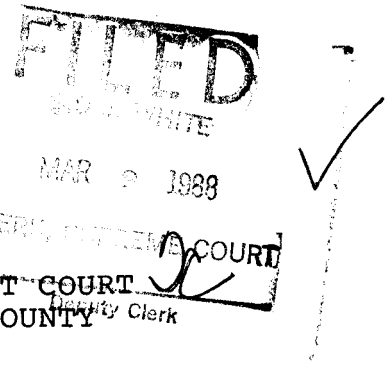
IN THE SUPREME COURT OF FLORIDA

ROGER LEE CHERRY,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

CASE NO. 71,341



APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER
112 Orange Avenue, Suite A
Daytona Beach, Florida 32014
Phone: 904/252-3367

ATTORNEY FOR APPELLANT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

The state charged Roger Lee Cherry by Indictment with burglary of a dwelling with an assault [1], grand theft second-degree [2], and two counts of first-degree murder [3] (R1070-1071) [4]. The matter proceeded to trial in the Circuit Court for Volusia County, Florida, the Honorable Uriel Blount, Jr. presiding. The jury found Cherry guilty of all counts as charged (1029-1031,1235-1238).

The penalty proceeding occurred the next day. The state presented no additional evidence. The defense introduced only a single recent psychiatric evaluation of Roger Cherry

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1/ Violation of Section 810.02(2)(a) Florida Statutes (1985)
2/ Violation of Section 812.014 Florida Statutes (1985)
3/ Violations of Section 782.04(1)(a) Florida Statutes (1985)
4/ (R) refers to the record on appeal of the instant case.

(R1166-1169). At the state's request, the court instructed the jury on four aggravating circumstances, those being an especially heinous, atrocious or cruel killing [5], a murder committed in the course of a burglary [6], a prior conviction of a violent felony [7], and a murder committed for pecuniary gain [8] (R1033-1034,1037). The court later found each of these aggravating circumstances to exist (R1241-1244). At defense counsel's request the jury received instructions on the mitigating factors of extreme mental or emotional disturbance [9], lack of capacity to appreciate criminality of conduct [10], a murder committed while under duress [11], and any other aspect of Roger Cherry's character or record (R1034,1037). Following deliberations, the jury recommended, by 7-5 and 9-3 margins, that sentences of death be imposed for the first-degree felony murders of Leonard and Esther Wayne (R1061-1063,1239-1240).

Judge Blount adjudicated Cherry guilty of burglary with an assault, grand theft second-degree, and two counts of first-degree felony murder (R1253) and sentenced Cherry (without the benefit of a sentencing guidelines scoresheet) to a life term of imprisonment on the burglary with an assault conviction, to a concurrent five year term of imprisonment on the grand theft conviction, and to two death sentences on the murder convictions

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5/ Section 921.141(5)(h), Florida Statutes (1985)
6/ Section 921.141(5)(d), Florida Statutes (1985)
7/ Section 921.141(5)(b), Florida Statutes (1985)
8/ Section 921.141(5)(f), Florida Statutes (1985)
9/ Section 921.141(6)(b), Florida Statutes (1985)
10/ Section 921.141(6)(f), Florida Statutes (1985)
11/ Section 921.141(6)(e), Florida Statutes (1985)

(R1255-1258). The court found nothing in mitigation (R1241-1244, Appendix A).

A timely notice of appeal was filed October 21, 1987 (R1262) and the Office of the Public Defender was appointed to represent Cherry for the purpose of appeal (R1267). This brief follows.

STATEMENT OF THE FACTS

On June 28, 1986 Jack Wayne and wife went to visit Jack's 79 year old mother and 80 year old father. The parents lived by themselves in a house across from the National Guard Armory in Deland (R297-298). The Waynes arrived around noon (R300). Jack Wayne noticed that his parents' Fairmont automobile was gone, which was not unusual (R301). Seeing that a door had been left open, Jack Wayne entered the house and saw that the television and a lamp were on (R304). Going into the bedroom, he found both parents lying dead on the floor approximately two feet apart (R308).

Esther Wayne had received several blows to the head and neck area (R391-392). She had a fracture of the left temporal bone (R397). The cause of her death was subdural hematoma due to the head injuries (R396-398). The blows were consistent with being inflicted by a fist (R413). When asked how long Mrs. Wayne would have survived these injuries, the medical examiner testified, "It would appear that she didn't survive more than a matter of minutes, maybe ten, fifteen minutes." (R399). The medical examiner determined that Leonard Wayne died from heart disease and opined without objection that the heart failure occurred when Wayne was personally confronted by an assailant (R407-409). The only trauma to Leonard Wayne's body was on the right foot which had recent bruising and an abrasion where the superficial layers of skin had been rubbed away (R402).

The police responded immediately when summoned. It was learned that $1,300 in cash and a loaded pistol remained in the

house (R316,369). Mr. Wayne's trousers were on a chair in the bedroom; the pockets had been turned inside out (R505). The police were unable to find Mr. Wayne's wallet (R505). The telephone wire had been cut at the junction box on the outside of the house (R497-496). Apparently, whoever cut the wire also cut himself because a bloody piece of paper had been discarded by the junction box and droplets of blood were found on the walkway leading to the porch (R498-501). A screen and three jalousie-type window panes had been removed at the porch, and police discovered three such window panes in the bushes near the house; there was blood on at least one of the window panes (R346,347,498-499). A police helicopter conducted a search of the area and the Wayne's Fairmont was found in a wooded area approximately one mile from the Wayne residence (R328-330).

A Sun Bank is located three city blocks from the Wayne residence (R519). After receiving an alert concerning the Wayne's account, an employee of the bank notified the police that two of the Waynes' bank cards had been retained by the bank's automatic teller machine at 1:58 o'clock a.m. on June 28, 1986 (R474-475,481). The machine automatically captures a card when the operator fails to successfully enter the secret code after three attempts (R471). Six unsuccessful attempts were made to use the two cards from 1:55 a.m. to 2:00 a.m. (R481).

The police developed Roger Cherry as a suspect primarily through Lorraine Neloms, who was Cherry's 24-year-old girlfriend (R426,511). Ms. Neloms lived with Cherry at 408 S. Garfield in Deland (R427). Their apartment was one city block

from the Wayne residence (R519) and five blocks from the wooded area where the Waynes' car was found (R521). The entire area is interlaced with foot paths (R521).

Ms. Neloms testified at trial that she and Cherry went to a friend's house on June 27, 1986 and that they returned home around 11:30 p.m. (R428-430). After talking for a while Cherry left, stating that he was going by the armory because he needed some money (R431-432). Neloms slept until Cherry returned around an hour later (R432). Cherry was carrying some rifles and he had a cut thumb (R432). He explained to Neloms that he cut his thumb when cutting a line (R433). Neloms claimed that Cherry displayed a brown wallet and a driver's license belonging to an individual named "Wayne" (R434). Cherry also showed Neloms some bank cards for Sun Bank (R435). After staying at the house for ten minutes, Cherry again left, stating that he was going to the bank (R435-436). He returned around fifteen minutes later and said that the cards had stuck in the machine and that he was going to ditch the car (R435-437).

Ms. Neloms testified that Cherry told her the following:

> Q: (Prosecutor) That night whenever Roger came in with the guns and the wallet, did you ask him what had happened or where he had been?
>
> A: (Ms. Neloms) Yeah, I asked him where he had been.
>
> Q: And what did he tell you?
>
> A: He told me he had been by the armory. He told me he had went into this house by the armory.

> Q. Did he tell you what had happened inside the house?
>
> A. Yeah. When he went in there, the people was awoke and saw him and the lady tried to fight him or something and he hit her and pushed the man and he grabbed his chest and he found their car keys and took their car.

(R437).

The next day Neloms and Cherry drove by the area where the Fairmont had been abandoned and they saw police all around the car (R437). Later that evening while watching the news Cherry and Neloms discovered that the people at the house had been killed (R438-439). She asked Cherry if he had killed the people and he said he never killed anyone (R439). Neloms was with Cherry when he thereafter threw out a pair of shoes and a pocket knife as they drove to Neloms' mother's house (R439-440). The police recovered a pair of shoes and a knife along the route Neloms claimed to have taken with Cherry (R440-441). Cherry was arrested in his apartment while watching television (R441). At the time of his arrest, Cherry's right thumb was cut (R442, State's Exhibit 31). At trial, Cherry explained that he had cut his thumb while beheading a fish (R847-850).

The police found a Negroid hair amid sweepings taken from the Wayne residence; the hair was inconsistent with Cherry's hair (R802-803). The police compared Cherry's blood with blood samples that had been recovered from the Wayne's residence, automobile and bank cards. The expert serologist who testified at trial stated that the most that could be determined insofar as the bank cards was that human blood was present on one (R635).

Cherry's blood was consistent with the blood found on the paper recovered by the cut phone wire (R641-642). The blood on the jalousie window pane was consistent with Cherry's blood (R644-645); that blood was also consistent with Esther Wayne's blood (R657-658). Blood found on a towel recovered from the front seat of the Wayne's Fairmont (R568) was consistent with Cherry's blood and inconsistent with any of the victims' blood (R647).

A latent fingerprint expert identified a left thumbprint of Cherry on one of the jalousie window panes found in the yard (R693). Another left thumbprint identified as Cherry's was on a metal tray found in the trunk of the Wayne's Fairmont (R689,692). Cherry's palmprint was found on the doorjamb of the bedroom wherein the Wayne's were found (R680,687). Cherry explained at trial that the Waynes had hired him to mow their lawn and do their windows approximately a week prior to their death (R857-860). He testified that he was never inside the Wayne's house (R873). He denied killing the Waynes (R877). Cherry believes that Ronnie Chamberlain told Neloms what to say (R872). Chamberlain is Neloms' current boyfriend, who was seeing Neloms when she was supposed to have been going with Cherry (R853).

Cherry testified that on the night the Waynes were killed he left Neloms around 11:30 p.m. and walked to Spring Hill to participate in a crap game. He won some money and walked back home (R839-843).

SUMMARY OF ARGUMENTS

POINT I: The trial judge excluded the testimony of a defense witness because the witness was disclosed late to the state during the trial. The cursory inquiry conducted by the court into the late disclosure revealed that the identity of the witness was learned by defense counsel on the very morning that witness was to have testified. The witness would have provided relevant information bearing on the credibility of Lorraine Neloms, the key witness of the state. The exclusion of that testimony was too extreme a sanction in a death case where other remedies were available. The ruling violated the Sixth and Fourteenth Amendments to the United States Constitution. The convictions must be reversed and the matter remanded for retrial.

POINT II: Roger Cherry was sentenced for two non-capital offenses without the benefit of a guidelines scoresheet. Compliance with Fla.R.Crim.P. 3.701 is mandatory for all offenses which are not capital felonies. Burglary and theft are not capital felonies. The life and five year sentences imposed for these offenses must accordingly be reversed and the matter remanded for resentencing on those offenses within the guidelines.

