IN THE SUPREME COURT OF FLORIDA

BILLY RAY NIBERT,

Appellant,

vs.

Case No. 71,980

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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

DOUGLAS S. CONNOR
ASSISTANT PUBLIC DEFENDER

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

ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

A Hillsborough County Grand Jury indicted Billy Ray Nibert, Appellant, on December 12, 1984 for first-degree murder in the stabbing death of Eugene Snavely. (R471-2) The case proceeded to trial; Nibert was found guilty and sentenced to death. On appeal to this Court, Nibert's conviction was affirmed but the death sentence was vacated because one aggravating circumstance was found erroneously. (R474-80) The case was remanded to the trial court for resentencing. (R840)

Back in the trial court, the original judge sua sponte disqualified himself and ordered the case reassigned. (R491) Two pre-trial motions, Motion to Declare Section 921.141(5)(h), Florida Statutes, Unconstitutional (R493-99) and Motion to Preclude Imposition of a Sentence of Death (R500-04), were considered and denied. (R3-13) The resentencing proceeding was held before the Honorable Susan C. Bucklew and a jury on February 1-3, 1988. (R1-422)

During voir dire, seven prospective jurors were struck for cause on the State's contention that they had impaired ability to consider impartially a penalty of death. (R132, 133, 134, 136, 137, 162) After the prosecutor had excused a second black prospective juror by peremptory strike, defense counsel objected that blacks were being systematically excluded from the jury. (R144) The trial judge noted that both the defendant and the victim were white and termed the defense objection

"ridiculous." (R145) The prosecutor was not required to give reasons for his peremptory strikes on black prospective jurors. (R147)

Before state witness Jack Andruskiewiecz testified, defense counsel objected to mention of any collateral crime evidence. (R222-3) Specifically, the court was asked to keep out Nibert's alleged statement several days before the homicide that he was going to rob the victim. (R222-3) The prosecutor agreed that the aggravating circumstance "during the commission of a robbery" was unsupported by the evidence but contended that the announced intention to rob was relevant to prove the "especially heinous, atrocious or cruel" aggravating factor. (R224-6) The trial judge agreed with the prosecutor and refused to limit the testimony. (R233-4) Prosecutorial comment during closing arguments regarding this testimony later formed the basis for a defense motion for mistrial which the court denied. (R364-6)

The trial judge denied two special jury instructions requested by Appellant. (R339, 346, 514-5) The jury was instructed on one aggravating circumstance (especially heinous, atrocious or cruel), three statutory mitigating circumstances (extreme mental or emotional disturbance, impaired capacity and age), and the nonstatutory open-ended mitigator. (R404-5) By a vote of 7-5, the jury recommended a sentence of death. (R414, 516)

Defense counsel filed a motion to question jurors which

the court heard on February 9, 1988. (R517-8, 426-39) The basis for the motion was inadvertent mention by defense witness Dr. Merin before the jury that Nibert had been on death row. (R517, 428) Appellant wanted to question the jurors to see if this information had played a material role in their deliberations. (R517, 426-8) The court denied the motion to question jurors. (R437-8)

A sentencing hearing was held February 10, 1988. (R443-63) After hearing arguments by counsel (R443-59), the sentencing judge found one aggravating circumstance (especially heinous, atrocious or cruel) was proved by the evidence. (R460-1) The court rejected the statutory mitigating circumstances claimed by Appellant but found "an abusive, deprived, and an unfortunate childhood" as a non-statutory mitigating factor. (R461-2) Giving "great weight to the jury recommendation", the judge imposed a sentence of death. (R462) Written findings in conformity with the oral pronouncement were prepared. (R534-6, see Appendix)

Nibert filed his notice of appeal on February 24, 1988. (R537) The Public Defender of the Tenth Judicial Circuit was designated as appellate counsel. Pursuant to Article V, section 3(b)(1) of the Florida Constitution and Fla.R.App.P. 9.030(a)(1)(A)(i), Billy Ray Nibert now appeals his sentence of death to this Court.

STATEMENT OF THE FACTS

A. STATE EVIDENCE

On November 16, 1984, Eugene Snavely, the victim of the homicide, lived in a house across the street from his brother in Tampa. (R191) The brother, James Snavely, testified that Eugene was often intoxicated and depended upon collecting aluminum cans and odd jobs for money. (R193-4) Around 5:00 p.m. on November 16, 1984, the witness saw a man carrying something, possibly a six-pack, approach his brother who was sitting on the back step of his house. (R194-5, 200) The two talked for a while and then went into Eugene's house. (R195-6)

Three-quarters of an hour later, James Snavely heard a banging on his back door. (R197) He opened it to find his brother covered with blood and holding a knife in his hand. (R196-7) The victim said that he had been stabbed with this knife. (R197)

Tampa police detective Dan Grossi investigated the homicide. (R203) He went to the victim's residence and observed blood all over the kitchen area. (R203-4) He found six empty tall beer cans which still had condensation on the outside, indicating that they had been freshly emptied. (R206-7)

Hillsborough County associate medical examiner, Dr. Lee Miller, testified that he performed an autopsy on Eugene Snavely. (R211) He found seventeen stab wounds. (R211) Three of these wounds were serious enough to be lethal. (R214) None of them,

however, struck a vital structure which would have caused rapid death. (R215) Some of the wounds were defensive type wounds on the victim's right hand. (R216) The victim had 52 mg percent alcohol in his blood; this is about half of the level necessary for a presumption of driving while intoxicated. (R217)

State witness Jack Andruskiewiecz lived in the Peter Pan Motel located about 1 1/2 miles from the homicide scene. (R205, 236) On the evening of the homicide, Nibert came to his motel room, "soaked" in blood. (R239) Andruskiewiecz let Appellant clean up in his bathroom. (R240) Andruskiewiecz said that Nibert was "white," hyperventilating, had "dry heaves" and was "freaked out." (R246-7) Nibert lay on the floor of the witness's motel room, gasping for breath for a long time. (R246-7)

Later that evening, Nibert told Andruskiewiecz that he had been in a fight in a bar. (R239) Then he said it was a street fight. (R239) While the two were watching the 11:00 news, a picture of the victim's house was telecast (R240-1), Andruskiewiecz recognized the house as belonging to the victim who he called the "old man." (R241) Nibert then admitted that he had done the stabbing. (R241) According to Andruskiewiecz, Nibert also said that he had made the victim get down on his knees before stabbing him. (R242) However, Andruskiewiecz also admitted that he never told this detail to the police, the state attorney's office or defense counsel; he just "didn't remember it until the day of the trial." (R255-6)

Over defense objection, Andruskiewiecz was permitted to testify that two days earlier he had encountered Nibert on the street. (R242-3) As they were talking, the victim came riding by them on his bicycle. (R243-4) Nibert pointed at Snavely and said that he was going to rob him. (R243-4)

B. DEFENSE EVIDENCE

In mitigation, Appellant called the father and son who had employed him in their commercial refrigeration business (R256-63), his two sisters (R264-79), his wife (R279-84) and a psychologist. (R284-333)

His former employers, Paul Hawks Sr. and Paul Hawks Jr., testified that Nibert worked for them off and on for about two years. (R257, 262) He was a trustworthy employee. (R258, 263) They fired Nibert several times because he would drink heavily on the weekends and not show up for work on Monday. (R258, 262) However, they always hired him back because he was a good worker and never had a problem on the job. (R258-9, 263)

