IN THE SUPREME COURT OF FLORIDA

DOMINICK OCCHICONE,

Appellant,

vs. : Case No. 71,505

STATE OF FLORIDA, :

Appellee.

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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STATEMENT OF THE CASE

A Pasco County grand jury indicted Dominick Occhicone, Appellant, on July 15, 1986, charging him with two counts of first-degree murder in the shooting deaths of Raymond and Martha Artzner. (R1373) The case proceeded to trial before Circuit Judge Lawrence E. Keough and a jury on September 14-22, 1987. (R1-1369)

During the jury selection process, it came to the court's attention that a courtroom spectator was discussing the case with prospective jurors. (R144-6) The spectator stated that she belonged to an organization, Homicide Victim's Group. (R148-9) She admitted telling a prospective juror that she thought the defendant was guilty. (R149) The judge admonished the spectator not to discuss the case "in such a way so that it could be overheard by anyone else in that courtroom." (R153-4) The defense motion for mistrial was denied. (R154-5)

Defense counsel objected to the prosecutor's opening statement, which anticipated possible defense witnesses and expert opinions based upon statements of Appellant not in evidence. (R223) This objection was renewed after the close of evidence in the guilt or innocence phase of the trial (R650) and included in counsel's subsequent motion for mistrial. (R854, 857)

A sheriff's deputy was permitted to testify to Occhicone's refusal to take an atomic absorption test which would

have shown whether gunpowder was present on his hands. (R529-30) During the prosecutor's closing argument, comment on this refused test was the basis for a defense objection and motion for mistrial. (R793-4)

The court denied Appellant's motions for judgment of acquittal on both counts. (R645-7) The jury returned verdicts of guilt to both counts of first-degree murder. (R864-5, 1580-1)

During the penalty phase of the trial, the trial judge denied a defense motion for mistrial when a police officer was permitted to testify to circumstances surrounding Appellant's prior conviction for resisting arrest with violence. (R896) The officer's testimony tended to show commission of other crimes for which Appellant was found not guilty. (R894-6)

Defense counsel also moved unsuccessfully for mistrial on several occasions during the prosecutor's cross-examination of defense witnesses because the prosecutor's questions insinuated that Appellant had a more extensive criminal history. (R925-7, 1181-2, 1231-4) Appellant's objection to allowing Dr. Mussenden to testify from a transcript without any predicate showing that his memory needed to be refreshed was overruled. (R1282-3) The court also overruled defense objections to allowing four sheriff's deputies to give their opinions in regard to Appellant's level of intoxication several hours after the shootings. (R1242-3, 1245, 1247, 1253)

The jury was instructed on four aggravating circumstances: a) prior conviction of violent felony, and, over

Appellant's objections, b) in the course of a burglary; c) especially "wicked, evil", atrocious or cruel; and d) cold, calculated and premeditated. (R1357-8, 1145-7, 1149) The jury was instructed on the mitigating circumstances of a) extreme mental or emotional disturbance, b) substantially impaired capacity, c) "the defendant's behavior and acclamation [sic] during his incarceration prior to this trial", and d) any other aspect of character or circumstance of the offense. (R1358-9) The jury by votes of 7-5 recommended sentences of death for both homicides. (R1364, 1599-1600)

On October 29, 1987, Appellant's Motion for New Trial was heard and denied. (R1617-23, 1663-70) Sentencing was held November 9, 1987. (R1673-91) Judge Keough found that the appropriate sentence for the murder of Raymond Artzner (Count I) was life imprisonment. (R1688, 1584) He followed the jury recommendation in imposing a sentence of death for the murder of Martha Artzner (Count 11). (R1688-9, 1585)

In his written findings filed November 18, 1987, the sentencing judge found three aggravating circumstances, § 921.141(5)(b) (prior conviction of violent felony), § 921.141(5)(d) (in the course of a burglary), and § 921.141(5)(i) (cold, calculated and premeditated). (R1646-7, see Appendix) He found one statutory mitigating circumstance, § 921.141(6)(b) (extreme mental or emotional disturbance), and the non-statutory mitigating circumstance of being a good prisoner. (R1648-9, see Appendix) The judge concluded that the

mitigating circumstances did not outweigh the aggravating circumstances. (R1649, see Appendix)

Appellant filed his Notice of Appeal on November 18, 1987. (R1635) The court permitted defense counsel to withdraw and Occhicone was found insolvent for purposes of appeal. (R1629, 1633)

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

STATEMENT OF THE FACTS

A. Events of June 10, 1986

On June 10, 1986, state witness Debra Lee Newell was employed as a bartender at Shooter's Liquor Lounge in Elfers. (R490) Around 1:30 a.m. Appellant, Dominick Occhicone, came into the bar and stayed for about an hour. (R491) He drank two vodka and cranberry mixed drinks and played a tune called "Sad Songs" on the jukebox. (R491-2, 496-7) Ms. Newell and Appellant talked about his relationship with ex-girlfriend Anita Gerrety. (R492) He asked the bartender whether she thought he should go over to Anita's house and try to talk with her. (R492, 497) When Occhicone left the bar at 2:30 a.m., it seemed as if he was not going to try to see Anita that night. (R492)

Anita Gerrety testified that in June of 1986 she was residing with her parents Raymond and Martha Artzner in a Pasco County subdivision. (R244) Her son and daughter also lived there but her son was staying elsewhere on this night. (R244, 247) Around 3:00 a.m. on June 10, Dominick Occhicone knocked on the outside sliding glass door of her bedroom. (R247) She woke up and asked Appellant what he wanted. (R248) He wanted to discuss their relationship and hoped they would get back together again. (R248) She told him there was nothing to discuss and that she would call the sheriff's office if he didn't leave. (R248)

Occhicone left, but returned an hour later. (R249) He pounded on Anita's glass door but she ignored him. (R249) Then

he started pounding on the window of her daughter's room. (R250) Anita woke her father. (R250) He tried to telephone the sheriff's office, but the phone line was dead. (R250)

Appellant continued to pound on the sliding glass door, mumbling something that she couldn't understand. (R251) Her father went into the garage and raised the overhead door. (R251) Anita followed her father out of the garage and on the driveway. (R251, 314) She saw Occhicone come "staggering" towards them. (R314-8) Anita could smell alcohol on him but gave an opinion that Appellant was not intoxicated "to the point where he didn't know what he was doing." (R317)

A confrontation ensued in front of the garage. Anita Gerrety testified that her father, Raymond Artzner, was very angry and yelled at Occhicone demanding that he leave. (R252) Mr. Artzner had a broomstick in his hands.[1] (R252-3) Occhicone did not argue but kept saying over and over, "Can we talk about this?" to Anita. (R318-9) A neighbor, Dennis Stonis heard a man yelling, "Get the hell out of here" and "Don't ever come back here." (R357-8) This exclamation was punctuated with a gunshot. (R358)

Anita saw Appellant raise his right hand, pointed at her father's face. (R254) It was not until she saw the muzzle

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[1] The evidence is conflicting as to whether Artzner ever hit Occhicone with the broomstick. Anita Gerrety said that her father never swung at Appellant. (R265) However, Appellant claimed to have been hit and jail records indicated that he was treated for a bump on the head after his arrest. (R970, 998, 1003, 1279)

flash and heard the shot, that she realized that Occhicone had a gun. (R254) As her father fell down, she retreated through the garage and into the house. (R254-5) She locked the door behind her but Appellant followed, breaking the glass in the door. (R255, 258) As she watched Occhicone reach through to unlock the door, she tried to get her mother and daughter to the front door. (R258) Anita and her daughter ran out the front door to a neighbor's house, but Mrs. Artzner remained behind. (R259-60) Anita heard shots while she was running. (R259)

When Deputy Wayne Taylor of the Pasco County Sheriff's office arrived at the scene around 4:00 a.m., he saw Mr. Artzner lying on the ground with a gunshot wound to the chest. (R385-7) Artzner told the deputy that "Dom" had shot him. (R387) Raymond Artzner was taken to the hospital but soon died from the single gunshot wound. (R591-2)

Martha Artzner was found dead by Deputy Taylor just inside the door leading from the garage to the hallway-kitchen area. (R387-8) Her death was caused by four bullet wounds, three of which were in her chest. (R597-9) One of the shots hit her heart and would have been "rapidly fatal" according to Dr. Corcoran, an associate medical examiner. (R602)

The telephone junction box was found torn away from the wall of the Artzner residence with the wires pulled out. (R407, 412, 418) Appellant's 1975 Corvette automobile, registered in his father's name, was found about five houses away with smoke coming from under the hood. (R368, 371, 420) With the

assistance of a tracking dog, sheriff's deputies located Occhicone along a railroad bed about three-quarters of a mile away. **(R374-9)** When placed under arrest, Appellant's hair was messed up, his clothing in disarray and he appeared to be half-asleep. **(R383)**

B. Lack of Premeditation Defense

Appellant did not contest the evidence that he committed the homicides, but contended that they were not premeditated. **(R225-6, 742, 831)** The defense did not put on any witnesses or evidence in the guilt or innocence phase but relied upon the testimony of state witnesses regarding Occhicone's long-standing history of alcohol abuse and his emotional distress caused by the breakup in his relationship with Anita Gerrety to show lack of capacity to form a premeditated intent to kill.