POINT III: The trial court found as separate aggravating circumstances that the murders were committed during the commission of a felony (burglary) and that the murders were committed for pecuniary gain. Pursuant to Mills v. State, infra, such double consideration of the same aspect of the crime is improper, in

that the intent to commit a theft, necessary to support the burglary conviction, is identical to the intent necessary to establish a murder committed for pecuniary gain. Accordingly, because the trial judge erroneously twice considered the same aspect of the murder to recommend and impose death sentences, the sentences must be reversed and sentences of life imprisonment imposed pursuant to the argument set forth in Point V.

POINT IV: The trial court found that both murders were especially heinous, atrocious or cruel. There are no additional circumstances that set this case apart from the norm. The evidence of what transpired is wholly circumstantial and entirely consistent with a theory not involving especially heinous, atrocious or cruel murders. The trial court failed to articulate any justification for this aggravating circumstance and in fact again erroneously relied on an aspect of the crime already contained in a prior finding. Because the trial court improperly considered this non-applicable aggravating circumstance when imposing the sentences, the death sentences must be reversed and the matter remanded for imposition of life sentences as set forth in Point V.

POINT V: Only two statutory aggravating circumstances exist in this case. Both are marginal, in that one will necessarily exist in every felony murder (murder during commission of a felony) and the other (prior conviction for violent felony, robbery) is not in this case sufficiently detailed to allow meaningful weighing.

The circumstances of the crime are such that the death penalty is unwarranted. From a proportionate standpoint, this case just does not qualify as a death case, as can be demonstrated by comparison to existing precedent such as Norris v. State, infra. The death sentences should be vacated and the matter remanded with directions that Cherry be resentenced to life imprisonment because the ultimate sanction does not comport with the facts of this case.

POINT VI: The death penalty in Florida is being arbitrarily and capriciously applied as a result of vague and inspecific statutory language. Decisions of this Court have not provided consistent results under the same or substantially similar facts. Moreover, this Court has applied the wrong standard of review concerning the presence of mitigating circumstances. Instead of consistently providing plenary review in all cases, this Court considers itself bound to an abuse of discretion standard when the jury recommends death. The death penalty statute in Florida, as applied, violates the Sixth, Eighth, and Fourteenth Amendments. The death sentences must be reversed and sentences of life imprisonment imposed.

POINT VII: It is unnecessary that a jury sentence a defendant. However, Due Process requires that the jury determine the defendant's guilt or innocence of the crime for the sentence imposed. If the verdict does not include elements that define an offense, an increased sentence for that offense cannot be imposed. It is

the prosecutor's burden to secure a jury verdict for all elements of the offense. Aggravating circumstances are limited solely to those specifically provided by statute. They actually define the crime of capital first-degree murder that is punishable by death. The aggravating circumstances thus become elements of the crime that must be found by the jury before the increased sanction of death may be lawfully imposed.

POINT VIII; As is affirmatively stated in the findings of fact, the trial court did not consider a psychiatric report that was introduced by the defense during the penalty phase of trial. That report contained relevant mitigating information, such as the fact that Cherry had an alcoholic mother, an abusive father, and a controlled substance habit. The Eighth and Fourteenth Amendments to the United States Constitution require a sentencer to consider all relevant mitigating evidence proffered by a defendant prior to imposition of the death penalty. Because the trial court affirmatively disclaimed considering such evidence, the death penalties must be reversed and the matter remanded for resentencing.

POINT IX: Convictions and sentences for burglary with an assault and felony murder constitute double jeopardy, in that the defendant is twice being sanctioned for the same conduct. The "assault" aspect of the burglary offense is an enhancement that increases the sanction from a third-degree felony to a first-degree felony punishable by life imprisonment. That same assault which

resulted in the death of another human being during the commission of a burglary is the basis for first-degree felony murder. The legislature did not intend such multiple punishments in this situation, and in any event the multiple sanctions violate the Double Jeopardy clause of the Florida Constitution and the Fifth Amendment to the United States Constitution.

POINT I

THE TRIAL COURT DENIED CHERRY DUE PROCESS AND A FAIR TRIAL BY PREVENTING A DEFENSE WITNESS FROM TESTIFYING DUE TO LATE DISCLOSURE OF THE WITNESS BY THE DEFENSE.

Lorraine Neloms was perhaps the key witness for the state. She testified that on the night of the murder Cherry left their apartment and returned around an hour later (R431-432). Neloms testified that when Cherry returned he displayed a brown wallet, and that inside the wallet was a license (R434). When asked by the prosecutor what she could observe about the license Neloms stated, "It was an old man and I saw the last name was Wayne." (R434-435). On cross-examination Neloms stated "He [Cherry] opened up the wallet and I saw the driver's license." (R450). Jack Wayne testified that his father did not drive due to his poor eyesight (R302), but claimed that his father had a driver's license (R313).

During presentation of its case defense counsel called as a defense witness Mr. Laughter. After the witness was sworn the state interposed an objection because the witness had not been listed by the defense on the witness list (R813-814). Defense counsel explained that the results of a late investigation had been received by him just that morning (R814). Counsel stated, "It's my understanding that [Mr. Laughter] will testify not as to whether or not Mr. Wayne possessed a driver's license card but rather that he did not have, in effect, a driver's license or at least that is my understanding at this time as communicated to me by Mr. Stephens." (R815)

When the court questioned the materiality of such testimony, defense counsel explained that Wayne's driver's license had not been reissued since 1970, and that such proof went to the credibility of Ms. Neloms' testimony about having viewed Cherry with Wayne's driver's license (R816). The court asked the state to respond and the prosecutor stated that he did not know if a full blown Richardson hearing for something of that nature was necessary. "We are caught a little flat footed because we never knew he existed. So, as a result, we have no way to disprove or prove anything about the license. It might not have been a license, it might have been some sort of I.D. card. If this Court is to permit this witness to testify, I would at least like a short break to be able to talk to him and find out what his testimony is going to be before he does testify." (R816). When defense counsel again apologized for the late disclosure, the court stated, "No apology is necessary, I'm not going to allow him to testify. Bring in the jury." (R816). This summary ruling was plain error and a denial of due process.

In Cooper v. State, 336 So.2d 1133 (Fla. 1976), this Court affirmed a murder conviction where the state presented the testimony of numerous witnesses, notwithstanding the state's failure to previously list them as witnesses.

> Once again the state may have violated a rule. But when that fact was discovered, the trial judge properly denied the request to exclude the witness or to recess the trial to enable defense counsel to obtain a ballistics expert of his own. Seeking a less drastic remedy, he recessed the court to allow the defense counsel to depose the expert before he was called to the

> stand. Since the defense should have been aware of the state's proposed proof by reason of information already known to it, the trial judge acted within the scope of his discretion to remedy whatever prejudice might have resulted from the state's breach.

Cooper at 1138. As this Court noted in Ziegler v. State, 402 So.2d 365 (Fla. 1981), "The failure to observe and comply with the rule of discovery should be remedied in a manner consistent with the seriousness of the breach." Id at 372.

A trial judge most certainly has great discretion in determining the appropriate sanctions that should attend a discovery violation, ranging from a short recess to exclusion of testimony, other than the defendant's own testimony. Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970). Such discretion can only properly be exercised, however, after a full and adequate inquiry into all of the surrounding circumstances.

> The trial court's discretion in attempting to remedy a discovery violation can be properly exercised only after the court has made an adequate inquiry into all of the circumstances surrounding such violation. This inquiry should cover, among other things, such questions as whether the violation is willful or inadvertent, trivial or substantial, and most importantly, what effect, if any, it has upon the ability of the aggrieved party to properly prepare for trial. Richardson v. State, 246 So.2d 771 (Fla. 1971).
>
> A Richardson inquiry is designed to ferret out procedural prejudice occasioned by a party's discovery violation. In ascertaining whether this type of prejudice exists in a given case, the trial court must first decide whether the discovery violation prevented the aggrieved party from properly preparing for trial, and then must determine the appropriate sanction to impose for such

> violation. Smith v. State, 372 So.2d 86 (Fla. 1979). In exercising its discretion, the court should inquire into the feasibility of rectifying any prejudice by some means short of excluding the witnesses. Adams v. State, 366 So.2d 1236 (Fla. 2d DCA 1979). In O'Brien v. State, 454 So.2d 675 (Fla. 5th DCA 1984), this court said:
>
> > Although it is within the judge's discretion to exclude witnesses that most extreme sanction should never be imposed except in the most extreme cases, such as when purposeful, prejudicial and with intent to thwart justice. . . . No sanction should be imposed, least of all the most extreme, without an adequate hearing to determine the cause and effect of the failure to disclose. [Citations omitted].
>
> Id at 677.

Peterson v. State, 465 So.2d 1349,1351 (Fla. 5th DCA 1985).

In Patterson v. State, 419 So.2d 1120 (Fla. 4th DCA 1982) the Fourth District Court of Appeal "underscore[d] the critical point that the exclusion of otherwise admissible evidence is an extremely severe remedy that must be reserved for the most compelling circumstances[.]" Id at 1123. There are no "compelling" circumstances present in the instant case. It appears from the cursory inquiry conducted by the trial court that the witness was only discovered by defense counsel the morning his name was provided to the prosecutor. The prosecutor asked for an opportunity to depose the witness prior to him testifying. The trial court instead summarily ruled that Mr. Laughter could not testify without ever determining how the testimony would prejudice the state's ability to refute it.

Mr. Laughter's testimony was relevant. The fact that Mr. Wayne had not been issued a driver's license since 1970 strongly undermines Neloms' claim that she observed Cherry with a driver's license belonging to Mr. Wayne. The jury should have been allowed to assess how much weight to give the testimony. The court's ruling unreasonably prevented the defendant from presenting relevant evidence in his own defense. The exclusion of relevant defense testimony violated the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Accordingly, the convictions must be reversed and the matter remanded for retrial.

POINT II

THE TRIAL COURT ERRED BY IMPOSING SENTENCES FOR NON-CAPITAL OFFENSES WITHOUT COMPLYING WITH FLA.R.CRIM.P. 3.701.

In pertinent part, Section 921.001(4)(a), Florida Statutes (1985) provides, "The guidelines shall be applied to all felonies, except capital felonies, committed on or after October 1, 1983." (emphasis added). Only capital offenses are excepted from the mandatory requirements of the sentencing guidelines. Cherry was found guilty of burglary with an assault, second-degree grand theft, and two counts of first-degree murder. The trial court, without the benefit of a guidelines scoresheet, sentenced Cherry to a life term of imprisonment on the burglary with an assault conviction and to a concurrent five year term of imprisonment on the theft conviction (R1066-1067,1255-1256). Guideline sentences are mandated by statute for these non-capital offenses. Fla.R.Crim.P. 3.701(d)(1). Because guideline sentences were not imposed for the burglary with an assault and theft offenses the sentences must be reversed and the matter remanded for resentencing in accordance with Florida's sentencing guidelines. State v. Jackson, 478 So.2d 1054 (Fla. 1985), overruled on other grounds, 513 So.2d 665 (Fla. 1987). See Stephens v. State, 513 So.2d 1275 (Fla. 3d DCA 1987).