Linda Nibert, Appellant's wife, testified that they were married in 1977 but separated in February, 1980. (R281) Appellant had an alcohol problem which destroyed the marriage. (R281-3) He would "go on binges where you wouldn't see him for days, or he would come home real late at night and just pass out on the floor.'' (R281) When Appellant was drinking, he had an angry personality and would do things that he couldn't remember. (R282) On the other hand, "when he is sober he is the nicest person that could ever be." (R283-4)

Nibert's sisters, Patricia Price and Karen Chattin testified concerning their upbringing in West Virginia. The family was raised by an alcoholic mother and a succession of seven step-fathers. (R265-6, 273) Starting when Billy was eleven or twelve, his mother forced him to drink alcoholic beverages with her. (R268-9, 272)

There were several times when the mother would bring men home from bars and have sex with them in front of the children. (R267, 273) The mother asked Billy to steal money from the men's wallets or other items, but he refused. (R266, 276) She became angry and beat him with a belt or a switch. (R266, 276) The mother beat both sisters and Billy nearly every day. (R265-7, 272-3, 275)

Both sisters testified that in later life they had required psychiatric treatment because of problems that were rooted in their childhood experiences. (R268, 274-5) Billy ran away from home several times: he eventually left home for good when he was eighteen. (R277, 279)

Dr. Sidney Merin, a clinical psychologist and neuro-psychologist, testified that he administered a battery of psychological tests to Nibert before his original trial on March 19, 1985. (R290-4) On October 30, 1987, Dr. Merin retested Nibert using most of the same tests. (R294-5) Dr. Merin noted a substantial across-the-board improvement in Nibert's performance on these tests. (R296-304) He attributed this improvement in part to the adverse effects which being an alcoholic would have

on the brain functions at the first testing. (R297-8) Merin concluded that "the brain is drying out and rehabilitating itself to some extent." (R318)

When Dr. Merin questioned him about events on the day of the homicide, Nibert told him that on that morning, he sold his blood to a blood bank and immediately spent the money on whiskey. (R310) He drank some more at a tavern in the afternoon before going to the victim's house, where both men drank beer. (R310) Regarding the testimony of Andruskiewiecz about Nibert's behavior after the homicide, Dr. Merin said that vomiting or "dry heaves" would not be uncommon when a person was in an intense state of distress and had drunk alcohol. (R311-2) Dr. Merin gave his opinion that Nibert was aware of what he had done and was overcome by revulsion. (R311-2)

The psychologist noted that both Nibert's mother and father were alcoholics. (R306) He said that Nibert was not merely disadvantaged during childhood; he was severely abused both mentally and physically. (R314) Drinking as a way of life was encouraged from the time he was twelve. (R315)

Dr. Merin gave his opinion that when Nibert committed the homicide, he was under the influence of extreme mental or emotional disturbance. (R319-20) Although Nibert could appreciate the criminality of his conduct, his capacity to control his behavior was substantially impaired. (R320-1) Dr. Merin said that Nibert was remorseful about the homicide. (R317) He also testified that Nibert had good potential for

rehabilitation and observed that a totally structured environment like prison was often helpful in rehabilitation. (R317-8) Nibert's improvement on the psychological tests showed that some positive changes had already occurred. (R317-8)

SUMMARY OF THE ARGUMENT

On remand from this Court for resentencing, the State relied upon the same evidence of one aggravating circumstance. Appellant, however, produced more witnesses and evidence in mitigation during this proceeding than in the original. The sentencing judge also found a mitigating circumstance. Comparison between the record in this resentencing and other decisions where this Court has reduced a death sentence to life imprisonment shows that Nibert's sentence of death is disproportionate.

Nibert, a white defendant, objected to the prosecutor's excusal of black prospective jurors. Because the trial judge did not have the benefit of this Court's decisions amplifying State v. Neil, 457 So.2d 481 (Fla. 1984), she termed the objection "ridiculous.'' The judge should have required the prosecutor to give reasons for his excusal of a black prospective juror who had not been asked any questions during voir dire.

A prospective juror was excused for cause based upon his views concerning the death penalty. The court found that the prospective juror was excludable because he had engaged in political activity opposing capital punishment. Review of the prospective juror's statements shows that he was willing to consider death as a possible penalty and would follow the law.

Although there was no evidence to indicate that Nibert robbed the victim during the course of this homicide, the

prosecutor was allowed to introduce speculation that this was Nibert's motive for the stabbing. The trial judge erroneously ruled that such speculation was relevant to the extremely heinous, atrocious or cruel aggravating circumstance.

In her weighing of the aggravating factor against the mitigating evidence, the court erred by arbitrarily rejecting extensive and unrebutted evidence of alcohol abuse as a mitigating factor. Also, the court gave "great weight" to the bare majority (7-5) jury recommendation of death in deciding to impose the death penalty. These errors in the sentencing process violate the constitutional requirement of reliability in capital sentencing.

In a pretrial motion, Appellant contended that a sentence of death would be unconstitutional for this homicide because killings committed with a knife are relatively common and there is nothing about this homicide which sets it apart from the vast majority of knife slayings where a sentence of death is not imposed. He appeals the trial court's denial of this motion and compares the facts of this homicide with aspects of other decisions by this Court.

This Court has recognized that the constitutionality of the section 921.141(5)(h) aggravating circumstance ("especially heinous, atrocious or cruel") depends upon a consistent limiting construction given to it by this Court. However, in the process of making the statute more definite, this Court has overstepped the bounds of judicial restraint and exercised legislative power

in violation of the Florida Constitution.

The trial court erred by denying a defense requested special jury instruction which would have informed the jury of one aspect of this Court's limitation on the section 921.141(5)(h) aggravating factor. Because the jury received no guidance, the resulting death recommendation is constitutionally unsound.

ARGUMENT

ISSUE I

A SENTENCE OF DEATH IS DISPROPORTIONATE WHEN COMPARED TO OTHER CAPITAL CASES WHERE THIS COURT HAS REDUCED THE PENALTY TO LIFE IMPRISONMENT.

The appropriate departure point is the statement of this Court in the opinion remanding this case for resentencing:

> We are left with one valid aggravating circumstance (HAC) and no mitigating circumstances. Although death may be the proper sentence in this situation, it is not necessarily so. (Citations omitted).

Nibert, 508 So.2d at 5.

In the new penalty proceeding, the State's evidence was essentially unchanged from that of the prior proceeding. On the other hand, there was substantially more evidence produced in mitigation. In the original penalty trial, some evidence about Nibert's drinking problem and his good work performance when not drinking was presented to the judge and jury. 508 So.2d at 2. In the proceeding at bar, for the first time, evidence of Nibert's upbringing and the abuse he suffered as a child was presented through his sisters Patricia Price and Karen Chattin who did not testify at the original trial. (R449) Dr. Merin was also a new witness. The present proceeding was the first which documented Nibert's improvement on psychological tests, indicating some rehabilitation while in prison with potential for more. (R317-8)

Unlike the original sentencing judge who found nothing in mitigation, the sentencing judge here found Nibert's "abusive, deprived and unfortunate childhood" as a non-statutory mitigating factor. (R462) The difference between the original sentencing proceeding and the one at bar is significant enough to require that the sentence of death be vacated as disproportionate. Cf., Proffitt v. State, 510 So.2d 896 (Fla. 1987).

This Court has recognized the vulnerability of a death sentence which rests on a single aggravating circumstance. In Sonuer v. State, 544 So.2d 1010 (Fla. 1989), the court wrote:

> We have in the past affirmed death sentences that were supported by only one aggravating factor, (citation omitted)[1], but those cases involved either nothing or very little in mitigation. 544 So.2d at 1011.

