, he reversed this ruling and allowed the drawings and, over defense objection, all of the evidence from the guilt or innocence phase to go to the jury. (R2212-3) The jury, by a vote of 9-3, recommended that a sentence of death be imposed. (R2216, 2838)

At a sentencing hearing held May 15, 1987, the court heard argument regarding the sentence to be imposed. (R2274-2317) On May 18, 1987, he imposed a sentence of death on Trotter. (R2962) In his written sentencing order, the court found four aggravating circumstances; 1) under sentence of imprisonment, 2) prior conviction of violent felony, 3) while engaged in a robbery, and 4) "especially wicked, evil, atrocious and cruel". (R2863, see Appendix) The court found four mitigating circumstances as well: 1) extreme mental or emotional disturbance, 2) substantially impaired capacity, 3) below average I.Q. with "family and developmental problems," and 4) remorse. (R2864, see Appendix) The sentencing judge declared that the aggravating circumstances outweighed the mitigating circumstances. (R2864-5, see Appendix)

Post-trial, defense counsel attempted to subpoena the jurors to inquire into possible extraneous influences in their deliberations. (R2861, 2967-8) The trial judge quashed the subpoenas. (R2974) At the hearing on Trotter's motion for new

trial held June 11, 1987 an affidavit by juror Morris was presented to establish that jurors had actually used the telephone in the juryroom after they had retired for deliberations. (R2995) The court noted that there was no allegation of improper communications on the telephone and denied the motion for new trial. (R3008-9) Juror Morris was later interviewed before the court on July 10, 1987 at which time the judge adhered to his prior ruling. (R2610)

Appellant filed his Notice of Appeal on June 11, 1987. (R2882) After preparation of the record on appeal, the Public Defender of the Tenth Judicial Circuit was designated as appellate counsel on July 27, 1987.

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

STATEMENT OF THE FACTS

A. GUILT OR INNOCENCE PHASE

On June 16, 1986 around 2:30 p.m., a truck driver went into Langford's Grocery in Palmetto, Florida. (R1359-60) He found the owner, Vergie Langford, sitting on the floor in the back of the store. (R1360) He saw blood on her; she told him that she had been stabbed and robbed. (R1361)

The truck driver, Johnny Stevenson, noted that there was an overturned bowl of cantaloupe near the cash register in the front of the store. (R1363) He saw a five dollar bill on the floor near the front counter. (R1364) Mrs. Langford's necklace was on the floor between the aisles. (R1364) Stevenson called the 911 emergency number. (R1362)

Paramedics Frank Tona and William J. McCarley responded to the call for assistance. (R1283, 1304) Mrs. Langford was semi-conscious. (R1284) She had suffered an evisceration wound and multiple stab wounds to the abdomen. (R1284-5, 1305) Tona observed a long bloody knife nearby which the victim had used in her business to cut bacon and cheese. (R1290, 1325)

Mrs. Langford complained that she had been robbed and stabbed. (R1314) She said that her assailant was a short black male with "Tropicana patches." (R1293) The paramedics treated her for blood loss and transported her to Manatee Memorial Hospital. (R1316-8)

Dr. Henry Smoak treated the victim in the Emergency Room of Manatee Memorial Hospital. (R1251) Mrs. Langford was in

critical condition when she arrived; she had a large abdominal wound which resulted in her insides protruding from her body. (R1253-4) There were four other stab wounds to the abdomen. (R1258) Dr. Smoak stabilized the victim's vital signs and delivered her to a surgeon, Dr. Ganey. (R1262-3)

Dr. James Ganey testified that he performed surgery on Mrs. Langford, finishing around 6:30 or 7:00 p.m. (R1420) He knew from talking to Langford's family that she had previously undergone open heart surgery and had continuing heart problems. (R1414) At 10:50 p.m., the patient went into a full cardiac arrest and could not be revived. (R1263-4) Dr. Ganey said that a normal young person would usually survive this type of trauma, but an older person with a bad heart like Mrs. Langford would have less chance of survival. (R1415)

Andrew Haynes and his wife Mattie were at Mrs. Langford's grocery store around 2:00 p.m. on June 16, 1986. (R1338, 1354) Mrs. Haynes went into the store and bought cold cuts, cheese and bread. (R1342) As she left, she saw a person standing outside the front screen door. (R1343-4) She identified Appellant as the person she had seen. (R1346) He had a Tropicana pin on his shirt. (R1346-7)

Mr. Haynes who remained outside, also saw Appellant on the porch of the store and spoke to him. (R1354-6) He recognized Trotter as someone he had seen previously in bars around Palmetto. (R1357)

Elnora Oates testified that Trotter came running

through the rain that afternoon to the rooming house where she resided. (R1433) They went to where Trotter was living. (R1434) Trotter acted nervous and paid a man $ 2 to warn him if anybody came up. (R1434-5) He told the witness to tell anyone who asked that he had been with her all day. (R1435) Trotter showed her a red bandanna containing $ 17-20 of change and $ 35-37 worth of food stamps. (R1435)

The two of them proceeded to buy $ 40 worth of rock cocaine and smoke it. (R1437) Trotter later bought another $ 40 slab of cocaine which they again smoked. (R1437-8) A third piece of rock cocaine was purchased for $ 20 before the witness left around 6 o'clock in the evening. (R1441-2)

About 2:30 the next afternoon, Trotter was questioned by Detective Castellow and Lieutenant Van Fleet at the Palmetto police station. (R1581, 1644) Trotter gave a taped statement at that time and three more taped statements during the afternoon and evening. (R3095-3148)

Trotter eventually confessed to the stabbing of Vergie Langford. He said that he went inside her store but didn't see her. (R3140) He went to the cash register and took money and food stamps. (R3140, 3142-3) He then went to the soda cooler where Mrs. Langford ran at him with a large knife and they got into a scuffle. (R3144) During the scuffle, Langford got cut and fell to the floor. (R3145-7) Trotter didn't remember how the wounds were inflicted, only that she was bleeding and her intestines were coming out. (R3147)

Other evidence presented by the State included Appellant's palm print found on the meat cooler in the store. (R1656-9) Blood found on T-shirt belonging to Trotter was consistent with the blood of the victim. (R1614)

B. PENALTY PHASE

By stipulation of counsel, a certified judgment of prior conviction for robbery was introduced into evidence against Trotter. (R1899) Ken Botbyl, a probation and parole officer, testified that Trotter was assigned to his community control caseload. (R1900-4) Trotter was placed on community control in September 1985 and was still under community control supervision on June 16, 1986, the day of the homicide. (R1903-4)

The defense case included testimony by the Appellant (R1912-47), his foster parents (R1949-71), two former teachers (R1971-81), the jail chaplain (R1982-90), a medical expert specializing in addictionology (R2005-46), and a clinical psychologist. (R2048-2135)

Melvin Trotter testified that he moved to Florida at an early age with his mother and six brothers and sisters. (R1914) His mother drank heavily, sometimes beat him and didn't provide much food or clothing. (R1914-6) One of her boyfriends beat him "all the time.'' (R1917) When he was old enough to go to school, he didn't go often because he didn't have clothing to wear. (R1917-8)

Eventually, when Melvin was about nine years old, H.R.S. stepped in and placed the children in foster homes. (R1918-9) Appellant resided with the Ellingtons until he was sixteen. (R1920) He testified that he never learned to read or write well but that he had a talent for drawing and mechanical work. (R1921-2)

Trotter said that the first time he used rock cocaine was when he had a misunderstanding with his wife and a neighbor gave him some to try. (R1924-5) He continued to smoke rock cocaine after that until his arrest for the homicide. (R1925) When his wife and he separated, he spent all of the money he earned from work on rock cocaine. (R1925-6)

When Trotter used rock cocaine, he would not be able to sleep. (R1926) He had not slept for four or five days before the day he went to Langford's Grocery. (R1926) He admitted that he stabbed Mrs. Langford and expressed remorse. (R1927)

Trotter's foster parents Laura and James Ellington testified that they had been in the foster parent program of H.R.S. since 1971. (R1950) They had been foster parents to somewhere between 75 and 100 children. (R1950) Melvin was brought to them when he was nine years old. (R1951) At that time he was hungry, had only the clothes on his back, and didn't go to school. (R1951) His mother was drunk most of the time, the house was filthy and there were signs that Melvin had been physically abused. (R1961-3)

Trotter lived with the Ellingtons until he was sixteen.