POINT III

THE TRIAL COURT ERRED IN CONSIDERING AS SEPARATE AGGRAVATING CIRCUMSTANCES MURDER FOR PECUNIARY GAIN AND MURDER DURING COMMISSION OF A FELONY (BURGLARY).

This point is controlled by Mills v. State, 476 So.2d 172 (Fla. 1985), Brown v. State, 473 So.2d 1260 (Fla. 1985), Maggard v. State, 399 So.2d 973 (Fla. 1981), and Provence v. State, 337 So.2d 783 (Fla. 1976). The controlling legal analysis is set forth in Provence;

> The state argues the existence of two aggravating circumstances, that the murder occurred in the commission of the robbery [subsection (d)] and that the crime was committed for pecuniary gain [subsection (f)]. While we would agree that in some cases, such as where a larceny is committed in the course of a rape-murder, subsections (d) and (f) refer to separate analytical concepts and can validly be considered to constitute two circumstances, here, as in all robbery-murders, both subsections refer to the same aspect of the defendant's crime. Consequently, one who commits a capital crime in the course of a robbery will always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged. Mindful that our decision in death penalty cases must result from more than a simple summing of aggravating and mitigating circumstances (citation omitted), we believe that Provence's pecuniary motive at the time of the murder constitutes only one factor which we must consider in this case.

Provence at 786.

In Brown v. State, 473 So.2d 1260 (Fla. 1985) this Court found the rape-murder exception applicable in the context

of a burglary where the theft/pecuniary gain aspect was independently satisfied by proof that Brown stole and subsequently sold the murder victim's television set.

> The evidence showed, however, that the offense of burglary had a much broader significance than simply being the vehicle for a theft. The victim was beaten, raped and strangled. While she was tormented her home was ransacked. Thus the burglary had a broader purpose in the minds of the perpetrators than a burglary seen merely as an opportunity for theft.

Brown at 1267.

In Maggard v. State, 399 So.2d 973, 977 (Fla. 1981) this Court found it improper to double the aggravating circumstances of murder committed for pecuniary gain and commission of murder while engaged in committing a burglary on facts legally indistinguishable from those in the case sub judice. In Maggard a person was killed and his property (approximately $100) was taken. In the instant case two persons were killed and their property taken. There is no proof here whatsoever that the burglary was committed for any purpose other than for pecuniary gain. Lorraine Neloms testified:

> Q: (Prosecutor) Did [Roger Cherry] tell you where he was going?
>
> A. (Neloms) He said he was going by the armory.
>
> Q. And did he tell you why he was going by the armory?
>
> A. He said he needed some money.

(R431). The indictment alleged that the underlying intent for the burglary offense was to commit a theft and it also separately

alleged the commission of grand theft second-degree (R1070). Cherry was found guilty of grand theft (R1236). No other crimes were alleged to have been committed, and in fact the evidence at trial did not even suggest that crimes other than those charged had been committed. It is clear that the pecuniary motive for the burglary is identical to the pecuniary motive for the murder. This aspect of the crime under these facts is necessarily contained in both aggravating circumstance of murder committed for pecuniary gain and murder committed during the commission of a burglary.

Similarly, the facts of this case cannot be distinguished from those in Mills v. State, supra, where this Court squarely held, "The aggravating factors that the capital felony was committed in the course of a burglary and that it was committed for pecuniary gain are in this situation both based on the same aspect of the criminal episode and should therefore have been considered as a single aggravating circumstance (citations omitted)." Mills at 178. See also Blanco v. State, 452 So.2d 520,525 (Fla. 1984)("We find no error in using burglary and pecuniary gain as one factor.").

Because the same aggravating aspect of the murder has erroneously been twice considered by the trial judge in imposing the sentences of death, the death sentences must be reversed. The matter should be remanded for imposition of life sentences as set forth in Point V.

POINT IV

THE TRIAL COURT ERRED IN FINDING THE MURDERS TO BE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL, IN THAT THE FINDINGS ARE SPECULATIVE, DUPLICITOUS, AND OTHERWISE UNSUPPORTED BY THE EVIDENCE.

The trial court supported the findings of especially heinous, atrocious or cruel murders as follows:

> As to Count III and Count IV, the crimes for which the Defendant, ROGER LEE CHERRY, did kill and murder ESTHER REDDING WAYNE while engaged in the commission of Burglary by blunt trauma and that he did strike and beat the victim with his hands and kick her with his feet. As to Count III, the Defendant, ROGER LEE CHERRY, did kill and murder LEONARD HENDERSON WAYNE while engaged in the commission of Burglary by touching and striking which caused the heart failure of LEONARD HENDERSON WAYNE.

(R1242)(Appendix A). The above emphasized references to "murder . . . while engaged in the commission of Burglary. . . " are virtually identical to the wording set forth in the second finding of the trial court, ("crimes were committed while he was engaged in the commission of the crime of Burglary"), and as such that consideration constitutes another instance of impermissible doubling of a single aspect of the crime. The remainder of the finding utterly fails to justify the finding of an especially heinous, atrocious, or cruel killing.

"The fourth step required by Fla.Stat. §921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where

reason is required, and this is an important element added for the protection of the defendant." State v. Dixon, 283 So.2d 1,8 (Fla. 1973). Of the two deaths at issue, the killing of Esther Wayne is the most aggravated, in that she died as a result of actually being struck by Cherry whereas Leonard Wayne evidently died just from the confrontation. If the aggravating circumstance is unsupported for the killing of Esther Wayne, a fortiori it is improper for the killing of Leonard Wayne. There is a conspicuous absence of evidence showing what actually transpired. Resort to speculation is required, and if the evidence that exists supports a conclusion that the murder was not especially heinous, atrocious or cruel, then that conclusion is reasonable and the evidence as a matter of law is legally insufficient to support the aggravating circumstance.

In reference to Esther Wayne and aside from the "burglary" aspect of the crime, the trial court supported the finding of an especially heinous, atrocious or cruel killing with the following: "[Cherry] did strike and beat the victim with his hands and kick her with his feet." (R1242). There is insufficient record support to establish that Cherry intentionally or maliciously kicked Esther Wayne with his feet where but a single footprint found on the nightclothes of Mrs. Wayne, and it "was consistent with [her] being stepped upon." (R420). The incident occurred around midnight, probably in the dark, and Cherry reasonably could have stepped on Mrs. Wayne in an effort to flee after she had fallen. Section 921.141(5)(h), Fla.Stat. (1985)

applies only if "the capital felony was especially heinous, atrocious or cruel." Though not without exception (See Point VI, infra) Florida precedent strongly indicates that this aggravating circumstance does not exist here.

By way of example, in Herzog v. State, 439 So.2d 1372 (Fla. 1983), this Court held the evidence insufficient to prove beyond a reasonable doubt an especially heinous, atrocious, or cruel killing where the female victim had been induced by the defendant to take drugs, then gagged, placed on a bed and smothered with a pillow, and ultimately dragged into a living room where she was successfully strangled to death with a telephone cord. This Court stated:

> As to the manner by which death was imposed, we find that in this factual context the evidence is insufficient, standing alone, to justify the application of the section (5)(h) aggravating factor. We have previously stated that this factor is applicable "where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Tedder v. State, 322 So.2d 908, 910 n. 3 (Fla. 1975) (quoting State v. Dixon, 283 So.2d 1, 9 (Fla. 1974) cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

Herzog, supra at 1380 (emphasis added). It ill serves the continued viability of the death penalty in Florida if this aggravating circumstance can be upheld under an assumption that Cherry kicked Mrs. Wayne and that she was conscious when the blow was inflicted, and that those additional acts separate this crime

from a routine murder. Application of this aggravating circumstance for assumed facts that are otherwise reasonably explained injects artibrariness and capriciousness into imposition of the death penalty and violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The established facts just are not those of an especially heinous, atrocious, or cruel murder.

This case is very similar to Rembert v. State, 445 So.2d 337 (Fla. 1984). Each case concerns a felony murder. In Rembert, this Court disapproved a finding of an especially heinous, atrocious or cruel murder where a robber hit the victim in the head with a club as many as seven times. Though noting that the crime was "reprehensible", this Court held that the state failed to meet the test set forth in State v. Dixon, 283 So.2d 1 (Fla. 1973). In Magill v. State, 428 So.2d 649 (Fla. 1983), this Court explained the correct application of §921.141(5)(h) to be as follows:

> It is not merely the specific and narrow method in which a victim is killed which makes a murder heinous, atrocious, and cruel; rather, it is the entire set of circumstances surrounding the killing . . . . There can be no mechanical, litmus test established for determining whether this or any aggravating factor is applicable. Instead, the facts must be considered in light of prior cases addressing the issue and must be compared and contrasted therewith and weighed in light thereof. Then, if the killing and its attendant circumstances do not warrant the finding of heinousness, atrociousness, and cruelty, it will be stricken.

Magill at 651. There simply are no additional facts that have been established in the instant case to demonstrate beyond a reasonable doubt that this aggravating circumstance applies. The proven facts do not support the existence of this aggravating circumstance in light of prior case law. The fact that the victims were killed in their own home does not support the finding. See Simmons v. State, 419 So.2d 316, 318-319 (Fla. 1982)(". . . the finding that the victim was murdered in his own home offers no support for the finding"). The fact that Esther Wayne was struck in excess of five times with a fist does not establish the existence of the circumstance. See Rembert, supra (elderly robbery victim struck seven times in head with club not especially heinous, atrocious or cruel). Even assuming that Cherry kicked Mrs. Wayne intentionally, the evidence shows that she was probably unconscious at that time due to being struck in the temple.

The trial court's order does nothing more than refer to the method by which the death of Mrs. Wayne was inflicted. There is nothing cited in the order to separate the murder of Mrs. Wayne from the murder of any other victim, in that all deaths can be said to have been inflicted somehow. Five or six blows by a fist to the head and at most a single kick in a non-lethal area is undoubtedly a bad way to suffer injury, but it is not an especially heinous, atrocious or cruel way to be killed. More violence can routinely be viewed uncensored on the Saturday night fights or in boxing matches in the Olympics. This is not meant to suggest that a terrible death did not occur here; it is only

to point out that what appears to have occurred is an unintended consequence that could occur in any situation where one person strikes another. If that alone supports the finding of an especially heinous, atrocious or cruel killing, then this aggravating circumstance can be found in virtually every murder and it will no longer genuinely limit the class of persons eligible for the death penalty.