Anita Gerrety testified that she and Occhicone began dating in **1982** and became engaged to be married in **1985.** **(R267)** They lived together with her two children and Appellant's five year old son for about six months in 1984. **(R268-9)** A wedding date of November **30,** 1985 was set. **(R269)**

Anita broke the engagement in September of **1985.** **(R274)** She testified that the reason was Occhicone's hot temper. **(R270)** In one incident, she was in the bedroom with the door locked. **(R271)** Appellant kicked in the bedroom door, holding a knife in his hands. **(R271)** There were other instances of verbal and physical abuse directed at her and her children. **(R271,** 300)

After their engagement was broken, Occhicone sent

flowers to her at work every day and called her continuously, trying to reestablish their relationship. (R275) During the night, he would come knocking on the sliding glass door to her bedroom. (R272-3) This happened around twenty times prior to the June 10th episode. (R273) Anita Gerrety testified that she also visited Occhicone at his house on four occasions after she broke off the relationship. (R312)

Appellant had been a heavy drinker for many years. One of several bartenders from Shooters Liquor Lounge who testified at the trial recalled that she had first met Dominick Occhicone ten years previously when she was employed by a different bar. (R464) Appellant was a very heavy drinker then as well as in 1986. (R465, 467)

His usual routine in the seven to nine months prior to the homicides was to enter Shooter's Lounge shortly after opening time at 7:00 a.m. (R449, 455) He would usually have 10-15 mixed drinks of vodka during the morning hours. (R449-50) When the afternoon bartender started work at 11:00 a.m., Occhicone would usually have a few more and then go home for a nap. (R467) Occasionally he would stay at the bar all day, but his customary routine was to leave periodically for a few hours and then return. (R451, 467) Sometimes Occhicone would still be at Shooter's when the bar closed at 2:00 a.m. (R450-1) This pattern was continuous, seven days a week. (R450)

Shooter's bartender Lily Lawson testified that Occhicone also frequented three other bars during this period.

(R453-4) He was always a heavy drinker but his drinking became much heavier after Anita broke off their relationship. (R454) Often Appellant sat in the bar actually crying over their break up. (R454) His sole topic of conversation was Anita. (R462)

The major event which intensified Occhicone's distress occurred when Anita came to visit him at his house in the middle of May. (R312) Anita told Appellant that she had undergone an abortion, but refused to tell him whether it was his child. (R313) Sometime shortly before or after this meeting, Anita also told Occhicone that she had met another man that she was interested in. (R334)

Appellant was enraged about Anita's abortion. (R472) He told one of the bartenders at Shooter's that he was going to hire a lawyer and sue her for having the abortion. (R476) When another bartender's grand-daughter was visiting the bar, Occhicone said he couldn't stand to look at her because it reminded him of the aborted child. (R455)

About a week or ten days prior to the June 10 homicides, Appellant began voicing threats directed at Anita and her family. (R446) He said that he felt like shooting Anita's father, mother and kids and making her watch. (R446, 466) He blamed Anita's parents for their break up. (R466) Occhicone made these threats on several occasions around the bar. (R473) Anita Gerrety also testified that Appellant had threatened "on numerous occasions'' to shoot her parents and children, starting with the kneecaps and working up. (R264) He would leave her for

last so that she could watch. (R264)

Bartender Debra Newell testified that during this time, Occhicone said he didn't care about anything any more. (R498) Everything reminded him of Anita; that was all that he could think about. (R498) He felt like shooting her and her kids and then shooting himself. (R498) But he said that he wouldn't do this because of his young son. (R499)

On the Sunday prior to the homicides, William Anderson, the owner of Shooter's Liquor Lounge, saw Appellant in the bar with a gun stuck in his waistband. (R513-4) Anderson told Occhicone to take it outside, that he couldn't carry a pistol in the bar. (R514-5) According to Anderson's testimony, Appellant, at an earlier time, had said in reference to Anita's parents, "Maybe I should just blow them away." (R509-10) Anderson told him not to talk craziness. (R511)

C. Penalty Phase Evidence

The prosecution put on Sergeant William Stoner of the Pasco County Sheriff's Office to testify to the circumstances surrounding an incident on October 11, 1980 which resulted in Occhicone's conviction for resisting arrest with violence. (R880-904) Stoner testified that he responded to a domestic complaint around 8:35 p.m. on that date. (R883) Occhicone met him outside the residence and ordered him to leave. (R885) He refused to let the officer speak to his wife. (R886) When Stoner persisted, Occhicone shoved him in the direction of his cruiser. (R886)

Occhicone then retreated into his residence; Sergeant Stoner knocked on the front door. (R887) Occhicone opened the door, told Stoner to leave and gave him "a thump on the chest." (R887) Another police officer arrived and together they placed Occhicone under arrest. (R888) Occhicone struggled with the officers, kicking and striking out with his hands. (R889) Stoner testified that Occhicone had been drinking. (R890) When asked if he was injured in the incident, Officer Stoner replied that he "just broke some skin on [his] knuckles. (R890)

In mitigation, a friend of Occhicone's, Joanne Carrico, testified about his state of mind during the year prior to the homicides. (R929-56) Ms. Carrico met Appellant when she was employed as a bartender at the Liquor Lodge; she later worked at Shooters also. (R930-1) She testified that Occhicone could consume a lot of alcohol. (R931) He did not show intoxication by slurred speech or falling down. (R933) Rather, intoxication would affect the way he talked, his actions and his moods. (R932-3) In addition to alcohol, Appellant smoked marijuana occasionally and took tranquilizers. (R941)

When the witness first met Appellant, he and Anita were still together. (R934) Occhicone's general mood was described as bubbly and happy; he would stop in to say hello but wouldn't stay around the bar long. (R934, 942) After the breakup, he was depressed, moody and listless. (R934) Ms. Carrico described Occhicone as obsessed with Anita to the point that she thought he was crazy. (R939, 956)

Appellant told Ms. Carrico about several encounters with Anita after their breakup. (R934-9) On a couple of occasions, Occhicone had gone over to Anita's parents' house during the night and Anita had let him sneak in and spend the night. (R935, 937) Mostly, it had been Anita who visited Occhicone at his house. (R935, 937)

One day in the middle of May, 1986, witness Carrico arrived at Appellant's house just as Anita was leaving. (R938) Ms. Carrico found Occhicone "crying and shaking and vomiting" inside his house. (R939) He told her that Anita had an abortion and he felt that he had nothing left to live for. (R939)

In several telephone conversations with the witness, Occhicone repeated suicidal intentions. (R940) In the week prior to the incident, Ms. Carrico received a telephone call from him where "he just kept telling me he was going to kill himself." (R940) She described Occhicone as "out of his mind", "totally upset" and "disturbed" during this conversation. (R940)

Four mental health experts testified during the penalty trial; three of these were defense witnesses. All of the doctors agreed that Occhicone had an alcohol dependent type personality. (R963, 1040, 1212, 1296) Dr. Fireman had at one time been director of an alcohol treatment group at a VA hospital. (R1111) He explained that alcoholics frequently can put on a facade of sobriety and mask the physical symptoms of intoxication. (R1111) However, if they were given mental testing of their ability to think rationally, it would be "diminished substantially."

(R1112)

All of the doctors also agreed that Occhicone was suffering from depression (R991, 1041-2, 1212, 1297) although they disagreed on its severity. Dr. Delbeato testified that Occhicone's results on the MMPI showed a "severely high chronic depression." (R994) This level of depression made Appellant "a good candidate for suicide." (R991, 994) Dr. Fireman diagnosed a major depression which was a primary basis for his finding that Appellant was under the influence of extreme mental or emotional disturbance. (R1041-2) On the other hand, state witness Dr. Mussenden termed Occhicone's depression "mild." (R1297)

During the psychiatric interviews, Occhicone told the physicians that he drank over one quart and perhaps as much as three quarts of vodka on the day of the incident. (R963, 1068, 1200, 1276) He also smoked some marijuana. (R1274, 1277) After Anita Gerrety sent him away at 3:00 a.m., he returned to his *own* house. (R1069, 1278) The phone rang and Anita said to him, "You fucking asshole. What do you come over here for?" She then hung up. (R1278, 1069)

Occhicone told the interviewers that he decided to return to the Artzner residence with the intention of shooting

himself in Anita's presence or challenging her to shoot him.[2] (R1069, 1279) He remembered the argument with Mr. Artzner and recalled shooting him impulsively after being hit on the head with a stick. (R970, 1066, 1279) His remembrance of shooting Mrs. Artzner was less clear and was a reaction to her screaming when he entered the house. (R1003, 1071, 1279, 1284)

Dr. Fireman gave his opinion that Occhicone did not have the mental capacity to form a premeditated intent. (R1042) His disorganized thinking process and self-destructive behavior precluded the deliberation necessary to premeditation. (R1043, 1104) Rather than cold-blooded and calculated, Appellant's actions were "hot-blooded, deranged and psychotic." (R1112)

Dr. Delbeato agreed that the homicides were not premeditated. (R1008, 1027) In his opinion, Occhicone is an emotionally unstable person given to dramatic and bizarre behavior when under the influence of alcohol. (R964-6) Appellant is "socially inefficient" with a personality "fixated like a teenager's.'' (R1013) Dr. Delbeato testified that Occhicone went to the Artzner home to be manipulative and pulled the telephone wires out *so* that he could "terrorize them and get his way." (R997, 1005) The "stupid dramatic game" backfired

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[2] This behavior would be consistent with an earlier incident to which Anita Gerrety testified during the guilt or innocence phase. Gerrety said she was at Occhicone's house around October 1985. (R279) When she tried to leave, Appellant pointed a pistol at her and fired it into the doorjamb. (R279-80) He tried to give her the pistol and asked her to shoot him, but she refused. (R280-1) The lurid details of the scene which followed are presented in the record at pages 282-288.

into an explosive frenzy. (R970)

Dr. Szabo also concluded that Occhicone intended to "frighten and terrorize" the Artzners. (R1194) He diagnosed an adjustment disorder with depression and a personality disorder in addition to alcoholism. (R1212) Dr. Szabo agreed with Drs. Delbeato and Fireman that Appellant was under the influence of an extreme mental or emotional disturbance and that his capacity to conform his conduct to the requirements of law was substantially impaired. **(R1177-8)**

In rebuttal, state witness Dr. Mussenden gave his opinion that Occhicone was not psychotic when he committed the homicides. (R1285) He concluded that Appellant was not extremely disturbed; nor was his capacity substantially impaired. **(R1288-9)** The state also presented testimony from four deputy sheriffs who came into contact with Occhicone after his arrest and gave opinions that he was not intoxicated. (R1246, **1248, 1254, 1324)**

As non-statutory mitigating evidence, two correctional officers from the Pasco County jail testified that Appellant was a very cooperative inmate during the time he was incarcerated awaiting trial. (R909, **917)** He served as a pod representative for the eight inmates in his cell block and made good suggestions to the staff. **(R908-9)** He adapted to the jail surroundings very well. (R923)

Appellant took the stand during penalty phase, testifying that he was a father and attempting to point out his

son in the courtroom. (R1224-5) He offered a composite exhibit of photographs of his son into evidence but the court excluded it on the state's objection. (R1225-30)

SUMMARY OF THE ARGUMENT

Rather than confine his opening statement to the evidence the State intended to present, the prosecutor speculated on what evidence the defense might present and his rebuttal to it. In fact, the defense chose to rest without presenting any evidence during the guilt or innocence phase. Appellant was denied due process by the prosecutor's reference during opening to statements Occhicone allegedly made and expert opinions based on these statements when neither the statements nor the opinions came into evidence. Appellant was also unable to confront the witnesses, who would have allegedly testified to these statements and rendered opinions based on them, in violation of the Sixth Amendment and Article I, section 16 of the Florida Constitution.