(R1952-3) He attended school and church regularly while he was living with them. (R1954, 1960) Melvin was a quiet and obedient child who never presented a disciplinary problem at home nor at school. (R1954, 1964) He was a slow reader but had mechanical abilities. (R1955, 1964) Mrs. Ellington called Melvin one of the best foster children they had. (R1954)

Two teachers who had taught Trotter while he attended Bradenton Middle School testified. (R1971-81) Rosa Hadley said that Melvin was in the educable mentally handicapped program. (R1973) She taught him for three years and he was always well behaved. (R1974) Samuel McDowell was also a teacher in the E.M.H. program. (R1977) Children are not admitted to the E.M.H. program until they go through a battery of psychological tests and it is determined that their I.Q. is under 70. (R1977) He taught Trotter for three years and found him a "quiet, cooperative, dependable, rather pleasant student." (R1978) Melvin was a classroom helper and attended school regularly. (R1979)

Robert Ferrier, chaplain of the Manatee County jail, testified that Trotter was a regular attendee at church services and bible study. (R1983) The chaplain said he also sits on the jail disciplinary board and that Trotter had never come before the board during the nine months he had been in jail awaiting trial. (R1984-6)

Dr. David Smith, a physician who specializes in the study and treatment of drug addictive diseases, testified in

regard to the effect of cocaine on the human brain. **(R2005-9)** Usage of cocaine causes a range of reactions varying from irritability to cocaine psychosis. **(R2010-14)** Cocaine psychosis produces the same type of psychotic reaction that a person having the mental illness paranoid schizophrenia would exhibit. **(R2011)**

Between the two ends of the scale of reactions to cocaine lies the "rage reaction" which Dr. smith described as an inappropriate overreaction to true sensory stimulus. **(R2013)** Thus, a person who had no history of violence might overreact very violently when impaired by cocaine. **(R2013)** Cocaine use also causes sleep deprivation which further impairs the brain. **(R2014)** Dr. Smith testified that of the large number of cocaine addicts treated at his clinic, 60% had at one time or another manifested a rage reaction or greater symptoms of cocaine psychosis. **(R2030-1)** When given a hypothetical based upon the history of Trotter, Dr. Smith said that the facts were consistent with a cocaine induced "rage reaction." **(R2027-9, 2034-6)**

Dr. Harry Krop, a clinical psychologist, testified that he evaluated Trotter and found no evidence of gross mental illness. **(R2055-7)** He administered the Wechsler Adult Intelligence test which gave Trotter an I.Q. of **72**. **(R2060-1)** Dr. Krop noted that this score placed Trotter in the borderline range of intelligence and that previous testing had shown a lower I.Q. **(R2061)** Trotter also showed a learning disability which meant that he could not learn up to the potential of his **72** I.Q. score. **(R2062)** Dr. Krop gave his opinion that this could have

resulted from the deprivation Trotter suffered in the "formative years" before he was nine and went to live with the Ellingtons. **(R2063-4)** The doctor said that Trotter was functioning mentally somewhere between age 11 and **12. (R2064-5)**

Dr. Krop also agreed with the diagnosis of a school psychologist who evaluated Trotter at age 15 and found an inadequate personality. **(R2065)** He estimated that at least **75** percent of death row inmates would be diagnosed as having an anti-social personality but that Trotter did not have this trait. **(R2066-7)**

Dr. Krop gave his opinion that Trotter's judgment was severely impaired at the time of the homicide. **(R2068)** He explained that a part of the intelligence test he administered measured judgment or common sense. **(R2068-9)** Trotter scored very low in this area; his judgment level is severely retarded. **(R2069)** To this must be added the distorted perception arising from cocaine abuse which caused an overreaction. (R2069)

Dr. Krop stated that Trotter was under extreme mental or emotional disturbance when he committed the homicide. **(R2075-6)** Trotter also had a substantially impaired capacity to conform his conduct to the requirements of law. **(R2076)** The psychologist also emphasized the emotionally deprived and abusive background which Trotter suffered as a young child, educational deprivation, lack of a male role model, and an alcoholic mother as contributing to his problems. **(R2076-9)** He agreed with previous determinations that Trotter has potential for

rehabilitation. **(R2080-1)**

In rebuttal, Ken Botbyl testified that he came into contact with Trotter **200** to **250** times in the nine months that he supervised him on community control. **(R2144-5)** He never noticed any signs of anxiety or impairment. **(R2145)** He noticed a weight loss which Trotter attributed to exercise. **(R2146)** There were no complaints about Trotter's job performance. **(R2147)** The witness had no knowledge that Trotter ever used cocaine prior to the homicide. **(R2148)**

C. POST-TRIAL MOTIONS

Defense counsel had subpoenas issued to the jurors which the State moved to quash. **(R2967)** Defense counsel requested leave to depose the jurors because of materials found in the jury deliberation room which may have been used by the deliberating jurors. **(R2968-9)** These items included a set of standard jury instructions, law books and a telephone. **(R2970-1)** Inquiry would be made of the jurors to find out if any of these were used. **(R2970)** The court granted the State's motion to quash the subpoenas without prejudice, stating that the defense would need first to show actual use of the materials. **(R2974, 2976)**

At the hearing on Appellant's Motion for New Trial, photographs of the interior of the jury deliberation room were introduced into evidence. **(R2981-5)** An affidavit from juror Morris was submitted which indicated that after the jury retired

for deliberations in both the guilt or innocence phase and the penalty phase, several jurors used the telephone. **(R2878, 2995)** In denying the motion, the trial judge observed that there were no allegations that the telephone was used for an improper purpose nor that the other materials in the room were used at all. **(R3008-9)**

Subsequently, juror Morris was brought before the court on July 10, **1987** for an interview. **(R2574-2608)** Juror Morris testified under oath that the telephone was not used by the jurors while they were discussing the case. **(R2586)** It was used prior to deliberations by jurors to notify their families that they would be late. **(R2587)** She never overheard any juror say anything about the case over the telephone. **(R2588)**

Juror Morris remembered specifically that Mr. Carpenter, foreman of the jury, used the telephone after the jury retired for deliberations in both the guilt or innocence and the penalty phase. **(R2594-6)** It was possible that more of the jurors used the telephone but she couldn't remember for certain. **(R2593-6)**

SUMMARY OF THE ARGUMENT

On the basis of exposure to prejudicial pretrial publicity, defense counsel challenged four prospective jurors for cause. The court denied these challenges for cause and required defense counsel to exhaust his peremptories. He requested an additional one, which was denied. Prospective juror Woods read a newspaper article indicating that Appellant would plead guilty as charged if he could receive a life sentence. The victim's family instead upon seeking the death penalty. Prospective juror Woods also said she would need to hear the defendant's side of the story in order to be fair. Prospective jurors Schmidt and Bradshaw were exposed to press reports about Appellant's status on community control. Prospective juror Beighle read an article which gave a prejudicial distortion of the facts which would not be in evidence. She also was predisposed in favor of the death if Trotter was convicted. The trial court did not make appropriate inquiries and whatever statements of impartiality were made by the prospective jurors were truly perfunctory.

Post-trial, it came to the court's attention that jurors had used the telephone in the jury room after retiring for deliberations. There was no allegation of prejudicial communications *so* the court denied the request to interview the jurors who had actually used the telephone. This was an insufficient inquiry by the court.

One of the assistant state attorneys who prosecuted this case had previously represented Trotter as defense counsel in a different prosecution. He eventually conducted the State's case in the penalty phase which included cross-examination of Trotter when he testified. In a capital case, a former attorney-client relationship is ample reason to disqualify a prosecutor who may be able to use confidential communications to rebut mitigating evidence. Trotter's pretrial motion to disqualify the prosecutor should have been granted.

At the State's request, eleven prospective jurors were excluded for cause because of their views concerning the death penalty. One of these, prospective juror Burse, was not even opposed to the death penalty. He was personally uncomfortable with the prospect of having to recommend a death sentence but stated that he would follow the law in accordance with the court's instructions. In excusing prospective juror Burse for cause, the trial judge misapplied Adams v. Texas, **448 U.S. 38 (1980).**

Evidence of Trotter's status on community control was introduced in the penalty phase as relevant to the aggravating circumstance § 921.141(5)(a) (under sentence of imprisonment). This was error because community control is not a sentence of imprisonment.

During the penalty phase, defense counsel tried to introduce an exhibit of Trotter's artwork as relevant to his character and potentially mitigating. The trial judge denied its

admission into evidence, but subsequently reversed his ruling after the jury retired for deliberations. The change of ruling came too late to prevent prejudice to Trotter.

The court's instruction to the jury on the aggravating circumstance § 921.141(5)(h) was unconstitutionally vague because it did not inform the jury of the limiting construction given to this factor. This Court has noted that all killings are heinous but that the aggravating circumstance applies only to a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." The jury was not given adequate guidance; therefore its death recommendation is constitutionally flawed.

In finding the aggravating circumstance of § 921.141(5)(h) (especially "wicked, evil, atrocious and cruel"), the court used the fact that the victim was killed in the store where she was the proprietor. He compared the facts at bar to decisions of this Court where the victim was killed in his or her home. This was a faulty analogy because one has an expectation of privacy in the home but not in a store open to the public at large. The aggravating circumstance should be struck because the facts of this homicide are typical of murder committed with a knife and not set apart from the norm of capital felonies.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY REQUIRING APPELLANT TO EXHAUST HIS PEREMPTORY STRIKES ON PROSPECTIVE JURORS WHO SHOULD HAVE BEEN EXCUSED FOR CAUSE BECAUSE OF THEIR EXPOSURE TO PREJUDICIAL PUBLICITY.