There is no point in belaboring the fact that the murder of Leonard Wayne was not especially heinous, atrocious or cruel. If it gets to the point that a murder caused "by touching and striking which cause[s] heart failure" of the victim is especially heinous, atrocious or cruel, then this aggravating circumstance will truly be available for virtually any murder. There just are no additional facts that have been proved to exist in this case that demonstrate beyond a reasonable doubt the applicability of this aggravating factor. Accordingly, the trial court erred in imposing the death penalty based on this aggravating circumstance. The death sentences must accordingly be vacated and sentences of life imprisonment imposed as set forth in Point V, infra.

POINT V

THE DEATH PENALTY IS DISPROPORTIONATE TO THE FACTS OF THIS CASE.

This case can perhaps best be described as a simple burglary gone bad. It is a textbook felony murder. Two aggravating circumstances exist. They are not particularly compelling. The deaths occurred during the commission of a burglary, but an obvious lack of premeditation to murder exists. Cherry has prior convictions for two "violent" felonies. Just how "violent" the prior felonies were, however, is unknown. On the spectrum of murder cases that this Court has reviewed, this case just does not qualify as one warranting imposition of the death penalty.

The aggravating circumstance of a murder committed during the commission of a felony will necessarily always be present in the felony murder context, as this Court recognized in White v. State, 403 So.2d 331, 335-336 (Fla. 1981). White involved a burglary where, during the course of the crime, eight people were taken hostage by White and his two co-defendants. When a mask fell from one of the co-defendants, a decision was made to kill the hostages. The co-defendants lined the hostages up and shot them execution-style in the back of the head; six died, two survived. On appeal White contended that the state is irrationally required to prove the existence of a statutory aggravating circumstances to obtain a death sentence for premeditated murder but not where it is committed without design during the commission of certain felonies.

> First, we note that we have already decided the reasonableness of taking into account as an aggravating circumstance the fact that the murder was committed during the commission of another serious felony. (citation omitted) Second, the defendant's argument overlooks the plurality opinion in Lockett v. Ohio, [438 U.S. 586 (1978)], which states that the Constitution neither forbids a state from enacting felony-murder statutes nor from making aiders and abettors equally responsible with their principals.
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> * * *
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> Furthermore, the fact that the mitigating circumstances listed in section 921.141(6), Florida Statutes (1977), are not exclusive removes much of the force of the defendant's equal protection argument. A defendant remains free to argue as a mitigating circumstance that he did not intend to kill the victim or that he did not act as the triggerman. The mitigating factors listed in the death statute merely indicate the principal factors to be considered. (citations omitted). Moreover, the mere existence of this aggravating circumstance does not mandate imposition of the death sentence. This Court has repeatedly emphasized that the death penalty statute does not contemplate a mere tabulation of x number of aggravating and y number of mitigating circumstances, but rather contemplates a reasoned weighing of those circumstances to determine whether the death sentence is appropriate. (citations omitted).

White at 336 (emphasis added). As set forth in White, supra, the fact that the instant deaths occurred during the course of a burglary cannot and does not automatically justify imposition of the death penalty. As this Court acknowledges, the fact that the defendant does not intend to kill is a valid non-statutory mitigating circumstance that clearly exists in this case as a

matter of law, notwithstanding the trial court's failure to recognize it as such.

The addition of one other statutory aggravating circumstance (conviction of a prior violent felony) does not push this case across the threshold that separates a death penalty case from one of life imprisonment. This Court has "conclude[d]" that, for the purpose of Section 921.141(5)(b), Florida Statutes (1977), robbery is as a matter of law a felony involving the use or threat of violence." Simmons v. State, 419 So.2d 316, 319 (Fla. 1982). Cherry has two uncontested convictions for robbery (R1213,1217). As pointed out in Simmons, however, there are many ways in which a robbery can be committed, ranging from a purse snatching to shooting the victim. Simmons at 319. We know nothing of the circumstances giving rise to the two robbery convictions in this case, because all that was presented by the state were judgments of conviction. The most that can be said is that the aggravating circumstance is present.

"There is no requirement that the state go behind the conviction to show the particulars of the conviction." Thompson v. State, 456 So.2d 444, 446 (Fla. 1984). However, this Court has also held that a prosecutor can explore in depth the details of a prior violent felony of which a defendant has been convicted. See Dufour v. State, 495 So.2d 154 (Fla. 1986). The justification for allowing this prejudicial material before the jury is to afford the sentencer with valid information to be used in a weighing process that is truly meaningful. See Herring v. State, 446 So.2d 1049 (Fla. 1984).

Again, all that exists here are judgments which indicate, at most, that the defendant has been convicted of two crimes involving violence to another person. Meaningful weighing of the true nature of this aggravating circumstance is precluded when it is established solely by a generic judgment. There are robberies, and then there are ROBBERIES! Compare Andre v. State, 431 So.2d 1042 (Fla. 5th DCA 1983)(defendant snatches money from another while discussing drug deal and runs) to Morales v. State, 451 So.2d 941 (Fla. 5th DCA 1984)(defendant smashes one woman in face to obtain car keys, then beats car owner when she tries to stop automobile from being taken) to Francois v. State, 407 So.2d 885 (Fla. 1982)(six robbery victims shot in back of head with shotgun, two more victims shot with pistol after all having been tied and placed on floor). If a mere judgment for a simple robbery may receive the same weight as a judgment accompanied by a detailed explanation of a needlessly violent robbery, then the use of this aggravating circumstance and/or this procedure affords the sentencer with too much discretion in sentencing a defendant to death. As such, this discretion results in arbitrary and capricious imposition of the death penalty and violates the Sixth, Eighth, and Fourteenth Amendments to the Unites States Constitution. The most that can be said in this instance is that Cherry has been convicted previously of two simple robberies. He is thus eligible for the death penalty. That is not the same as saying that the death penalty is in this situation appropriate.

At the very least, the instant death sentences should be vacated and the matter remanded for resentencing. Half of the

statutory aggravating circumstances were erroneously considered by the trial judge when the death sentence was imposed. Though the court found no mitigating circumstances to exist, he failed to recognize the total absence of premeditation as a valid mitigating factor and otherwise failed to consider the mitigating evidence contained in the psychiatric report of Doctor Bernard. See Point VII infra. More appropriate, however, is for this Court to reverse the death sentences and to remand with directions that Cherry be resentenced to life imprisonment without parole for 25 years. This follows, because a comparison of the facts of this case to the facts of other cases demonstrates that a sentence of life imprisonment is the appropriate sanction. (See chart, Appendix B).

The proof fails to establish which of the Waynes encountered Cherry first. The state proceeded on the theory that Esther Wayne went to bed while her husband watched television (R284-285). Assuming that to be true, it is as consistent with the evidence to also conclude that Leonard Wayne then unsuspectingly went into the darkened bedroom, perhaps to get his pipe-cleaning knife which was on the chair next to his trousers (R527,904), surprised Cherry, had a heart attack and fell to the floor, thereby awakening his wife, as it is to conclude that Mrs. Wayne awoke first and struggled with Cherry, causing her husband to come into the bedroom. Indeed, it would seem that had Mr. Wayne heard his wife fighting with an intruder, he would surely have first obtained the loaded pistol (R316,369) from on top of the

refrigerator before investigating, especially in light of his blindness, age, and vulnerable state of undress.

It is further not unreasonable to conclude that Mrs. Wayne then assaulted Cherry in defense of her husband. Cherry used no weapon, which is consistent both with the premise that Cherry did not anticipate a confrontation with the residents of the house and that the encounter was sudden. The fact that the telephone line was first cut to delay the call for police if he was discovered suggests that Cherry intended to flee if given the chance and wanted a head start. Mrs. Wayne was struck some five times with a fist (R416), but there was no testimony of "defensive wounds". It was dark; the incident occurred around midnight. Only a light and television set were on in the living room. There is no indication that Cherry could perceive any characteristics about the persons confronting him in the bedroom, or how badly they were injured when struck.

Mrs. Wayne suffered a blow to the head which fractured the temporal bone (R397). She died from subdural hematoma (internal bleeding in the skull), a cause of death that would not be obvious or apparent. It is doubtful that the entire encounter lasted more than thirty seconds. The evidence suggests that Cherry fled after striking Mrs. Wayne and did not realize that anyone had been killed. He repeatedly told Neloms that he never killed anyone, and his actions were such that he did not try to conceal from Neloms what he had done or where it had occurred until after they both learned by a television broadcast that the Waynes had died (R438).

Q. (Prosecutor) Was Roger there when you were watching the news?

A. (Neloms) Yes. Q. What did you say to Roger when you saw the news?

A. I asked him, was that the house? He said he didn't know. And then I asked him did he kill them and he said he didn't kill nobody.

Q. How did he act when he saw that on the news?

A. Real strange.

(R438-439).

The circumstances of this offense are themselves mitigating. Cherry was unarmed when he entered the residence, and no weapon was used in effecting the death of the Waynes. There is a conspicuous lack of premeditation which, as noted by this Court in White, is itself a non-statutory mitigating circumstance deserving weight. Mr. Wayne died without any force being applied by Cherry. Mrs. Wayne died as a result of force, to be sure, but the extent of that force was far from excessive and certainly insufficient to support a premeditated murder. Cf. Johnston v. State, 497 So.2d 863 (Fla. 1986)(84-year-old woman manually strangled and stabbed five times); Wright v. State, 473 So.2d 1277 (Fla. 1985)(75-year-old woman sexually battered and stabbed in face and neck); Brown v. State, 473 So.2d 1260 (Fla. 1985)(81-year-old semi-invalid woman beaten, raped and killed by asphyxiation); Quince v. State, 414 So.2d 185 (Fla. 1982)(severe beating, wounding, raping and manual strangulation of an 82-year-old frail woman). When contrasted against cases such as these and those set forth in Appendix B where the death penalty was

rejected as being disproportionate to the offense, it is evident that the instant case is lacking in truly aggravating circumstances.

Significantly, there are no cases that have been affirmed by this Court where the death penalty has been imposed on facts similar to those now at issue. Cases with facts which are perhaps closest to the facts of this case are Swan v. State, 322 So.2d 485 (Fla. 1975), and Norris v. State, 429 So.2d 688 (Fla. 1983). Swan involved the felony murder of a woman who was house-sitting a residence that Swan and a co-defendant had decided to burglarize. The victim was last seen alive by a friend who left her alone in the home for the night. The following morning two neighbors found the victim in a semi-conscious condition on the floor of the home, badly bruised and beaten. She had been gagged and her hands, neck and left foot had been tied so that any efforts she might have made to free herself could have choked her to death. She never fully regained consciousness and died in a hospital about a week later.