During voir dire, the trial court was informed that a courtroom spectator was telling prospective jurors that Occhicone was guilty. When questioned by the judge, the spectator admitted that she had discussed the case with a prospective member of the panel who was later excused by a defense peremptory. The court denied Appellant's motion for mistrial. His failure to inquire of the remaining jurors whether any had been prejudiced by the spectator's comments requires reversal.

The State introduced evidence that following Occhicone's arrest, he refused to take an atomic absorption test. The State offered no evidence to show that Occhicone was ever warned that the test was mandatory and that his refusal could be

used against him at trial.

During the guilt or innocence phase of the trial, Appellant did not testify. There is no record waiver of this fundamental constitutional guarantee.

The sentencing judge erroneously found that the homicide of Mrs. Artzner was cold, calculated and premeditated. The facts show that the shootings followed an angry confrontation with Mr. Artzner. There was neither a lengthy series of atrocious events nor a substantial period of reflection by Occhicone prior to the homicide. Therefore, the section 921.141(5)(i) aggravating circumstance was improperly found.

Comparison between other decisions of this Court and the record at bar show that this is not one of the most aggravated and unmitigated of first-degree murders. Accordingly, a sentence of life imprisonment is the proportional penalty here rather than death.

During the penalty phase of the trial, four police officers were allowed to give their opinions about Occhicone's level of intoxication after his arrest. There was no showing that lack of intoxication hours after the homicides was relevant to prove lack of intoxication when they occurred.

The prosecutor was permitted to insinuate on cross-examination of defense witnesses that Occhicone had a more extensive criminal record. This was done by reference to Appellant's "rap sheet", his "criminal past", and asking him how many times he had been convicted of a felony. The prosecutor

also elicited from Officer Stoner testimony that referred to a charge for which Occhicone had been acquitted at trial.

The court restricted Appellant's right to present mitigating evidence in his behalf when he ruled that photographs of Appellant's son were inadmissible. The photographs were relevant to rebut testimony elicited by the State that Occhicone abused his son.

Finally, the court's instructions to the jury during penalty phase were inadequate. The jury was instructed on the contested aggravating factor, section 921.141(5)(d) without even a minimal definition of the crime of burglary. The jury was also instructed on an aggravating factor which the court later agreed was inapplicable [section 921.141(5)(h)]. The jury instructions on sections 921.141(5)(h) and (i) were unconstitutionally vague because the jury was not informed of the limited construction given to these aggravating circumstances. The jury's death recommendation by a 7-5 vote precludes any finding of harmless error in the penalty trial.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE PROSECUTOR'S COMMENTS DURING OPENING STATEMENT WHICH ANTICIPATED TESTIMONY FROM WITNESSES WHO WERE NEVER CALLED DURING TRIAL.

The general rule of law regarding the prosecutor's opening statement is that he may "outline the evidence which he, in good faith, expects the jury will hear during presentation of the state's case." Ricardo v. State, 481 So.2d 1296 at 1297 (Fla. 3d DCA), rev. den., 494 So.2d 1152 (Fla. 1986). As stated by the Supreme Court of Idaho:

> Generally, opening remarks should be confined to a brief summary of evidence counsel expects to introduce on behalf of his client's case-in-chief. Counsel should not at that time attempt to impeach or otherwise argue the merits of evidence that the opposing side has or will present.

State v. Griffith, 97 Idaho 52, 539 P.2d 604 (1975). The ABA Standards are in agreement with this rule:

> The prosecutor's opening statement should be confined to a brief statement of the issues in the case and to remarks on evidence the prosecutor intends to offer which the prosecutor believes in good faith will be available and admissible,

ABA, Standards for Criminal Justice 3-5.5 (2d edition 1980).

In the case at bar, however, the prosecutor, rather than confine himself to the state's case, decided to speculate on what evidence might be presented by Appellant if he chose to present a defense. The prosecutor told the jury:

> I expect during the course of this trial -- I expect that you're going to hear from the paid psychiatrist of the defense, the man who back on June the 1st of 1987, said the Defendant was legally sane, he now is going to come back here for the first time and say: No, he is legally insane. And I believe that's possibly what you're going to hear. ...
>
> The fact that this psychiatrist was going to say the Defendant was suffering from a mental disease or disorder that prevented him from distinguishing right from wrong is associated with his intoxicated state. And it's based solely on what this Defendant told him months after the crime occurred. And he's going to tell you that he believes what this Defendant told him.

(R222-3)

At this point, defense counsel objected to the State's anticipation of the defense case. (R223) The court overruled Appellant's objection and the prosecutor continued:

> You're going to hear from this psychiatrist, a fellow by the name of Albert Firemen, who is going to tell you that he believed what the Defendant told him. And you're going to hear, ladies and gentlemen, numerous things that aren't true. You're going to hear about the Defendant's ability to recall each and every specific instance of what happened on June the 10th of 1986, the night of this

murder.

> You're going to hear, ladies and gentlemen, from medical personnel, physicians, who are going to tell you that if this Defendant had that type of recall months after the crime, he would not have been intoxicated. Because these experts are going to tell you that people do not have that good of recall after drinking as much as the Defendant told him he drank.

(R223-4)

Appellant, of course, did not present an insanity defense or call any witnesses on his behalf. He did rely on evidence of intoxication to dispute the element of premeditation and asked the jury to convict for second-degree murder only. Therefore, the prosecutor's mention of Appellant's "ability to recall each and every specific instance of what happened on ... the night of this murder" referred to statements made by the defendant which never came into evidence. The prejudice to Appellant's defense became evident with the prosecutor's mention of "physicians, who are going to tell you that if this Defendant had that type of recall months after the crime, he would not have been intoxicated." (R224) No physicians testified during the guilt or innocence phase of this trial.

Florida courts have not hesitated to reverse convictions when improper remarks are made by the prosecutor in his opening statement. See, Roberts v. State, 443 So.2d 192 (Fla. 3d DCA 1983) (comment on exercise of right to remain silent); Post v. State, 315 So.2d 230 (Fla. 2d DCA 1975) (putting

accused's character into evidence); Smith v. State, 358 So.2d 1137 (3d DCA); cert.dism., 364 So.2d 892 (Fla. 1978) (comment on silence). Cf., Fussell v. State, 436 So.2d 434 (Fla. 3d DCA 1983) (question to juror on voir dire commenting on silence). A "pre-evidentiary coercion" is as equally forbidden as "post evidentiary comment." Clark v. State, 256 Ark. 658, 509 S.W.2d 812 at 815 (1974); Roberts, supra.

The case at bar is analogous to that of Commonwealth v. Wilson, 402 A.2d 1027 (Pa. 1979). In Wilson, the prosecutor made references in opening argument to the defendant's incriminating statements following his arrest. These statements were never introduced into evidence at trial. Noting that when a confession is introduced into evidence, a defendant may cross-examine the witness who attests to it, the Wilson court held that the defendant was denied due process. Although the prosecutor was acting in good faith (because the statements had been previously found admissible after a pretrial motion to suppress) the prejudice to the defense required reversal.

The same is true in the case at bar. There is no evidence to show that the prosecutor's opening statement was not a good faith representation of what evidence he believed the defense would present. However, the defendant cannot be coerced into presenting evidence on his behalf. Amendments V and XIV, United States Constitution. Occhicone was prejudiced because there was no way he could cross-examine the prosecutor's assertion that he could recall every detail of the homicides.

Nor could he cross-examine the alleged expert opinions that this type of recall was inconsistent with intoxication. He was not given the fair trial constitutionally mandated by the Fourteenth Amendment, United States Constitution and Article I, Section 9 of the Florida Constitution.

Looking at the facts from a slightly different perspective, the prosecutor's opening statement consisted of hearsay statements allegedly made by Occhicone and hearsay expert opinion. Appellant was denied his constitutional rights under the Sixth Amendment, United States Constitution and Article I, section 16, Florida Constitution when he could not confront the witnesses who heard his statements and rendered opinions about his intoxication. Indeed, when these mental health experts testified during the penalty phase, three of them agreed that alcohol played a major role in the homicides. (R966-9, 1040-3, 1178) So the prosecutor's opening statement was misleading as well.

Because Occhicone's rights under Amendments V, VI and XIV, United States Constitution and the corresponding guarantees of the Florida Constitution were violated by the prosecutor's reference to prejudicial facts and opinions which never came into evidence, he should now be granted a new trial.

ISSUE II

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR MISTRIAL (BASED UPON A COURTROOM SPECTATOR'S EXPRESSION OF HER OPINION THAT APPELLANT WAS GUILTY IN THE HEARING OF PROSPECTIVE JURORS) WITHOUT CONDUCTING AN INQUIRY INTO WHETHER APPELLANT WAS PREJUDICED.