At a pretrial hearing before Acting Circuit Judge Dakan, both parties agreed that there should be individual voir dire of the prospective jurors concerning their exposure to the extensive publicity in this case. (R2557) The court agreed to individual voir dire on publicity issues. (R2562) Defense counsel further requested the trial judge to allow both sides twenty peremptory challenges each, noting that Fla. R. Cr. P. 3.350(e) authorized judicial discretion to allow that number since two indictments were consolidated for trial. (R2562-3) This motion was denied with the proviso that it could be renewed if problems with publicity arose. (R2563-4) The court reserved ruling on the defense motion for change of venue. (R2752-6, 2565)

At trial during jury selection, defense counsel renewed his motion for change of venue, noting the number of prospective jurors who had read about the case. (R325) The acting circuit judge ackn wledged that 14 of the first 27 jurors questioned had been excused for cause. (R325) However, only one of the excusals for cause was directly related to the press coverage. (R325) The court also observed that none of the prospective

jurors to that point recalled press coverage of Trotter's status on community control. (R326) The motion for change of venue was denied. (R326)

Out of a total sixty-six jurors who were examined, forty-seven admitted to having heard something about the case. (R64, 96, 104, 107, 155, 179, 202-10, 214, 240-1, 242-6, 248, 251, 286-8, 315-6, 316-7, 318-9, 340-1, 365, 366, 396, 429-34, 435-46, 494-5, 529-30, 530-40, 560, 561, 567, 601-8, 626, 649-50, 651-5, 669, 694-7, 700-1, 731-5, 735-44, 744-54, 761-2, 784-6, 791-2, 807-11, 814, 815, 833-6) Six prospective jurors were excused for cause on the basis of exposure to prejudicial publicity. (R211, 363, 563, 609, 648, 667)

Appellant move to excuse for cause on publicity grounds, four other prospective jurors. (R90, 447, 540-2, 754-5) The court denied these challenges for cause (R91, 448, 543, 755) and defense counsel used peremptories to excuse the four prospective jurors. (R1194, 1196, 1199) Subsequently, Appellant exhausted his ten peremptory strikes and moved for an additional peremptory strike. (R1200) The motion for an additional peremptory was denied. (R1200)

This Court held in Hill v. State, 477 So.2d 553 (Fla. 1985) that it is reversible error to abridge a defendant's right to peremptory challenges by forcing him to expend one on a prospective juror who should have been excused for cause. As in Hill, Appellant at bar exhausted his peremptories and requested an additional challenge which was denied. Consequently, if any

of the four prospective jurors Woods, Schmidt, Bradshaw or Beighle should have been excused for cause, Appellant must be granted a new trial.

The applicable rule of law for determining juror competency is that stated by this Court in Singer v. State, 109 So.2d 7 at 24 (Fla. 1959) and reaffirmed in Hill, supra, 477 So.2d at 555:

> [I]f there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial[,] he should be excused on motion of a party, or by [the] court on its own motion.

A) PROSPECTIVE JUROR WOODS

During voir dire, prospective juror Woods acknowledged that she read part of an article which appeared in that day's paper. (R64) The article was made part of Court's Exhibit "A" and is contained in the record on appeal at R2764.

The heading of the article is "Langford's Family Says Murder Suspect Tried Plea Bargain." (R90, 2764) Prospective juror Woods admitted reading about half of the article before she put it down, realizing that it concerned the case for which she was a prospective juror. (R84-5) Woods said she remembered reading that the victim's relatives wanted the death penalty imposed on Trotter. (R86) She indicated that she remembered reading that defense counsel had tried to get the family to agree

to a life sentence, but they refused. (R86) When asked her reaction to reading that defense counsel was attempting to plead Appellant guilty to first-degree murder in exchange for a life sentence, prospective juror Woods said that she put the paper down at that point. (R88)

The acting circuit judge inquired of prospective juror Woods:

> THE COURT: Is there anything about the article that sticks in your mind that would have any effect on your ability to sit in this case?
>
> PROSPECTIVE JUROR WOODS: No, other than it was a murder case and that's what we've been briefed on earlier.
>
> THE COURT: Okay. Let me ask you this. One of the things that I will instruct you on, and we'll probably be going over later on, is that of course Mr. Trotter at this point is presumed innocent and the state has an absolute obligation, first of all before we get to any penalty issue, to prove beyond a reasonable doubt that he is guilty of the charge. And if they fail in that burden, it would be your obligation to come back with a verdict of not guilty.
>
> Do you understand that basically to be the law? Is there anything about what was contained in that article that would have any affect on your ability to apply the law in this case?
>
> PROSPECTIVE JUROR WOODS: No, Sir.

(R87-8)

Defense counsel challenged prospective juror Woods for cause pointing out her exposure to two particularly prejudicial facts which would not be in evidence; the offer to plead guilty as charged and the desire of the victim's family for a death sentence. (R90) The court denied Appellant's challenge for cause, stating that he was satisfied that the article "would not have an effect on her." (R91)

An accused is constitutionally entitled to be tried by "a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717 at 722 (1961); Amends. VI and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const. A juror's statement that he will return a verdict in accord with the evidence produced at trial

> is not determinative of his competence, if it appears from other statements made by him or from other evidence that he is not possessed of a state of mind which will enable him to do so. Singer v. State, supra, at 24.

As this Court also recognized in Sinaer:

> It is difficult for any person to admit that he is incapable of being able to judge fairly and impartially.

109 So.2d at 24.

At bar, prospective juror Woods' exposure to newspaper reports that Appellant wanted to plead guilty as charged if he could avoid the death penalty raised a strong question about whether she could truly afford Appellant a presumption of innocence. Certainly this offer to plead guilty could not be

presented in evidence at trial. Section 90.410, Florida Statutes (1987). The trial judge's perfunctory inquiry merely emphasized a juror's "obligation to come back with a verdict of not guilty" if the State failed to prove their case. (R88) This is a far cry from determining whether prospective juror Woods was an "impartial, indifferent juror."

The American Bar Association Standards for Criminal Justice address exposure of prospective jurors to publicity. Standard 8-3.5(a) provides in part:

> The questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how any exposure has affected that person's attitude toward the trial, not to convince the prospective juror that an inability to cast aside any Preconceptions would be a dereliction of duty.

(2d edition 1980) (e.s.)

The trial judge's admonition to prospective juror Woods of her "obligation" and asking her if she disagreed with him about the law squarely contradicts the ABA standard.

The nature of the publicized facts is also of utmost significance. ABA Standard 8-3.5(b) provides in part:

> A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession, or other incriminating matters that may be inadmissible in evidence .... shall be subject to challenge for cause without regard to the prospective juror's testimony as to state of mind.

Exposure to reports of an accused's offer to plead guilty should fall within this area of automatic challenge for cause.

Decisions from both Florida courts and those of other jurisdictions support the conclusion that a plea offer is highly significant and prejudicial. The Third District reversed a conviction in Weber v. State, 501 So.2d 1379 (Fla. 3d DCA **1987)** where the jury learned that the defendant had previously been convicted of the same offense for which they were trying him. The Weber court wrote:

> Courts which have confronted the discrete issue posed by the present case have uniformly concluded that the prejudice arising from the exposure of jurors to information that the defendant was previously convicted of the very offense for which he is on trial is *so* great that neither an ordinary admonition of the jurors nor the juror's ritualistic assurances that they have not been affected by the information can overcome it.

501 So.2d at **1382.**

A newspaper article which disclosed the prior conviction at trial for the first-degree murder the accused was charged with was also grounds for reversal in Cappadona v. State, 495 So.2d 1207 (Fla. 4th DCA **1986).** The Fourth District termed juror exposure to the newspaper article "an intolerable dilution of the presumption of innocence to which he [the accused] was constitutionally entitled." 495 So.2d at **1208.**

In Irvin v. Dowd, supra, the United States Supreme

Court made special mention of the defendant's

> offer to plead guilty if promised a 99-year sentence, but also the determination, on the other hand of the prosecutor to secure the death penalty.

366 U.S. at 725-6.

among the prejudicial pretrial publicity which prevented a fair trial. This is of course directly parallel to the facts at bar.

Finally, the case at bar is closely analogous to that of Miracle v. Commonwealth, 646 S.W.2d 720 (Ky. 1983) where several jurors had, on a previous occasion, witnessed the defendant entering a plea of guilty to a capital offense as charged. The Kentucky court reversed on the basis of the jury's knowledge of the withdrawn plea.

The second prejudicial aspect of the newspaper article read by prospective juror Woods should also be considered. Evidence that a victim's family wants the convicted killer to receive a death sentence rather than life is not admissible at trial because it is irrelevant to the capital sentencing decision. Amends. VIII and XIV, U.S. Const.; Booth v. Maryland, 482 U.S. ____, 107 S.Ct. 2529, 96 L.Ed.2d **440** (1987); Grossman v. State, 525 So.2d 833 (Fla. 1988).

If the above was not grounds enough to excuse prospective juror Woods for cause, there is yet another basis. Later in the voir dire, the following exchange between prospective juror Woods and the trial court took place:

> PROSPECTIVE JUROR WOODS: I would if I probably didn't hear the

defense. But in order to be fair, I need to know everything to make a fair decision. There might be questions in my mind. But if the State prepares their case and they have convinced me beyond a reasonable doubt, then I'll be satisfied.

But to be fair, I think I would need to hear somethinu in his behalf.

THE COURT: Let me suggest something to you. I think sometimes we forget this.

You know, we've already heard form the defendant in this case. The State has made an accusation. They have said, "We accuse you of this crime," and the defendant had entered a plea of not guilty.

And what he is saying when he enters that plea of not guilty is, "I tell you that I am not guilty and I demand that the State prove this case beyond a reasonable doubt."

Now, knowing that, do you still feel that you would want to hear from the defendant, if you had doubt?

PROSPECTIVE JUROR WOODS: I just -- as you said a while ago, he could get up there and lie. So if both attorneys are presenting the law to me and the facts from both the State and the defendant, to me I feel like I have a more fair decision if I hear his side of it.

THE COURT: You would agree, though, that cross-examination for example would be part of his side? In other words, if they put holes in the State's case that make you have a reasonable doubt, that would -- that's really what you're

> talking about, I sort of gather from your answer?
>
> PROSPECTIVE JUROR WOODS: Well, I know they're going to present the facts based on the law. But, as he said, cross-examination in Melvin's defense would be very important to me in order to feel like I could make a fair decision.
>
> THE COURT: That's what it's there for.

(R1119-20) (e.s.)

Again there was a basis for a reasonable doubt as to prospective juror Woods' ability to be impartial. She indicated that she would need to hear Trotter's "side of it" in order to make a fair decision. Again the trial judge beat the juror down by arguing with her and asking if she disagreed with the law.