> The forty-nine year old female victim was five feet five inches tall and weighed one hundred seventy one pounds. Medical and post mortem examinations showed she had previously suffered a heart attack, stroke, arteriosclerosis and, apparently, diabetes. At the time of death, a week after her beating, she had a severe thrombosis which decreased blood flow to her brain, gangrene in her right foot, broken vertebrae near her skull, pneumonia, and septic shock."

Swan at 487.

In rejecting Swan's argument that the prior existing infirmities caused the death of the victim, this Court noted that

"criminals take their victims as they find them", and held "If the jury could have concluded reasonably that the wounds resulting from the beating administered by the Appellant and his co-defendant caused or materially contributed to the victim's death, it was proper to find Appellant guilty." Swan at 487. The first-degree murder conviction was affirmed. However, this Court reversed the death sentence, stating as follows:

> In imposing the death sentence sub judice, the trial court found that the aggravating circumstances outweighed those mitigating circumstances in that the crime was outrageously wicked, vile, atrocious, cruel and heinous. While we recognize that the statute leaves the sentencing to the trial court, there is a specific duty imposed on this Court to consider the record in order to assure that the punishment accorded a criminal will meet the standards prescribed in Furman v. Georgia, [408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)]. Having considered the total record, we are of the opinion that there were insufficient aggravating circumstances to justify the imposition of the death penalty. We think the court should have followed the jury's recommendation for punishment.

Swan at 489.

Thus in Swan two defendants beat a forty-nine year old woman and left her tied in a manner that she could choke herself to death. The record shows that the crime occurred during the commission of a burglary, as did the crime in Cherry. In Swan, the trial court found that the murder was especially heinous, atrocious or cruel, evidently based on the additional fact that the victim was left tied in the manner that she would have choked herself to death had she tried to free herself; in the instant

case the facts show no additional circumstance that justifies a finding of an especially heinous, atrocious or cruel killing. In Swan, the defendant had committed a prior violent felony, in that Swan had pled guilty to resisting arrest with violence. Cherry has committed two prior robberies. The uncontested facts of Swan are if anything more egregious than those of the instant case.

In Norris v. State, 429 So.2d 688 (Fla. 1983) this Court held that the death penalty was disproportionate for the felony murder of a 97-year-old woman who had died as a result of a beating occurring during the burglary of her home.

> Norris broke into a residence occupied by a seventy-year-old woman and her ninety-seven-year-old mother. After beating both women, he ransacked the house and stole some money and jewelry. The mother died a month after the beating. According to the pathologist, her head and facial injuries, which were consistent with being caused by blows from a hand or fist, caused her death.

Norris at 689. Again, this Court ruled that the death penalty was disproportionate to the offense and that the trial court erred in overruling a jury recommendation for life imprisonment. Norris at 690.

Two separate death penalties have been imposed in the instant case for conduct that is identical to that set forth in the Norris case. The death penalty for the death of Leonard Wayne is clearly disproportionate to the conduct involved. The state sought a conviction for the murder of Leonard Wayne solely on the basis of felony murder (R1070). The jury, in a special verdict form, found Cherry guilty of felony murder (R1237-1238). The evidence at trial supports only felony murder. Leonard

Wayne's body exhibited no external damage except for bruising that occurred to Wayne's foot, and that bruising was consistent with his foot merely striking a chair (R418). The only evidence in the record of any force being applied to Leonard Wayne by Cherry is found in the testimony of Neloms, who, when asked if Cherry told her what had happened in the house, stated "Yeah. When he went in there, the people was awoke and saw him and the lady tried to fight him or something and he hit her and pushed the man and he grabbed his chest and he found their car keys and took their car." (R437). This disjointed account of what happened establishes, at most, that Cherry pushed the man and the man grabbed his chest prior to Cherry leaving. A "push" is not ordinarily equivalent to deadly force. See Tipton v. State, 97 So.2d 277 (Fla. 1957)(person who, during an argument, pushed another who subsequently died from a heart attack was entitled to judgment of acquittal on charge of manslaughter).

> Consideration of the act in its surroundings at the time of its commission, not of the results alone, should determine criminal responsibility for manslaughter under the Florida homicide statute. It is necessary for the act to result in the death of a human being under the definition of homicide; but this does not relieve the courts of a duty to study the act itself to determine whether the punishment for manslaughter should be applied. This conclusion does not require the use of the shibboleths, malum prohibition (sic) and malum per se. The statute itself provides harsher guideposts.

Tipton at 281.

Concededly, the push in Tipton occurred during a mutual argument. That same push in the context of a burglary does

indeed justify criminal sanctions. Society has a bona fide interest in punishing burglars and those whose felonies cause the death of another human being. However, a scenerio can be imagined where a burglar in fact never encounters a victim, but instead is heard by a victim to drop something and the victim, who had a heart condition, suffers a heart attack and dies as a result of hearing the burglar. The burglar leaves without ever knowing that he was heard or that the victim died. It can still be said that the burglary "caused or materially contributed" to the death of the person, and thus felony murder would arguably be applicable. See Brinson v. State, 144 Fla. 228, 198 So.15 (1940) An aggravating circumstance would also exist in this scenario, in that the murder would have been committed during the commission of a felony. However, imposition of the death penalty for this conduct is so grossly disproportionate to the act that it clearly cannot stand.

An appellate court can appropriately determine the proportionality of punishment to the offense. In Coker v. Georgia, 433 U.S. 584, 53 L.Ed.2d 982, 97 S.Ct. 2861 (1977) the United States Supreme Court held that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape. More recently, in Solem v. Helm, 463 U.S. 277, 77 L.Ed.2d 637, 103 S.Ct. 3001 (1983) the United States Supreme Court held that a sentence of life imprisonment for cashing bad checks violates the Eighth Amendment to the United States Constitution.

> In sum, we hold as a matter of principle that a criminal sentence must be

> proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. But no penalty is per se constitutional. As the court noted in Robinson v. California, 370 U.S. at 667, 8 L.Ed.2d 758, 82 S.Ct. 1417, a single day in prison may be unconstitutional in some circumstances.
>
> When sentences are reviewed under the Eighth Amendment, courts should be guided by objective factors that our cases have recognized. First, we look to the gravity of the offense and the harshness of the penalty. . . . Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive . . . . Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions.

Solem at 290-291, 77 L.Ed.2d 649-650. Using this analysis the death penalty is clearly disproportionate to Cherry's conduct involving Leonard Wayne.

The facts concerning the death of Mrs. Wayne similarly do not justify imposition of the death penalty. It is first imperative to note the jury in this case found Cherry guilty of felony murder in reference to the killing of Mrs. Wayne. The evidence is insufficient to establish that Cherry killed Mrs. Wayne from a premeditated design. No weapon was used. The blows were inflicted by a fist. Mrs. Wayne was evidently still alive when Cherry fled from the Wayne residence. Her death resulted

from internal bleeding. Cherry did not realize that Mrs. Wayne had been killed until the next day when the news broadcast was viewed by both Cherry and Neloms. The circumstantial evidence just does not establish beyond a reasonable doubt that Cherry premeditated the death of Mrs. Wayne and the jury properly did not so conclude. Instead, they found that Mrs. Wayne was killed by Cherry during the course of a burglary and that therefore felony first-degree murder had occurred.

Examination of Florida case law establishes that the death penalty has never been approved by this Court solely for felony murder. Rather, only in the situation where a premeditated murder was found to have occurred in conjunction with the felony murder has the death penalty has been approved. For example, in Copeland v. State, 457 So.2d 1012 (Fla. 1984) the defendant was convicted of the felony murder of a nineteen-year-old cashier who was abducted from work, taken to a motel and subsequently raped by the defendant, then taken to a wooded area and shot. Not only was Copeland convicted of felony murder, he was also convicted of kidnapping, robbery, and sexual battery. The fact that the victim was shot after being transported to a wooded area indicates that the murder was both premeditated as well as having occurred during a felony.

Examination of the "felony murder" cases set forth in Appendix B reveals that even when the felony murder is accompanied by a premeditated murder and even when the jury recommends the death penalty, that sanction is not always appropriate even though nothing in mitigation was found by the trial court. For

example, in Nibert v. State, 508 So.2d 1 (Fla. 1987) the defendant stabbed a 57-year-old alcoholic victim seventeen times after stating his intention to rob the victim a few days before. The defense put into evidence that Nibert had a problem with alcohol, that his father was an alcoholic, and that when he was not drinking he was a considerate, trustworthy, hardworking person (compare this to the similar evidence contained in Cherry's psychiatric report, R1167-1168). The jury recommended death. This Court approved one of two of the aggravating circumstances used by the trial court, but vacated the death sentence and remanded for resentencing, stating: "We are left with one valid aggravating circumstance (HAC) and no mitigating circumstances. Although death may be the proper sentence in this situation, it is not necessarily so. See e.g. Caruthers v. State, 465 So.2d 496 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984)." Nibert at 5.

This Court is by far in a much better position than is a jury to compare the circumstances of a particular case to others that have occurred in Florida and to exercise informed judgment as to the appropriate sanction. Indeed, that is the precise function of the proportionality review that this Court has undertaken. A reasoned, professional proportionality review of this case allows for no other reasonable conclusion but that the death penalties are undeserved under the established facts as compared to prior case law. As set forth in White, supra, the uncontroverted fact that Cherry did not premeditate the death of either victim constitutes a valid mitigating circumstance.

Therefore, because the trial court relied on improper aggravating circumstances to sentence Cherry to death, the existence of the mitigating circumstance otherwise requires this Court at a minimum to remand for resentencing. However, this Court should more appropriately reverse the death penalties and remand with directions that sentences of life imprisonment be imposed because, from a proportionality review, the facts simply do not justify the death penalty.

POINT VI

THE FLORIDA DEATH PENALTY STATUTES VIOLATE THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, IN THAT THE STATUTORY AGGRAVATING AND MITIGATING CIRCUMSTANCES, AS APPLIED BY THE TRIAL AND APPELLATE COURTS, DO NOT GENUINELY LIMIT THE CLASS OF PERSONS THAT ARE ELIGIBLE FOR THE DEATH PENALTY, THEREBY RENDERING THE DEATH PENALTY SUSCEPTIBLE TO UNDUE ARBITRARY AND CAPRICIOUS APPLICATION.

The bete noire of capital punishment is a procedure enabling arbitrary and capricious imposition of the death penalty. This occurs when the sentencer is afforded too much discretion. It was in response to the condemnation of arbitrary and capricious imposition of the death penalty in Furman v. Georgia, 408 U.S. 238 (1972) that the Florida legislature enacted death penalty legislation embodying statutorily defined aggravating circumstances that must exist and outweigh mitigating circumstances before the death penalty is authorized. The aggravating/mitigating circumstance requirement passed constitutional muster in Proffitt v. Florida, 428 U.S. 242 (1976).