This standard was amplified in Smallev v. State, 546 So.2d 720 (Fla. 1989) where the single aggravating factor found was (as at bar) heinous, atrocious or cruel. Despite a 10-2 jury vote recommending death for Smalley, this Court held that there was enough mitigating evidence to reverse the sentence on proportionality grounds. The Smallev court looked at "the entire picture of mitigation and aggravation" in concluding that death was unwarranted. 546 So.2d at 723.

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[1] It is noteworthy that the case cited for this proposition is LeDuc v. State, 365 So.2d 149 (Fla. 1978). LeDuc involved the brutal rape and murder of a nine-year-old child. Although the judge in LeDuc considered only heinousness as an aggravator, it appears evident that the sexual battery would support a second aggravating circumstance.

In the case at bar, there are substantial mitigating aspects. Indeed, the mitigating evidence is practically identical to that relied upon by this Court in Holsworth v. State, 522 So.2d 348 (Fla. 1988) in reducing the defendant's sentence to life imprisonment. Holsworth presented evidence of drug and alcohol abuse which the trial court rejected. At bar, the sentencing judge also rejected the unrebutted evidence of Nibert's history of alcohol abuse and claim of intoxication at the time of the homicide. (R535, see Appendix) Nonetheless, it is evident that Nibert's alcoholic lifestyle caused the breakup of his marriage (R281-3), caused him to be fired by employers who called him a trustworthy and good employee (R258, 262-3), and resulted in his being homeless at the time of the offense.[2]

Other parallels between the mitigating vidence found substantial in Holsworth and the case at bar include the abused childhoods of both Holsworth and Nibert. Both defendants also presented favorable evidence from employers and positive character traits suggesting rehabilitative potential within the prison system.

While the evidence in mitigation is comparable between Holsworth and the case at bar, the aggravating circumstances are not. Holsworth attacked two women with a knife during an early morning burglary of their mobile home, killing one and inflicting

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[2] Although most of the evidence concerning Nibert's homelessness appears only in the prior record (Nibert v. State, Case No. 67,072), witness Jack Andruskiewiecz mentioned that Nibert was living "on somebody's porch or garage." (R237)

multiple wounds on the other. He had been convicted of a previous attack on another woman in the same trailer park where he also unlawfully entered the victim's mobile home in the early morning hours. By contrast, Nibert has never been previously convicted for a violent felony. Moreover, the circumstances at bar suggest that the stabbing resulted from a sudden quarrel between two winos who were drinking together. (R206-7)

Another decision for comparison is Hansbrouah v. State, 509 So.2d 1081 (Fla. 1987). In Hansbrouah, the employee of an insurance agency was stabbed over thirty times in the course of a robbery-murder. This Court found that two aggravating factors[3] were valid. However, testimony concerning drug abuse, a difficult childhood and mental/emotional problems was sufficient mitigation to make life imprisonment a reasonable sentence for Hansbrough. The case at bar is less aggravated and more mitigated.

Finally, the facts at bar should be compared with Freeman v. State, 547 So.2d 125 (Fla. 1989) where this Court also reduced the defendant's sentence to life imprisonment. In Freeman, the defendant crawled through a window of the victim's residence and stole several items of personal property. In a prior incident, Freeman had threatened a neighbor with a knife when he was caught during an attempted burglary. Thus, there were three aggravating circumstances compared to the single

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Sections 921.141(5)(d) and (h), Florida Statutes (during a robbery, heinous, atrocious or cruel).

aggravator at bar. The factors in mitigation are similar; although Freeman was five years younger, he did not have the alcohol dependency problem that Nibert had.

No doubt the State will ask this Court to disregard the Holsworth, Hansbrouah and Freeman decisions because those defendants had jury life recommendations. The jury vote at bar was 7-5 in favor of death, or one vote shy of a life recommendation. (R414, 516) To treat such a sharply divided jury advisory vote as mandating a different standard of appellate review would clash with the Eighth Amendment, United States Constitution.

The United States Supreme Court has consistently emphasized that the Eighth Amendment requires heightened reliability in capital sentencing. See e.g., California v. Ramos, 463 U.S. 992 (1983). Surely, allowing a single juror to decide whether the defendant lives or dies would be impermissibly arbitrary or capricious. Yet this is exactly what would occur if this Court chose to affirm a death sentence based on a 7-5 jury death recommendation which would be reduced to life had the jury returned a tie vote life recommendation. To hang an impervious veil between tie vote jury life recommendations and bare majority death recommendations is as constitutionally infirm as the capital sentencing procedures condemned in Furman v. Georgia, 428 U.S. 238 (1972). See also, Issue V, infra.

One further proportionality decision of this Court bears discussion. In Ross v. State, 474 So.2d 1170 (Fla. 1985),

the victim was subjected to a prolonged brutal beating all over her body before she expired. This Court found that the extensive injuries supported the trial judge's finding that the especially heinous, atrocious or cruel aggravating circumstance applied. Weighing this one aggravating circumstance, this Court found that death was a disproportionate penalty for Ross because of testimony by family members about his alcoholism, his own statement that he had been drinking before the attack, and the domestic nature of the homicide. 474 So.2d at 1174.

Comparison with the case at bar shows that Nibert was also an acute alcoholic who told Dr. Merin that he was drinking since the morning on the day of the homicide. (R310) The sentencing judge correctly found that Nibert's severely abused childhood should be weighed in mitigation. Brown v. State, 526 So.2d 903 (Fla. 1988). Nibert additionally has good potential for rehabilitation (R317-8); and he showed revulsion and remorse about the homicide. (R311-2, 317)

Because the same single aggravating circumstance in Ross and the case at bar must be weighed against comparable factors in mitigation, the penalty in both cases should be the same.[4] As this Court wrote in the seminal decision of State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943

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[4] Additional authorities for the proposition that a single aggravating circumstance can seldom support a death sentence include Lloyd v. State, 524 So.2d 396 (Fla. 1988), Caruthers v. State, 465 So.2d 496 (Fla. 1985), Rembert v. State, 445 So.2d 337 (Fla. 1984), and Swan v. State, 322 So.2d 485 (Fla. 1975).

(1974):

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case.

283 So.2d at 10.

If this Court proposes to achieve like results in like capital cases, Nibert's sentence of death should be reduced to life imprisonment.

ISSUE 11

THE TRIAL JUDGE ERRED BY PERMITTING THE STATE TO EXCUSE BLACK PROSPECTIVE JURORS BY PEREMPTORY STRIKE WITHOUT REQUIRING THE STATE TO GIVE NON-RACIAL REASONS FOR THE EXCUSAL.

At the outset, we should bear in mind that jury selection in this penalty trial took place on February 1, 1988. (R1) Therefore, the trial judge and counsel did not have the benefit of this Court's opinion in State v. Slappy, 522 So.2d 18 (Fla.), cert. den., 108 S.Ct. 2873 (1988), which issued a month later. Neither did the trial judge anticipate this Court's decision in Kibler v. State, 546 So.2d 710 (Fla. 1989).

During voir dire, defense counsel objected when the State excused prospective juror Naomi C. Butler by peremptory strike. (R144, see Appendix) Defense counsel noted that this was the second black prospective juror which the State had struck.[5] He asked that the court require the prosecutor to articulate a reason for the peremptory strike. (R144, see Appendix)

The trial judge noted that neither Appellant nor the victim in this case was black. (R144-5, see Appendix) The prosecutor stated that State v. Neil, 457 So.2d 481 (Fla. 1984) applied only when the defendant was black. (R145) The judge also observed that defense counsel had excused one black

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[5] The record does not reflect which prospective juror was the first black excused from the panel.

prospective juror. (R145) In response to defense counsel's request that the prosecutor explain his peremptory strike, the court said, "I think that's ridiculous." (R145, see Appendix)

The court went on to ask defense counsel what reason there was to establish "a strong likelihood that the peremptories are being exercised solely due to the jurors' race." (R146, see Appendix) The inquiry concluded with the following exchange between the prosecutor and the court:

> MR. BENITO: There is a black on the jury that I'm not going to excuse. I have not been systematically excusing blacks when I'm leaving a black on the jury.
>
> THE COURT: I don't think that you've established the burden, so I'm not going to require the State to state a reason at this point in time.

(R147, see Appendix)

This exchange should be compared with the one reproduced in this Court's opinion in Thompson v. State, 548 So.2d 198 (Fla. 1989). In Thompson, the same prosecutor declared:

> MR. BENITO: ... That's not what the Neal [sic] case says. The Neal [sic] case says if I start systematically excluding blacks from the jury panel, you got [sic] to make a finding of that, and I've got to explain my reasons for doing that. There's a black seated on the jury.
>
> How can I be systematically excluding blacks when you got a black sitting on the jury after I excuse Mr. Bell?

548 So.2d at 201.

The Thompson court termed this an erroneous statement and specifically stated that peremptory strikes may be improper even if they are not "systematic." 548 So.2d at 202, fn.4. This note is in accord with the decision of Tillman v. State, 522 So.2d 14 (Fla. 1988), where this Court reversed, declaring:

> it is of no consequence that the state accepted one black juror to serve on the panel. 522 So.2d at 17.

As a second point, although the trial judge did not expressly rule that a white defendant could not challenge the exclusion of black prospective jurors, she clearly relied upon the absence of a black defendant or victim in terming defense counsel's objection "ridiculous." (R144-5) Recent decisions from this Court such as Kibler v. State, 546 So.2d 710 (Fla. 1989); Barwick V. State, 547 So.2d 612 (Fla. 1989); and Hamilton v. State, 547 So.2d 630 (Fla. 1989), clarify that an accused is entitled to an impartial jury selected without racial discrimination regardless of the race of the accused.

The final question is whether Appellant met the burden of showing a likelihood that the challenge of prospective juror Naomi C. Butler was racially motivated. *Any* doubt as to whether Appellant met this burden should be resolved in his factor. State V. Slappy, 522 So.2d 18 at 22 (Fla.), cert. den., 108 S.Ct. 2873 (1988). The most glaring aspect of the excusal of the black prospective juror is that the record reflects that neither of the

attorneys asked her any questions whatsoever. The only thing she said during the entire jury selection process was the following exchange with the trial judge:

> THE COURT: Thank you. Ms. Butler?
>
> PROSPECTIVE JUROR #31: Yes?
>
> THE COURT: Naomi C. Butler?
>
> PROSPECTIVE JUROR #31: Yes.
>
> THE COURT: And where is Naomi R. But1er?
>
> PROSPECTIVE JUROR #43: (Indicating).
>
> THE COURT: Did you all realize that you have the same first and last names?
>
> PROSPECTIVE JUROR #31: No, not until today.
>
> PROSPECTIVE JUROR #43: No.

(R48)

In Slappy, this Court pointed to a similar excusal of black members of the venire without questioning in holding that the defendant met his burden of showing a likelihood of racial motivation:

> The defense called the court's attention to a pattern of using peremptory challenges to exclude jurors of a cognizable minority who had indicated no impartiality or unfairness, and whom the state had failed even to question. This showing was sufficient of itself to require explanation, and thus shifted the burden to the state to present specific reasons based on the jurors' responses at voir dire or other facts evident from the

record.

522 So.2d at 23.

Accordingly, the trial judge at bar should have required an explanation from the State for the excusal of minority jurors because there was nothing on the record to show any race-neutral reason. As this Court wrote in a footnote to Slappy:

> The rule in Neil would be meaningless indeed if, by simply declining to ask any questions at all, the state could excuse all blacks from the venire.

522 So.2d at 23, fn.2.

Because Nibert's penalty trial was before a jury which may have been selected in violation of the Sixth Amendment, United States Constitution, requirement of a fair cross-section of the community as well as Article I, section 16 of the Florida Constitution, his sentence of death should now be vacated.

ISSUE III

THE TRIAL COURT ERRED BY EXCUSING PROSPECTIVE JUROR WEATHERFORD FOR CAUSE DUE TO HIS OPPOSITION TO THE DEATH PENALTY.

During the jury selection, a total of seven prospective jurors were excused for cause on the State's motion because of their views regarding the death penalty. (R132, 133, 134, 136, 137, 162) Several of the excusals were arguably erroneous; but in the interest of economy, Appellant will confine his argument to the excusal of prospective juror Weatherford. The exclusion from a capital jury of any juror who is qualified to serve requires that the sentence of death be vacated. Gray v. Mississippi, 481 U.S. 648 (1987); Davis v. Georgia, 429 U.S. 122 (1976).

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

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

448 U.S. at 45.

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

As Justice Rehnquist recently explained:

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

Gray v. Mississippi, 481 U.S. at 658 (1987), quoting from Lockhart v. McCree, 476 U.S. 162 at 176 (1986).

At bar, prospective juror Weatherford was such a juror. He stated that he was opposed to the death penalty "as a political issue for years." (R50) He said that he might vote for the death penalty in "extraordinary heinous crimes." (R63) He "would listen to the case", but would likely vote for life. (R64) He thought "in most cases the death penalty is too harsh." (R87)

At a bench conference, the following transpired:

> (Prosecutor) MR. BENITO: I will challenge Mr. Weatherford, #14. He said that I was ninety-five percent wrong going in if I was seeking the death penalty.
>
> He's a philosophy teacher.
>
> (Defense Counsel) MR. MEYERS: Who else would know? I object to Mr. Weatherford being struck for cause. We had agreed on Mr. Daniel, #13.
>
> THE COURT: I realize that. Mr. Weatherford stated that he was opposed to the death penalty. He campaigned politically against the death penalty. He also has a class

> that he did not wish to miss tomorrow, and I'm going to strike him for cause.

(R134)

First, it must be recognized that being a philosophy teacher does not disqualify anyone from serving on a jury. See section 913.03, Florida Statues (1985) (listing grounds for challenge to individual jurors for cause). When the prosecutor referred to being "ninety-five percent wrong," he evidently meant the following exchange between prospective juror Weatherford and himself:

> MR. BENITO: If the State were seeking the death penalty as the State is doing in this particular case, as you come in here today with your personal views, it may be very difficult for you to give the State a fair trial -- is that a fair statement?
>
> PROSPECTIVE JUROR #14: No, I would be fair about it. I just think that you are wrong.
>
> MR. BENITO: You think that I'm wrong in seeking the death penalty, but you still think that you can give me a fair trial?
>
> PROSPECTIVE JUROR #14: I would listen to the case, but I would be most likely to decide no.
>
> MR. BENITO: You don't think that I'm wrong when you first came in here?
>
> PROSPECTIVE JUROR #14: Not automatically. Just about ninety-five percent.

(R63-4)

This exchange shows that the prosecutor might well conclude that he would have a difficult time convincing this juror that death was the appropriate penalty. He might well determine that it would be wise to exercise one of his peremptory challenges to remove prospective juror Weatherford from the panel. However, it was error to request that the juror be removed for cause. Prospective jurors cannot be barred from service because of their attitudes toward capital punishment "on any broader basis' than inability to follow the law or abide by their oaths." Adams v. Texas, 448 U.S. at 48 citing Witherspoon v. Illinois, 391 U.S. at 522, n.21.

The trial court's reasons for excluding prospective juror Weatherford for cause do not pass constitutional muster under the Sixth and Fourteenth Amendments, United States Constitution. Neither opposition to the death penalty nor campaigning politically against it are sufficient grounds for disqualifying a juror from service on a capital jury. With regard to the prospective juror's desire to teach his scheduled class, it would only have caused an inconvenience to his students. (R36-7) Such an inconvenience does not constitute a hardship and cannot outweigh an accused's right to be tried by a jury selected from a fair cross-section of the community.

Accordingly, Nibert's sentence of death should now be vacated because of the erroneous exclusion for cause of a qualified juror.

ISSUE IV

THE TRIAL JUDGE ERRED BY ALLOWING THE STATE TO INTRODUCE SPECULATION THAT NIBERT MAY HAVE BEEN ATTEMPTING TO ROB THE VICTIM.

Immediately before state witness Jack Andruskiewiecz took the stand, defense counsel objected to allowing the witness to testify to a statement allegedly made by Nibert days prior to the incident to the effect that he was planning to rob Snavely. (R222-3) Defense counsel noted this Court's opinion from Nibert's prior appeal where it was stated:

> It is undisputed that there was no evidence to indicate that Nibert did, in fact, rob the victim on the night of the murder. (R475, 508 So.2d at 2, fn.1)

Later in the Nibert opinion, this Court also wrote:

> The testimony that Nibert had allegedly planned to rob the victim two days prior to the murder cannot support this aggravating circumstance in that there was no evidence that the victim was in fact robbed before being stabbed. (R480, 508 So.2d at 4-5)

The prosecutor contended that Nibert's alleged statement was admissible in relation to the especially heinous, atrocious or cruel aggravating circumstance:

> MR. BENITO: The Supreme Court in their opinion didn't hold that there was no robbery. They are saying that there is not enough evidence to get the aggravating circumstance.
>
> I'm just saying that the testimony is relevant, event [sic] to prove heinous, atrocious and

> cruel, to give the jury an idea that this guy went over there to rob the guy. Not that it occurred in the course of a heated exchange or killed him in the heat of passion.
>
> Evidence shows that two days before, "I'm going to rob the guy." Points to the guy riding his bike down the street, okay.
>
> "See the old man on the bike? I'm going to rob him."
>
> Two days later this man's got seventeen stab wounds in him, and that's not relevant to tell the jury what he had said two days earlier about the man that he killed?
>
> And Mr. Meyers is going to want to paint the picture, I'm sure, to the jury that even though he went over there to drink beer like they always did, and they got in a fight and Mr. Nibert lost his head because he had been drinking, and he stabbed the guy in a frenzy, and that was it.
>
> Well, that may be his argument, but he can't get away from the fact that it's extremely relevant that two days before this guy is pointing at the man and saying, "I'm going to rob that guy."

(R226-7)

Defense counsel further explained that he would have to cross-examine the witness with regard to the alleged robbery plan and this purported collateral crime would become a feature of the trial. (R228-9, 234-5) The prosecutor replied:

> I'm not arguing to the jury the robbery aspect as such, but I'm

> going to argue to the jury that the fact that this guy announced his intention two days before to rob the old man, it goes to the heinousness, the cruelty and atrociousness of this particular crime.

(R231)

The trial judge agreed that the prosecutor could present evidence and argument as long as he related it to the aggravating circumstance (HAC) found valid by this Court. (R233-4)

Accordingly, over defense counsel's renewed objection, Andruskiewiecz was permitted to testify about a conversation with Nibert two days prior to the homicide:

> Q. What did Mr. Nibert tell you at that time?
>
> A. He said he knew where he could get his hands on some money.
>
> Q. And what else did he tell you? What else did he tell you?
>
> A. Well, you know, people are always telling you stuff, and you know -- blah, blah, blah.
>
> And all of sudden the old man came riding around the corner on his bike and he pointed right at him and he said, "Him. I'm going to --" he told me what he was going to do.
>
> Q. What did he tell you he was going to do?
>
> A. He was going to rob the old man.[6]

---

[6] The victim of the homicide, Eugene Snavely, was not known by name to witness Andruskiewiecz. (R244) Snavely was fifty-seven years old. (R211)

(R243)

This is a classic example of the State getting evidence in the back door which would not be admissible through the front. The prosecutor offered no legal basis for his assertion that a prior announcement of intention to rob someone is relevant to the especially heinous, atrocious or cruel aggravating circumstance. Clearly it is not; this Court in State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), defined the scope of this aggravating circumstance:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

283 So.2d at 9.

The error was compounded during the prosecutor's closing argument. Defense counsel objected when the prosecutor exclaimed:

> He didn't go into that house that day with a six-pack of beer in a bag because he was under extreme mental or emotional disturbance. He had announced two days before, "I'm going to rob that old man," and where is he at two days later?

> What a coincidence. At the old man's house.
>
> Holy Cow! What a coincidence!

(R364)

The trial judge denied defense counsel's motion for mistrial and also refused a request for curative instruction that "any alleged robbery" not be considered in aggravation. (R365-6) The prosecutor continued:

> Two days before he tells Mr. Andruskiewiecz, "I'm going to rob the old man."
>
> Two days later, he's at the old man's house. An old man that told tales -- remember, his brother told you that he may have been drinking one night and told somebody that he had a lot of money in the house, because when he drank he liked to tell tall tales.

(R366-7)

Here the prosecutor resorted to rank speculation. Snavely may have had a reputation for telling tall tales, but the State never introduced any evidence to indicate that he ever claimed to have a lot of money in his house.

In Draaovich v. State, 492 So.2d 350 (Fla. 1986), this Court disapproved of the State's introduction of speculation during the penalty phase of his trial that the defendant had been involved in arsons. The defendant's reputation as an arsonist, unsupported by any evidence of actual involvement, was deemed improper to rebut the mitigating factor of no significant prior criminal activity.

At bar, a similar improper consideration entered into the weighing process because the jury was encouraged to speculate that Nibert went to Snavely's residence with a criminal intent. This Court has said that evidence "must relate to one of the statutory aggravating circumstances in order to be considered in aggravation." Odom v. State, 403 So.2d 936 at 942 (Fla. 1981). Mere arrests and accusations of criminal activity are not admissible as evidence in aggravation. Odom; Perry v. State, 395 So.2d 170 (Fla. 1980); Provence v. State, 337 So.2d 783 (Fla. 1976). Since the State was unable to prove that Nibert either robbed or attempted to rob Snavely before the stabbing, the trial judge should have barred all speculation about Nibert's intent when he went to Snavely's residence.

The error may well have caused the bare majority 7-5 death recommendation instead of a jury life recommendation. Accordingly, Nibert should now be granted a new penalty trial before a new jury.

ISSUE V

THE TRIAL COURT ERRED IN THE WEIGHING OF ONE AGGRAVATING FACTOR AGAINST MITIGATING FACTORS BECAUSE A) MITIGATING EVIDENCE WAS NOT WEIGHED FOR ARBITRARY REASONS, AND, B) GREAT WEIGHT WAS GIVEN TO THE 7-5 MAJORITY JURY DEATH RECOMMENDATION.

Under Florida's trifurcated death penalty statute, the trial judge must make a reasoned, independent weighing of aggravating and mitigating circumstances before imposing a sentence of death. Section 921.141(3), Florida Statutes (1983); Ross v. State, 386 So.2d 1191 (Fla. 1980). The court must weigh "relevant factors and [reach] its own independent judgment about the reasonableness of the jury's recommendation." Roaers v. State, 511 So.2d 526 at 536 (Fla. 1987). To be consistent with the Eighth and Fourteenth Amendments to the federal constitution, the sentencing process must exhibit "responsible and reliable exercise of sentencing discretion." Caldwell v. Mississippi, 472 U.S. 320 at 329 (1985).

A) The Sentencing Judge Arbitrarily Rejected Mitigating Evidence

In Rogers v. State, 511 So.2d 526 (Fla. 1987), this Court discussed the obligation of the sentencing judge with regard to mitigating evidence. If the facts alleged in mitigation are supported by the evidence and these facts are also of a nature which reduce a defendant's moral culpability for the homicide, then they must be weighed against the aggravating circumstances. "Judges may not refuse to consider relevant

mitigating evidence." Roaers, 511 So.2d at 535 citing Eddinus v. Oklahoma, 455 U.S. 104 at 115-6. See also, Lamb v. State, 532 So.2d 1051 (Fla. 1988).

At bar, the court's written findings explain why the statutory mitigating circumstances of impaired capacity [§ 921.141(6)(f)] and emotional or mental disturbance [§ 921.141(6)(b)] were rejected. (R535, see Appendix) First, the court found that the fact that Nibert was married at the time of the offense and remained married "refuted" the claimed mitigators. (R535, see Appendix) This finding ignores the additional fact that Appellant had been separated from his wife since February 1980. (R281) Nibert was homeless and said to be living "on somebody's porch or garage." (R237)

If anything, considering that Appellant's wife did not divorce him should result in a finding of positive character traits rather than rebuttal of mitigation. The same is true of the testimony of Nibert's employers who called him "a good, trustworthy employee, unless intoxicated." (R535, see Appendix) The sentencing judge should have weighed these factors on the mitigating side of the scale rather than using them in refutation of mitigating circumstances.

Finally, the sentencing judge gave no consideration to the extensive and unrebutted evidence of alcohol abuse. Although the evidence was conflicting as to the degree of Appellant's intoxication at the time of the homicide, it was evident from all of the witnesses' testimony that Nibert had a severe alcohol

problem reaching back to childhood. Even state witness Jack Andruskiewiecz testified that Nibert was an alcoholic who got drunk whenever "he could afford it." (R245)

In Ross v. State, 474 So.2d 1170 (Fla. 1985), this Court was presented with a similar rejection by the sentencing judge of alcoholism as a mitigating factor. The **Ross** court wrote:

> It is apparent that the trial judge did not consider as mitigating factors the sentencing phase testimony relating to the appellant's drinking problems, the testimony of the state's key witness, Harwood, that the appellant confessed he had been drinking when he attacked the victim, or ... We find the trial court erred in not considering these circumstances collectively as a significant mitigating factor.

474 So.2d at 1174.

As in **Ross**, the trial judge at bar erred by failing to weigh Nibert's severe alcohol problem as a significant mitigating factor.

Because the sentencing judge arbitrarily rejected mitigating evidence, Nibert's sentence of death violates the Eighth and Fourteenth Amendments, United States Constitution. Lockett v. Ohio, 438 U.S. 586 (1978); Eddinas v. Oklahoma, 455 U.S. 104 (1982). This Court should now remand this case for a reweighing of all the relevant evidence.

B) The Sentencing Judge Gave Great Weight to the Bare Majority Jury Death Recommendation

At the sentencing hearing, the judge explained her decision to impose a sentence of death as follows:

> In conclusion, the Court feels that the mitigating circumstances do not outweigh the aggravating circumstances. I'm also giving great weight to the jury recommendation in this case. The jury recommended by vote of seven to five that this Court impose the death penalty.

(R462)

The written findings amplify the judge's reliance on the jury recommendation:

> In considering the proper sentence to impose, the Court has given the recommendation of the sentencing jury great weight as is required by law.

(R536, see Appendix)

Appellant recognizes that this Court wrote in Grossman v. State, 525 So.2d 833 at 846 (Fla. 1988):

> A jury recommendation of death, reflecting the conscience of the community, is entitled to great weight.

The Grossman language must be interpreted within the context of the unanimous jury death recommendation returned in that case. It should not be extended to all jury death recommendations; particularly not those where a bare majority of seven jurors vote to recommend death. When a jury is sharply divided about the proper penalty, it reflects a genuine dispute within the conscience of the community. Such a bare majority recommendation

should receive no weight, rather than great weight.

In Johnson v. Louisiana, 406 U.S. 356 (1972), a plurality of the United States Supreme Court held that the Fourteenth Amendment was not violated by a state statute which allowed conviction by a 9-3 majority of jurors. In his concurring opinion, Justice Blackmun emphasized that nine jurors constituted a substantial majority and stated that a 7-5 standard "would afford me great difficulty." 406 U.S. at 366.

By analogy, when a substantial majority of a capital penalty jury recommends death, it is not unreasonable for the sentencing judge to allow this factor into the weighing process. However, the Eighth and Fourteenth Amendments' heightened concern for reliability in capital sentencing bars imposition of a death sentence which is predicated upon such an arbitrary and capricious foundation as the vote of a single juror. At bar, it was only the vote of a single juror which prevented Nibert from achieving a 6-6 tie vote life recommendation.

From the court's oral and written findings, it would appear that the "great weight" given to the jury recommendation may have been crucial in the court's decision to impose a death sentence. Accordingly, Nibert's sentence of death should be vacated and reweighing by the sentencing judge ordered.

ISSUE VI

NIBERT'S SENTENCE OF DEATH IS UNCONSTITUTIONAL BECAUSE THERE IS NO PRINCIPLED DISTINCTION BETWEEN THE FACTS AT BAR AND THE VAST MAJORITY OF HOMICIDES COMMITTED WITH A KNIFE WHICH ARE NOT PUNISHED BY DEATH.

Pretrial, Appellant filed a "Motion to Preclude Imposition of a Sentence of Death." (R500-04) This motion contended that a sentence of death would violate the Eighth and Fourteenth Amendments, United States Constitution, because the homicide at bar cannot be distinguished in a "principled way" from homicides where the death penalty is not imposed. (R500-02) In particular, Appellant noted that during 1984 (the year of this homicide), 1264 murders were committed in Florida; and a knife was the weapon employed in 220 of them.[7] (R501, 504) Because knife murders are relatively common and the homicide at bar was typical of most knife murders, a sentence of death based upon the manner of killing alone would be cruel and unusual "in the same way that being struck by lightning is cruel and unusual" [quoting from Justice Stewart's concurring opinion in Furman v. Georgia, 408 U.S. 238 (1972)]. (R500-02) The trial judge heard argument and denied the motion. (R3-5)

A basic constitutional tenet under the Eighth Amendment is that "capital punishment must be imposed fairly, and with

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[7] The source for these statistics is the 1986 Florida Statistical Abstract, University Presses of Florida, Gainesville, 1986, p. 532.

reasonable consistency, or not at all." Eddinas v. Oklahoma, 455 U.S. 104 at 112 (1982). Therefore, there must be a principled way to distinguish a case where the death penalty is imposed from the many cases where it is not. Godfrey v. Georgia, 446 U.S. 420 (1980). The mere fact that a murder is committed with a knife is constitutionally insufficient to prove an aggravating circumstance which would subject the perpetrator to a sentence of death. Proffitt v. Wainwriaht, 685 F.2d 1227 (11th Cir. 1982), modified, 706 F.2d 311 (11th Cir.), cert. denied, 464 U.S. 1002 (1983).