Defense counsel renewed his challenge for cause to prospective juror Woods on both the original grounds and her feeling about the defendant testifying. (R1192-3) He noted that prospective juror Woods never said that she could set aside her desire to hear the defendant's testimony and follow the instructions of the court. The trial judge again denied the challenge for cause. (R1193) When defense counsel requested an additional peremptory challenge, he specifically referred to having to use a peremptory to excuse prospective juror Woods. (R1200)

This aspect of prospective juror Woods' predisposition to find Trotter guilty if evidence was not produced on his behalf may well be related to the prejudicial publicity previously

detailed. In any event, there exists a reasonable doubt from her answers that she could set aside her bias and render an impartial verdict. See Gibson v. State, 534 So.2d 1231 (Fla. 3d DCA 1988). The trial judge should have excused prospective juror Woods for cause.

B) PROSPECTIVE JURORS SCHMIDT AND BRADSHAW

Both prospective jurors Schmidt and Bradshaw were exposed to newspaper reports that Trotter was on community control or "house arrest" at the time of the homicide. Prospective juror Schmidt recalled:

> I think he's the same man they said was under house arrest, and then in the commission of a robbery, I guess, in Palmetto. I think he stabbed the lady.

(R530-1)

Schmidt was a policeman for 14 years and attended "a lot of trials." (R534) He lost some because of "bum evidence." (R534) He was aware that the prosecutor was often legally precluded from presenting certain facts at trial which were nonetheless true. (R535)

Defense counsel questioned prospective juror Schmidt about his ability to disregard things he read if these facts never came out at trial:

> MR. SLATER: And you're telling me that you can just completely put that in the back of your mind and never allow it in anyway? You think you can never allow it to have some influence in your decision?

PROSPECTIVE JUROR SCHMIDT: I don't know. I don't know, really.

MR. SLATER: It's going to be difficult for you?

PROSPECTIVE JUROR SCHMIDT: It would be difficult, sure.

(R535-6)

Then he inquired about prospective juror Schmidt's attitude towards community control:

MR. SLATER: Yes, what do you think of house arrest?

PROSPECTIVE JUROR SCHMIDT: I don't believe in it.

MR. SLATER: What do you think of somebody that's under house arrest and commits a homicide?

PROSPECTIVE JUROR SCHMIDT: Well, that's -- you're saying like, yeah, like they got him charged with -- yes, it's serious, very serious.

MR. SLATER: How serious?

PROSPECTIVE JUROR SCHMIDT: Probably serious enough that if you can prove, like I said, the death penalty, yes, and all these circumstances.

(R538-9)

Although prospective juror Schmidt's response was not completely articulate, he seems to be saying that a defendant's status on "house arrest" would be enough to incline him toward the death penalty. Thus, prospective juror Schmidt was biased by the newspaper reports in the same way as the prospective juror in

Hill v. State, supra, who this Court determined should have been excluded for cause. The Hill court wrote:

> It is exceedingly important for the trial court to ensure that a prospective juror who may be required to make a recommendation concerning the imposition of the death penalty does not possess a preconceived opinion or presumption concerning the appropriate punishment for the defendant in the particular case. A juror is not impartial when one side must overcome a preconceived opinion in order to prevail. When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause.

477 So.2d at 556.

The trial judge recognized that Appellant's status on community control would not be in evidence during the guilt or innocence phase of the trial. It also should not have been part of the penalty phase evidence as will be argued in Issue V, infra. The prosecutor contended that "a juror's knowledge of a defendant's criminal background is not a consideration" and attributed this position (without case citation) to the Second District Court of Appeal. (R542) The trial court recognized the contradiction of this proposition:

> THE COURT: How does the Second District square that with the Williams Rule, though? I mean, on the one hand you're telling me that we should let this man stay on the stand, assuming he knows all of that; and on the other hand, if he mentions it in the trial, then I

have to declare a mistrial.

(R542)

Nevertheless, the trial judge refused to excuse prospective juror Schmidt for cause. (R543) Defense counsel excused him by peremptory strike. (R1196)

To begin with, the Second District does not regard a juror's knowledge of the defendant's criminal background as tolerable. In Wildina v. State, 427 So.2d 1069 (Fla. 2d DCA 1983), the court reversed where one juror stated knowledge of previous charges against the accused. The Wilding court specifically held that "an accused's right to a fair and impartial jury is violated when a jury is improperly made aware of a defendant's arrest for unrelated crimes either during the jury selection process or during the trial proper." 427 So.2d at 1070.

Because Trotter's status on community control indicated a previous conviction for an unrelated crime (and not merely an arrest), the prejudice would be even greater. Prospective juror Schmidt could not be an impartial juror.

The decision of the United States Supreme Court in Marshall v. United States, 360 U.S. 310 (1959) is instructive. News accounts of the defendant's two prior felony convictions reached the jurors. Despite the jurors' assurances that they would decide the case solely on the evidence at trial, the Supreme Court determined that reversal was required. The Court wrote:

> We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. [Citation omitted] It may indeed be greater for it is then not tempered by protective procedures.

360 U.S. at **312-3.**

Accordingly, this Court should hold that Trotter's rights to an impartial jury under Art. I, **§ 16 of** the Florida Constitution and Amends. VI and XIV of the federal constitution were violated when the trial judge refused to excuse prospective juror Schmidt for cause.

The same argument applies to the denial of Appellant's challenge for cause to prospective juror Bradshaw. Mr. Bradshaw saw several newspaper articles concerning the case:

> MR. BRADSHAW: Been sometime ago but, as I recall, the woman was found stabbed a number of times, I don't recall who found her; she was still alive, died I believe within a day after that but I'm not sure; she identified the assailant before she died; I believe there was a witness who saw the defendant running from the store shortly after the attack was supposed to have occurred; the defendant was on probation or house arrest or some program such as that.
>
> Later articles dealt more with criticism of that program. And the latest thing was just about the selection of the jury process in

yesterday morning's paper. (R745)

. . .

I believe one of the articles indicated the defendant's employer had fired him. And the implication appeared to be that the program, whoever was supervising, wasn't aware of it.

Now, that's what I inferred. Whether or not that's what they intended, I don't know.

(R746-7)

Defense counsel asked prospective juror Bradshaw whether he would be able to totally disregard what he read about the case. Bradshaw replied:

PROSPECTIVE JUROR BRADSHAW: Well, I don't think I would ever [be] able to put it outside of my mind or set it aside completely. That would be impossible.

(R749)

When asked whether the newspaper reports might affect the juror's determination of guilt or innocence, Bradshaw said:

I would try not to let it have, but, you know, I haven't been in any position *so* I honestly can't answer you.

(R750)

He gave a similar response to counsel's question about influence on the sentencing recommendation:

PROSPECTIVE JUROR BRADSHAW: Well, again, I would have to give the same answer. I would try to set it aside and follow the guidance given by the judge. But I just don't know at this point.

(R750)

Prospective juror Bradshaw's candid responses show that he would try to be an impartial juror but could not guarantee that his exposure to newspaper reports would have no bearing on his decision. He was well aware of Trotter's status on community control and the criticism directed at that program because of this homicide. Defense counsel moved that prospective juror Bradshaw be excused for cause. (R754-5) The court denied the challenge for cause (R755) and defense counsel expended his last peremptory strike to excuse him. (R1199)

As with prospective juror Schmidt, prospective juror Bradshaw was exposed to information about Trotter's status on community control. This information was *so* prejudicial that it could not be received into evidence. Had Bradshaw served on the jury, he could have tainted the whole jury by mentioning what he knew. Accordingly, the trial judge should have excused both prospective jurors Schmidt and Bradshaw on defense counsel's challenges for cause.

C) PROSPECTIVE JUROR BEIGHLE

Prospective juror Beighle had discussed the case with co-workers when it appeared in the newspapers. (R429-30) The same "Trotter" seemed familiar to her because she had worked in the payroll department at Tropicana. (R430) When asked if she remembered details of the crime from her discussions, prospective juror Beighle responded:

I'm going by what people told me;

> that he apparently wanted money or something and she gave him money and it wasn't enough or something like that, and that's basically the details that I heard, you know.

(R432)

She also felt that death would be the appropriate sentence if the State proved that Trotter committed the homicide. **(R434)**

Defense counsel challenged prospective juror Beighle for cause. **(R447)** He noted that a newspaper article had stated that the victim was threatened with death if she didn't produce more money but that no evidence of that scenario would be presented at trial. **(R447-8)** The court denied the challenge for cause **(R448)** and defense counsel excused her by peremptory strike. **(R1196)**

Prospective juror Beighle should have been excused for cause because the information she heard was directly prejudicial to Appellant's defense at trial. Trotter admitted stealing money from the cash register but claimed that the struggle in which the victim was killed was a separate incident where Trotter panicked. Thus, he was guilty of theft and the homicide was not a first-degree murder. **(R1818)**

Had prospective juror Beighle been allowed to sit on the jury, her exposure to allegations that Trotter killed the victim because she couldn't produce more money would have prevented an impartial verdict. When a juror is biased against the sole theory of a defendant's defense, the juror should be excused for cause. See Moore v. State, 525 So.2d **870** (Fla.

1988). Moreover, prospective juror Beighle indicated a predisposition in favor of the death penalty should Trotter be convicted of the killing. (R434) This is also ample basis to exclude a prospective juror for cause. Cf. Hill v. State, supra.