That court subsequently explained why the necessity of consideration of specific aggravating/mitigating circumstances prior to authorization of imposition of the death penalty affords sufficient protection against arbitrariness and capriciousness:

> This conclusion rested, of course, on the fundamental requirement that each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of Furman itself. For a system "could have standards so vague that they would fail adequately to channel the sentencing

> decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur." 428 U.S., at 196, n 46, 49 L.Ed.2d 859, 96 S.Ct. 2909. To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Zant v. Stephens, 462 U.S. 862, 877 (1983)(footnote omitted). The aggravating circumstances must be sufficiently definite to provide consistent application, and aggravating circumstances that are too subjective and non-specific to be applied even-handedly are unconstitutional. See Godfrey v. Georgia, 446 U.S. 420 (1980)(aggravating circumstance of "substantial history" of "serious assaultive history" too subjective).

Florida's death penalty system utilizes ten statutory aggravating circumstances. It is respectfully submitted that when the ten circumstances are considered in pari materia the class of first-degree murderers who are eligible for the death penalty is not sufficiently restricted to preclude capriciousness and arbitrariness in the imposition of the death penalty. Too much unbridled discretion is being afforded the sentencer and the appellate courts when the sentence is reviewed.

The aggravating circumstances used in Florida are replete with highly subjective language:

> (5) AGGRAVATING CIRCUMSTANCES - Aggravating circumstances shall be limited to the following:
> (a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.

§921.141(5), Fla.Stat. (1987). The statutes provide no definition of the subjective terms found in either the aggravating or mitigating circumstances, so the courts and the juries are left to fend for themselves insofar as determining when the factors exist.

The facial constitutionality of Florida's death penalty statute was determined in 1976 by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 253 (1976). The Court ruled that the statutes and procedures were being constitutionally

applied at that time. Id at 927. Of the 21 death penalty cases reviewed at the time Proffitt, this Court had reversed 7. It is respectfully submitted that more meaningful statistics now exist and that that the definitions of the statutory aggravating and mitigating circumstances have since proved to be too broad to comport with constitutional requirements of specificity and consistency in application, and that the vagaries of unbridled discretion denounced in Furman v. Georgia, 408 U.S. 238 (1972) have returned in full force.

In State v. Dixon, 283 So.2d 1 (Fla. 1973), which is perhaps the one most important Florida case relied on by the United States Supreme Court in Proffitt, this Court rejected the contention that the statutory aggravating and mitigating circumstances were impermissibly vague, stating, "review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under circumstances in another case." Dixon at 10. Indeed, this language is specifically cited by the United States Supreme Court in approving the death penalty system in Florida. Proffitt at 251.

It is respectfully submitted that this Court has failed to consistently apply the statutory aggravating and mitigating circumstances. This Court has rendered decisions that are diametrically opposed to others containing virtually the same material facts. These decisions cannot be reconciled. Time and again this Court is belatedly acknowledging that previously approved aggravating circumstances were in fact improperly

applied. It is critical that the statutory aggravating circumstances be sufficiently specific so as to afford consistent application by the this Court, which in turn provides guidance to the trial courts. This simply has not happened. The vacillation by this Court not only fails to provide sufficient guidance to the trial courts, it also demonstrates that the aggravating circumstances are too susceptible to interpretation to afford unerring application in the face of compelling facts. It is not just the application of a single vague factor that is the problem. Rather, it is the recurring corrections in the application of most of the aggravating circumstances that signals fatal inspecificity.

By way of example, in Raulerson v. State, 358 So.2d 826 (Fla. 1978) this Court approved the trial court's finding of a murder committed in an especially heinous, atrocious or cruel manner. After resentencing was ordered by the federal court for the middle district of Florida, Raulerson v. Wainwright, 408 F.Supp.381 (M.D. Fla. 1980), this Court struck the finding, after reviewing the same facts, stating, "We have held that killings similar to this one were not heinous, atrocious, and cruel. (citations omitted)." Raulerson v. State, 420 So.2d 567,571 (Fla. 1982).

Similarly, this Court has recently receded from a prior holding it made in King v. State, 390 So.2d 315 (Fla. 1980), where this Court affirmed the trial court's finding of the defendant having created a great risk of death or serious harm to others when he set fire to his house. King was granted a

resentencing by the Eleventh Circuit Court of Appeal due to ineffectiveness of trial counsel during the sentencing proceeding. King v. Strickland, 748 F.2d 1462 (11th Cir. 1984), cert denied, 471 U.S. 1016 (1985). On direct appeal to this court following resentencing, this Court, again reviewing the same facts, struck the aggravating circumstance that it had previously approved in 1980, stating:

> On his original appeal, this Court affirmed the trial court's finding this aggravating factor and stated that "when the Appellant intentionally set fire to the house, he should have reasonably foreseen that the blaze would pose a great risk to the neighbors, as well as the firefighters and the police who responded to the call." 390 So.2d at 320. Upon reconsideration we find that this aggravating factor should be invalidated. In Kampff v. State, 371 So.2d 1007, 1009 (Fla. 1979), we stated:"'great risk' means not a mere possibility, but a likelihood or great probability." Furthermore, we have also said that "a person may not be condemned for what might have occurred." White v. State, 403 So.2d 331, 337 (Fla. 1981) cert. denied, 463 U.S. 1229 (1983). Only the victim was in the house when King set it on fire. That two firefighters suffered smoke inhalation and that the fire caused considerable damage to the house does not justify finding that this aggravating factor has been established. This case is a far cry from one where this factor can properly be found. E.g., Welty v. State, 402 So.2d 1159 (Fla. 1981)(setting fire to condominium when six elderly people were asleep in other units qualified as great risk of death to many persons).

King v. State, 12 FLW 502, 505 (Fla. Sept. 24, 1987). If the King case "is a far cry from one where the factor could be properly be found", how did that factor get approved in the first

case? How many trial courts have relied on the King decision rendered in 1980 that established the wrong standard for this aggravating circumstance? Further, how is it that this Court overlooked the Kampff decision upon which it now relies when that case was decided a year prior to King?

This Court's vacillation in its dealings with the statutory aggravating circumstances can not help but breed confusion to those seeking to consistently apply the aggravating circumstances. For instance, in Caruthers v. State, 465 So.2d 496 (Fla. 1985) this Court disallowed a finding of a cold, calculated and premeditated murder where a robber shot a store clerk three times. This Court stated "the cold, calculated and premeditated factor applies to a manner of killing characterized by heightened premeditation beyond that required to establish premeditated murder." Caruthers at 498 (emphasis added). Eight pages later, in the next reported decision, this Court approved the same factor, stating "this factor focuses more on the perpetrator's state of mind than on the method of killing. Johnson v. State, 465 So.2d 499, 507 (Fla. 1985)(emphasis added). Then in Provenzano v. State, 497 So.2d 1177 (Fla. 1986), this Court reverted back to the prior standard stating ". . . as the statute indicates, if the murder was committed in a manner that was cold and calculated, the aggravating circumstance of heightened premeditation is applicable." Provenzano at 1183. How are the trial courts to know which standard applies? Is it the defendant's state of mind or is it the manner in which the crime was committed?

Further, this Court is suspiciously selective in applying the second prong of the cold calculated or premeditated, without any pretense of moral or legal justification. In Cannady v. State, 427 So.2d 723 (Fla. 1983), this Court disapproved the finding of a cold, calculated or premeditated murder because, according to the defendant, the victim rushed at him before he was shot five times. "During his confession appellant explained that he shot Carrier because Carrier jumped at him. These statements establish that appellant had at least a pretense of a moral or legal justification, protecting his own life." Cannady at 730. Yet in Provenzano v. State, 497 So.2d 1177 (Fla. 1986) this Court approved that aggravating factor and rejected a claim that the fact that the victim (a courtroom bailiff) was firing a pistol at the defendant when the victim was shot did not afford at least a pretense of moral justification.

In Hardwick v. State, 461 So.2d 79 (Fla. 1984) this Court approved utilization of a violent felony committed by a defendant upon a murder victim contemporaneous with the crime of murder to establish a prior conviction for a violent felony. "Where the evidence supports a finding of premeditated murder or where the violent felony is not a necessarily included element of felony murder, we cannot say that the separate acts of violence on one victim are less revealing of the violent propensities of the perpetrator than contemporaneous acts of violence on separate victims. We find no error here." Hardwick at 81. However, this Court has now receded from Hardwick. Patterson v. State, 513

So.2d 1257 (Fla. 1983). If these aggravating circumstances are so clear, how are they being so consistently misapplied?

Yet another aberration concerns the trial court's use and this Court's review of lack of remorse by a defendant. In Pope v. State, 441 So.2d 1073 (Fla. 1983) this Court held:

> [H]enceforth lack of remorse should have no place in the consideration of aggravating factors. Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor.

Pope at 1078 (emphasis added). Thus, the only way for a sentencer to even refer to remorse would seem to be an acknowledgement that it exists as a non-statutory mitigating factor, in that it would be virtually impossible for a trial judge to address every possible non-statutory mitigating circumstance and affirmatively state that it does not exist. Yet, when a sentencing order refers to an absence of remorse as a non-existent mitigating circumstance in a particular case, this Court will sometimes acknowledge the impropriety, as in Patterson, supra, and at other times determine that an acknowledgement of lack of a mitigating factor is not the same thing as using that same factor in aggravation. See Echols v. State, 484 So.2d 568, 575 (Fla. 1985)(not improper to use no remorse to negate mitigation). The reasoning is but a semantical distinction without a meaning.

As previously noted, this Court rejected the contention that the aggravating circumstances are impermissibly vague, stating "review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under

circumstances in another case." Dixon at 10. The foregoing examples cannot rationally be reconciled with that guarantee and they demonstrate that this Court needs to reconsider whether the statutory aggravating circumstances are sufficiently objective so as to comport with constitutionally required consistency and specificity in imposition of the death penalty. These patent inconsistencies in application of the aggravating circumstances show that the tail is now wagging the dog.

Furthermore, Appellant feels constrained to point out that the guarantee of consistency between the same penalty for the same facts in different cases is suspect on at least three bases over and above vagueness, those being limited exposure by this Court to other murder cases, the use of an improper standard to review the presence of mitigating circumstances, and a presumption of propriety of the death penalty in the presence of one aggravating circumstance and no mitigating circumstance. More specifically, this Court does not have the benefit of the facts and circumstances of other murder cases in which the death penalty was not imposed other than by review of such cases on a discretionary basis pursuant to certified questions or decisions in express and direct conflict with other decisions. In that respect the spectrum through which this Court views the facts determining the proportionality of imposition of the death penalty is geared solely to first-degree murder cases in which the death penalty was actually imposed, rather than the wider range of facts of other murder cases wherein the lesser sanction is imposed by the trial court. Because the perception of this

Court is as a matter of procedure unduly restricted an adequate proportionality analysis of first-degree murder cases cannot be performed.