In this Court's opinion remanding this case for resentencing and leaving the possibility of a death sentence open, the Court approved the trial court's finding that this homicide was especially heinous, atrocious or cruel. Nibert v. State, 508 So.2d 1 at 4 (1987). Three aspects of the homicide were deemed significant: a) the victim was stabbed seventeen times, b) there were defensive wounds, and c) the victim remained conscious through the attack.[8] Appellant now submits that these aspects are an insufficient basis under the Eighth and Fourteenth Amendments, United States Constitution, for a sentence of death.

Considering first the number of wounds, it seems evident that the number of wounds inflicted during an intentional killing with a knife depends primarily upon how long the victim

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[8] In the resentencing now before this Court, the State again presented evidence of these aspects of the homicide. The trial court specifically relied upon these in the sentencing order. (R534, see Appendix)

resists and the strength of the attacker. The great majority of homicides with a knife involve multiple stab wounds. Assigning a threshold number for the total of stab wounds necessary to support a sentence of death would be arbitrary and capricious. Seventeen stab wounds is not a principled distinction between the case at bar and the vast majority of knife homicides.

Regarding defensive wounds, this feature is common to most knife slayings where the victim is aware of the attack. Indeed, it would seem more torturous if the victim suffered no defensive wounds because his arms were restrained during the stabbing. An unconscious victim has not caused this Court to reject the especially heinous, atrocious or cruel aggravating circumstance in a homicide committed with a knife. See, Mason v. State, 438 So.2d 374 (Fla. 1983); Breedlove v. State, 413 So.2d 1 (Fla. 1982). Conversely, this Court rejected this aggravating circumstance in Demps v. State, 395 So.2d 501 (Fla. 1981) where a conscious victim was held down during the stabbing. Accordingly, the presence or absence of defensive wounds is not a principled distinction upon which to base a sentence of death.

Finally, there is the aspect that the victim remained conscious during the attack. This is also true in most knifings; only when the knife strikes a vital structure such as the brain or spinal cord or severs a very large blood vessel is death rapid. (R215) In Mason, supra, this Court relied upon the fact that the victim lived for several minutes after the stabbing in finding that the HAC aggravating circumstance was proved. On the

other hand, in Demps, supra, the victim lived for several hours after the stabbing, yet the aggravating circumstance was rejected. In Teffeteller v. State, 439 So.2d 840 (Fla. 1983), this Court wrote:

> The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies.

439 So.2d at 846.

Accordingly, consciousness during and after the homicidal act has not been treated consistently by this Court in relation to the HAC aggravating circumstance. Moreover, because remaining conscious during a knife attack is common, there is no principled distinction between that aspect of the case at bar and the majority of knife homicides where a sentence of death is not imposed.

Recently, the Supreme Court of Utah considered the constitutional permissibility of a sentence of death for a defendant who stabbed his victim seven times. The victim also suffered superficial cuts and bruises; she remained conscious for three or four minutes after the lethal wounds were inflicted. The Utah court wrote:

> The record contains no evidence that Tuttle intended to do or in fact did anything but kill his victim by stabbing her. Even though this method is gory and distasteful, there is absolutely no evidence that Tuttle had a quicker or less painful method available to

> him or that he was expert at such matters and intentionally refrained from administering one wound that would have caused instantaneous death in favor of a number of wounds that would prolong the victim's life and suffering. On the facts, there is nothing that could support a finding that this killing falls into the narrow Godfrey[9] - Wood[10] category and is sufficiently distinguishable from other intentional killings to make its perpetrator eligible for the death penalty.

State v. Tuttle, 780 P.2d 1203 at 1218-9 (Utah 1989).

This Court should now view the case at bar in a similar light. There is no evidence that Nibert intentionally prolonged the victim's life in order to cause him further suffering. Goryness of the victim's death is not a constitutionally viable basis upon which to impose a sentence of death upon the perpetrator. Accordingly, Nibert's sentence of death was imposed in violation of the Eighth and Fourteenth Amendments, United States Constitution, because the homicide at bar is not sufficiently distinguishable from the vast majority of homicides committed with a knife which do not result in a sentence of death.

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[9] Godfrey v. Georgia, 446 U.S. 420 (1980)

[10] State v. Wood, 648 P.2d 71 (Utah 1981)

ISSUE VII

THIS COURT'S JUDICIAL CONSTRUCTION OF THE SECTION 921.141(5)(h) AGGRAVATING CIRCUMSTANCE TO CURE ITS FEDERAL CONSTITUTIONAL INFIRMITY OF VAGUENESS HAS RESULTED IN JUDICIAL LEGISLATION WHICH VIOLATES ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION.

The aggravating circumstance of section 921.141(5)(h), Florida Statutes (1983) reads:

> The capital felony was especially heinous, atrocious or cruel.

Since the inception of the Florida death penalty statute in 1973, this aggravating circumstance has been attacked as unconstitutionally vague. In this Court's initial decision construing the death penalty statute, State v. Dixon, 283 So.2d 1 (Fla. 1973), an attack on the vagueness of the words "heinous," "atrocious," and "cruel" was rejected:

> we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended.

283 So.2d at 9.

When the United States Supreme Court considered the constitutionality of the section 921.141(5)(h) aggravating circumstance in Proffitt v. Florida, 428 U.S. 242 (1976), the Court did not hold that the statutory language was adequate. Rather, the Proffitt court relied upon the limiting construction given to this aggravating circumstance by the Supreme Court of Florida. Because the aggravating circumstance was applicable to

only "the conscienceless or pitiless crime which is unnecessarily torturous to the victim,"[11] it was held constitutional within the Eighth and Fourteenth Amendments, United States Constitution. 428 U.S. at 255-6.

Any possibility that the statutory language would be deemed sufficiently precise on its face was laid to rest in Maynard v. Cartwriaht, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). The Court held that the language "especially heinous, atrocious, or cruel" does not guide the sentencing jury's discretion as required by the Eighth Amendment. Because the Oklahoma court had not cured this constitutional infirmity by a limiting construction, the death sentence was set aside.

Therefore, any continued validity of the section 921.141(5)(h) aggravating circumstance in Florida depends upon a consistent narrowing construction given to this factor by the appellate court. In Smalley v. State, 546 So.2d 720 (Fla. 1989), this Court asserted that it

> has continued to limit the finding of heinous, atrocious, or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim.

546 So.2d at 722.

Appellant disagrees with this characterization of this Court's activity with regard to the section 921.141(5)(h) aggravating factor. To be sure, every trial court finding of this aggravating circumstance has not received approval from this

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[11] Quoting from State v. Dixon, 283 So.2d at 9.

Court. However, there are no decisions that Appellant is aware of which have held that the (5)(h) aggravating circumstance was improperly applied because the killer used only "necessary" rather than "unnecessary" torture. Neither are there any reversals based upon killings conducted with "pity" or "conscience." Indeed, the terms "conscienceless," "pitiless," and "unnecessarily torturous," are at least as vague as the statutory language which they purport to limit.

In fact, what this Court has done in its review of findings under the section 921.141(5)(h) aggravating circumstance is to conceive a model which represents the "norm" of capital felonies. The aggravating circumstance is inapplicable unless the killing is

> accompanied by such additional acts as to set the crime apart from the norm of capital felonies. (e.o.)

Amoros v. State, 531 So.2d 1256 at 1260 (Fla. 1988); Lewis v. State, 377 So.2d 640 (Fla. 1979). Accord, Brown v. State, 526 So.2d 903 (Fla. 1988); Jackson v. State, 498 So.2d 906 (Fla. 1986).

The "norm" of capital felonies appears to be a shooting death where the victim has not been subjected to extensive mental anguish prior to the shooting and expires shortly thereafter. Compare, Jackson v. State, 502 So.2d 409 (Fla. 1986) with Troedel v. State, 462 So.2d 392 (Fla. 1984). Employing an arcane calculus, this Court determines whether the facts of the case before it deviate sufficiently from the norm to be "set apart"

and thus within the purview of the section 921.141(5)(h) aggravating circumstance. Compare, Teffeteller v. State, 439 So.2d 840 (Fla. 1983), with Phillips v. State, 476 So.2d 194 (Fla. 1985).

This process is not judicial interpretation of the death penalty statute, but legislation on the part of this Court. It violates Article 11, section 3 of the Florida Constitution. As this Court wrote in Brown v. State, 358 So.2d 16 (Fla. 1978):

> The Florida Constitution requires a certain precision defined by the legislature, not legislation articulated by the judiciary.

358 So.2d at 20.

The Florida Legislature has never articulated what homicides are to be classified as especially heinous, atrocious or cruel. Where criminal statutes are deficient, the courts are not permitted "to make the statute definite and certain." State v. Barquet, 262 So.2d 431 (Fla. 1972).

In State v. Wershow, 343 So.2d 605 (Fla. 1977), this Court declined to abandon judicial restraint and held a statute unconstitutionally vague where a saving construction would require limiting the statute's application. The Wershow majority quoted with approval from the dissent in Screws v. United States, 325 U.S. 91 (1944):

> What the Constitution requires is a definiteness defined by the legislature, not one argumentatively spelled out through the judicial process which, precisely because it is a process, can not avoid incompleteness. A definiteness which requires so much subtlety to expound is hardly definite.

343 So.2d at 608.

This is exactly the problem with this Court's construction of the section 921.141(5)(h) aggravating circumstance. Taking as an example this Court's opinion in the first round of the case at bar, such nuances as number of stab wounds, defensive wounds, and remaining conscious throughout the stabbing were brought within the scope of the especially heinous, atrocious or cruel aggravating factor. Nibert v. State, 508 So.2d 1 (Fla. 1987). However, this construction did not make the aggravating circumstance more definite. As pointed out in Issue VI, supra, the aspects found compelling by the Nibert court have not been treated consistently by this Court elsewhere.

When confronted with the identical language in the Arkansas death penalty statute, the Supreme Court of Arkansas held it unconstitutionally vague. The Arkansas Court wrote:

> There are any number of circumstances to which we might refer in determining what "especially heinous, atrocious, or cruel" means. That is part of the problem. If we begin to adjudicate this issue in each case at this level we are likely to wind up displaying the very sort of inconsistency the Constitution requires us to avoid.

Wilson v. State, 295 Ark. 682, 751 S.W.2d 734 at 737-8 (1988). Noting that the United States Supreme Court effectively transformed the supreme courts of Florida and Georgia into legislative bodies by holding that a limiting construction of the vague statutory language was constitutionally permissible, the Arkansas court declined to follow this path. 751 S.W.2d at 738.

This Court should now recognize that in attempting to provide a constitutional limiting construction to the section 921.141(5)(h) aggravating circumstance, it has been exercising power reserved to the Florida Legislature by Article II, section 3 of the Florida Constitution. This aggravating circumstance should now be declared unconstitutional.

ISSUE VIII

THE TRIAL JUDGE'S INSTRUCTION TO THE JURY ON THE SECTION 921.141(5)(h) AGGRAVATING CIRCUMSTANCE WAS CONSTITUTIONALLY INADEQUATE BECAUSE IT FAILED TO INFORM THE JURY OF THE LIMITING CONSTRUCTION GIVEN TO THIS AGGRAVATING CIRCUMSTANCE.

Initially, Appellant notes that he challenged the constitutionality of the section 921.141(5)(h) aggravating circumstance in a pretrial motion based in part upon the Tenth Circuit's decision in Cartwriaht v. Maynard, 822 F.2d 1477 (10th Cir. 1987). (R493-9, 6-12) After the trial judge denied this motion (R5-6, 13), the defense proposed a special jury instruction which would inform the jury of an aspect of the limiting appellate construction given to the especially heinous, atrocious or cruel aggravating factor. (R514, 338-47) Thus, unlike the situation in Smalley v. State, 546 So.2d 720 (Fla. 1989), Nibert's claim is properly preserved for appellate review.

In Maynard v. Cartwriaht, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), the United States Supreme Court held that capital sentencers must be given sufficient guidance when instructed on aggravating circumstances to prevent unfettered discretion. In particular, the statutory language "especially heinous, atrocious or cruel" was held impermissibly vague under the Eighth Amendment to guide the jury's discretion.

Recognizing that in Florida a capital jury does not act as the sentencer, adequate instructions are still required. A

Florida capital jury has great power because the trial judge is limited under Tedder v. State, 322 So.2d 908 (Fla. 1975) in his power to override a jury recommendation of life imprisonment. Thus, the jury recommendation is a "critical factor" in whether a death sentence is imposed. LaMadline v. State, 303 So.2d 17 at 20 (Fla. 1974). A death sentence which follows a 7-5 jury death recommendation is especially vulnerable because any error which could have prejudiced the defendant's opportunity to win a life recommendation cannot be harmless. Morgan v. State, 515 So.2d 975 (Fla. 1987); Rhodes v. State, 547 So.2d 1201 (Fla. 1989).

At bar, Nibert requested that the jury be instructed:

> The fact that Mr. Snavely continued to live for a while after the stabbing and was in undoubted pain and knew that he was facing imminent death, does not in and of itself support a finding that this murder was especially heinous, atrocious or cruel.

(R514)

This is a correct statement of the law. Teffeteller v. State, 439 So.2d 840 (Fla. 1983); Demps v. State, 395 So.2d 501 (Fla. 1981). It is in accord with the limiting construction given to the section 921.141(5)(h) aggravating circumstance factor by this Court. Because the trial court declined to give any limiting instruction on the section 921.141(5)(h) aggravating circumstance, it may truly be said that "the jury's interpretation ... can only be the subject of sheer speculation." Godfrey v. Georgia, 446 U.S. 420 at 429 (1980).

Even if this Court determines that the section 921.141(5)(h) aggravating circumstance was proved by the evidence, this does not cure the instructional error. Properly instructed jurors might have given less weight to the aggravating circumstance had its application been better defined. If even one juror could have consequently changed his or her recommendation to life from death, Nibert's sentence of death cannot stand under the Eighth Amendment.

Accordingly, this Court should vacate Nibert's sentence of death and order a new sentencing proceeding.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Billy Ray Nibert, Appellant, respectfully requests this Court to grant him relief as follows:

As to Issues I, VI and VII - reduction of his sentence to life imprisonment.

As to Issues 11, 111, IV and VIII - remand for a new sentencing proceeding before a new jury.

As to Issue V - remand for reweighing by the sentencing judge.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NUMBER **0143265**

DOUGLAS S. CONNOR
Assistant Public Defender
P. O. Box 9000 - Drawer PD
Bartow, FL **33830**
(813) 534-4200

DSC/an