To summarize, there were reasonable doubts from the record that prospective jurors Woods, Schmidt, Bradshaw and Beighle could render impartial verdicts based solely on the evidence produced at trial. The trial court did not recognize the potency of the prejudicial facts reported in the press which would not be in evidence at trial. The prospective jurors' statements of impartiality were perfunctory at best. Trotter was denied his right under Art. I, Sections 9 and 16 of the Florida Constitution to an impartial jury. His corresponding federal constitutional rights under the Sixth, Eighth and Fourteenth Amendments were also violated. He should now be granted a new trial.

ISSUE II

THE TRIAL JUDGE ERRED BY FAILING TO CONDUCT A SUFFICIENT INVESTIGATION INTO EXTRANEOUS INFLUENCES IN THE JURY DELIBERATIONS AND DENYING APPELLANT'S MOTION FOR NEW TRIAL.

After sentencing, defense counsel issued subpoenas to the jurors and bailiffs for the purpose of taking their depositions. (R2861, 2967-8) The State filed a motion to quash the subpoenas (R2861-2) and a hearing was held on May 26, 1987. (R2964-77)

At this hearing, affidavits were presented showing that the jury deliberated in a room which had various law books including a complete set of the Florida Standard Jury Instructions available for the jury's use. (R2969-71) There was also a telephone in the jury room. (R2970) Defense counsel wanted to depose the jurors to find out if there was any use of the materials or the telephone. (R2970)

The State replied that there was no evidence of juror misconduct, use of the telephone or legal books. (R2972-3) The trial court agreed and quashed the subpoenas directed to the jurors. (R2974) The court ruled that Appellant would have show actual use of the materials or phone before the jurors could be interviewed. (R2974, 2976)

Subsequently, on May 28, 1987, a sworn affidavit was taken from juror Annie Morris in which she stated that jurors used the telephone in the jury room after being instructed and sent back for deliberations. (R2878) This occurred during both

the guilt or innocence phase and the penalty phase of Trotter's trial. (R2878)

At the hearing on Trotter's motion for a new trial held June 11, 1987, defense counsel presented photographic exhibits of the jury deliberation room depicting the legal materials and telephone available to the jury. (R2983-5) Defense counsel argued that access to these was in itself sufficient reason to grant a new trial. (R2989-95) In addition, the affidavit of juror Morris was submitted to establish that the telephone had actually been used after the jury retired to deliberate. (R2995)

In denying Appellant's motion for new trial, the trial judge noted that the hearing room was used for jury deliberations in this case because the jury rooms could not accommodate twelve jurors comfortably. (R3008-9) He ruled that there was no clear showing that the phone was used during deliberations and no allegation that it was used for an improper purpose (R3008-9). Neither was there any evidence that the legal materials were used. (R3009)

The trial judge's ruling was error because it placed the burden upon Appellant to prove impropriety and the court conducted no further inquiry. In Russ v. State, 95 So.2d 594 (Fla. 1957), this Court approved the position that any matters occurring in the jury room which do not essentially inhere in the verdict itself can be presented by affidavit or testimony as grounds for a new trial. When jurors, after retiring to deliberate upon the verdict, separate without leave of court, a

new trial is mandated. Fla. R. Crim. P. 3.600(b)(3); Livingston v. State, 458 So.2d 235 (Fla. 1984).

Use of the telephone at bar is comparable to a separation of the jurors because an outside influence can enter the deliberations. In Durano v. State, 262 So.2d 733 (Fla. 3d DCA 1972), a juror had a conversation with someone outside the courtroom regarding the trial. The Third District reversed for a new trial, stating:

> The right of a defendant to have a jury deliberating his guilt or innocence free from any distractions, outside or improper influence is a paramount right which must be closely guarded.

262 So.2d at 734.

The Durano decision should be compared with Gonzalez v. State, 503 So.2d 425 (Fla. 3d DCA 1987) where the jury took a lunch recess prior to beginning deliberations and one juror separated from the others. In holding that this separation did not require reversal, the Gonzalez court emphasized that the juror spoke to no one while he was gone.

When there is a colorable showing of extrinsic influence or juror misconduct, the court must investigate the impropriety. In Robinson v. State, 438 So.2d 8 (5th DCA), rev. den., 438 So.2d 834 (Fla. 1983), defense counsel requested the trial judge to inquire whether any of the jurors had read a prejudicial news story which appeared during the trial. The trial court's refusal to interrogate the jurors was deemed ground

for reversal. Similarly, when juror misconduct was alleged in Sconyers v. State, 513 So.2d 1113 (Fla. 2d DCA 1987) the trial court erred in denying the defendant's motion to interview jurors.

In the case at bar, there was not only jury use of the telephone after retiring for deliberations but also legal materials in the jury room which held potential for prejudice. This Court in Johnson v. State, 27 Fla. 245, 9 So. 208 (1891) stated that it was error "to allow the jury, after retiring to consider their verdict, to have access to law books of any description". 9 So. at 213. In Yanes v. State, 418 So.2d 1247 (Fla. 4th DCA 1982) the trial court gave the jury the entire book of Standard Jury Instructions with directions to read only the two marked instructions. The Yanes court held that such a "slipshod attitude" toward the sanctity of the jury process could not be condoned and required reversal even without any showing that the jury actually read inapplicable instructions.

As applied to the facts at bar, Appellant made a sufficient showing of possible extrinsic influences on the jury's deliberations to require a new trial, especially considering that this is a capital case. At a minimum, the contents of the jury room and juror Morris's affidavit required the trial judge to permit juror interviews to determine what actually occurred during deliberations.

The remaining question is whether the trial court's subsequent interview of juror Morris on July 10, 1987 rectified

the error. **(R2576-2610).** This interview was ordered by the court pursuant to the State's motion to supplement the record. **(R2885-6)** At the hearing, juror Morris stated that the telephone was used by jurors before deliberations began to inform their families that they would be late coming home. **(R2585)** Once deliberations began, the phone was not used. **(R2587)** Juror Morris did not hear any of the jurors say anything about the case on the telephone. **(R2588)** She didn't see anyone looking at the legal books in the jury room. **(R2589)**

Juror Morris said that Mr. Carpenter, the jury foreman, used the telephone after the jury retired to deliberate the guilt or innocence phase of the trial. **(R2594)** Another juror may also have telephoned. **(R2595)** Of course, juror Morris could not hear what was said by the parties on the other end of the telephone conversations. **(R2594)** Before penalty phase deliberations, jury foreman Carpenter also used the telephone. **(R2596)**

The trial judge struck juror Morris's affidavit from the record based upon her testimony and a finding that it was procured in violation of the court's order that the Public Defender's office not "have any conversation with any of the jurors." **(R2610)** A contempt proceeding was held in regard to the procurement of juror Morris's affidavit. **(R2611-19)** The court reiterated at the close of the hearing that no jurors from the trial be contacted "under any circumstances." **(R2619)**

Although juror Morris's testimony did not show any proof that Trotter was prejudiced by extrinsic influences in the

jury deliberations, the court erred by not conducting a further inquiry. Certainly the jury foreman Mr. Carpenter should have been contacted and questioned about his telephone conversations prior to deliberations in both phases of the trial. Something might have been said by the party he telephoned about the trial. Also, other jurors may have heard something more than juror Morris did or may have seen use of the law books.

In State v. Malone, **333** Mo. **594,** 62 S.W.2d **909 (1933)** jurors had been permitted to use the telephone to contact their families. The Missouri court was critical of this occurrence even though the officer in charge of the jury listened to what the jurors said on the telephone. There was an "opportunity for communications to be made to a juror." 62 S.W.2d at **914.** The Malone court reversed the judgment on other grounds, specifically declining to decide whether the telephone conversations alone would have required reversal.

At bar, there was even a greater likelihood of improper influence. The bailiff did not supervise the jurors' telephone calls. Juror Carpenter who used the telephone in both phases of the trial was not even questioned as to the content of his conversations, nor were any jurors other than Mrs. Morris asked to give their recollection.

Because the possibility exists that the jury deliberations were tainted by extraneous influences, Trotter should receive a new trial.

ISSUE III

THE TRIAL JUDGE ERRED BY DENYING APPELLANT'S MOTION TO DISQUALIFY PROSECUTOR BECAUSE THE ASSISTANT STATE ATTORNEY ASSIGNED TO THE CASE HAD PREVIOUSLY REPRESENTED TROTTER.

Prior to trial, Appellant filed a motion to disqualify Richard Seymour from representing the State of Florida in the prosecution because of his prior representation of the accused. (R2750-1) At a hearing held March 19,1987 (R2240-57), it was established that Assistant State Attorney Richard Seymour had previously been employed as an Assistant Public Defender for eight years. (R2247) During Seymour's tenure in the Public Defender's office, Trotter was represented on several occasions. (R2242) In 1981, Seymour personally represented Trotter on a violation of probation charge. (R2241-2, 2247)

Prosecutor Seymour acknowledged the representation but stated that he had no recollection of Trotter. (R2250-1) Trotter had been charged with technical violations of his probation. (R2248-9) When the presiding judge offered to modify Trotter's probation, he accepted the court's offer. (R2249-50) Thus, there was no hearing on the violation of probation charge. (R2250) Seymour also declared that he didn't remember even discussing a 1984 case where the Public Defender represented a co-defendant of Trotter's on a robbery charge. (R2251) In short, he had no recollection of any details which he could use against Trotter in either the guilt or penalty phase of the trial. (R2252-3)

The trial judge ruled that there was no impropriety because Trotter failed to show "any specific conversations or confidential information which he gave to Mr. Seymour that would be prejudicial." (R2257)

In Young v. State, 177 So.2d 345 (Fla. 2d DCA 1965), the court recognized that when a public defender representing a defendant subsequently becomes a prosecutor in the same case, the defendant has been denied due process of law and any conviction obtained must be reversed. This Court, in State v. Fitzpatrick, 464 So.2d 1185 (Fla. 1985) reviewed a decision of the Fifth District which held that the entire state attorney's office had to be disqualified when an attorney who had consulted with the defendant later joined the state attorney's staff. The Fitzpatrick majority held that the entire state attorney's office need not be disqualified providing that the former defender neither personally assists in the prosecution nor provides prejudicial information regarding the case. Justices Ehrlich and Shaw dissented from this holding, stating:

> To the public at large, the potential for betrayal in itself creates the appearance of evil, which in turn calls into question the integrity of the entire judicial system. 464 So.2d at 1188.

The dissent also pointed out the relatively minimal cost of disqualifying the state attorney.

In the case at bar, Appellant did not even ask that the entire state attorney's office be disqualified, only that the

former lawyer be barred from personally prosecuting him for a capital offense. The motion was filed within a few weeks of when Seymour was shifted to the prosecution of the case and well before trial. (R2243) To the general public, ethical precepts about loyalty to a former client would seem to require at a minimum that a lawyer should not actively seek to put his former client in the electric chair. Such appearance of impropriety calls into question the fair administration of justice.

Rule 4-1.9 of the Rules Regulating the Florida Bar provides in part:

> 4-1.9 Conflict of interest; former client.
> A lawyer who has formerly represented a client in a matter shall not thereafter:
> (a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation...

This Rule serves to prevent the potential for use of a former client's secrets and confidences against him. Without such a rule, clients would be at risk in divulging information to their lawyers. Rule 4-1.9 is also essential in promoting public confidence in the integrity of the bar.

Since Fitzpatrick, this Court decided in Preston v. State, 528 So.2d 896 (Fla. 1988) that there was no conflict of interest sufficient to warrant disqualification when an attorney who represented the defendant several years previously on a

misdemeanor charge later joined the state attorney's office. The Preston court specifically noted that, unlike the case at bar, the client's former attorney played no substantive role in the prosecution.

Counsel is aware of one federal decision where an attorney later prosecuted his former client on an unrelated charge. In Havens v. Indiana, 793 F.2d 143 (7th Cir. 1986), the court held the defendant was not denied a fair trial nor due process of law solely by reason of a former attorney-client relationship with the prosecutor. The Havens court noted however that "ethical concerns dictate that it may have been the better course of action for Milford [prosecutor] to recuse himself from the entire case." 793 F.2d at 145.

Havens can be distinguished form the case at bar on two grounds. First, this Court need not find a constitutional violation in order to reverse Trotter's conviction and/or sentence. This Court's supervisory powers over members of the Florida Bar give ample foundation to reverse in the interests of justice. Fla. R. App. P. 9.140(f).

Secondly, Havens was not a capital case. There is greater potential for prejudice in the penalty trial of a capital case because character evidence which might be inadmissible in a guilt or innocence trial becomes the focus of the penalty trial. The danger is not so much that confidential communications could serve as a basis for proof of aggravating circumstances as it is that privileged information could be used to rebut aspects of a

defendant's character or record that might be offered as mitigating evidence. The existence of a prior attorney-client relationship with the individual who is actually conducting the penalty trial in a capital proceeding could thus have a chilling effect upon production of mitigating evidence.

It cannot be overemphasized that prosecutor Seymour made no effort whatsoever to avoid conflict. Indeed he stated at the motion hearing:

> Things happen in capital cases that would often result in reversals in other cases. The state has no fear of this conflict.

(R2248)

At trial, there were two prosecutors but Seymour was the one who conducted the penalty phase. When Trotter testified as a witness, it was Seymour who cross-examined him. Seymour commenced:

> Q. MR. TROTTER, you told us about your mother. There's a picture of Mrs. Langford in front of you. Your mother didn't stab her; did she?
>
> **A. No.**
>
> Q. Your mother's boyfriend didn't stab Mrs. Langford; did he?
>
> A. No.
>
> Q. The other Melvin who lived there in the house with you didn't do that; did he?
>
> **A. No.**
>
> Q. I'm going to ask you to look at this jury and tell this

jury the truth about what you did to Mrs. Langford?

A. I stabbed Mrs. Langford.

(R1927)

Defense counsel made nine objections during the course of the cross-examination, six of which were sustained by the court. (R1928-34) A discovery violation came to light which Seymour explained as being inadvertent because he was "not involved in this case back in January when they had that hearing." (R1940) The trial judge gave a curative instruction to the jury. (R1946-7)

Prosecutor Seymour lso gave the penalty argument to the jury. (R2172-94) A defense motion for mistrial was denied, but the court instructed the jury "not to let sympathy for anyone, including the victim, play a part in your decision." (R2179-80) Seymour referred to Appellant by his first name, "Melvin." (R2189)

Taken as a whole, the record gives the appearance of a personal vendetta by an attorney turned prosecutor against his former client. This is not only inimical to the judicial system; in a capital case it violates due process of law. Appellant was denied his Sixth and Fourteenth Amendment rights to a trial that is fundamentally fair. His sentence of death does not meet the Eighth Amendment standard of reliability in capital proceedings. Likewise, the parallel guarantees of Article I, sections 9 and 17 of the Florida Constitution were violated by allowing an attorney to prosecute his former client in a capital case.

ISSUE IV

THE TRIAL COURT ERRED BY EXCUSING PROSPECTIVE JUROR BURSE FOR CAUSE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION.

During the jury selection, a total of eleven jurors were excused for cause on the State's motion because of their views regarding the death penalty. **(R139, 200, 311, 324, 562, 699, 783, 831, 1031)** Several of these excusals were arguably unwarranted; however, in the interest of economy Appellant will confine his argument to the excusal of prospective juror Burse. The exclusion from a capital jury of any juror who is qualified to serve requires that the sentence of death be vacated. Gray v. Mississippi, **105** S.Ct. **2045 (1987);** Davis v. Georgia, **429** U.S. **122 (1976).**

In Witherspoon v. Illinois, 391 U.S. **510 (1968),** the United States Supreme Court held that the Sixth Amendment right to an impartial jury and Fourteenth Amendment due process are violated when all jurors opposed to capital punishment are struck for cause from a capital jury. As refined in Adams v. Texas, **448** U.S. **38 (1980),** the applicable proposition of law is:

> a juror may not be challenged for cause based upon his views about capital punishment unless these views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

448 U.S. at **45.**

Accord, Wainwright v. Witt, **469** U.S. **412 (1985).**

Turning to the case at bar, it should be first noted that prospective juror Burse was not even opposed to capital punishment. Burse was initially questioned by the prosecutor:

> How do you feel about the death penalty?
>
> PROSPECTIVE JUROR BURSE: I don't know.
>
> MR. SEYMOUR: You've never been called upon to recommend the death sentence before?
>
> PROSPECTIVE JUROR BURSE: No, Sir.
>
> MR. SEYMOUR: Do you think you could do *so?*
>
> PROSPECTIVE JUROR BURSE: I don't know. I honestly don't know.
>
> MR. SEYMOUR: Do you have any personal or religious convictions against the imposition of a death sentence?
>
> PROSPECTIVE JUROR BURSE: No.

(R97-8)

The prosecutor continued:

> MR. SEYMOUR: Let me ask you this question. You have some problems with the death sentence, with the death penalty?
>
> PROSPECTIVE JUROR BURSE: I don't have any problems with that. I only have the problem of my conviction being that.
>
> MR. SEYMOUR: You have some problems with your being able to vote for that? That being the case, you might have?

PROSPECTIVE JUROR BURSE: I don't know. I might have some problems with that.

(R99)

Later, prospective juror Burse clarified his position:

PROSPECTIVE JUROR BURSE: I think I understand the question. I don't have any objection to the death penalty, and I don't feel that the death penalty would cause me a problem of finding guilt and I don't think that it would stop me from giving the death penalty.

However, it would have to be some awful terrible consideration involved in that.

(R123)

The trial judge then personally questioned Mr. Burse:

THE COURT: All right. I don't mean to put a lot of emphasis on this or anything, Mr. Burse, but I'm just trying to clarify in my own mind here; you've indicated that you personally have no problems with the death penalty, philosophically or morally; is that correct?

PROSPECTIVE JUROR BURSE: I have no moral objections with it, no.

. . .

THE COURT: Let me just ask you this, Mr. Burse. You've indicated -- well, let me just put it this way.

Do you feel that if I instruct you as to what the law is and how you are to use the evidence, particularly, there will be a separate phase if we get to that

> point -- well, the question that I have: do you **feel** that you would be able to follow the law as I instruct you in determining whether or not you would recommend death as a possible penalty?
>
> PROSPECTIVE JUROR BURSE: Yes, Sir.
>
> THE COURT: Okay. All right. Thank you. Thank you very much. I'm going to give you that card.

(R124-6)

It would appear that the trial court was satisfied with Mr. Burse's responses because there was no further questioning. However, when the state challenged Burse for cause (R138), the court granted the challenge, stating:

> THE COURT: I think he did express doubts, and I believe that Mr. Seymour's impression of the law is correct so I will grant that.

(R139)

Prospective jurors cannot be barred from service because of their attitudes toward capital punishment "on 'any broader basis' than inability to follow the law or abide by their oaths." Adams v. Texas, 448 U.S. at 48 citing Witherspoon v. Illinois, 391 U.S. at **522,** n. 21. Excluding prospective jurors who acknowledge that they may be affected by the prospect of a death sentence or take their responsibilities with great seriousness violates the Sixth and Fourteenth Amendments. Adams v. Texas, 448 U.S. at **50-51.**

Prospective juror Burse clearly stated that he was not opposed to the death penalty. His sole reservation was that deciding whether to impose it would involve "some awful terrible consideration." (R123) He repeatedly stated that his discomfort with the death penalty would not affect his decision on guilt or innocence. (R100, 123) While acknowledging that he was "uncomfortable with the concept" of the death penalty because "I don't hunt and I don't kill" (R98), he never said that he would refuse to consider death as a possible sentence. In fact, he stated that his emotional involvement would not prevent him from voting for the death penalty. (R123)

When the prosecutor challenged prospective juror Burse, he equated "personal difficulty" in voting for death with substantial impairment in ability to follow the law. (R138) However, the State is not entitled to excuse all jurors for cause who cannot vote for death at the drop of a hat. Mr. Burse never indicated in any manner that he would disregard his oath or fail to follow the court's instructions on the law. Indeed, he told the trial judge that he could follow the law in accordance with the court's instructions. (R126)

Excusal for cause of prospective juror Burse in the case at bar is directly comparable to the prospective jurors erroneously excused in Adams v. Texas, supra. The Adams jurors were excluded because they stated that the possibility of a death sentence would affect their deliberations. As with prospective juror Burse at bar, there was no evidence that the Adams jurors

would disregard their oaths or fail to follow the law. Accordingly, the sentence of death imposed upon Appellant Trotter cannot stand because he was deprived of an impartial jury under the Sixth and Fourteenth Amendments, United States Constitution and Article I, Sections 9 and 16, Florida Constitution.

ISSUE V

EVIDENCE THAT TROTTER WAS ON COMMUNITY CONTROL AT THE TIME OF THE OFFENSE SHOULD NOT HAVE BEEN PRESENTED DURING THE PENALTY PROCEEDING AND SHOULD NOT HAVE BEEN CONSIDERED BY THE SENTENCING JUDGE AS AN AGGRAVATING CIRCUMSTANCE.

At the penalty proceeding before the jury, the State put on Ken Botbyl as a witness. (R1900-5) He testified that he was a Probation and Parole Officer assigned to a community control caseload. (R1900) He identified Trotter as being on community control under his supervision on June 16, 1986. (R1903-4)

In his closing argument, the prosecutor contended that community control is "an equivalent to prison." (R2177) He further argued, "[i]t is a prison sentence and that's an aggravating factor." (R2177) The judge instructed the jury on four aggravating circumstances including:

> The crime for which Melvin Trotter is to be sentenced was committed while he was under sentence of imprisonment.

(R2204)

The written findings of the judge include under sentence of imprisonment as one of the four aggravating circumstances proved. (R2863, see Appendix) Trotter's community control status was the sole basis for this aggravator.

In Peek v. State, 395 So.2d 492 (Fla. 1981), this Court held that being on probation does not establish the "person under

sentence of imprisonment", § 921.141(5)(a), aggravating factor. The Peek court defined "person under sentence of imprisonment" as including:

> (a) persons incarcerated under a sentence for a specific or indeterminate term of years, (b) persons incarcerated under an order of probation, (c) persons under either (a) or (b) who have escaped from incarceration, and (d) persons who are under sentences for a specific or indeterminate term of years and who have been placed on parole.

395 So.2d at 499.

The Peek holding has been subsequently reaffirmed in Bolender v. State, 422 So.2d 833 (Fla. 1982); Ferauson v. State, 417 So.2d 631 (Fla. 1982) and Ferauson v. State, 417 So.2d 639 (Fla. 1982).

Of course, community control did not exist as a sentencing alternative when Peek was decided. But the facts are clear that Trotter was not incarcerated at the time of the offense; he was not an escapee from incarceration; nor had he been placed on parole while under sentence.

When the legislature established community control as a sentencing alternative, it is evident that community control was designed as a type of probation which would be more restrictive. Both probation and community control are encompassed within Chapter 948, Florida Statutes (1985). Section 948.001(1), Florida Statutes (1985) defines "community control" as:

> a form of intensive, supervised custody in the community, including surveillance on weekends and holidays, administered by officers

> with restricted caseloads. Community control is an individualited program in which the freedom of an offender is restricted within the community, home, or non-institutional residential placement and specific sanctions are imposed and enforced.

In directing the Department of Corrections to develop a community control program, Section 948.10(1), Florida Statutes (1985) states:

> The program shall offer the courts and the Parole and Probation Commission an alternative, community-based method to punish an offender in lieu of incarceration when the offender is a member of one of the following target groups:
>
> . . .
>
> (c) individuals found guilty of felonies, who, due to their criminal backgrounds or the seriousness of the offenses, would not be placed on reuular Probation. (e.s.)

Elsewhere in Chapter 948, community control is referred to as "this sentencing alternative to incarceration." Section 948.01(4), Florida Statutes (1985). It is also provided that the court may impose a "period of incarceration as a condition of probation or community control." Section 948.03(4), Florida Statutes (1985).

Such statutory language indicates that community control is not a "sentence of imprisonment" but rather an alternative to imprisonment like probation. This Court should hold that the aggravating circumstance of Section 921.141(5)(a)

is inapplicable where the defendant to be sentenced was on either probation or community control at the time of the offense.

Further support for this position is contained the recent amendment to Fla. R. Crim. P. 3.790. This Rule was amended, effective January 1, 1989 to include community control within the scope of the rule regarding probation. In re Amendment to Florida Rules of Criminal Procedure, 533 So.2d 1147 (Fla. 1988).

Because the penalty phase jury in the case at bar heard testimony and argument about Trotter's status on community control, they likely considered this non-statutory aggravating factor in determining their sentencing recommendation. The penalty verdict is consequently tainted.

In Lona V. State, 529 So.2d 286 (Fla. 1988), this Court reversed for a new penalty proceeding where the jury heard evidence of a prior murder conviction which was later reversed on appeal. Similarly, in Trawick V. State, 473 So.2d 1235 (Fla. 1985), the jury heard evidence and argument from the State which was irrelevant to any statutory aggravating circumstance. A new penalty proceeding before a new jury was ordered. In accordance with these decisions, Trotter's sentence of death should be vacated and this case remanded to circuit court for a new penalty trial.

ISSUE VI

THE TRIAL JUDGE ERRED BY RULING APPELLANT'S ARTWORK INADMISSIBLE AS PENALTY PHASE EVIDENCE. HIS SUBSEQUENT REVERSAL OF THIS RULING AFTER JURY DELIBERATIONS HAD BEGUN DID NOT RECTIFY THE ERROR.

When Melvin Trotter testified on his own behalf during penalty phase, he said that he spent some of his time in jail doing drawings. (R1922). He brought some with him to court which were marked as defense composite exhibit 9. (R1922, 3090) Defense counsel moved to introduce the drawings into evidence but the trial judge sustained the state's objection that the artwork was "calculated to arouse the passions and sympathy of the jury." (R1923)

When Trotter finished testifying, defense counsel renewed his motion to admit the drawings as evidence of artistic ability which was a relevant non-statutory mitigating factor. (R1947-8) The court adhered to his ruling. (R1948)

After the jury had retired for deliberations (R2210), the jury sent a question to the judge asking whether they could see Trotter's drawings. (R2211) At this point, the court reversed his ruling and acknowledged that artwork might be relevant mitigating evidence. (R2211) He allowed the drawings to go to the jury and, over defense objection, sent in all of the evidence from the guilt or innocence phase as well. (R2212-3) Defense counsel noted that he had been unable to use Trotter's drawings in his closing argument. (R2212)

It is clear that a defendant's artistic ability is relevant non-statutory mitigating evidence. The drawings proffered by Trotter reflect upon his character and potential. They also are relevant to show that if given a life sentence, he could make productive use of his time in prison.

In Brown v. State, 526 So.2d 903 (Fla. 1988), this Court wrote:

> Mitigating evidence is not limited to the facts surrounding the crime but can be anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant.

526 So.2d at 908.

Had Van Gogh committed the crime at bar (instead of cutting off his own ear) a reasonable jury should conclude that a life sentence would be the appropriate punishment. The Eighth and Fourteenth Amendments, United States Constitution require that a capital sentencer consider any evidence with mitigating potential which a defendant wishes to present. See Hitchcock v. Dugger, 481 U.S. ___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986); Lockett v. Ohio, 438 U.S. 586 (1978).

The remaining question is whether the trial judge's belated admission of Trotter's drawings cured the error. This, of course, allowed the jury to see the artwork before making their recommendation. The defense, however, was still prejudiced because Trotter could have further testified about his artwork if

the drawings had been admitted while he was on the stand. And, as defense counsel noted, he was not able to make use of the drawings in his closing argument because they had been excluded from evidence. (R2212)

The United States Supreme Court in Herring v. New York, 422 U.S. 853 (1975) held that the Sixth and Fourteenth Amendments, United States Constitution, require a state court to permit a defendant or his counsel to present a closing argument. The Herring court wrote:

> In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.

422 U.S. at 862.

Florida courts have reversed convictions where the trial court made unreasonable time limitations on defense counsel's closing argument. See e.g. Foster v. State, 464 So.2d 1214 (Fla. 3d DCA 1984). Certainly in a capital case the importance of defense counsel's penalty phase argument cannot be underestimated.

Had the trial judge admitted Trotter's drawings into evidence but restricted defense counsel from mentioning them in closing argument, there would have been an unreasonable interference with Trotter's right to assistance of counsel. The effect of what occurred at bar is identical. Counsel was unable to fulfill his role of aiding the jury evaluate the evidence. Accordingly, the sentence of death cannot stand because it was

imposed following a sentencing proceeding which violated the Sixth, Eighth and Fourteenth Amendments. This case should be remanded for a new penalty proceeding before a new jury.

ISSUE VII

THE TRIAL COURT'S INSTRUCTION ON THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE WAS UNCONSTITUTIONALLY VAGUE BECAUSE IT DID NOT INFORM THE PENALTY JURY OF THE LIMITING CONSTRUCTION GIVEN TO THIS AGGRAVATING CIRCUMSTANCE.

In Proffitt v. Florida, 428 U.S. 242 (1976), the United States Supreme Court held the Florida death penalty statute constitutional. With regard to Proffitt's argument that the "especially heinous, atrocious or cruel" aggravating circumstance was vague and overbroad the Court noted that

> the eighth statutory provision [HAC] is directed only at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.' 428 U.S. at 255 quoting from State v. Dixon, 283 So.2d at 9 (Fla. 1973).

The Proffitt court concluded that this construction of the especially heinous, atrocious or cruel aggravating circumstance provided adequate guidance "to those charged with the duty of recommending or imposing sentences in capital cases." 428 U.S. at 256 (e.s.).

The problem in the case at bar is that the jury was never informed of this limiting construction. They were instructed in the language of the standard instruction:

> The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

(R2204, 2835)

As this Court has observed:

> It is apparent that all killings are heinous - the members of our society have deemed the intentional and unjustifiable taking of a human life to be nothing less. However, the legislature intended to authorize the death penalty for the crime which is "especially heinous" - "the conscienceless or pitiless crime which is unnecessarily torturous to the victim."

Lewis v. State, 377 So.2d 640 at 646 (Fla. 1979).

More recently, the United States Supreme Court examined the same statutory language (especially heinous, atrocious or cruel) in the context of the Oklahoma death penalty statute. The Court held the Oklahoma aggravating circumstance unconstitutionally vague under the Eighth Amendment, United States Constitution. Maynard v. Cartwriaht, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). The Cartwriuht court reasoned that the words "especially heinous, atrocious or cruel" gave the sentencing jury no guidance as to which first degree murders met these criteria. Consequently, the sentencer's discretion was not channeled to avoid the risk of arbitrary imposition of the death penalty.

Some distinctions between the Oklahoma capital proceedings and those in Florida must be acknowledged. In Oklahoma, capital juries are the sentencer and they must make written findings of which aggravating factors they found. In Florida, on the other hand, the jury returns an advisory recommendation without any findings with regard to the

aggravating factors weighed in the recommendation. We simply do not know how many members of Trotter's jury gave weight to the especially heinous, atrocious or cruel aggravating circumstance.

Nevertheless, Trotter's death sentence is unreliable under the Eighth Amendment, United States Constitution. Although a Florida jury's sentence recommendation is advisory rather than mandatory, it can be a "critical factor" in whether a death sentence is imposed. LaMadline v. State, 303 So.2d 17 at 20 (Fla. 1974). In Valle v. State, 502 So.2d 1225 (Fla. 1987), this Court held that a defendant must be allowed to present all relevant mitigating evidence to the jury in his effort to secure a life recommendation because of the great weight the sentence recommendation would be given. The corollary to this proposition is that the jury must not be misled into thinking that an aggravating circumstance applies because that circumstance was not properly defined to them. In either case, there is a likelihood of an erroneous death recommendation.

Accordingly, Trotter's sentence of death should be vacated and a new capital sentencing proceeding before a new jury ordered by this Court.

ISSUE VIII

THE SENTENCING JUDGE ERRED BY FINDING THE § 921.141(5)(h) AGGRAVATING FACTOR BECAUSE THE FACT THAT THE VICTIM WAS KILLED IN THE STORE SHE OPERATED IS IRRELEVANT AND THE CRIME WAS NOT SET APART FROM THE NORM OF CAPITAL FELONIES.

At the sentencing hearing when Acting Circuit Judge Dakan pronounced a sentence of death, he explained his weighing process and concluded:

> I would point out that she was murdered in her own store, which she had run for a great number of years which I think is similar to those cases which deal with the killing in one's own home. I have considered these factors.
>
> I have considered the aggravating factors and it is the court's findings that the aggravating factors do outweigh the mitigating factors.

(R2961)

The judge followed up this pronouncement in his written finding that the crime was "especially wicked, evil, atrocious and cruel":

> Vergie Langford was killed in the store which she owned and ran for many years. As with every proprietor, her store was no doubt her second home.

(R2863, see Appendix)

In some cases, this Court has considered evidence that the victim was killed at home as relevant to the heinous, atrocious or cruel aggravating circumstance. Eg. Troedel v.

State, 462 So.2d 392 (Fla. 1984); Breedlove v. State, 413 So.2d 1 (Fla.) cert. denied, 459 U.S. 882 (1982). In Breedlove, this Court explained:

> While pain and suffering alone might not make this murder heinous, atrocious, and cruel, the attack occurred while the victim lay asleep in his bed. This is far different from the norm of capital felonies and sets this crime apart from murder committed in, for example, a street, a store, or other public place.

413 So.2d at 9.

It should be recognized that this Court has contradicted this holding as well:

> The finding that the victim was murdered in his own home offers no support for the [HAC] finding. Simmons v. State, 419 So.2d 316 at 319 (Fla. 1982).

Regardless of whether being killed in one's own home is relevant to the heinous, atrocious or cruel aggravating factor, it is clear that being killed in a store is not. The Breedlove court's rationale was based upon a victim's greater expectation of privacy and security in the home as opposed to public places. Being a proprietor of a store infers an invitation to the public at large to enter the store. Unfortunately, there is substantial risk involved in tending a store as this Court is well aware from the number of homicides where convenience store clerks have been victimized.

The Eighth Amendment, United States Constitution would bar any capital sentencing distinction between killing a proprietor of a store as opposed to an employed clerk. Booth v. Maryland, 482 U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987); Jackson v. State, 498 So.2d 906 (Fla. 1986). The same is true with regard to the sentencing judge's observation that the victim was seventy years old and could have been subdued "with little effort." Age of the victim is both an irrelevant and unconstitutional consideration in determining whether death is the appropriate sentence.

Although the victim's prolonged survival and suffering from the knife wounds cannot be discounted, this aspect alone is not enough to make a homicide especially heinous, atrocious or cruel. Teffeteller v. State, 439 So.2d 840 (Fla. 1983); Demps v. State, 395 So.2d 501 (Fla. 1981). The stabbing of Vergie Langford was a typical knifing with the possible distinction that one wound was *so* large that it allowed the victim's insides to protrude. However, there is no evidence that Trotter intended this result; indeed, Dr. Ganey testified that the wound could have been caused by the victim's body twisting in a reaction to being stabbed. (R1424)

This Court has repeatedly emphasized that the extremely heinous, atrocious or cruel aggravating circumstance applies only to killings "accompanied by such additional acts as to set the crime apart from the norm of capital felonies." State v. Dixon, 283 So.2d 1 at 9 (Fla. 1973). Accord, Tedder v. State,

322 So.2d 908 (Fla. 1975); Lewis v. State, 377 So.2d 640 (Fla. 1979). In the case at bar, there were no additional acts apart from the multiple stab wounds. Committing a homicide with a knife does not deviate from the norm of capital felonies because a large percentage of murders are committed with a knife.1

Recently, the Utah Supreme Court considered the applicability of the Utah equivalent to Florida's § 921.141(5)(h) aggravating circumstance where the facts showed seven stab wounds along with scratches, scrapes and bruises. State v. Tuttle, Case No. 20068 (Utah April 12, 1989) [45 Cr L Rptr 20871. The court wrote:

> The record contains no evidence that Tuttle intended to do or in fact did anything but kill his victim by stabbing her. Even though this method is gory and distasteful, there is absolutely no evidence that Tuttle had a quicker or less painful method available to him or that he was expert at such matters and intentionally refrained from administering one wound that would have caused instantaneous death in favor of a number of wounds that would prolong the victim's life and suffering. On the facts, there is nothing that could support a finding that this killing falls into the narrow Godfrey[2]-Wood[3] category and is sufficiently distinguishable from other intentional killings to make

---

1 For example, in 1983 there were 1203 murders committed in Florida. 220 of these utilized a knife. 1984 Florida Statistical Abstract, University Presses of Florida, Gainesville 1984, p. 542.

2 Godfrey v. Georgia, 446 U.S. 420 (1980)

3 State v. Wood, 648 P.2d 71 (Utah 1981)

> its perpetrator eligible for the death penalty. For these reasons, we find the application of section 76-5-202(1)(g) to the facts of this case contrary to the intention of the statute, as we construe it in light of Godfrey and Wood.

Slip opinion at p. 36.

This Court should apply the same reasoning to the parallel facts in the homicide at bar and disapprove the sentencing judge's finding of the heinous, atrocious or cruel aggravating factor.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Melvin Trotter, appellant, respectfully requests the following relief:

As to Issues I, II and 111, remand for a new trial.

As to Issues IV, V, VI, and VII, remand for a new penalty proceeding before a new jury.

As to Issue VIII, remand for reweighing by the sentencing judge.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
FLORIDA BAR NUMBER 0143265

Douglas S. Connor
DOUGLAS S. CONNOR
Assistant Public Defender

Public Defender's Office
Tenth Judicial Circuit
Polk County Courthouse
P. O. Box 9000
Drawer PD
Bartow, FL 33830
(813) 534-4200