Further, the guarantee of consistency is suspect because this Court at times considers itself bound to an abuse of discretion discretion standard insofar as determining the presence vel non of mitigating circumstances, but at other times embarks upon a plenary review of the record to discern the existence of either statutory or non-statutory mitigating circumstances. The election of this Court not to provide plenary review in all cases effectively defeats the guarantee of consistent application of the death penalty. A trial court's finding of the non-existence of a mitigating circumstance is not entitled to the weight that this Court is affording it, and by not providing plenary review of the presence of mitigating circumstances when a death recommendation comes from the jury this Court is shirking its duty to provide a truly accurate proportional analysis.

It is respectfully submitted that a trial court's error in failing to recognize and consider relevant mitigating evidence contained in the record should, instead of being condoned by this Court as an act of discretion, corrected by this Court when the uncontroverted presence of such mitigating evidence is pointed out on appeal. The failure of a trial judge to acknowledge as valid reasons for mitigation uncontroverted facts which were recognized in other cases (of which he may be and probably is unaware) as valid reasons for mitigation clearly results in

arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments. Facts that constitute a reason to mitigate a sentence in one case must also constitute a reason to mitigate a sentence in another case if the death penalty is to receive the promised consistent application. This basic premise is found in the Latin maxim "ubi eadem ratio, ibi eadem lex; et de similibus idem est judicium". This Court has specifically recognized this premise in the death penalty context;

> We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same.

Slater v. State, 316 So.2d 539, 542 (Fla. 1975). If an appellate court exercises tunnel vision in myopically accepting the trial court's finding of no mitigating circumstances when there is a recommendation of death from the jury, how can it justify taking the blinders off when there is a jury recommendation for life imprisonment? See Pope v. State, 441 So.2d 1073,1076 (Fla. 1983).

At diverse times this Court acknowledges that mitigating evidence is present in the record. Specifically, this Court has held that the trial judge is in as good a position as is the jury to apply the aggravating and mitigating circumstances, in that "the trial judge does not consider the facts anew. In sentencing a defendant, a judge lists reasons to support a finding in regard to mitigating or aggravating factors."

Provenzano at 1185. Thus, this Court is in an even better position than is the trial judge to find and consistently apply aggravating and mitigating circumstances. Indeed, this Court is in a better position to recognize what constitutes valid non-statutory mitigating circumstances that should have been considered by the trial court, but were not, simply because this Court reviews all the cases, whereas the trial judge only presides over a limited few. If appellate courts will provide plenary review to determine for themselves the voluntariness of a statement, which involves a quasi-factual determination, certainly that same degree of scrutiny and participation must apply to a matter as grave as imposition of the death sentence. See Miller v. Fenton, 474 U.S 104, 88 L.Ed.2d 405, 106 S.Ct. 445 (1985)(rejection of "presumption of correctness" as an issue of fact as to whether confession was voluntarily given). Again, it is stressed that for the death penalty to be constitutionally applied the "discretion" to impose that penalty must be kept at a minimum. Similarly, the discretion of an appellate court in affirming death penalties must be minimized. By allowing the trial judge such unbridled discretion in determining mitigating circumstances and in failing to perform an adequate independent analysis of the existence of mitigating circumstances, this Court is renegging on its promise of consistent application of the death penalty.

For these reasons it is respectfully submitted that, as now applied, the statutes governing imposition of the death penalty in Florida are impermissibly vague and are otherwise subject to unfair and discriminatory application. The arbitrary

and capricious application violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 1, Sections 9, 16 and 22 of the Florida Constitution. Accordingly, the death penalties must be vacated and sentences of life imprisonment imposed.

POINT VII

THE DEATH PENALTY WAS IMPOSED IN CONTRAVENTION OF THE RIGHTS TO DUE PROCESS AND A JURY TRIAL GUARANTEED BY THE CONSTITUTION OF FLORIDA AND THE UNITED STATES, IN THAT IN RENDERING ITS VERDICT THE JURY DID NOT CONSIDER THE ELEMENTS THAT STATUTORILY DEFINE THE CRIME FOR WHICH THE DEATH PENALTY MAY BE IMPOSED.

The overall theme of this point is that the aggravating circumstances define the substantive crime for which the death penalty may be imposed, and as such those elements must be determined by the jury. Jury sentencing is not the issue. Rather, it is whether in rendering its verdict or in making its sentencing recommendation the jury determined the existence of substantive, statutory elements that define the crimes in Florida for which the death penalty may be imposed.

Two penalties are not available when a person is convicted of first-degree murder. Rather, a sentence of life imprisonment with no eligibility for parole for 25 years is the only sanction necessarily available when the jury renders its verdict. A crime for which the death penalty may be imposed is sui generis, and it is defined exclusively through the statutory aggravating circumstances set forth in Section 921.141(5), Florida Statutes. Without at least one of these statutory elements being present the death penalty cannot be imposed. These elements thus define the crime punishable by the death penalty. As such, the aggravating circumstances must be determined by the jury.

More specifically, the judge in this case determined that the murder was committed in an especially heinous, atrocious

or cruel manner. "It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). If, as stated by this Court, the aggravating circumstance truly requires something more than that required for a conviction of first-degree murder, it follows that a jury finding of guilt of premeditated or felony murder does not necessarily include a factual finding to support this aggravating circumstance.

This Court has recognized, as a requirement of Due Process, the necessity for a factual determination to be made by the jury to authorize imposition of a more serious sanction based on factual elements of a crime. State v. Overfelt, 457 So.2d 1385 (Fla. 1984). As stated by the Third District Court of Appeal, "It is axiomatic that a verdict which does not find everything that is necessary to enable the court to render judgment cannot support the judgment." Streeter v. State, 416 So.2d 1203, 1206 (Fla. 3d DCA 1982).

All aggravating circumstances in the capital context must be proved beyond a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla. 1980). This is acknowledgment of their

importance as elements of the crime. In re Winship, 397 U.S. 358 (1970). The aggravating circumstances substantively define the crime of capital first-degree murder, that is, the crime of first-degree murder punishable by death.

> The aggravating circumstances of Section 921.141(6), Florida Statutes actually define those crimes, when read in conjunction with Florida Statutes 782.04(2) * * * to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury.

State v. Dixon, 283 So.2d 1,9 (Fla. 1973)(emphasis added). This theme has consistently been adhered to by this Court, and correctly so.

> In contending that the capital felony sentencing law regulates practice and procedure, appellant relies upon Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), and Lee v. State, 294 So.2d 305 (Fla. 1974). The critical issue in those cases was the legality of applying Florida's new death penalty law to persons who had committed a murder before the law had taken effect. In holding that the law could be applied to such persons, the United States Supreme Court and this Court referred to the changes in the law as procedural. Those references concerned the manner in which defendants who had committed murder before the new law took effect should be sentenced. They were not meant to be used as shibboleths for deciding whether the new law violates article V, section 2(a) of the Florida Constitution by regulating the practice and procedure in the Florida Courts. By delineating the circumstances in which the death penalty may be imposed, the legislature has not invaded this Court's prerogative of adopting rules of practice and procedure. We find that the provisions of section 921.141 are matters of

> substantive law insofar as they define those capital felonies which the legislature finds deserving of the death penalty. The appellant's contention that the statute improperly attempts to regulate practice and procedure is without merit. [Citations omitted.]

Vaught v. State, 410 So.2d 147, 149 (Fla. 1982)(emphasis added).

The Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the substantive elements of the crime. Patterson v. New York, 432 U.S. 197, 210 (1977). A conviction of first degree murder, even first-degree premeditated murder, as held by this Court, does not contain an aggravating circumstance. If, as repeatedly held by this Court, the aggravating circumstances effectively "define" the crime for which the death penalty can be imposed, it is incumbent on the state to secure jury findings of these substantive elements. Overfelt, supra; Perkins v. Mayo, 92 So.2d 641 (Fla. 1957); Harris v. State, 53 Fla. 37, 43 So. 311 (1907); Streeter v. State, 416 So.2d 1203 (Fla. 3d DCA 1982); Duncan v. Louisiana, 391 U.S. 145 (1965).

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to a higher voice of authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of

> his peers gave him an inestimable safeguard against the compliant, biased, or eccentric judge.

Duncan at 155-156 (emphasis added).

The increased reliability needed for Constitutional requirements of Due Process in the capital penalty context militates heavily toward a procedure whereby the jury provides as much protection against arbitrariness as is possible. The United States Supreme Court has held that jury imposition of sentence is not constitutionally mandated. Spaziano v. Florida, 468 U.S. 447 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). This is not to say, however, that the jury must not determine the elements of the offense that serve to increase the sentence that may be imposed on the defendant. See McMillan v. Pennsylvania, 477 U.S.__, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986).

This identical issue has been presented by the undersigned counsel and is currently pending in Remeta v. State, Case No. 69,040 and Hildwin v. State, Case No. 69,513. Variations of this argument have been presented by the undersigned counsel in Provenzano v. State, 497 So.2d 1177 (Fla. 1986), Peede v. State, 474 So.2d 808 (Fla. 1985), and Wright v. State, 473 So.2d 1277 (Fla. 1985). In Wright, this Court did not elaborate on its reasoning in disposing of the issue, but simply stated, "We have previously considered and expressly rejected the latter two arguments. See, e.g., Johnson v. State, 393 So.2d 1069 (Fla. 1980), cert. denied, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49

L.Ed.2d 913 (1976), aff'g 315 So.2d 461 (Fla. 1975)." Wright at 1281. These citations do not address the instant argument.

In Johnson, the defendant argued that imposition of the death sentence after a jury recommendation of life imprisonment violated his Fifth Amendment protection against double jeopardy. Those are not the grounds on which the instant constitutional attack is based. Rather, the grounds at issue concern the Sixth Amendment right to jury determination of the facts on which a particular sanction attends. Similarly, the argument does not contest the function of the jury insofar as rendition of a non-unanimous recommendation, and it is herein conceded that the jury recommendation process is essential to constitutional application of the death penalty. Indeed, that is the precise holding of Proffitt. What is instead advanced is that the Sixth Amendment requires more of the jury than is presently being accorded by rendition of a recommendation, and that this contention has not previously been adequately addressed by this Court's decisions or by the decisions of the United States Supreme Court.

This issue was neither identified nor discussed by this Court in the opinion deciding Peede, supra. However, in Provenzano this Court said:

> Appellant's contention that the sixth amendment right to a jury trial is violated by Florida's death penalty procedure because the trial court determines the facts anew after the jury issues its recommendation is without merit. The United States Supreme Court recently recognized the validity of the trial judge's power to impose the death sentence. Spaziano v. State, 468 U.S.