During voir dire, it came to the court's attention that a courtroom spectator was making statements that Appellant was guilty. (R144-5) The spectator was telling this to a prospective juror. (R145) Defense counsel noted that when this spectator was pointed out to him, she was talking to another prospective juror. (R146)

The spectator, Lela Loretta Lochard, was brought before the court to explain her conduct. (R147-54) She stated that she was a member of the "Homicide Victim's Group" appearing at the trial in support of Anita Gerrety, the victim's daughter. (R148) She admitted making statements that Occhicone was guilty but denied saying he should get the death penalty. (R149) These statements were made to a prospective juror who was later excused from the jury panel by defense peremptory strike. (R150, 161, 142) She denied telling anyone else except her husband about her belief in Appellant's guilt. (R151)

The trial judge reprimanded the spectator and ordered her not to discuss the case any further "in such a way so that it could be overheard by anyone else in that courtroom." (R154) Defense counsel then moved for a mistrial saying that other

prospective jurors might have overheard the Victim's Group member. (R154) The court denied the motion for mistrial, observing that there was no proof that "anyone has been tainted." (R155)

Another witness from the courtroom then testified that she was seated in the row right behind Ms. Lochard. (R157-8) There were five prospective jurors in Ms. Lochard's immediate vicinity. (R158) Lochard was saying that Occhicone was guilty in a loud voice. (R158-9) Everyone in the back three rows could hear everything that she was saying. (R159)

The trial judge adhered to his previous ruling on the defense motion for mistrial. (R163) He told counsel that he could inquire about the matter on voir dire of the prospective jurors. (R163)

The Sixth Amendment, United States Constitution and Article I, section 16, Florida Constitution guarantee a criminally accused the right to a fair trial by an impartial jury. Misconduct by a courtroom spectator is grounds for a mistrial where the misconduct could "prejudice the defendant or influence the verdict." People v. Spain, 154 Cal.App. 3d at 851, 201 Cal.Rptr. 555 at 558 (Cal.Ct.App. 1984).

This Court has considered the issue of interaction between courtroom spectators and jurors in two capital cases. In Woods v. State, 490 So.2d 24 (Fla.), cert.den., 479 U.S. 954 (1986), the defendant was on trial for the murder of a prison correctional officer. A number of the victim's fellow officers

attended the trial dressed in their uniforms. Woods complained that the presence of these uniformed officers intimidated the jury and denied him a fair trial. This Court affirmed the trial court's ruling which allowed the uniformed spectators to remain, but cautioned that "the question is close." 490 So.2d at 27. The Woods Court particularly noted that the spectators caused no disruption.

Another analogous case where this Court found no reversible error is Scull v. State, 533 So.2d 1137 (Fla. 1988). Following rendition of the verdict in the guilt or innocence phase of Scull's trial, the jury foreman embraced the victim's mother. The trial judge dismissed the jury foreman and conducted individual voir dire of the remaining jurors to find out whether their sentencing recommendation would be influenced by the foreman's conduct. This Court found the trial court's action acceptable and rejected Scull's argument that the entire jury panel should have been dismissed.

The case at bar requires a different analysis than Woods or Scull. Unlike Woods, the courtroom spectator at bar expressed her opinion about Appellant's guilt in the presence of prospective jurors. Unlike Scull, the trial judge did not conduct an examination of the prospective jurors to determine whether any had been influenced by the Victim's Group member. Rather, the facts at bar are closest to those presented in State v. Stewart, 295 S.E.2d 627 (S.C. 1982).

In this South Carolina murder trial, a juror reported

to the judge that a spectator continually glared at the jury and had made "opinionated remarks" overheard by some jurors before the jury was sworn. The trial judge denied the defendant's motion for mistrial but instructed the jury to disregard the spectator's comments. The South Carolina court held that the trial court's action was insufficient. Before denying the motion for mistrial the judge should have "determined whether or not there was prejudice." 295 S.E.2d at 630.

The Stewart decision is also instructive because of the analogy the South Carolina court drew between spectator misconduct and prejudicial news articles appearing during trial. Regarding news articles, once the defendant shows that the articles are prejudicial, the trial judge must inquire whether any of the jurors read the articles. He cannot merely presume that the jury had followed instructions. 295 S.E.2d at 630.

The same rule of law regarding prejudicial media coverage during trial prevails in Florida courts. A court's failure to inquire whether jurors have been exposed to prejudicial accounts and, if so, whether they can still render an impartial verdict requires reversal for a new trial. Robinson v. State, 438 So.2d 8 (Fla. 5th DCA), rev.den., 438 So.2d 834 (Fla. 1983); Ferrante v. State, 524 So.2d 742 (Fla. 4th DCA 1988). This Court should now declare that the same procedure must be followed when there is a possibility of prejudice arising from improper remarks made by courtroom spectators. Because the trial court did not ascertain whether any of the remaining prospective

jurors overheard the spectator's remarks and, if so, whether the remarks might influence the verdict, Occhicone should be granted a new trial.

ISSUE III

WHEN THE PROSECUTOR COMMENTED DURING CLOSING ARGUMENT ABOUT APPELLANT'S REFUSAL TO TAKE AN ATOMIC ABSORPTION TEST, THE MOTION FOR MISTRIAL SHOULD HAVE BEEN GRANTED.

In State v. Burwick, 442 So.2d 944 (Fla. 1983), cert. den., 466 U.S. 931 (1984), this Court held that it was error to permit the State to rebut an insanity defense by introducing evidence that the defendant exercised his right to silence and requested to speak with an attorney after receiving Miranda warnings. The Burwick decision rests on two independent rationales. First, this Court found that post-Miranda silence has dubious probative value not only as it relates to guilt but also as it relates to mental condition. Secondly, the Burwick court held that the Due Process Clause of the United States Constitution, Fourteenth Amendment and Article I, Section 9 of the Florida Constitution would not permit the State to benefit by assuring the defendant that he would not be penalized by exercising his Miranda rights and then impeaching his defense with testimony that he invoked these rights.

The United States Supreme Court has agreed that fundamental fairness guaranteed by the Due Process Clause of the Fourteenth Amendment is violated when the State uses the defendant's exercise of post-Miranda silence to obtain his conviction. Doyle v. Ohio, 426 U.S. 610 (1976). In Wainwright v. Greenfield, 474 U.S. 284 (1986), the Court found the Doyle

holding equally applicable where the State introduces exercise of these constitutional rights to rebut an insanity defense. Commenting that the State could prove that the defendant's behavior appeared rational at the time of his arrest without mentioning exercise of his constitutional rights, the Greenfield court barred evidentiary use of an individual's exercise of constitutional rights after the State's assurance that such exercise would not be penalized.

At bar, Appellant presented a defense which depended upon a diminished capacity to premeditate the shooting deaths of Mr. and Mrs. Artzner. Therefore, the Greenfield and Burwick holdings are equally relevant to his situation.

During the guilt or innocence trial, deputy sheriff Roy Corrigan was permitted to testify as follows:

> Q. Deputy Corrigan, you're now at the sheriff's office, you now come into contact with the Defendant, and you at that point in time decided that you were going to conduct an atomic absorption test?
>
> A. Yes.
>
> Q. What is an atomic absorption test?
>
> A. An atomic absorption test is a test used to determine whether gunpowder is present on the hand of someone who may or may not have shot a weapon using a gunpowder charge. There are swabs taken from each hand and sent to a lab.
>
> Q. So, were you going to take *the* swabs from the defendant's hands?
>
> A. Yes.

Q. Did you go over to him and attempt to do that?

A. Yes, I did.

Q. What happened?

A. He physically would pull his hands back and said: You're going to have force me to.

Q. You were going to have to force him?

A. Yes.

Q. Did you force him, did you take it?

A. No, sir, I did not take the test.

(R529-30)

The Third District, in Herrina v. State, 501 So.2d 19 (Fla. 3d DCA 1986), has addressed the admissibility of a defendant's refusal to take a "hand swab test." The Herring court held that fundamental fairness forbids use of the defendant's refusal as proof of guilt unless the defendant was specifically told that the test was compulsory. Otherwise, the State could mislead the defendant into thinking that no adverse consequences would result from refusing the test.

At bar, nothing in Deputy Corrigan's testimony indicates that Occhicone was advised that refusal to take the atomic absorption test could be used as evidence against him. Even more prejudicial was the use of this refusal in the prosecutor's closing argument. The prosecutor commented:

As I was saying, at that point in

> time Deputy Corrigan went and attempted to get an atomic absorption test done of this Defendant, and the Defendant physically refused and told him: You have to fight me for this. This is a fellow who is so intoxicated, so clouded by poison, by alcohol, by marijuana, that he doesn't know what he's doing that night. Yet, he knows enough not to give the identification technician his hands to do an atomic absorption test.

(R794)

Defense counsel objected to this line of argument, specifically citing Greenfield, supra, as authority. (R794) He further moved for mistrial. (R794) The trial court should have granted a mistrial.

This error should be considered by this Court for its effect on both guilt or innocence and the penalty trials. Although Appellant's counsel did not object to allowing Occhicone's refusal to take the atomic absorption test into evidence (R529), he specifically objected to any testimony which would tie an exercise of rights[3] to rebuttal of Appellant's mental condition. (R528, 533-9) The prosecutor's comment on the refusal as reflecting a sober and rational state of mind may have caused the jury to give less weight to the mitigating evidence

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[3] It should be understood that Occhicone did not have any right to refuse the atomic absorption test if Deputy Corrigan had advised him that adverse consequences would attach to his refusal. See, South Dakota v. Neville, 459 U.S. 553 (1983). This predicate (analogous to Miranda warnings) was not established by the prosecution.

presented in the penalty phase as well as puncturing Appellant's lack of premeditation defense in the guilt or innocence trial. Since Appellant's conviction and sentence rest on this violation of the Fifth, Eighth and Fourteenth Amendments, United States Constitution as well as the corresponding guarantees under Article I, sections 9 and 17 of the Florida Constitution, he should now be granted a new trial.

ISSUE IV

THE TRIAL COURT ERRED BY FAILING TO INFORM APPELLANT OF HIS RIGHT TO TESTIFY DURING THE GUILT OR INNOCENCE PHASE OF HIS TRIAL AND FAILING TO SECURE AN ON-THE-RECORD PERSONAL WAIVER OF THIS FUNDAMENTAL RIGHT.

At the outset, Appellant concedes that this Court has previously decided this question adversely to him in Torres-Arboledo v. State, 524 So.2d 403 (Fla.), cert. den., 109 S.Ct. 250 (1988). He requests this Court to revisit this issue in light of the following.

In Pock v. Arkansas, 482 U.S. ___, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987), the Court held that an accused's right to testify in his own defense is constitutionally guaranteed by the Due Process Clause of the Fourteenth Amendment, the Compulsory Process Clause of the Sixth Amendment, and the Fifth Amendment privilege against self-incrimination. The Court had previously noted in passing that the right to take the witness stand in one's own defense was a fundamental guarantee which only the accused himself could waive. For instance, in Jones v. Barnes, 463 U.S. 745 at 751 (1983), the Court wrote:

> the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.

None of these fundamental rights may be waived except by the accused personally.

In People v. Curtis, 681 P.2d 504 (Colo. 1984), the Colorado Supreme Court held that the record must reflect that an accused was adequately informed of his right to testify and that he knowingly, intelligently and voluntarily waived this right. Recently, the West Virginia Supreme Court joined Colorado in requiring a record waiver of the defendant's right to testify. State v. Neuman, 371 S.E.2d 77 (W.Va. 1988).

At bar, Occhicone did testify in the penalty phase of his trial. During the guilt or innocence phase of his trial, there is nothing on the record to show whether or not he was aware of his right to take the stand. The court's failure to advise Appellant of his right to testify and secure a personal waiver of that right was cited to the trial court in Appellant's comprehensive Motion for New Trial as grounds for a new trial. (R1623)

This Court should also recognize that none of the decisions relied upon in Torres-Arboledo v. State, supra, involved a capital prosecution. A defendant may be entitled to greater due process protections in a capital case. Beck v. Alabama, 447 U.S. 625 (1980). This Court has also previously noted the distinction between procedural rights in capital and non-capital trials. Compare Harris v. State, 438 So.2d 787 (Fla. 1983) (defendant must expressly waive instruction on lesser included offenses) with Jones v. State, 484 So.2d 577 (Fla. 1986) (no record waiver of instruction on lesser included offenses required in non-capital prosecution).

Based on the foregoing, Appellant urges this Court to recede from Torres-Arboledo and to hold that Fourteenth Amendment due process and Article I, section 9 of the Florida Constitution require that, in a capital case, the record must show a personal waiver of the right to testify when the accused does not testify in his own behalf.

ISSUE V

THE SENTENCING JUDGE ERRONEOUSLY FOUND THE AGGRAVATING CIRCUMSTANCE COLD, CALCULATED AND PREMEDITATED [§921.141(5)(i)] APPLICABLE TO THIS HOMICIDE.

The State relied heavily on Appellant's barroom outbursts against the Arteners as evidence that the homicides were cold, calculated and premeditated. In his written findings, the sentencing judge noted Occhicone's dislike for Anita Gerrety's parents and his prior blustering threats to punish Anita by shooting her family in her presence. (R1647, see Appendix) The judge equated these prior emotional tantrums with "heightened premeditation." (R1647, see Appendix)

In defining the scope of the section 921.141(5)(i) aggravating circumstance, this Court has repeatedly used as examples "execution murders, contract murders, or witness elimination murders." Harmon v. State, 527 So.2d 182 at 188 (Fla. 1988); McCray v. State, 416 So.2d 804 (Fla. 1982). Application of this aggravating factor requires "a careful plan or prearranged design to kill." Roaers v. State, 511 So.2d 526 at 533 (Fla. 1987). "Heightened" premeditation means "a cold-blooded intent to kill that is more contemplative, more methodical, more controlled" than ordinary premeditation. Nibert v. State, 508 So.2d 1 at 4 (Fla. 1987).

Turning to the events of June 10, 1986, it is clear that when Occhicone came to the Artzner residence at 3:00 a.m. to talk to Anita, there was no intent to commit murder. When Anita

told him to leave or else she was going to call the Sheriff's Office, Appellant left. (R248-9)

When Occhicone returned to the Artzner residence an hour later, he was armed with a pistol. At some point, he pulled the telephone wires from the junction box. These factors alone do not prove a premeditated intent to kill, however. In Harvey v. State, 529 So.2d 1083 at 1087 (Fla. 1988), this Court specifically observed that cutting phone lines in advance does not prove a prearranged homicide.

Moreover, there were other explanations for Occhicone's conduct. At both 3:00 a.m. and when he returned, Appellant insisted on talking to Anita about their relationship. (R248, 318) Pulling out the phone wires ensured that she couldn't ignore him and merely call the police.

If Occhicone had planned to kill Mr. and Mrs. Artzner when he returned to their residence, it seems likely that he would have shot Mr. Artzner as soon as Artzner opened the garage door. Engaging in a heated argument which the neighbors could overhear is inconsistent with the cold, calculated and premeditated aggravating circumstance. It should also be understood that Occhicone only shot Mr. Artzner once and that this shooting may have been a reaction to being hit with a broomstick.

Therefore, even in the light most favorable to the State, there is no evidence to show that Occhicone contemplated shooting Mrs. Artzner at any time before he shot Mr. Artzner.

Even disregarding Appellant's claim that he broke through the door between the garage and the kitchen to get help for Mr. Artzner (R1071), any premeditated intent to kill Mrs. Artzner could have existed for only a short time before Occhicone shot her.

The facts at bar are comparable those in several decisions of this Court where the cold, calculated and premeditated aggravating circumstance was disapproved. In Garron v. State, 528 So.2d 353 (Fla. 1988), the defendant shot his wife during a heated quarrel. He then went to another room and gunned down his stepdaughter while she was on the telephone. This Court called the shooting of the stepdaughter "a spontaneous reaction", in striking the heightened premeditation aggravating circumstance. 528 So.2d at 361.

Similarly, in Kina v. State, 436 So.2d 50 (Fla. 1983), the defendant struck his roommate on the head with a piece of pipe. He then went to another room in the apartment and took a pistol from its hiding place. He returned to shoot the victim twice in the head, causing her death. This Court found that premeditation was proven, but not a cold and calculated manner, in striking the aggravating factor.

As a final case for comparison, consider Hamblen v. State, 527 So.2d 800 (Fla. 1988). The defendant was robbing the proprietress of a boutique when the victim pressed a silent alarm button. This made the defendant angry and he proceeded to march the victim into a dressing room where he shot her in the head.

The killing was premeditated but did not rise to the level of the section 921.141(5)(i) aggravating circumstance. As in these cases, there was no

> particularly lenathv. methodic, or involved series of atrocious events or a substantial period of reflection and thouuht by the perpetrator[4]

in the facts at bar. Consequently, Occhicone's sentence of death should be vacated and the proper factors in aggravation and mitigation reweighed.

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[4] Nibert v. State, 508 So.2d at 4 (Fla. 1987) (emphasis in original).

ISSUE VI

A SENTENCE OF DEATH IS A DISPROPORTIONATE PENALTY FOR THIS HOMICIDE.

In State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974) this Court stated that the death penalty was reserved by the legislature as a punishment for "only the most aggravated and unmitigated" of first-degree murder cases. 283 So.2d at 7. Part of this Court's function in capital appellate proceedings is to "review [the] case in light of the other decisions and determine whether or not the punishment is too great." 283 So.2d at 10.

The homicide at bar is not one of the most aggravated first-degree murder cases. The sentencing judge found three aggravating circumstances applicable. (R1646-7, see Appendix) One of these, the cold, calculated and premeditated factor, was erroneously found. The other two aggravating circumstances, while supported by the evidence, were not deserving of much weight when compared to other capital cases.

One of the aggravating factors was section 921.141(5)(d), Florida Statutes (1985), committed during the course of a burglary. Certainly Occhicone broke through the garage entry door into the Artzner residence. However, this was not a well-planned breaking and entering, but an impulsive response to the shooting of Mr. Artzner.

The other proven aggravating factor was section 921.141(5)(b), Florida Statutes (1985), prior conviction of a

violent felony. This factor was based upon the contemporaneous homicide of Raymond Artzner and a prior conviction for resisting arrest with violence. With regard to the resisting arrest conviction, it is noteworthy that it arose from a domestic complaint and that Occhicone had been drinking. (R883, 890) Also, the arresting officer was not injured in the scuffle. (R889-90)

When comparing the case at bar to other decisions of this Court, it becomes evident that there are several cases where the defendant's sentence was reduced to life where there was another victim killed in the same incident. In Masterson v. State, 516 So.2d 256 (Fla. 1987), two victims were shot in the head with a pillow and a chair cushion used as muffling devices during the course of an armed burglary. The defendant told his friends that he shot the female victim because he didn't want to leave any witnesses.

On appeal, this Court reduced Masterson's sentence to life imprisonment in accordance with the jury recommendation. The mitigating evidence that the defendant was a Vietnam veteran suffering from post-traumatic stress disorder who had consumed substantial amounts of drugs and alcohol on the day of the murder established a reasonable basis for a life sentence.

When compared to the facts in Masterson, there is much less aggravation at bar and at least equal mitigation. Occhicone's shooting of Mrs. Artzner was impulsive rather than a calculated execution to eliminate a witness. Like Masterson,

Occhicone had consumed a great deal of alcohol prior to the shootings. While the sentencing judge found that Occhicone's capacity was not substantially impaired, he relied upon Appellant's habitual heavy drinking, noting that Occhicone "was able to ambulate, converse and generally function without apparent symptoms of impairment." (R1648, see Appendix) A more perceptive analysis of the evidence would have focused upon the mental deterioration caused by alcohol abuse and the result on Occhicone's effective ability to control his behavior. Cf., Guraanus v. State, 451 So.2d 817 (Fla. 1984).

The sentencing judge at bar did, however, find as a mitigating factor that Occhicone was under the influence of extreme mental or emotional disturbance. (R1648, see Appendix) He also found that Occhicone had adjusted well to prison and was a good inmate. (R1649, see Appendix) Certainly, there was ample evidence in mitigation from which a reasonable person could conclude that Appellant, like Masterson, deserved a life sentence.

Other decisions of this Court which should be considered in terms of proportionality include Amazon v. State, 487 So.2d 8 (Fla. 1986) and Holsworth v. State, 522 So.2d 348 (Fla. 1988). Amazon involved the particularly atrocious double murder of a mother and her eleven-year-old daughter who were stabbed to death during the burglary of their home. A sexual battery and kidnapping accompanied the homicides. In Holsworth, the defendant burglarized the mobile home of a mother and her

daughter. Holsworth stabbed both, killing the daughter. Three years earlier he had attacked another woman in her mobile home located in the same trailer park. This Court reduced the sentences of death to life imprisonment in both Amazon and Holsworth.

One distinction between the case at bar and Masterson, Amazon, and Holsworth is that the defendants in the latter cases all received jury penalty recommendation of life imprisonment. Occhicone's jury recommended death by a 7-5 margin. (R1364, 1600) This Court has stated that a jury's sentencing recommendation is of "extreme importance." Copeland v. Wainwriuht, 505 So.2d 425 at 427 (Fla. 1987). Even a tie vote jury recommendation of life is "entitled to great deference." Craig v. State, 510 So.2d 857 at 867 (Fla. 1987).

One question presented here is whether this Court can treat capital cases where six jurors recommend a life sentence entirely differently from those where only five jurors recommend a life sentence. The Eighth Amendment requires heightened reliability in capital sentencing proceedings. See e.g., California v. Ramos, 463 U.S. 992 (1983). When the State convinces only a bare majority of jurors that death is the appropriate sentence, a sole juror could effectively make the decision whether the defendant lives or dies.[5] Such a result

[5] Cf., Johnson v. Louisiana, 406 U.S. 356 (1972), J. Blackmun concurring (Conviction by substantial majority of jury [9-3] is constitutionally permissible but 7-5 standard would be questionable).

would result in the arbitrary and capricious capital sentencing condemned in Furman V. Georgia, 428 U.S. 238 (1972), and hence violate the Eighth Amendment, United States Constitution. For this reason, this Court should examine the case at bar for proportionality in comparison with decisions where jury life recommendations were returned as well as those where the jury recommended death.

The advisory jury recommended death in Wilson v. State, 493 So.2d 1019 (Fla. 1986), where the defendant killed his father and a five-year-old cousin while also attempting to murder his stepmother. This Court approved the finding of aggravating circumstances (prior conviction of violent felony and heinous, atrocious or cruel) and noted that there were no mitigating factors. Nonetheless, the Wilson court reduced the defendant's sentence to life imprisonment because murders arising from heated domestic confrontations do not warrant a sentence of death.

At bar, the shootings followed an angry confrontation between Mr. Artzner and Occhicone. A neighbor heard Artzner yelling, "Get the hell out of here" and "Don't ever come back here." (R357-8) Occhicone's relationship with Anita Gerrety also lends a quasi-domestic aspect to the incident.

What is even more significant about the comparison between Wilson and the case at bar is the contrast between the total lack of mitigation in Wilson and the substantial amount of mitigating evidence here. Alcohol clearly played a major role in this tragedy. Occhicone's obsession with Anita Gerrety amounted

to extreme emotional disturbance.

In Irizarry v. State, 496 So.2d 822 (Fla. 1986) the defendant's "passionate obsession" with his former wife led him to break into her house. He attacked her and her new lover with a machete, killing the ex-wife. This Court stated that a penalty of life imprisonment "is consistent with cases involving similar circumstances." 496 So.2d at 825.

As a final case for comparison, this Court should consider the decision of Fead v. State, 512 So.2d 176 (Fla. 1987). Fead shot his girlfriend to death in a jealous rage magnified by consumption of alcohol. Despite his previous conviction for murder in 1973 and his status on parole, six justices of this Court agreed that Fead's sentence should be reduced to life imprisonment. Probably Justice Shaw's concurring opinion in Fead is most apropos here, because he disagreed with the majority's Tedder[6] application and relied on proportionality alone. 512 So.2d at 179.

The case at bar fits the pattern of murders arising from "lovers' quarrels or domestic disputes" identified in Fead. 512 So.2d at 179. Moreover, Occhicone killed two people during the same alcohol influenced incident. This is clearly less reprehensible than engaging in more than one murderous episode as Fead did.

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

Considering the foregoing, Occhicone deserves to have his sentence reduced to life imprisonment because "[t]his is not one of the more aggravating and indefensible crimes for which the death penalty is appropriate." Fead, 512 So.2d at 179-80, Shaw, J. concurring.

ISSUE VII

THE TRIAL COURT ERRED BY PERMITTING FOUR POLICE OFFICERS TO GIVE THEIR OPINIONS ABOUT APPELLANT'S LEVEL OF INTOXICATION BECAUSE THE OFFICERS DID NOT OBSERVE HIM UNTIL SEVERAL HOURS AFTER THE SHOOTINGS.

Florida courts permit a lay witness to give an opinion as to whether another person was intoxicated under certain circumstances. As stated by this Court in ~~Cannon v. State~~, 91 Fla. 214, 107 So. 360 (1926):

> It was permissible ... to allow the state to introduce evidence showing or tending to show that the defendant was under the influence of intoxicating liquor at the time the deceased was struck and injured, or that she was in that condition so shortly thereafter as to afford a reasonable inference that such condition existed at the time of the injury.

107 So. at 362.

The question presented in the case at bar is whether observations not "so shortly thereafter" are admissible to show lack of intoxication at the time of the event.

Witnesses testified that the shootings occurred shortly before 4:00 a.m. on June 10, 1986. (R351, 354, 357) Detective Roy Haynes testified that he and Deputy Hypes encountered Occhicone and placed him under arrest "shortly after" 6:00 a.m. (R430) Therefore, somewhat over two hours elapsed between the shootings and the first contact with Appellant. It should also be noted that neither of the two arresting officers testified in

regard to intoxication.

Of the witnesses who did testify, Deputy Corrigan said he came into contact with Occhicone between 7:00 and 7:30 a.m. (R1244), Deputy Taylor said "approximately 6:00" (R1248), Sergeant Petrosky said approximately 8:00 a.m. (R1254), and Sergeant Carpenter couldn't recall more specifically than the "early morning hours". (R1324) These four witnesses all gave opinions that Appellant didn't appear to be intoxicated. (R1246, 1248, 1254, 1324)

Defense counsel objected to the testimony of these witnesses on several grounds, one of which was relevancy. (R1243) They simply had not observed Occhicone close enough to the time of the shootings for their opinions to be competent. (R1243) The objections were renewed (R1247, 1252-3) and defense counsel also moved to strike Sergeant Carpenter's testimony because he was unable to recall the time with any specificity. (R1325-6)

The facts at bar should be compared with those of State v. McGarr, 147 A. 876 (R.I. 1929). In McGarr, the defendant complained that a physician was not permitted to testify that the defendant was sober at 8:00 p.m. Noting that the doctor said he couldn't tell whether the defendant had been under the influence of alcohol two hours earlier (when the offense occurred), the appellate court affirmed the trial court's exclusion of this testimony.

Comparison should also be made with this Court's

decision in Garron v. State, 528 So.2d 353 (Fla. 1988) where non-expert opinions on sanity were discussed. The Garron court held that lay opinions on sanity are admissible only if the witness observed the accused "in close time proximity" to the offense. 528 So.2d at 357. A similar standard should be applied to non-expert opinions on intoxication.

At the very least, the trial court should have required a foundation to show why an opinion that someone was sober two to four hours after the event is relevant to prove lack of intoxication at the time of the shootings. There was no scientific evidence before the court or the jury to indicate how long it would take a severely intoxicated individual to become sober in appearance. Therefore, the jury could only guess as to what weight the officers' testimony should be given.

Considering the jury's bare majority recommendation of 7-5 in favor of death, the error here cannot be harmless. The only eyewitness to the shootings, Anita Gerrity, testified that Occhicone reeked of alcohol and was staggering. (R317-8) Had the jury not heard opinions that Appellant was sober hours after the event, they might well have given more weight to the impaired capacity mitigating factor. Appellant should now be granted a new penalty proceeding before a new jury.

ISSUE VIII

APPELLANT'S PENALTY TRIAL WAS UNFAIR BECAUSE THE PROSECUTOR WAS PERMITTED TO INSINUATE REPEATEDLY ON CROSS-EXAMINATION THAT APPELLANT HAD A MORE EXTENSIVE CRIMINAL RECORD.

At several times during the penalty proceedings, the prosecutor cross-examined defense witnesses in such a way as to insinuate that Occhicone had an extensive criminal record. The first such occurrence came during the testimony of correctional officer William Belcher who had said on direct examination that Occhicone was helpful in resolving problems within the jail. (R917-8) The prosecutor cross-examined Officer Belcher as follows:

> Q. Now, you only know this Defendant since his arrest date?
>
> A. Yes, sir.
>
> Q. Do you know how he acts in the jail?
>
> A. Yes.
>
> Q. You don't know how he acts when he's got his freedom?
>
> A. No, I do not.
>
> ...
>
> Q. And by the way, do you get a chance to check records and rap sheets and things of that nature?
>
> A. Occasionally, I do.
>
> Q. Do you do that over there with all the inmates?
>
> A. Only on certain occasions when

I do find a problem and I do like to check their background to see what they might do.

...

Q. And I assume that you've not done that in Mr. Occhicone's case because he's been a fairly good prisoner?

A. I had not had the occasion to want to do so.

(R922-4)

The inescapable point of this line of questioning is that if the witness had seen Appellant's rap sheet, he wouldn't be testifying to Occhicone's good character. The jury might well conclude that Occhicone's rap sheet showed an extensive criminal background.

In the first place, this cross-examination was beyond the scope of direct. Belcher testified only to Occhicone's good conduct while awaiting trial in jail, not to his prior conduct in the outside world. Defense counsel objected to mention of a rap sheet and moved for a mistrial. The prosecutor defended his actions, saying the cross-examination showed the witness' bias in that he "doesn't usually do his job" and doesn't check all of the inmates' rap sheets. (R925-6) The trial court overruled the objection and denied the motion for mistrial. (R927)

The prosecutor's questioning at bar is similar to the cross-examination of the defendant in Straiaht v. State, 397 So.2d 903 (Fla. 1981), where unrelated criminal activity was suggested. The Straiaht court called the prosecutor's question "highly improper" as a "general attack on the defendant's

character." 397 So.2d at 909. The prosecutor's question in Straiaht was calculated to "elicit irrelevant testimony" and suggest "to the jury the existence of such prejudicial evidence." 397 So.2d at 909. The same is true of the prosecutor's question about rap sheets at bar.

Although the error in Straight was harmless because it could not have affected the verdict, at bar the bare majority 7-5 jury death recommendation precludes a finding of harmlessness. Compare, Rhodes v. State, Case No. 67,842 (Fla. July 6, 1989) [14 FLW 343] (Communication between judge and jury outside presence of defendant and counsel not harmless because close jury vote). This Court should also note the decision of Lee v. State, 410 So.2d 182 (Fla. 2d DCA 1982) where a police detective's statement that he obtained the defendant's aliases from his rap sheet was held reversible error.

During his cross-examination of Doctor Szabo, the prosecutor again made prejudicial insinuations. In reference to the conditions of the psychiatric interview, the prosecutor asked:

> Q. And you sat down and asked questions of the Defendant, I guess?
>
> A. Yes.
>
> Q. And I guess you asked him some of his background?
>
> A. Yes.
>
> Q. And I guess questions about his criminal past?

A. Yes.

(R1181)

Defense counsel objected and moved for a mistrial. (R1181) The Court overruled the objection because Dr. Szabo didn't give any details of this "criminal past." (R1181-2)

As defense counsel said at the time, mentioning a criminal past without giving the details is "probably worse than saying what it was." (R1182) While the jury was aware of Occhicone's conviction for resisting arrest with violence, the term "criminal past" connotes a more extensive criminal history. The jury might well have interpreted the prosecutor's question to mean that Occhicone was a career criminal.

Many years ago, this Court, in Messer v. State, 120 Fla. 95, 162 So. 146 (1935), reversed the conviction where during cross-examination the prosecutor injected:

> veiled innuendoes and suggestions of general criminality calculated to ... inspire the belief on the jury's part that, regardless of the merits of the particular case being tried, the accused should be found guilty because of his being generally suspected of other offenses. 162 So. at 147.

Thus, innuendo or insinuation of additional criminal activity is sufficiently prejudicial to require reversal. Other decisions by Florida courts to this same effect include Von Carter v. State, 468 So.2d 276 (Fla. 1st DCA 1985) (reference to scar on defendant's neck to insinuate that he had been involved in a knife fight); Thorpe v. State, 350 So.2d 552 (Fla. 1st DCA

1977) (reference to prior accusation of crime where no conviction was obtained); Wilt v. State, 410 So.2d 924 (Fla. 3d DCA 1982) (once defendant admits prior conviction, further questioning must be considered an attack on character).

One final incident at trial deserves mention for its cumulative effect. When Occhicone testified on his own behalf, the prosecutor asked him on cross-examination "how many times have you been convicted of a felony or a crime involving dishonesty?" (R1231) While ordinarily this would be permissible under section 90.610 of the Florida Evidence Code [see Jackson v. State, 530 So.2d 269 (Fla. 1988)], at bar, the judge correctly recognized that Occhicone's credibility was not in question because he only testified that he had a son. (R1233-4) While sustaining Appellant's objection, the court denied the motion for mistrial. (R1233-4)

The prosecutor's question about prior convictions had only a limited prejudicial effect, but when combined with the prior insinuations of generalized criminal activity; it is clear that Occhicone was denied a fair penalty trial. The Eighth and Fourteenth Amendments, United States Constitution require a high degree of procedural fairness and reliability in a capital sentencing proceeding. Gaining a jury death recommendation through insinuations of greater criminal activity on the Appellant's part does not meet the constitutional standard. Accordingly, Occhicone should now be granted a new penalty phase proceeding before a new jury.

ISSUE IX

THE TRIAL COURT ERRED BY FAILING TO STRIKE TESTIMONY FROM OFFICER STONER WHICH RELATED DETAILS OF A FELONY FOR WHICH APPELLANT HAD BEEN TRIED AND ACQUITTED.

During the penalty phase, Officer Stoner was permitted to testify that he encountered Occhicone in October 1980 when the deputy responded to a domestic complaint. The prosecutor elicited the following testimony from Stoner:

> Q. Did he become physical with you?
>
> A. He did. He pushed me in the general direction of my car, and than he attempted to close the outer garage door. And then he retreated to the inner confines of his residence.
>
> ...
>
> Q. Did you come in contact with the Defendant again?
>
> A. Yes, sir.
>
> Q. And can you tell the jury what happened then?
>
> A. He opened the front door and stated that -- he told me to get the hell out of here, and gave me a thump on the chest.

(R887)

These alleged batteries on Officer Stoner all took place before Appellant was placed under arrest.

Defense counsel moved to strike this testimony because it was not relevant to the resisting arrest with violence

conviction. (R893) He noted that the testimony was evidence of battery on a law enforcement officer and would be used as an improper aggravating factor by the jury. (R893) The prosecutor admitted that Occhicone had been found not guilty after trial on the battery charge. (R894, 896)

The trial judge denied Appellant's request and refused to give the jury any cautionary instruction. (R895-6) The court also denied the defense motion for mistrial on these grounds. (R896)

In State v. Perkins, 349 So.2d 161 (Fla. 1977), this Court considered whether evidence of crimes for which a defendant has been tried and acquitted may be admitted at a subsequent trial. The Perkins court noted a split authority, but decided to follow the Fifth Circuit's position expressed in Winaate v. Wainwrisht, 464 F.2d 209 (5th Cir. 1972). This Court wrote:

> We agree with Winaate that it is fundamentally unfair to a defendant to admit evidence of acquitted crimes. To the extent that evidence of the acquitted crime tends to prove that it was indeed committed, the defendant is forced to reestablish a defense against it. Practically, he must do so because of the prejudicial effect the evidence of the acquitted crime will have in the minds of the jury in deciding whether he committed the crime being tried. It is inconsistent with the notions of fair trial for the state to force a defendant to resurrect a prior defense against a crime for which he is not on trial.

349 So.2d at 163.

Accordingly, the Perkins court held that relevant evidence of collateral crimes otherwise admissible under the "Williams Rule" is barred where acquittal has been obtained.

In Jackson v. State, **498** So.2d **406** (Fla. **1986),** the defendant had been acquitted of attempted first-degree murder when tried for an incident which occurred during her flight from the homicide of a police officer. At trial for first-degree murder in the death of the officer, the trial court specifically limited testimony about the incident such that:

> No testimony was allowed concerning the alleged shooting or concerning the facts of the alleged crime of which appellant was acquitted.

498 So.2d at **410.**

The trial court's limitation of the testimony to facts which placed the defendant in the witness' cab with a handgun was approved by this Court because the evidence did not show a collateral crime.

At bar, the court should have tailored the admissible evidence by granting the defense motion to strike all reference to physical contact between Occhicone and Officer Stoner prior to the arrest. The court should also have cautioned the jury to disregard this testimony in accord with Appellant's request. The danger exists that the jury at bar gave credence to Officer Stoner's testimony that Occhicone struck him twice before the arrest although a previous jury evidently found this testimony incredible.

In Robinson v. State, 487 So.2d 1040 (Fla. 1986), the trial court allowed the State to cross-examine defense witnesses at penalty phase regarding crimes the defendant had allegedly committed, but was never charged with. This Court stated:

> Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial. We find the state went too far in this instance.

487 So.2d at 1042.

If it is excessively prejudicial for a penalty jury to hear evidence about crimes for which the defendant was never charged,[7] it must be equally prejudicial to hear about crimes for which the defendant was tried and acquitted. The Eighth and Fourteenth Amendments, United States Constitution cannot countenance a jury recommendation of death which could have resulted from a single juror's giving weight in aggravation to a prior charge for which Appellant was acquitted. Accordingly, Occhicone should now be granted a new penalty proceeding before a new jury.

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[7] See also, Garron v. State, 528 So.2d 353 (Fla. 1988).

ISSUE X

THE TRIAL COURT IMPROPERLY RESTRICTED APPELLANT'S RIGHT TO PRESENT MITIGATING EVIDENCE WHEN PHOTOGRAPHS OF APPELLANT'S SON WERE DENIED ADMISSION INTO EVIDENCE.

Hitchcock v. Duaqer, 481 U.S. 393 (1987) is the most recent of a line of United States Supreme Court decisions descended from Lockett v. Ohio, 438 U.S. 586 (1978). The basic holding of these cases is that sentencing juries and judges may not be precluded from considering any relevant mitigating evidence in a capital proceeding. Evidence is relevant if it deals with any aspect of a defendant's character or record or any circumstance of the offense which the defendant proffers as grounds for imposition of a sentence other than death. Lockett; Skipper v. South Carolina, 476 U.S. 1 (1986). This Court has recognized that "evidence of contributions to family ... reflects on character and provides evidence of positive character traits to be weighed in mitigation". Roaers v. State, 511 So.2d 526 at 535 (Fla. 1987). See also, Jacobs v. State, 396 So.2d 713 (Fla. 1981) (role as mother could reasonably have been considered by jury in recommending life).

At bar, Occhicone took the witness stand in the penalty phase to testify that he was a father. (R1224-5) He offered a composite photographic exhibit of four photographs of his son into evidence. (R1225-6) The prosecutor objected to their admission:

> Mr. Halkitis: Judge, he's testified he's a father. We're

> talking about the relevance of a photograph depicting his child, and that is not relevant. He already testified that he is a father and I had no objection to him -- that he's a father, no objection that he had a son named Dominick.

(R1228)

The trial judge noted that young Dominick was "a very nice looking boy'' but sustained the prosecutor's relevancy objection. (R1228, 1230)

It was improper to restrict the defense presentation to the bare fact that Appellant had a son. Merely being a father is of little mitigating value; the important inquiry is what type of care was provided for the son. The photographs offered by Appellant showed a healthy, alert and well-groomed boy. The jury could certainly have concluded that Occhicone did not neglect his son.

Admission of the photographs was also relevant to rebut negative inferences which had been introduced in regard to Occhicone's fitness as a parent. During the guilt or innocence phase, Anita Gerrety was permitted to testify over defense objection that Appellant had physically abused his son. (R327-8) Gerrety testified:

> He would smack him. He would lock him in his room for hours at a time. I've watched him throw -- I can't remember what it was he threw at him one time and gave him a bloody nose.

(R328)

While admission of this bad character evidence was no doubt harmless error in relation to the guilt or innocence stage of the trial, it was prejudicial with regard to the penalty phase. At the least, Occhicone should have been permitted to dispel the mental picture which the jury might have formed of an abused child with photographs showing a normal, healthy boy.

Because Appellant's presentation of relevant mitigating evidence was restricted in violation of the Eighth and Fourteenth Amendments, United States Constitution, his sentence of death should be vacated and a new penalty proceeding ordered.

ISSUE XI

THE TRIAL COURT'S PENALTY INSTRUCTIONS TO THE JURY WERE UNCONSTITUTIONALLY VAGUE BECAUSE THREE OF THE AGGRAVATING FACTORS WERE INADEQUATELY DEFINED.

The trial judge instructed the jury on four statutory aggravating circumstances: section 921.141(5)(b) (prior conviction of violent felony); section 921.141(5)(d) (committed during the course of a burglary); section 921.141(5)(h) (especially "wicked, evil" atrocious or cruel); and section 921.141(5)(i) (cold, calculated and premeditated). (R1357-8, 1603-7) Appellant objected to instruction on the latter three of these aggravating circumstances. (R1134, 1145, 1149) Each of these jury instructions will be considered separately.

a) Instruction on section 921.141(5)(d)

Over Appellant's objection, the judge instructed the jury on this aggravating circumstance as follows:

> The crime for which the defendant is to be sentenced was committed while he was engaged in the commission or an attempt to commit the crime of burglary.

(R1357, 1605)

The judge did not provide any definition of the crime of burglary.

In State v. Jones, 377 So.2d 1163 (Fla. 1979), this Court held that in a felony murder prosecution, a complete failure to instruct on the elements of the underlying felony is fundamental error. The Jones court wrote:

> It is essential to a fair trial that the jury be able to reach a verdict based upon the law and not be left to its own devices to determine what constitutes the underlying felony.

377 So.2d at 1165.

Appellant recognizes that the State need not charge and convict him of a felony in order to use the felony as an aggravating factor under section 921.141(5)(d). Ruffin v. State, 397 So.2d 277 (Fla. 1981). Nonetheless, aggravating circumstances must be proved beyond a reasonable doubt before they may be considered during a capital sentencing proceeding. Atkins v. State, 452 So.2d **529** (Fla. 1984). Without at least a minimal instruction on the elements of burglary, the jury at bar could hardly decide whether this aggravating circumstance was proved beyond a reasonable doubt.

Significantly, there was conflicting evidence on this aggravating factor. The State relied upon circumstantial evidence to try to show that Occhicone entered the Artzner house with the intent to shoot Mrs. Artzner. On the other hand, there was evidence from the mental health experts that Occhicone broke through the door with the intent to get help for Mr. Artzner. (R1071-2, 1284) The prosecutor himself stated:

> At the time he entered that home what his intent was is a jury question. We could never prove that by way of direct evidence. We don't know what his intent was when he broke into the house. It could be argued he broke in because he wanted to kill her. It could be argued that he broke in because he

> was in a psychotic rage and didn't have the intent to kill her.

(R1154)

One cannot assume that the jury was aware that the crime of burglary requires intent to commit an offense within the structure entered. Indeed, the average person would probably consider a forced entry into a residence to be sufficient proof of burglary. Consequently, a jury instruction on the elements of burglary was essential in the case at bar.

We cannot know how many jurors found the section 921.141(5)(d) aggravating circumstance proved, nor how many found this factor crucial in deciding whether to recommend life or death. However, given the 7-5 jury recommendation of death, any likelihood that even one juror mistakenly found this aggravating circumstance because of an inadequate instruction is enough to impair the reliability of the death recommendation. Occhicone's sentence of death was therefore imposed in violation of the Eighth and Fourteenth Amendments, United States Constitution, because the jury was not given sufficient guidance as to what they needed to find in order to apply this aggravating circumstance.

b) Instruction on section 921.141(5)(h)

Over Appellant's objection, the trial judge instructed the jury on this aggravating factor:

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

(R1358, 1606)

In his written findings, the court deemed this aggravating circumstance inapplicable. The order reads:

> Although there was evidence in the record justifying the jury's consideration of the aggravating circumstance under § 921.141(5)(h) ..., it has not been established beyond a reasonable doubt when compared with the facts surrounding other murders.

(R1646, see Appendix)

In fact, no view of the evidence would have supported a finding of the (5)(h) aggravating factor. The victim, Martha Artzner was shot four times in rapid succession. (R597-9) The medical examiner found that one of the bullets hit her heart and would have been "rapidly fatal." (R602) These facts are directly on point with decisions of this Court holding that such homicides are not especially heinous, atrocious or cruel. See, Amoros v. State, 531 So.2d 1256 (Fla. 1988); Lewis v. State, 377 So.2d 640 (Fla. 1979); Brown v. State, 526 So.2d 903 (Fla. 1988).

The problem at bar is that some jurors may have thought that the shooting of Mrs. Artzner was "especially wicked, evil, atrocious or cruel". They may have weighed this factor in aggravation and returned a death recommendation instead of life. A likelihood that even one juror found this factor crucial in deciding whether to recommend life or death makes the jury death recommendation by a 7-5 vote unreliable.

Appellant recognizes that this Court has rejected the argument that the United States Supreme Court's decision in Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) invalidates the Florida especially heinous, atrocious or cruel aggravating circumstance. Smalley v. State, Case No. 72,785 (Fla. July 6, 1989) [14 FLW 342]. Nonetheless, the same feature which led the Cartwriaht court to declare Oklahoma's statutory factor unconstitutionally vague under the Eighth Amendment is present here in the case at bar. Occhicone's jury was given no guidance as to which first degree murders qualified as "especially wicked, evil, atrocious or cruel". Consequently their discretion was not channeled to avoid the risk of arbitrary imposition of the death penalty.

Although Oklahoma capital juries actually impose sentence rather than recommend a sentence to the sentencing judge, the Florida capital jury still has great power. The jury recommendation can be a "critical factor" in whether a death sentence is imposed. LaMadline v. State, 303 So.2d 17 at 20 (Fla. 1974). In Valle v. State, 502 So.2d 1225 (Fla. 1987), this Court held that a defendant must be allowed to present all relevant mitigating evidence to the jury in his effort to secure a life recommendation because of the great weight the sentence recommendation would be given. The corollary to this proposition is that the jury must not be misled into thinking that an aggravating circumstance applies because that circumstance was not properly defined to them. In either case, there is a

likelihood of an erroneous death recommendation.

Accordingly, Occhicone's sentence of death is unreliable under the Eighth Amendment, United States Constitution because it was imposed following a jury recommendation that was tainted by consideration of an impermissibly vague definition of an aggravating circumstance that did not, in any event, apply to the facts of this homicide.

c) Instruction on section 921.141(5)(i)

Over Appellant's objection, the trial judge instructed the jury on this aggravating circumstance in the language of the standard instruction:

> The crime for which the Defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(R1358, 1607)

The problem with this instruction is very much like that discussed above; it is *so* vague that the jury was not adequately informed of what factors must be present in order to apply this aggravating circumstance.

This Court has given a limiting construction to the terms "cold, calculated and premeditated" so as to comply with the requirements of the Eighth Amendment, United States Constitution. In Rosers v. State, 511 So.2d 526 (Fla. 1987), this Court required that a careful plan or prearranged design to kill must be shown before this aggravating circumstance may be

proved. Occhicone's jury, however was not informed of this limiting construction. Consequently, some of the jurors may have believed that a finding of premeditation alone was sufficient to include this aggravating factor in the weighing process.

There is a reasonable possibility that some of the jurors found the cold, calculated and premeditated aggravating factor proved and that at least one of these jurors joined in the recommendation of death. Had the jury been properly instructed concerning the limited construction given to this aggravating factor, there is a reasonable possibility that fewer jurors would have found the cold, calculated and premeditated factor applicable and that for one juror this would be enough reason to recommend life instead of death. Thus a jury instruction which properly defined the limited applicability of the CCP aggravating factor (or no jury instruction at all on CCP) might well have resulted in a 6-6 life recommendation instead of a **7-5** death recommendation.

In Morgan v. State, **515** So.2d **975** (Fla. **1987),** this Court noted the special vulnerability of a death sentence imposed after a 7-5 jury recommendation for death. An error which could have prejudiced the defendant's opportunity to win a life recommendation cannot be harmless when the difference between life and death is a single vote.

Consequently, the court's failure to channel the jury's discretion in applying this aggravating circumstance makes Occhicone's sentence of death unreliable under the Eighth

Amendment. Cf., Maynard v. Cartwriuht, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). A new penalty proceedi.ng before a new jury should now be ordered.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Dominick Occhicone, Appellant, respectfully requests this Court to grant him the following relief:

As to Issues I-IV, reversal of conviction and remand for a new trial.

As to Issues V and VI considered together, vacation of his death sentence and remand for imposition of a life sentence.

As to Issues VII-XI, vacation of his death sentence and remand for a new penalty trial.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Room 804, 1313 Tampa St., Tampa, FL 33602, (813) 272-2670, on this 12th day of September, 1989.

Respectfully submitted,

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