> 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). Further, the trial judge does not consider the facts anew. In sentencing a defendant, a judge lists reasons to support a finding in regard to mitigating or aggravating circumstances. These reasons are taken from all the evidence in the case and any further evidence presented at the time of sentencing. Moreover, the sentence of death is not unconstitutional as applied.

Provenzano at 1185. Though identifying the basic issue, this Court's discussion is couched in terms of the Fifth Amendment proscription against double jeopardy. The citation to Spaziano supports the conclusion that the trial judge has the power to impose a death sentence over a jury recommendation of life and that jury sentencing is not constitutionally required, but Hildwin does not here contest the trial judge's power to impose the death penalty over a jury recommendation of life; neither does he contend that the jury must sentence the defendant. Rather, it is respectfully submitted that the protections afforded the defendant by a jury trial are such that the defendant has Sixth Amendment right to jury determination of the presence of statutory aggravating circumstances. Significantly, the United States Supreme Court in Spaziano expressly noted that such grounds were not being argued by counsel in that case; Spaziano at 458.

The same fundamental reasoning used by this Court in State v. Overfelt, 457 So.2d 1385 (Fla. 1984) must apply here. Each statute on its face does not require that the jury determine the factual basis required to impose the more severe sanction but, as acknowledged by this Court in Overfelt, the constitution

requires that such facts be determined by the jury: ". . . it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode." Overfelt at 1387. Procedural due process is not a static concept, but instead a dynamic process of evolution.

> For all its consequence "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." (Citation omitted). Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter v. Dept. of Social Services, 452 U.S. 18, 24-25, 101 S.Ct. 2153, 68 L.Ed.2d 640, 648 (1981).

In light of the far ranging consequences that this holding entails, this Court may wish to limit recognition of this right to those cases in the "direct appeal" posture pursuant to Griffin v. Kentucky, __U.S.__, 40 Cr.L. 3169 (1987). However, the sheer force of logic and precedent mandates that such recognition is necessary. Accordingly, this Court should reverse the death sentences and remand with directions that life sentences be imposed.

POINT VIII

THE TRIAL COURT ERRED IN FAILING TO CONSIDER A PSYCHIATRIC REPORT INTRODUCED INTO EVIDENCE BY DEFENSE COUNSEL DURING THE PENALTY PHASE OF TRIAL.

The only piece of evidence introduced by either the state or defense counsel during the penalty phase was a psychiatric report prepared by Doctor Bernard on September 10, 1987 (R1166-1169). The family history portion of that portion provides the following:

> [Cherry] was born in Waynesboro, Mississippi on June 14, 1951. His mother died in 1980 at age 53 with alcohol problems. His father died in 1968 at about age 50 with a heart attack. He is first in a sibling group of two. As he was growing up his father had a very bad temper and beat the defendant severely. He ran away from home 8 or 9 times in order to get away from the beatings. He said that when he was 13 his father put a chain around his neck and made him walk around so that others could see what was taking place. He did this for about 3 days and went without food or water, except what he was given by his brother.

(R1167). The alcohol and drug history portion of the psychiatric evaluation states: "[Cherry] said that in the year before his arrest he smoked about 5 or 6 joints of pot per day, and during the same period of time he smoked about $700 worth of 'crack', with the last being used on June 28, 1986." (R1168). The document further indicates that despite only a 10th grade education, Cherry has never been fired from any of his jobs, which included construction and hauling pulpwood (R1167). This information is clearly relevant; it is clearly mitigating. Cherry

has no quarrel with the premise that a trial court can ascribe whatever weight it wants to mitigating evidence. The problem here is that the trial court did not even consider the evidence. This is boldly and affirmatively set forth in the findings of fact.

> These findings and the orders of this Court are based solely on the testimony of the witnesses in this matter before the jury and the argument of counsel for the state and defense. * * * The Court further certifies that the decisions of this Court in this Order are not based on any Pre-Sentence Investigations, juvenile case files, psychiatric reports or otherwise[.]"

(R1244). Indeed, it seems that the trial court summarily dismissed the mitigating evidence under the premise that the jury previously "rejected" any mitigating evidence (R1243).

The findings of a trial judge should be made with "unmistakable clarity" to afford meaningful appellate review. Mann v. State, 420 So.2d 578, 581 (Fla. 1982). This is not a case where the judge was aware of the substance of the evidence and afforded it little weight. See Mason v. State, 438 So.2d 374,379 (Fla. 1983)("Rather than having been ignored, it appears that the [mitigating] evidence was considered and rejected."). Rather, this is an affirmative statement by the trial court that the psychiatric report was not considered. Neither the argument of the prosecutor nor the defense counsel during the penalty phase apprised the judge of the substance of this mitigating evidence.

> [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires

> consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the penalty of death.

Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

In Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) the United States Supreme Court reversed a murder conviction where, as directed by statute, the sentencing court did not consider "particularly relevant" evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance. "On remand, the state courts must consider all relevant mitigating evidence and weigh it against the evidence of aggravating circumstances." Eddings at 117, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)(emphasis added).

The failure of the trial court to consider the relevant mitigating evidence contained in the psychiatric report prior to imposition of the death penalty, as affirmatively established in the trial court's findings of fact, violated the Eight and Fourteenth Amendments to the United States Constitution. Accordingly, the death sentences must be reversed and the matter remanded for resentencing.

POINT IX

IMPOSITION OF SANCTIONS FOR BOTH BURGLARY WITH AN ASSAULT AND FIRST DEGREE FELONY MURDER IS UNCONSTITUTIONAL, IN THAT THE DEFENDANT IS TWICE BEING PUNISHED FOR THE SAME OFFENSE.

It is analytically impossible to commit a pure felony murder without also committing the underlying felony. This is so, generally, because all that a felony murder is is an enumerated felony accompanied by the death of another person. In Florida, first degree felony murder is defined as follows: "The killing of a human being when committed by a person engaged in the perpetration of a burglary." Section 782.04(1)(a)2e, Florida Statutes (1987). Applying the traditional rule set forth in Blockburger v. United States, 284 U.S. 299 (1932), it is readily seen that all of the elements for the burglary are in this case present in the offense of felony murder.

Recently, the law concerning double jeopardy has undergone one of the routine adjustments that make the law of double jeopardy so interesting. In Carawan v. State, 515 So.2d 161 (Fla. 1987), this Court concluded that a defendant could not be convicted of both attempted manslaughter and aggravated battery where those offenses were predicated on a single underlying act. The Court held:

> Where there is a reasonable basis for concluding that the Legislature did not intend multiple punishments, the rule of lenity contained in section 775.021(1) and our common law requires that the court find that multiple punishments are impermissible. For example, where the

> accused is charged under two statutory provisions that manifestly address the same evil and no clear evidence of legislative intent exists, the most reasonable conclusion usually is that the legislature did not intend to impose multiple punishments.

Carawan at 168. The Court adopted what is in essence what is a single evil approach, that being that if a particular evil is addressed with particularity in one statute, then a separate sanction authorized by a different statute for that same evil will not justify imposition of that second sanction for the same conduct. Similarly, in Hall v. State, 13 FLW 30 (Fla. January 7, 1988), this Court recently held that it is improper to impose two sanction for the separate offenses of armed robbery and possession of a firearm in the commission of a felony.

> In the instant case, Hall was charged both with committing a robbery when carrying a firearm, under 812.13(1) and (2)(a) and the use and display of a firearm and the carrying of a concealed firearm while committing a felony, under 790.07(2). We hold the legislature had no intent of punishing a defendant twice for the single act of displaying a firearm or carrying a firearm while committing a robbery. To hold otherwise would mean that, for every offense of robbery in which a defendant uses or carries or displays a firearm, in violation of Section 812.13, there will also be a violation of section 790.02(2). Robbery, under section 812.13(1), becomes the enhanced offense of armed robbery 812.13(2)(a) by reason of the element of carrying or displaying a firearm. Interpreting the statutes according to the state would mean the offense is enhanced twice for carrying or displaying the same weapon. It is unreasonable to presume the legislature intended this result. In accordance with Carawan, we find this would constitute a dual punishment for one act, and

> would be contrary to the legislative intent under the principles set forth in our holdings in Carawan, Mills, Houser, and Boivin.

Hall at 31.

The offenses now at issue are burglary with an assault and felony murder. Assuming without conceding that the legislature intends to punish the burglary aspect (a crime against property) separately from the murder aspect (a crime against a person), it remains that the enhancement to the burglary statute of "an assault or battery committed during the course of the burglary" is identical to that for the basic felony murder sanction. Stated somewhat more simply, hopefully, the enhancement to the offense dealing with a crime against property obtains because a crime against a person was committed in conjunction with the crime against the property. This is undeniably the same theory upon which felony murder exists, that is, it is an enhancement to a crime against property due to the contemporaneous occurrence of harm to an individual. The assault/battery upon Mr. and Mrs. Wayne resulted in Cherry being convicted of first-degree felony murder. It also resulted in Cherry being convicted of the enhanced form of burglary with an assault. At the very least, this Court should vacate the judgment for burglary with an assault and remand with directions that Cherry be adjudicated guilty of burglary of a dwelling and resentenced accordingly. Alternatively, this Court is asked to reverse the burglary conviction as being a necessarily lesser included offense of the first-degree felony murder.

CONCLUSION

Because the trial judge unreasonably presented the defense from presenting relevant testimony in its own behalf as set forth in Point I, this Court is asked to reverse the convictions and to remand for a new trial. Because the trial court failed to comply with Florida Rule of Criminal Procedure 3.701, this Court is asked to reverse the sentences for the non-capital offenses and to remand with directions that Roger Cherry be sentenced within the guidelines on those offenses. Because two improper aggravating circumstances were used to sentence Roger Cherry to death and because the death penalty is disproportionate to the crimes, as set forth in Points III, IV, and V, this Court is asked to vacate the death penalties and remand with directions that Roger Cherry receive sentences of life imprisonment. Because the death penalty in Florida, as applied, is being imposed in an arbitrary and capricious manner and otherwise in a way to divest the defendant of his right to a jury trial as set forth in Points VI and VII, this Court is asked to declare Section 921.141 unconstitutional, to vacate the death sentences, and to remand with directions that Roger Cherry receive sentences of life imprisonment. Because the trial judge failed to consider relevant testimony entered into evidence by the defense as set forth in Point VIII, this Court is asked to reverse the death penalties and to remand for a new sentencing proceeding. Finally, because convictions for burglary with an assault and first degree

felony murder constitutes double jeopardy, this Court is asked to vacate the convictions and sentences for burglary with an assault.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER
112 Orange Avenue, Suite A
Daytona Beach, Florida 32014
Phone: 904/252-3367

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Florida 32014 in his basket at the Fifth District Court of Appeal and mailed to Mr. Roger Lee Cherry, #E021641, P.O. Box 647, Starke, Fla. 32091, on this 2d day of March 1988.

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER