IN THE SUPREME COURT OF FLORIDA

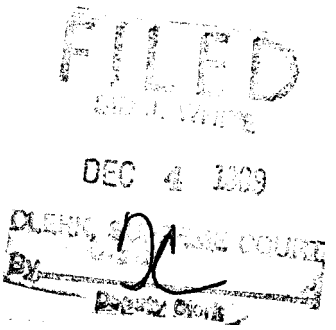
JAMES FLOYD,

Appellant,

vs. : Case No. 72,207

STATE OF FLORIDA, :

Appel1ee. :




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

# INITIAL BRIEF OF APPELLANT

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

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## STATEMENT OF THE CASE

On March 6, 1984 a Pinellas County grand jury returned an indictment charging Appellant, James Floyd, with the premeditated murder of Annie Barr Anderson by stabbing her with a knife on January 16, 1984. (R6-7)

Appellant was tried before a jury, and found guilty of the murder on August 23, 1984. (R48, 51)

On August 24, 1984 the jury recommended by a seven to five vote that Appellant be sentenced to death. (R50, 52)

On August 27, 1984 Circuit Judge Philip A. Federico imposed a sentence of death upon Appellant. (R55, 57-58) Judge Federico found the following aggravating circumstances (R57-58): (1) The capital felony was committed while Appellant was engaged in the commission of a burglary of Anderson's home. (2) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest. (3) The homicide was committed for pecuniary gain. (4) The capital felony was especially heinous, atrocious and cruel. (5) The homicide was committed in a cold, "calculating" and premeditated manner without any pretense of moral or legal justification. Judge Federico found no mitigating circumstances, "legal or otherwise." (R58)

Appellant's subsequent appeal to this Court resulted in an opinion dated November 20, 1986 affirming Appellant's conviction of first-degree murder, but vacating his sentence of death. (R62-

70)[1] The Court remanded for a resentencing hearing before a jury because the trial court had not adequately instructed Appellant's jury on mitigating circumstances. (R66-69) The opinion noted that evidence was presented at penalty phase from which the jury could have found nonstatutory mitigating circumstances, such as letters which showed that Appellant's father was dead, his mother was an alcoholic, and he was the father of two small children, and testimony from the victim's daughter explaining her family's belief that capital punishment was wrong. (R66) But the inadequate and confusing jury instructions the trial court gave denied Appellant his right to an advisory opinion. (R69) This Court also agreed with Appellant's contentions that the aggravating circumstances of cold, calculated and premeditated and committed to prevent arrest were not proven beyond a reasonable doubt. (R65-66)

Prior to Appellant's new penalty trial, the State and the defense both filed motions in limine. (R83-84, 85-87) The State's motion sought to exclude any reference to the fact that the victim herein and her daughter were opposed to capital punishment. (R85)[2] The trial court granted the motion. (R271, 543-545)

Appellant's motion in limine sought to limit the State to eliciting testimony as to appropriate aggravating circumstances, and to preclude the State from retrying the underlying offense.

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[1] The opinion is reported at 497 So.2d 1211.

[2] Ann Shirley Anderson, Annie Barr Anderson's daughter, testified at the penalty phase of Appellant's trial in 1984 concerning her family's belief that capital punishment was wrong. (R66, 536-538)

(R83) The motion particularly sought to disallow the testimony of Gregory Anderson, as his testimony would only go to Appellant's guilt, and would have no relevance to aggravation. (R83) The court ruled that Anderson would be allowed to testify for the State, but could not refer to one particular statement Appellant allegedly made to Anderson. (R270, 545-550)

Among numerous other pre-penalty phase motions filed by Appellant was a motion for additional peremptory challenges or to declare section 913.08(1)(a) of the Florida Statutes unconstitutional. (R268-269) The court ruled that he would not grant more than the 10 challenges prescribed by the Rules of Criminal Procedure unless he found special circumstances to go beyond that number. (R291, 524)

Appellant's new sentencing trial was held on January 12-14, 1988, with the Honorable Richard A. Luce presiding. (R497-1042)

At the beginning of jury selection, defense counsel objected to the panel as not being "represented in the community'' because it contained only two black members. (R564)[3] The objection was noted and overruled. (R564)

During voir dire, Appellant challenged prospective juror Hendry for cause because of his views on the death penalty. (R665-667) After the court denied the challenge, Appellant used one of his peremptories to excuse Hendry. (R667, 671)

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[3] Appellant, James Floyd, is a black man. (R1, 654)

Also during jury selection, Appellant objected to the State successfully challenging both of the black prospective jurors on the panel, one for cause and one peremptorily. (R670-671) The objection was overruled. (R671)

The court denied several of the instructions Appellant asked the court to give to his penalty phase jury. (R297, 300, 301, 305, 306, 307, 308, 309, 310, 311, 958-961, 963-965, 967-968, 972)

During deliberations the jury posed the following question to the court (R318, 1032-1033): "What is the definition of Murder In The First Degree as opposed to other Degrees?" (R318, 1032-1033) The court responded that he could not answer the question, as it would involve matters not relevant to the proceedings, and he required the jury to continue deliberating under the instructions they had been given. (R1038)

The jury returned a few minutes later with a death recommendation by a vote of eight to four. (R323, 1039)

A sentencing hearing was held before Judge Luce on February 29, 1988. (R1044-1075) The court sentenced Appellant to death, finding the following aggravating circumstances: (1) The murder was committed for financial gain. (R333-334, 1066-1067) (2) The murder was especially heinous, atrocious or cruel. (R334, 1067-1068) The court also found that the murder was committed during a burglary of the victim's residence, but indicated he would purposely not "count" this as an aggravating factor, to avoid the "coupling" prohibition. (R333, 1065-1066) The court further noted

that he "personally believe[d]" that two additional aggravating circumstances were proved, to-wit: that the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, and that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, but the court was bound by the rejection of these aggravating circumstances in this Court's opinion in this case. (R333, 334, 1066, 1068-1069) The court found no mitigating circumstances. (R335-337, 1071-1072)

Appellant filed his notice of appeal on March 30, 1988. (R338)

The Public Defenders for the Sixth and Tenth Judicial Circuits were appointed to represent Appellant for purposes of appeal. (R340)

## STATEMENT OF THE FACTS

### I. STATE'S CASE

Near the beginning of his opening statement to the jury, the prosecutor told the jury about the victim herein, Annie Barr Anderson, as follows (R692-693):

> She was an eighty-six-year-old white female, lived at 1320 Thirteenth Street North, in St. Petersburg. She lived alone. She was a widow. Her husband, who had been an associate minister in the Presbyterian Church, passedawaysome years before. Had one daughter, a forty-seven-year-old-woman, also Annie Anderson, who was an African minister, who did not live with her.
>
> She was a leader of a bible church in that same church where her husband had been an associate minister. Hobbies included raising butterflies and, between her family and the church and raising butterflies, that's how she occupied her time.

Later during his opening statement, the prosecutor referred, over objection, to a stab wound that went through Anderson's wrist which, he said, the medical examiner would testify was a defensive wound. (R696-697)

Anderson was last seen alive on January 16, 1984 at 1:47 p.m. when she cashed a check for $50 at a Landmark Bank in St. Petersburg. (R715-716)

The next night members of the St. Petersburg Police Department responded to Anderson's home after receiving a "check on welfare'' call. (R718-719, 733-734) Her neighbors had not seen

her, and were concerned about her. (R710)

Officer Ray Olsen arrived at Anderson's house at around 8:30 p.m. (R719) Sgt. Thomas Gavin, Olsen's supervisor, arrived a few minutes later. (R720, 734) They met with the Reverend Vonn James Warthen, who was already at Anderson's house. (R719, 735) Warthen was associate pastor at First Presbyterian Church, and Anderson was a member of his congregation. (R708-709)

The police observed that there was mail in Anderson's mailbox, and her newspaper had not been picked up. (R719, 735) The officers knocked numerous times, but received no response. (R720) The front door was locked with a deadbolt, and the screen door was latched. (R720, 738) The police could find no exterior signs of forced entry. (R720, 745-746, 819) They entered the house through an unlocked back door. (R720, 735)

Anderson was found lying on a bed in the northwest bedroom. (R721, 736) She was obviously dead. (R721, 736)

When Sgt. Gavin initially saw Anderson, he thought she had had a heart attack and died. (R736) As he looked closer he saw stains on her dress that did not look right, and which were later found to be blood. (R736)

Anderson had been stabbed multiple times. (R820-821) She had a bruise and injury to the bridge of her nose which Gavin felt was consistent with being struck with her glasses on. (R739, 821) She also had a laceration on the back of her left hand which

appeared to be a self-defense wound. (R726, 739, 821)[4]

On the bedroom floor was a Kleenex box that appeared to have been knocked off the dresser. (R722, 820) Also lying on the floor was a wooden knob that appeared to have been freshly broken off the dresser. (R722, 820) There was a tablecloth on the bed, and it appeared that someone had taken an object that had blood on it and wiped it on the tablecloth. (R722-723)

Anderson's purse containing $50 was still in a closet in her bedroom. (R836)

The windows to the house appeared to have been painted shut. (R723, 743) There were fresh pry marks on the window sills on two windows inside the bedroom, indicative of someone trying to get out. (R723, 728, 743-745, 747, 821, 837)

The police removed hairs from clothes and a sweater at the scene. (R824-825) Upon analysis, the hairs were found to be negroid. (R824-825)

The residence was processed for fingerprints and one was found, but the police were unable to identify to whom it belonged. (R823)

Outside Anderson's house, the police found a singular motorcycle-type track, which they photographed. (R376-378, 829-

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[4] Defense counsel lodged a number of objections during the testimony of the police officers who testified to matters which were speculative or involved conclusions they were not qualified to make, such as Gavin's testimony that the bruise on Anderson's nose indicated to him that a fight or struggle had occurred (R739), and the testimony of Olsen and Gavin which characterized the injury to Anderson's hand as a defensive wound. (R725-726, 739)

830)

The associate medical examiner who performed an autopsy on Anderson found that she had received a stab wound to the right upper chest which penetrated the heart, 11 stab wounds to the abdomen, and a stab wound in the left wrist area that came out the top of the hand. (R751-753) These wounds were consistent with a knife. (R753)

The wound to the chest was a rapidly fatal wound with death occurring within a matter of a few minutes at the most, whereas the other wounds were potentially fatal, but death would not have occurred as quickly. (R753-754) The cause of death was a combination of loss of blood and a collecting of fluid in the sac around the heart, which interfered with the beating of the heart (cardiac tamponade). (R753-754)

Although the associate medical examiner could not determine the order of the stab wounds with certainty, one of the logical choices, and the one he preferred, was that the wound to the chest was the first wound. (R754, 757-758)

On January 16, 1984 Appellant cashed a $500.00 check at Landmark Bank drawn on the account of Ann Shirley Anderson and Annie Barr Anderson. (R369-372, 808-812)

Two days later, Appellant attempted to cash another check on the Andersons' account, this one for $700.00. (R374, 764-765) The police were called, and they encountered Appellant inside the Landmark Bank. (R760-762) Appellant pushed Detective John Butler of the St. Petersburg Police Department and ran out of the bank,

but was caught about two blocks away. **(R761-763)** The police handcuffed Appellant and walked him back to the bank, where they patted him down. **(R763)** Butler found a checkbook in Appellant's front pocket which bore the names Ann Shirley Anderson or Annie Barr Anderson. **(R375, 763-764)**

The police impounded Appellant's motorcycle, which was on the other side of the bank. **(R379, 766-767)** A crime scene technician removed a white athletic sock that appeared to have dried blood on it from the pocket of a jacket that was lying on the motorcycle. **(R767)** The blood on the sock proved to be Type **O,** which was the same type as that of Anderson, but not the same type as that of Appellant. **(R825)**

The tires the police removed from Appellant's motorcycle looked similar to the tire tracks the police had found at Anderson's residence. **(R831)**

Upon his arrest, Appellant was initially charged with forgery, and taken to a holding cell in the basement of the police department. **(R773-774)** Officer Greg Totts of the St. Petersburg Police Department was present when another officer was reading Appellant his rights. **(R774)** Before Totts said anything, Appellant suddenly looked up at him and said, "I know that the police are mad at me for running, but I have been in jail before and I was afraid." **(R774-775)**[5]

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[5] Appellant challenged the propriety of placing his prior record before the jury at penalty phase, but his objection was overruled. **(R774-775)**

Appellant asked Totts at one point what he was being charged with. (R775) When Totts told him, Appellant kept repeating, "Is that all I'm being charged with?'' (R775) He appeared quite confused, as if he should have been charged with something else. (R775)

When Appellant was questioned by Detective Robert Engelke at the police station on the day he was arrested, Appellant admitted trying to pass the check for which he was arrested, but denied filling the check out. (R826-827) Appellant gave two different accounts of his activities from Monday through Wednesday. (R828) He first said he had gotten the checks on Tuesday, and that was when he made them out, and finally came around to passing them on Wednesday. (R828) Appellant then said he found the checks on Monday and had them filled out by his brother, and ended up passing the checks on Wednesday. (R829) Appellant denied any involvement in getting the checks from the victim's residence or any involvement in the homicide. (R829)

Greg Anderson first met Appellant in a holding cell in the county jail in January, 1984. (R780-781) Anderson struck up a conversation with him. (R781)

A couple of days later, Appellant told Anderson he had broken into this lady's house and was ripping her off, when she came in and scared him, and he killed her with a knife. (R781, 783, 788-789) Anderson then contacted Detective Pflieger of the St. Petersburg Police Department and told him about his conversations with Appellant. (R783)

Thereafter, Anderson encountered Appellant when they were in the same elevator, and Appellant said he was going to "get" Anderson because Appellant's lawyer told him that Anderson was going to be a witness against him. (R786)[6]

Anderson had "had problems with'' black people, and testified before that he did not like them. (R800)

## II. APPELLANT'S CASE

Appellant, James Floyd, worked with his father in a lawn service. (R849, 872, 902-903)

When Appellant's father became disabled with cancer, Appellant became the man of the house. (R874) After his father succumbed to the cancer and died in March, 1983, Appellant took over the lawn service. (R850-851, 872, 903-904, 909)

Appellant and his brothers did a good job taking care of Eula Williams' two lots and nine avocado trees. (R849-850)

Appellant also worked on Williams' car whenever she needed it. (R850)

Appellant had always respected Williams, who had known him for about eight or nine years, and, as far as Williams knew, Appellant treated everybody that way. (R849, 851-852)

Williams did not know Appellant to be a violent person, and did not know of any confrontations he had had with persons in their neighborhood. (R851-852)

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[6] Anderson's testimony regarding this alleged threat was admitted over defense objections that it was irrelevant and prejudicial. (R784-786)

Rex Estelle was Appellant's supervisor when he worked at the First Baptist Church in downtown St. Petersburg. (R855) Appellant began working there as a day laborer, but acquired the custodian's job when the church's custodian left. (R855-856) Appellant was running the lawn service at the same time he worked at the church. (R876)

Appellant initially was a willing, good worker with a nice disposition. (R855) He was very neat, extremely pleasant to be around, and had a wonderful sense of humor and a beautiful smile. (R855) He never exhibited that he was a violent person. (R856)

Appellant's mother was an alcoholic, and had been so afflicted for a long time. (R850, 856-858, 872-873, 904, 915) Because Estelle was a recovering alcoholic and drug addict, Appellant asked him to talk with his mother. (R857) Estelle and a female member of Alcoholics Anonymous did speak with Pinky Floyd at some length, but found her uninterested in recovering from her condition. (R857)

About six months before the Anderson homicide, Estelle noticed a change in Appellant, as if he had stepped off a cliff. (R860) Whereas Appellant had previously been a very even-tempered, easy-going guy, he began having extreme mood swings. (R858-859) At times he would be "in a big depression," while at other times he would be almost manic. (R859) Estelle felt that Appellant had begun abusing drugs or alcohol, but Appellant became angry when Estelle approached him about taking drugs. (R859, 863-864)

There were approximately three to five incidents at the church where money or other property was missing, and Appellant was suspected of doing the taking. **(R861-863)** No criminal charges were filed against him, but right before Christmas, **1983,** Appellant's employment was terminated. **(R863)**

Thomas Snell was a communications officer with the St. Petersburg Police Department. **(R871)** He had known Appellant for over **15** years, as they lived in the same neighborhood. **(R871)** Snell also knew Appellant's parents. **(R872)**

Snell had never known Appellant to be a violent person. **(R873)** He was very passive and "kind of even-tempered." **(R873-874)** Snell never knew Appellant to be in any kind of trouble. **(R873)**

Appellant used to play with Snell's children, and took care of them sometimes. **(R873)** Snell found Appellant to be quite dependable. **(R874)**

Snell believed Appellant's mother's alcoholism had quite an effect on Appellant. **(R872-873)**

On cross-examination of Snell, and over defense objections, the prosecutor was permitted to ask Snell whether he knew that on March **5, 1980** Appellant was "committed" of petit theft at Kash & Karry, and whether he knew that on December **12, 1980** Appellant was convicted of grand theft and burglary of Mary Nightpickles and Food Incorporated, and whether he knew that on September 2, **1981** Appellant was convicted of a grand theft, and whether he knew that on September **24, 1981** Appellant was convicted

of a failure to appear. (R879-894) Snell was not aware of these matters, but knowing them did not change his opinion of Appellant. (R878, 894-895)

Lela Richardson had known Appellant since he was about four years old. (R901) Appellant cut her yard and ran errands for her and took her places. (R902) She found him to be hard-working and dependable. (R902) She never had any problems with him relative to his work. (R903)

Richardson found Appellant to have a nice and kind personality; he was always smiling. (R905) He had always been polite and respectful. (906) Richardson had never known him to be a violent person. (R905)

Richardson felt that Appellant's mother's alcoholism and his father's death both affected him very much. (R904-905, 907-908) When his father died it "took a hold of his life" because "that was his bread and water." (R906) Richardson felt that after his father's death, Appellant got in with the wrong crowd. (R906)

Richardson testified that Appellant had a son whom he helped support while he was able. (R906)

Richardson had known Appellant to have problems with the law one time prior to the instant offense, but she did know what it was about. (R905) On cross-examination Richardson said it would not surprise her that Appellant had been in trouble more than one time. (R908)

Appellant's mother, Pinky Floyd, testified that Appellant was a very nice boy who worked both when his father was living and

after he passed away. (R910) She asked the jury to recommend that her son's life be spared. (R910)

Ben Boykins had known Appellant for 15 years. (R911) Appellant was a very nice young man with a good personality, about whom Boykins never knew anything bad. (R912) He was a good worker, dependable and industrious. (R912)

Boykins had never known Appellant to be a violent person, nor seen him act violently. (R912-913)

Appellant had been to Boykins' house a number of times, and Boykins never had any problems with Appellant at all. (R913)

After Boykins testified, the State requested a proffer of the testimony of the next defense witness, Ann Shirley Anderson, the victim's daughter. (R916-917) During the proffer Anderson stated that she did not think Appellant should be executed because he could use his life to become a constructive citizen. (R919) After hearing argument of counsel, the court ruled that Anderson would be allowed to testify as to what she perceived Appellant's character to be based upon her contacts with him, but she would not be allowed to make a direct recommendation to the jury as to the sentence Appellant should receive. (R920-927)

Anderson then testified in the presence of the jury. (R932-935) She said that Annie Barr Anderson was her mother. (R932) The witness had corresponded with Appellant after the homicide. (R932-933) She had also visited with him in prison for approximately 30 minutes, which was as long as she was permitted to meet with him. (R933-935) Anderson attempted to meet with

Appellant other times, but the authorities denied her requests to do so. (R935) When defense counsel asked the witness if she felt that Appellant's character was of a worthwhile nature, she replied, "The people that God gives life to are worthwhile." (R934)

## 111. STATE'S REBUTTAL AND CLOSING ARGUMENT

After Anderson testified, the State moved to be allowed to introduce as rebuttal evidence the judgments and sentences pertaining to the offenses committed by Appellant that the prosecutor had referred to during his cross-examination of defense witness Thomas Snell. (R935) Over defense objection, the court ruled that he would allow the documents into evidence. (R936-937) In the presence of the jury, the prosecutor referred to the documents, which were marked as State Exhibits 24A-E, as "judgments and sentences to the convictions that I referred to when I was cross-examining defense witness Tom Snell." (R942) The documents that were admitted were: (1) State Exhibit 24-A: An order withholding adjudication of guilt and placing Appellant on probation for the second degree misdemeanor of retail theft at Kash and Karry, an affidavit for violation of probation, an arraignment and plea of guilty to the violation of probation, and a judgment and sentence on violation of probation. (R383) (2) State Exhibit 24-B: An order withholding adjudication of guilt and placing Appellant on probation for grand theft and burglary pertaining to the Miramar Pickles and Foods, Inc. and Shanti Patel. (R384) (3) State Exhibit 24-C: The same order as in State Exhibit 24-B. (R385) (Appellant was charged with burglary in one case and grand

theft in another. He was sentenced on the same day to concurrent probationary terms in each. Hence the one order pertaining to two cases. **(4)** State Exhibit **24-D:** A judgment and sentence against Appellant for grand theft. **(R386)** **(5)** State Exhibit **24-E:** An order withholding adjudication of guilt and placing Appellant on probation for failure to appear. **(R387)**

The prosecutor began his closing statement to the jury by reciting the wounds incurred by Anderson **(R984-985)** He then said **(R985):**

> You don't hear much about Annie Barr Anderson in a case like this; her warmth of life, which she did have. Our rules don't permit it.
>
> Annie Barr Anderson was known as the butterfly lady, and she was eighty-six years old and she was alive.

## IV. SENTENCING HEARING

At the sentencing hearing of February 29, **1988** before Judge Luce, Appellant told the court that his father's death created a problem for him and his family that he felt he could not deal with. **(R1047)**

Appellant said he had two sons, Benjamin, age four, and Alexander, age seven, for whom he wanted to try to set a good example. **(R1047-1048)**

Appellant also mentioned that he had succeeded in helping some people in the Pinellas County Jail with their problems, and wanted to continue to help people. **(R1048-1049)**

Appellant expressed that he was ''truly sorry'' for Mrs.

Anderson, and felt "very bad for her." (R1048)

Ann Shirley Anderson appeared at the hearing and expressed her hope that the court would give Appellant life so that he could become again a constructive person. (R1050)

Among other things, the prosecutor said to the court, "Not much has been said about Annie Anderson. She was an 85-year-old-lady. Also a very loving person." (R1061)

The court described the homicide of Annie Barr Anderson as involving a "ferocious attack." (R1068)

After discussing and rejecting all statutory mitigating circumstances (R1069-1071), the court discussed non-statutory mitigation (R1071):

> The last mitigating factorwould be one that comes right from your case, Floyd versus State, cited at 497 So.2d 211. Any other aspect of the defendant's character or record or any other circumstance of the offense. Well, stop and think about the things that were brought out in the sentencing today. First from you, because no one had ever heard from you before today. There is some remorse that I see. There is a desire to live within the confines of the rules while you're in custody. There is a suggestion that you would like to help other prisoners with their problems. A desire to establish a rapport with your children. Quite frankly, Mr. Floyd, those do not qualify to the Court as the type of mitigation contemplated. Certainly, if there was some type of mitigation there, it is totally outweighed. I personally cannot find any mitigation in those factors whatsoever that were brought out at sentencing today. Therefore, as I total up all the mitigating factors,

there are none.

The court concluded that there were two aggravating factors and no mitigating factors and said, "I cannot ignore that score." (R1072) He then sentenced Appellant to death. (R1072-1074)

## RY OF THE ARGI

I. The prosecutor below should not have been permitted to exercise an apparently racially-motivated peremptory challenge to remove Mark Edmonds, the sole remaining black person, from Appellant's jury panel. The court abdicated his responsibility when he failed to determine whether the reason the prosecutor gave for removing Edmonds was reasonable, racially-neutral, and supported by the record. In fact, the record failed to support the prosecutor's argument that Edmonds expressed satisfaction with a 25 year sentence as sufficient punishment for Appellant, nor would such a reason for excusing the prospective juror pass constitutional muster. Nothing else Edmonds said during voir dire could provide a legitimate basis for excusing him.

11. The trial court should have granted Appellant's challenge for cause to prospective juror Lee Hendry, who was predisposed to vote for a death sentence in all cases of premeditated murder. Appellant's right to peremptory challenges was abridged when he was forced to expend one of his peremptories to remove the biased juror, and he later exhausted his limit of 10 peremptories.

111. The court below should have permitted defense witness Ann Shirley Anderson to testify that she and her mother, the victim herein, did not believe in the death penalty. The court was legally bound to follow this Court's previous opinion in this case, in which this Court recognized that the jury could properly

consider testimony that the Anderson family believed capital punishment to be wrong as nonstatutory mitigation. Such testimony is not prohibited by the Supreme Court's holding in Booth v. Maryland that the prosecution may not introduce a victim impact statement at a capital sentencing proceeding. The defendant is afforded greater latitude in the evidence he may offer in support of a sentence less than death than the State is permitted in seeking a death sentence, as the defendant is not constrained by a limited list of statutory factors that the jury and court may consider. The opinion of Ann Shirley Anderson and her mother regarding capital punishment was relevant to the issue of the extent of retribution to be visited upon Appellant. Even assuming Anderson's testimony might have been inadmissible under the rationale of Booth, it should have been admitted here, as the prosecution put forth considerable victim impact type evidence and argument.

IV. The jury's death recommendation herein was tainted by the jury's receipt of evidence of a highly prejudicial non-statutory aggravating circumstance: that Appellant had threatened State witness Gregory Anderson.

V. The State should not have been allowed to question defense witness Thomas Snell regarding whether he knew about Appellant's criminal record, and should not have been permitted to put evidence of that record before the jury. Furthermore, the prosecutor misled the jury as to the true nature of Appellant's record. The court's instruction to the jury that they could not

consider Appellant's convictions as aggravating circumstances, but could consider them in determining whether Appellant had a significant history of prior criminal activity did not cure the problems created by the State's conduct, and the record does not show that Appellant intended to rely upon the mitigating circumstance of no significant prior criminal history until the State raised the issue of Appellant's record.

**VI**. The State should not have been permitted to elicit from three of its police officer/witnesses their inferences and conclusions regarding what happened when Annie Anderson was killed which suggested a more violent confrontation than the jury might otherwise have concluded from the evidence. Particularly troublesome is the fact that the officers characterized a wound to Anderson's wrist as a defensive wound when there was no expert medical testimony as to this.

**VII**. Appellant's counsel should have been allowed to inform the jury of all the aggravating circumstances enumerated in Florida's capital sentencing statute. In this way the jury would have been better informed concerning where Appellant's case fit within the sentencing framework ***so*** as to make an intelligent decision whether there were sufficient aggravating circumstances to justify a sentence of death. Furthermore, counsel's attempted argument was relevant to the absence of aggravation as a potential mitigating circumstance.

**VIII**. A. The State failed to prove that financial gain was the motivation for the homicide of Annie Barr Anderson. The

fact that ***$50*** was left undisturbed in her purse suggests otherwise, and her checkbook may have been taken as an afterthought.

B. Nothing about the instant homicide sets it apart from the norm ***so*** as to qualify it for the especially heinous, atrocious or cruel aggravating circumstance. Knife killings are relatively common, and the courts have not invariably found stabbing deaths to fall within this aggravator. Anderson did not suffer for any length of time, and there was no evidence to suggest that Appellant meant for her to suffer at all.

IX. The court below failed to fulfill his duty to make specific, unambiguous findings as to all mitigating factors shown by the evidence. He also engaged in a counting, rather than a weighing, process of aggravators versus mitigators, and included in his contemplation of Appellant's sentence two aggravating circumstances which this Court previously found not to apply to Appellant's case, thus distorting the sentencing weighing process.

## ARGUMENT

### ISSUE I

**APPELLANT WAS DEPRIVED OF HIS RIGHTS UNDER THE FLORIDA AND UNTIED STATES CONSTITUTIONS WHEN THE STATE PEREMPTORILY EXCUSED THE SOLE BLACK PROSPECTIVE JUROR REMAINING ON THE PANEL WITHOUT PROVIDING A VALID RACIALLY-NEUTRAL EXPLANATION FOR THE EXCUSAL.**

At the outset of voir dire, counsel for Appellant, James Floyd, who is a black man, objected to the jury panel as not being "represented" in the community because only two of its members were black. (R564) The court noted and overruled the objection. (R564)

After the prospective jurors were questioned, the State procured the excusal of the only two blacks on the panel. Watson Haynes was excused for cause, because of his opposition to the death penalty. (R664-665) Mark Edmonds was excused peremptorily. (R670) Immediately upon the State's use of a peremptory to excuse Edmonds, defense counsel objected to the State exercising its challenges to exclude both of the black potential jurors, thus denying Appellant a cross-section of the community. (R670-671)

The court asked the State to give a reason for exercising its peremptory, which left no black on the panel. (R671) The prosecutor responded that he did not need to give a reason unless systematic exclusion was shown, but then said, "I think he [Edmonds] said he would be satisfied for twenty-five years and

that's punishment enough. You know, I thought that that was enough." (R671)

The court said he did not specifically recall Edmonds' answer, but said it was on the record, and overruled Appellant's objection. (R671)[7]

The use of the peremptory challenge to exclude potential jurors from service solely on the basis of their race is barred by both the Constitution of the United States and the Constitution of the State of Florida.

In Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) the Supreme Court held use of peremptory challenges to exclude jurors solely on the basis of race to violate the defendant's right to equal protection as guaranteed by the Fourteenth Amendment.[8]

Before Batson, however, this Court had recognized that racially discriminatory use of the peremptory challenge is inimical to the Constitution of the State of Florida. State v. Neil, 457

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[7] It is somewhat difficult to ascertain from the record which of the four prospective jurors the State excused peremptorily prior to the time Appellant lodged his objection - Carolyn Tinnen, Susan Hester, Nancy Jamison, and Mark Edmonds (R669-670) - was black. However, the prosecutor referred to the juror in question as "he" (R671), and Edmonds was the only male among the four. Also, undersigned counsel's consultations with trial counsel for Appellant indicate that Edmonds must have been the black juror whom the State removed peremptorily.

[8] Pending now before the Supreme Court in Holland v. Illinois, Case Number *88-5050*, which was argued on October 10, 1989, is the question of whether the State's use of peremptory challenges to remove black prospective jurors on grounds of race also violates the Sixth Amendment right to trial by jury, a question the Court specifically declined to address in Batson.

So.2d **481** (Fla. **1984).** The Court set forth in Neil the procedure to be followed when one a party believes the other party is exercising his peremptory challenges to exclude members of a particular race:

> **A** party concerned about the other side's use of peremptory challenges must make a timely objection [footnote omitted] and demonstrate on the record that the challenged persons are members of **a** distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. If **a** party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective jurors' race. [Footnote omitted.] The reasons given in response to the court's inquiry need not be equivalent to those for a challenge for cause. If the party shows that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race, then the inquiry should end and jury selection should continue. On the other hand, if the party has actually been challengingprospectivejurorssolely on the basis of race, then the court should dismiss that jury pool and start voir dire over with a new pool.

**457** So.2d at **486-487.**

The party alleging improper use of peremptories need not demonstrate, as the prosecutor below argued, "systematic" exclusion from the panel of all members of a distinct racial group. The issue is whether any prospective juror has been excused because of his or her race, and the striking of a single black juror because of race is unconstitutional. State v. Slappy, 522 So.2d 18 (Fla. 1988); Tillman v. State, 522 So.2d 14 (Fla. 1988); Mitchell v. State, 548 So.2d 823 (Fla. 1st DCA 1989); Mayes v. State, 14 F.L.W. 2383 (Fla. 4th DCA Oct. 11, 1989).

Any doubt about whether the complaining party has met his initial burden under Neil must be resolved in that party's favor. Slappy; Tillman; Williams v. State, 14 F.L.W. 2462 (Fla. 1st DCA Oct. 16, 1989).

Here, as in Timmons v. State, 548 So.2d 255 (Fla. 2d DCA 1989), the State exercised a peremptory challenge to excuse the sole remaining black prospective juror after the only other black prospective juror had been excused for cause. The striking of the sole remaining black member of the jury panel, who had not demonstrated that he would be partial or unfair, raised the strong likelihood that the juror was rejected on racial grounds and shifted the burden to the State to show otherwise. Parrish v. State, 540 So.2d 870 (Fla. 3d DCA 1989). See also Blackshear v. State, 521 So.2d 1083 (Fla. 1988).

While Judge Luce did not specifically find that Appellant had made a prima facie showing of discrimination, such a finding can be implied from the fact that he asked the prosecutor to give

reasons for challenging Edmonds. Kibler v. State, 546 So.2d 710 (Fla. 1989). It then became the court's duty to evaluate the explanation the prosecutor gave and determine whether it was racially-neutral, reasonable, and supported by the record. Tillman; Mitchell. This the court failed to do; he merely overruled Appellant's objection to the prosecutor's improper use of his peremptories.

> .... [T]he absence of an evaluation by the trial court of [the] explanation by the state and the absence of a determination by the trial court that such an explanation was supported by the record require that [this Court] reverse and remand for a new [penalty] trial.

Timmons, 548 So.2d at 256. See also Knowles v. State, 543 So.2d 1258 (Fla. 4th DCA 1989); Parrish (failure to conduct full Neil inquiry after defendant demonstrates likelihood of racial bias reversible error).

Had the court below reviewed the record, he would have found no support for the prosecutor's stated reason for excusing Edmonds. When questioned, Edmonds said he believed in capital punishment to a certain extent, depending upon the crime: he said nothing about being satisfied with 25 years as adequate punishment. (R600)

Furthermore, even if the record did show Edmonds to be ''weak" on the death penalty, this would not necessarily justify his excusal. In Brown v. Rice, 693 F.Supp. 381 (W.D.N.C. 1988) the court held it violative of the United States Constitution for the

prosecutor to use peremptory challenges consistently to exclude potential jurors who express reservations about capital punishment, but who would not be excusable for cause.

Finally, none of the other responses Edmonds made to voir dire questioning show any racially-neutral justification for the State to remove him from the jury panel. He was questioned only briefly, revealing that he was an equipment operator for the City of Clearwater who lived in Largo and enjoyed playing softball in his spare time. (R598-599) Had any of these facts been given as the prosecutor's reason for excusing Edmonds, the court surely would have deemed them unreasonable.

Because the prosecutor exercised his peremptory challenges in an apparently racially discriminatory manner, and did not give any legitimate reason that enjoyed record support for excusing the sole remaining black prospective jury from Appellant's panel, Appellant was denied equal protection of the law and his right to trial by a jury representing a fair cross-section of the community, as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States, and by Article I, Sections 2, 9, 16, and 22 of the Constitution of the State of Florida. As a result, Appellant must be granted a new penalty proceeding before a new jury.

## ISSUE 11

THE TRIAL COURT ERRED BY DENYING APPELLANT'S CHALLENGE FOR CAUSE ON PROSPECTIVE JUROR HENDRY, WHO SHOWED A PREDISPOSITION IN FAVOR OF DEATH AS THE PROPER PENALTY.

When prospective juror Lee Hendry was initially questioned by the prosecutor on voir dire regarding his views on the death penalty, he said, "I'm for it." (R603)

Upon questioning by defense counsel Robert Love, Hendry expounded his opinion of capital punishment, as follows (R649-650):

> VENIREMAN HENDRY: I think there is some kind of a deterrent for capital crimes. If you don't, I think there would be more capital crimes. In some circumstances, premeditated murder proven beyond a reasonable doubt, I think the death penalty is warranted.
>
> MR. LOVE: Okay. So, I just want to be clear, sir. If you have a premeditated murder, somebody's been pounding, what have you, on the system, that the death penalty would be warranted under your views?
>
> VENIREMAN HENDRY: Right.
>
> MR. LOVE: Do you think that's the case in all cases of those premeditated, finding death penalties warranted?
>
> VENIREMAN HENDRY: Yes.

Appellant moved the court to excuse Hendry for cause because he was in favor of the death penalty for any premeditated murder. (R665-667) The court refused to excuse Hendry for cause. (R667) Appellant then removed Hendry by exercising one of his

peremptory challenges. (R671) Appellant subsequently exhausted all of his 10 peremptory challenges. (R676-677)[9]

In Singer v. State, 109 So.2d 7 (Fla. 1959), this Court stated:

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

109 So.2d at 23-24. Here there was a great deal of doubt whether Hendry would be able to consider the evidence and follow the law to render an impartial advisory sentencing recommendation. Indeed, his fixed view that capital punishment was appropriate in all cases of premeditated murder made it certain that he would return a death recommendation regardless of the testimony presented and the instructions he received from the court.

This Court has held that a juror's bias in regard to the sentencing aspect of a capital case implicates the Sixth Amendment, United States Constitution and Article I, section 16 of the Florida Constitution. Thomas v. State, 403 So.2d 371 (Fla. 1981). The United States Supreme Court has held that the Due Process Clause of the Fourteenth Amendment requires "a fair trial by a panel of impartial 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717 at 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).

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[9] Before Appellant's penalty trial began, the court denied his motion for additional peremptories. (R268-269, 291, 524)

In Hill v. State, 477 So.2d 553 (Fla. 1985) a prospective juror stated that he did not believe that every case of premeditated murder should result in a death sentence but that he was inclined toward the death penalty for the defendant if he were convicted. Hill's challenge for cause to this juror was denied and a peremptory strike expended. Hill subsequently exhausted his peremptory challenges. In vacating the sentence of death, this Court wrote:

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

477 So.2d at 556. This Court reaffirmed the Hill rationale in Moore v. State, 525 So.2d 870 (Fla. 1988).

In the case at bar, prospective juror Hendry was even more predisposed to vote for death than was the juror who should have been excused for cause in Hill. The Hill juror did not believe every case of premeditated murder should result in a death sentence; Hendry did believe that the death penalty is warranted in all cases of premeditated murder.

Furthermore, Hendry and the other prospective jurors were told that premeditated murder was the species of homicide of which Appellant was convicted. The court read the indictment charging Appellant with the premeditated murder of Annie Barr Anderson and told them that they were not to consider guilt or nonguilt, as that had previously been determined. (R558-559) The prosecutor likewise said that Appellant had already been convicted and found guilty of first degree murder. (R567) Therefore, Hendry was aware that Appellant had been convicted of the kind of killing which Hendry believed always called for a sentence of death.

Nothing in the record suggests that Hendry could put aside his beliefs in this case and follow the law. Nowhere did he "unequivocally assert that [he] could be a fair and impartial juror and disregard any preconceived opinions and prejudices." Auriemme v. State, 501 So.2d 41, 44 (Fla. 5th DCA 1986). (Auriemme was cited by this Court in its Moore opinion.)

The court's error in refusing to excuse Hendry for cause was not rendered harmless by Appellant's subsequent expenditure of one of his peremptories to remove the biased juror. The court's ruling improperly "abridged appellant's right to peremptory challenges by reducing the number of those challenges available to him." Hill, 477 So.2d at 556.

Appellant's sentence of death must be vacated because his rights to an impartial jury under Article I, section 16 of the Florida Constitution and Amendments VI, VIII and XIV of the United States Constitution were violated by forcing him to expend a

peremptory challenge on a prospective juror who should have been excused *for* cause.

## ISSUE III

THE COURT BELOW ERRED IN PREVENTING ANN SHIRLEY ANDERSON, THE VICTIM'S DAUGHTER, FROM TESTIFYING THAT NEITHER SHE NOR HER MOTHER BELIEVED IN THE DEATH PENALTY, PARTICULARLY WHEN THE STATE HAD PUT BEFORE THE JURY CONSIDERABLE ARGUMENT AND EVIDENCE CONCERNING THE VICTIM'S CHARACTER AND LIFESTYLE.

At the penalty phase of Appellant's first trial, Ann Shirley Anderson, Annie Barr Anderson's daughter, testified concerning her family's belief that capital punishment was wrong. (R66, 536-538)

Prior to Appellant's new penalty trial, the State successfully moved in limine to preclude any reference to the fact that the victim and her daughter were opposed to capital punishment. (R85, 271, 543-545)

This issue surfaced again in the midst of Appellant's presentation of his case to the jury when the State sought and received a proffer of the testimony of Ann Shirley Anderson. (R916-920) Relying heavily upon Robison v. Maynard, 829 F.2d 1501 (10th Cir. 1987), in which the 10th Circuit Court of Appeals decided that the death-sentenced Petitioner was not deprived of due process when the trial court refused to allow him to present the testimony of a relative of the victim who did not want the death penalty imposed, the court restricted Anderson to testifying as to what she perceived Appellant's character to be based upon her contacts with him, and did not permit her to make a direct recommendation to the jury as to the sentence Appellant should

receive. (R928-930)

Under the circumstances of this case, the court should have allowed to jury to hear that the Andersons were against the death penalty, and the court should have considered this factor as well. In this Court's original opinion herein, ~~Floyd v. State~~, 497 So.2d 1211 (Fla. 1986), the Court stated:

> Lastly, we agree that the trial judge's failure to adequately instruct the jury on mitigating circumstances requires resentencing. In the penalty phase letters were put into evidence which showed that Floyd's father was dead, his mother was an alcoholic, and that he was the father of two small children. **In** addition, the victim's dauahter explained her family's belief that capital Punishment was wrong. Althouahtherewas evidence Presented from which the jury could have found nonstatutory miticrating circumstances, the trial iudae failed **to give any instructions on what** could be considered in mitiaation.

497 So.2d at 1215 (emphasis added). This Court thus indicated that the Andersons' belief that capital punishment was wrong was a legitimate matter for the jury to consider as nonstatutory mitigation. The trial court herein was obligated to follow this Court's decision in Floyd, not the 10th Circuit's decision in **Robison. State v. Lott, 286 So.2d 565 (Fla. 1973); State v. Dwyer,** 332 So.2d 333 (Fla. 1976). His failure to follow ~~Floyd~~ must result in vacation of Appellant's death sentence.

Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) does not dictate a different result. In ~~Booth~~

(which was discussed in Robison) the Supreme Court held it violative of the Eighth Amendment for the State to introduce a victim impact statement at the sentencing phase of a capital murder trial. Although the evidence Appellant wished to introduce might be considered the "flip side" of victim impact evidence, one who is seeking to preserve his life is not constrained in his presentation of evidence to the same extent that the State is constrained in its presentation of evidence in support of a death sentence. The State's case in aggravation must be addressed only to the circumstances set forth in section 921.141(5) of the Florida Statutes. Trawick v. State, 473 So.2d 1235 (Fla. 1985). The person to be sentenced, however, must be allowed to present for the jury's and the court's consideration any relevant mitigating evidence. Hitchcock v. Dusaer, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); Eddinas v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Certainly, the fact that the victim and her daughter did not believe the death penalty to be a just punishment was relevant to the need for retribution, one of the oft-cited justifications for capital punishment. See Greaa v. Georaia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, 880-881 (1976).

Furthermore, the prosecutor below put before the jury considerable evidence and argument (some of it not supported by the evidence) of the type held inadmissible in Booth and South Carolina v. Gathers, 490 U.S. ___, 109 S.Ct. ___, 104 L.Ed.2d 876 (1989) (in

which the prosecutor conveyed to the jury the suggestion that the Defendant deserved the death penalty because the victim was a religious man and a registered voter). In his opening statement to the jury, for example, he emphasized Annie Barr Anderson's age, her widowhood, the connections she and her late husband had with the church, her family values, and her lifestyle revolving around "her family and the church and raising butterflies." **(R692-693)** The prosecutor elicited from his first witness, the Reverend Vonn James Warthen, the fact that Anderson was called "the butterfly lady" because she raised Monarch Butterflies on her back porch. **(R709)**[10] The prosecutor continued with his theme of attempting to make the jury feel the impact of Anderson's death as acutely **as** possible in his closing statement. He referred to Anderson's "warmth of life, which she did have," and the fact that she was **86** years old, was known as the butterfly lady, and was alive. **(R985)** Even at the sentencing hearing before the court the prosecutor emphasized Anderson's age and his view that she was "a very loving person." **(R1061)** None of this evidence and commentary was admissible under Booth, Gathers, and the Eighth Amendment. It served only to invoke sympathy for the victim and to sway the jury from the proper consideration of Appellant's fate.

Assuming, arguendo, that Ann Shirley Anderson's testimony regarding her mother's and her own opposition ***to*** capital punishment

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[10] This testimony came in after the court overruled a defense objection to the leading nature of the assistant state attorney's questioning of Warthen. **(R709)**

was inadmissible under the rationale of Booth, fundamental fairness dictates that it should have been permitted in this case. Where the State was allowed to put before the jury and court victim impact testimony and argument which the State deemed favorable to its case, Appellant should have been allowed to round out the picture by presenting testimony he believed might persuade the jury to recommend a sentence less than death.

Appellant was deprived of his right to an advisory sentence by the court's restriction on his presentation of evidence in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, sections 9, 16, 17 and 22 of the Constitution of the State of Florida. He must receive a new penalty trial.

## ISSUE IV

THE DEATH RECOMMENDATION HEREIN WAS TAINTED BY THE JURY'S RECEIPT OF IRRELEVANT, HIGHLY PREJUDICIAL TESTIMONY THAT APPELLANT HAD THREATENED STATE WITNESS GREGORY ANDERSON.

Gregory Anderson testified for the State at Appellant's penalty trial concerning certain admissions Appellant allegedly made to Anderson while they were in jail together. (R780-781, 783) Anderson testified that he was moved to a single cell after he spoke to a Detective Pflieger regarding his conversation with Appellant. (R784) The prosecutor then asked whether Anderson had occasion to see Appellant at any time after that, whereupon Anderson began to describe a contact he had with Appellant when they were in the same elevator. (R784) Defense counsel lodged an objection to Anderson testifying to statements Appellant made at that time, on grounds of relevancy and prejudice. (R784-786) The objection was overruled, and Anderson testified that Appellant said he was going to "get" Anderson because Appellant had found out from his lawyer that Anderson was a witness against him. (R786)

Anderson's testimony was irrelevant and should not have been heard by Appellant's jury. It did not relate to any of the aggravating circumstances enumerated in section 921.141(5) of the Florida Statutes, which are the only aggravating factors the jury and court may consider. State v. Dixon, 283 So.2d 1 (Fla. 1973); Elledae v. State, 346 So.2d 998 (Fla. 1977).

While evidence of threats made by the defendant to induce another not to testify or to testify falsely may be admissible on the issue of the defendant's guilt, Jones v. State, 385 So.2d 1042 (Fla. 1st DCA 1980), such evidence has no place in a penalty trial where guilt or innocence is no longer an issue.

Improper admission of threats can serve only to create undue prejudice in the minds of the jury against the accused. See Jones; State v. Price, 491 So.2d 536 (Fla. 1986). The suggestion here that Appellant intended to physically harm, or even kill, a key State witness could have done nothing other than inflame Appellant's jury.

In Elledae this Court emphasized that

> regardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.

346 So.2d 1003.

Where, as here, the jury heard evidence that did not properly relate to any statutory aggravating circumstance, the death recommendation is tainted and will not be permitted to stand. Trawick v. State, 473 So.2d 1235 (Fla. 1985). Appellant is entitled to a new sentencing trial. Amends. VIII, XIV, U.S. Const.; Art. I, §§ 9, 17, Fla. Const.

## ISSUE V

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO ASK DEFENSE WITNESS THOMAS SNELL ABOUT HIS KNOWLEDGE OF APPELLANT'SPRIORCRIMINALRECORDAND TO INTRODUCE EXTENSIVE EVIDENCE PERTAINING TO THAT RECORD.

The question of the admissibility of Appellant's past criminal record first arose during the State's questioning of one of its witnesses, Officer Greg Totts of the St. Petersburg Police Department. Totts testified that shortly after Appellant's arrest, while he was in the basement of the police department, Appellant said, "I know the police are mad at me for running, but I have been in jail before and I was afraid." (R774) Defense counsel argued that it was improper in penalty phase for the State to raise "until it's brought up, anything that is indicative of the defendant's prior record, even the fact that he has one." (R774-775) The court overruled the objection. (R775)

The fact that Appellant had been in jail before did not relate to any of the aggravating circumstances found in section 921.141(5) of the Florida Statutes, which are exclusive. State v. Dixon, 283 So.2d 1 (Fla. 1973); Elledae v. State, 346 So.2d 998 (Fla. 1977). It served only improperly to suggest to the jury that Appellant had in the past been convicted of, or at least charged with, other crimes apart from the instant homicide.

The subject of Appellant's record came up again when the State was preparing to cross-examine defense witness Thomas Snell. Snell, a communications officer with the St. Petersburg Police

Department, had testified on direct examination (among other things) that he never knew Appellant to be in any kind of trouble. (R873) On cross the prosecutor wanted to question Snell regarding his knowledge of Appellant's criminal record. After considerable discussion among the court and counsel, the court ultimately ruled that Appellant had opened the door to this type of cross-examination by eliciting testimony concerning Appellant's character from Snell, and allowed the prosecutor to proceed. **(R891-892)** The prosecutor then asked Snell whether he knew that Appellant was convicted of five specific named offenses on various dates. **(R894)** Snell was not aware of these convictions, but they did not change his opinion of Appellant. **(R894-895)**

The State later introduced into evidence, as rebuttal, documents which the prosecutor characterized as "judgments and sentences to the convictions" he referred to when he was cross-examining defense witness Tom Snell. **(R942, 383-387)**

In Cook v. State, **46** Fla. **20, 35** So. **665 (1903)** this Court indicated that a character witness may be asked on cross-examination if he has heard of specific acts of bad conduct inconsistent with the character trait he was called to prove. However, the prosecutor below proceeded improperly in the manner in which he questioned Snell and in introducing documentary evidence to bolster that questioning.

The purpose of allowing **a** character witness to be cross-examined as to specific acts of the defendant is not to establish that such acts were actually committed, but to test the credibility

of the witness and to determine the weight to which his testimony is entitled. Cook. For this reason, the proper form of cross-examination is to ask the witness whether he has "heard" of a particular event, not whether he "knows" of the event, as the prosecutor did here. Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948); Roberson v. United States, 237 F.2d 536 (5th Cir. 1956).

Similarly, evidence of specific bad acts committed by the accused is inadmissible, as the actuality of the defendant's prior arrests or convictions is not the issue. Cook; Cornelius v. State, 49 So.2d 332 (Fla. 1950); Roberson. Thus it was error for the court to permit the State to introduce the documents pertaining to Appellant's convictions; whether Appellant had in fact committed the crimes could not change the fact that Snell had not heard of Appellant's convictions and in no way served to rebut Snell's testimony.

Furthermore, the jury was misled by the prosecutor's references to Appellant having been "convicted" of all five offenses, and to the documents he was introducing into evidence as "judgments and sentences." There are only two judgments and sentences in State Exhibit 24A-E: one that was entered upon Appellant having violated his probation for retail theft (R383) and one for grand theft. (R386) For the other offenses - grand theft, burglary, and failure to appear - Appellant was placed on probation after pleading guilty and adjudication was withheld. (R384, 385, 387) Although this Court has equated a guilty plea with a

conviction, McCrae V. State, **395** So.2d 1145 (Fla. **1980),** it was fundamentally unfair for the prosecutor to mischaracterize the nature of the documents he was placing into evidence and the disposition of Appellant's charges before the jury.

During his instructions to the jury the court charged them that convictions of burglary, grand theft, grand theft, failure to appear and petit theft were not aggravating circumstances to be considered in determining the penalty to be imposed upon Appellant, but that a conviction of that crime or crimes could be considered in determining whether Appellant had a significant history of prior criminal activity. (R1026) The record does not reflect that the State's evidence of other crimes Appellant committed was introduced for the purpose of rebutting the mitigating circumstance of no significant history of prior criminal activity. It was apparently introduced solely to rebut Tom Snell's testimony. Furthermore, nothing in the record suggests that Appellant even intended to rely upon this mitigator until the State injected the issue of Appellant's prior record into the proceedings. See Maggard V. State, **399** So.2d **973** (Fla. **1981).**

The court should have instructed the jurors at the time the prosecutor was cross-examining Snell on the limited purpose for which such examination was being allowed, that is, to test the validity of Snell's character evidence and not to establish a non-statutory aggravating circumstance against Appellant. See Michelson, Roberson. It was too late to attempt to cure the State's mishandling of this matter in the final charge. Roberson.

The courts of this State have recognized the extremely damaging nature of evidence of other crimes allegedly committed by the defendant. See, for example, Nickels v. State, 90 Fla. 659, 106 So. 479 (1925); Dixon V. State, 426 So.2d 1258 (Fla. 2d DCA 1983).

In Robinson v. State, 487 So.2d 1040 (Fla. 1986) this Court granted a new sentencing proceeding, in part because of the State's improper cross-examination of two defense penalty phase witnesses who testified that Robinson was a good-hearted person and a good worker. The prosecutor asked these witnesses about two crimes that Robinson had not even been charged with that occurred after the murder for which he was on trial. This Court observed that "[h]earing 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. Here too the State went too far in its zeal to obtain a death recommendation, violating Appellant's right to a fair sentencing proceeding. Amends. VIII, XIV, U.S. Const; Art. I, §§ 9, 16, 17, 22, Fla. Const. Appellant's death sentence must be vacated and a new penalty trial held.

## ISSUE VI

THE TRIAL COURT ERRED IN PERMITTING THREE OF THE STATE'S NONEXPERT WITNESSES TO OFFER THEIR OPINIONS AND CONCLUSIONS AS TO VARIOUS MATTERS DURING APPELLANT'S PENALTY TRIAL.

Several times during Appellant's penalty trial three of the State's witnesses who investigated the Annie Anderson homicide, police officers Roy Olsen, Thomas Gavin, and Robert Engelke, none of whom was offered or accepted as an expert in any field, were permitted to give testimony that constituted opinions or conclusions the witnesses were not qualified to make, over defense objections. For example, Olsen was allowed to testify that a Kleenex box lying on the floor of the bedroom where Annie Anderson's body was found "appeared to have been knocked off the dresser," and that a wooden knob found lying near the bed "appeared to have been freshly broken off the dresser." (R722--emphasis added) Olsen also mentioned a tablecloth found lying on the bed and that "it appeared like someone had taken some type of object that had blood on it and wiped it on there and left it on the bed." (R723--emphasis added)

Olsen further testified that Anderson had a laceration on the bridge of her nose which he said "appeared like she was probably smacked in the face or struck in the face, and it caused the laceration." (R723-724--*emphasis* added)

The prosecutor asked Olsen whether he had an opinion as a law enforcement officer as to the nature and characteristic of a particular wound to the top of Anderson's hand (R725), and Olsen

responded, again over defense objections:

> In my opinion, I would say that wound would be characterized as a defense wound, and what I mean by that is during when she was attacked or assaulted, she probably held her hand up to defend herself, and she received a wound when the attacker struck out at her.

(R726--emphasis added)

The prosecutor asked Sgt. Gavin if he noticed anything in the bedroom where the body was found that would indicate that a disturbance had occurred recently. (R738-739) Gavin mentioned a "bruise and injury" to the bridge of Anderson's nose "that would have been consistent with being struck with the glasses on, meaning forced it into the bridge of the nose," and that was "indicative to [Gavin] of a fight or a struggle." (R739) Gavin also referred to a "very large laceration on the back part of [Anderson's] left hand," which he described as a self-defense wound, and which was "consistent with some kind of attack." (R739-740)

Detective Engelke was permitted to offer his theory of how the homicide occurred. (R822-823) He believed it was committed by a "creep-in burglar." (R823) Engelke speculated that Anderson was in the garage, doing her laundry, when the perpetrator entered the unsecured residence through the rear door. (R823) He was inside the residence when Anderson returned with some clean laundry, confronted him, and the homicide occurred. (R823)

On redirect of Engelke the prosecutor asked whether the abrasion on Anderson's nose looked any less fresh than the 12 stab

wounds to her abdomen. (R843)[11] (On cross-examination Engelke had testified that he did not know exactly when or how the abrasion to the bridge of the nose occurred. (R836)) Although the prosecutor agreed with the defense that his question "absolutely" called for a conclusion on the part of the lay witness, the trial court overruled Appellant's objection, and Engelke testified that all the injuries appeared to have occurred at the same time. (R843-844)

The general rule is that nonexpert witnesses are not permitted to express opinions. Kersey v. State, 73 Fla. 832, 74 So. 983 (1917). See also Rowe v. State, 120 Fla. 649, 163 So. 22 (Fla. 1935); Fla. Std. Jury Instr. (Crim.) 2.04(a). In Thomas v. State, 317 So.2d 450 (Fla. 3d DCA 1975), the court stated:

> It is well established that the opinion of a witness on a fact in issue is not admissible where the jury is as well qualified as the witness to form an opinion on the subject, and nonexpert witnesses ordinarily are required to confine their testimony to facts and are not permitted to give their opinions and conclusions.

317 So.2d at 451-452. Testimony consisting of guesses, conjectures or speculation is clearly inadmissible. Durrance v. Sanders, 329 So.2d 26 (Fla. 1st DCA 1976).

The testimony of the three police officers violated these principles, as it was not confined to what they observed, but was shot through with their conclusions and speculations. The objected

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[11] According to the associate medical examiner who performed the autopsy on Anderson, she had 11 wounds to the abdomen, not 12. (R752)

- to testimony of the police officers, taken as a whole, suggested a more violent confrontation than what the jurors might have inferred on their own, unaided by the subjective embellishments of the State's witnesses. The jurors should have been allowed to draw their own conclusions. That is what they were there for.

Perhaps the most egregious aspect of the testimony of Olsen and Gavin was characterizing the injury to Anderson's hand as a "defense" or "self-defense" wound that probably occurred when Anderson held her hand up to defend herself. In his opening statement the prosecutor told the jury, over objection, that the medical examiner would testify that the stab **wound** to Anderson's wrist was a defensive wound that occurred when Anderson put up her hand to defend herself. **(R696-697)** Interestingly enough, however, the State's medical expert, Dr. Edward Cochran, the associate medical examiner, never **so** testified. **(R748-758)** He mentioned the wound to Anderson's hand and wrist, but said nothing about it being a defensive wound. **(R752-753)** Instead the jury was permitted to hear this opinion from non-experts after the assistant state attorney had assured them they would hear it from the medical examiner.

Section **90.701** of the Florida Evidence Code sets forth an exception to the general rule that a nonexpert witness may not testify in the form of inference and opinion, as follows:

> **90.701** Opinion testimony of lay witnesses.- If a witness is not testifying as an expert, his testimony about what he perceived may be in the form of inference and opinion when:

> (1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he has perceived to the trier of fact without testifying in terms of inferences or opinions and his use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and
>
> (2) The opinions and inferences do not require a special knowledge, skill, experience, or training.

The exception is not applicable here. There is no reason why the officers could not have told the jury what they observed, unadorned by inferences they drew therefrom. And the jury might very well have been misled as to what occurred at Anderson's residence, by placing too much weight upon the officers' speculations rather than relying sufficiently upon their own common sense notions about what happened.

The State invaded the province of the jury by eliciting opinions and conclusions from its witnesses which suggested a more violent struggle than the jury might have believed actually occurred, had they been left to their own devices. Appellant was denied his right to a proper penalty trial, in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 9, 16, 17 and 22 of the Constitution of the State of Florida. His death sentence must be vacated, and he must receive a new advisory sentence.

## ISSUE VII

THE TRIAL COURT ERRED IN NOT PERMITTING APPELLANT'S COUNSEL TO ARGUE TO THE JURY A RELEVANT BASIS FOR RECOMMENDING A SENTENCE OF LIFE.

During his closing statement to the jury, counsel for Appellant told the jury there were nine statutory aggravating factors, and began to tell the jury what they were. (R1010) He was cut short when the court sustained a State objection. (R1010-1011)

Defense counsel's attempted argument was proper and should have been allowed. The jury's first duty in deciding whether to recommend death or life is to ascertain whether sufficient aggravating circumstances exist to justify a sentence of death. § 921.141(2)(a), Fla. Stat. (1987); Fla. Std. Jury Instr. (Crim.), p. 78. This function may more readily be fulfilled if the jury is apprised of all the aggravating factors which can support a death sentence so that they may see where Appellant's case falls within the statutory scheme and thus make an informed recommendation.

Furthermore, Appellant's line of argument has a foundation in the case law of this Court. For example, Rembert v. State, 445 So.3d 337 (Fla. 1984), Caruthers v. State, 465 So.2d 496 (Fla. 1985), Ross v. State, 474 So.2d 1170 (Fla. 1985) and Wilson v. State, 493 So.2d 1019 (Fla. 1986) are among the cases where this Court found the existence of an aggravating factor but also found the death penalty unwarranted. Appellant's counsel should have

been permitted to argue along similar lines that a sentence of death was not proportional to the facts of the homicide and the good points of Appellant's character.

In this Court's previous opinion in Appellant's case, Floyd v. State, 497 So.2d 1211 (Fla. 1986), this Court indicated that "a trial judge should not be permitted in any way to inject his preliminary views of a proper sentence into the jurors' deliberations'' 497 So.2d at 1215. The Floyd court quoted from Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976):

> If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be preconditioned by the judge's view of what they were allowed to know.

497 So.2d at 1216 (emphasis in original). The court below unduly limited the jury's advisory function by not permitting them to know how Appellant's case fit within the overall plan devised by the legislature for imposing sentences in capital cases.

In Lewis v. State, 398 So.2d 432 (Fla. 1981), this Court wrote that the sentencing jury:

> is allowed to draw on any considerations reasonably relevant to the question of mitigation of punishment.

398 So.2d at 439. In Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), the United States Supreme Court relied upon its prior decisions in Lockett v. Ohio, 438 U.S. 586,

98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) to hold that the Eighth Amendment, United States Constitution requires that evidence which might serve "as a basis for a sentence less than death" not be excluded from the sentencer's consideration. 90 L.Ed.2d at 7. Pursuant to these principles, an absence of aggravating factors is certainly something which the jury may legitimately consider in mitigation as calling for a sentence less than death, and defense counsel should have been allowed fully to develop his argument in this regard. Because he was not, Appellant was not afforded the advisory sentence to which he was entitled, in accordance with the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 9, 16, 17 and 22 of the Constitution of the State of Florida. He is entitled to a new penalty trial.[12]

[12] The appellant in Banda v. State, 536 So.2d 221 (Fla. 1988) raised an issue similar to the one Appellant raises herein, but the Court did not reach the issue in Banda. 536 So.2d at 224.

## ISSUE VIII

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND IN FINDING IN AGGRAVATION THAT THE HOMICIDE WAS COMMITTED FOR FINANCIAL GAIN AND WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

### A. FINANCIAL GAIN

The only evidence that the homicide herein was committed for financial gain is that Appellant cashed a check drawn on the victim's account on the day she was killed and attempted to cash another two days later. However, these facts do not necessarily demonstrate that Appellant intended to take Anderson's checkbook and killed her for that purpose. The checkbook could have been taken as an afterthought.

In Hill v. State, 14 F.L.W. **446** (Fla. Sept. 14, **1989)** there was evidence that Hill took the victim's billfold and money, and that immediately prior to the murder Hill had no money to pay for drinks. This Court rejected the trial court's finding that the homicide was committed for pecuniary gain. Hill also sexually battered the victim, which may have been the motivating force behind the homicide, and the money could have been taken as an afterthought. See also Scull v. State, **533** So.2d **1137** (Fla. **1988)** (defendant's taking of victim's car insufficient to prove pecuniary gain was primary motive for killing where it was possible car was taken to facilitate escape). It may be that Appellant went into Anderson's residence with some other (albeit unknown) purpose in mind and merely picked up the checkbook after the killing because

it was lying on the dresser in clear view.

In Simmons v. State, 419 So.2d 316 (Fla. 1982) this Court emphasized that proof beyond a reasonable doubt of a pecuniary motivation for homicide cannot be supplied by inference from circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance. Here the fact that Anderson's purse containing ***$50*** was left undisturbed (R836) strongly suggests that pecuniary gain was **not** the motivation for this homicide, and the level of proof required under Simmons has not been met.

B. Especially Heinous, Atrocious or Cruel

In his discussion of this aggravating circumstance in his written sentencing order, the court referred to the "Medical Examiner's testimony when he described the twelve stab wounds to [Anderson's] torso, the defensive stab wound to her wrist, a blow on the bridge of her nose and the fatal stab to her heart." (R334) Some clarification is necessary. As discussed in Issue VI. herein, the associate medical examiner never characterized the wound to Anderson's wrist as a "defensive" wound; the State's police officer witnesses did that. Also, the fatal stab to Anderson's heart was one of the 12 wounds to her torso -- she was stabbed 11 times in the abdomen and once in the chest. (R751-753)

Not all deaths by stabbing with a knife are especially heinous, atrocious or cruel. This Court has repeatedly emphasized that this aggravating circumstance applies only to killings "accompanied by such additional acts as to set the crime apart from

the norm of capital felonies." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), Accord: Simmons v. State, 419 So.2d 316 (Fla. 1982); Lewis v. State, 377 So.2d 640 (Fla. 1979). Committing a homicide with a knife does not deviate from the norm of capital felonies because a large percentage of murders is committed with a knife.[13]

In Demps v. State, 395 So.2d **501,** 506 (Fla. 1981) this Court found a killing not to be "so 'conscienceless or pitiless' and thus set 'apart from the norm of capital felonies' **as** to render it 'especially heinous, atrocious or, cruel' [citations omitted]" where the victim was held down on his prison bed and knifed.

In other cases involving stabbings the trial court judge did not find the heinous, atrocious or cruel factor. See, for example, Williamson v. State, **511** So.2d 289 (Fla. 1988) (victim stabbed repeatedly); Kelley v. State, **486** So.2d **578** (Fla. 1986) (victim stabbed several times and shot); Provence v. State, 337 So.2d 783 (Fla. 1976) (eight stab wounds). Doubtless there are many other cases involving multiple stabbings which were not found to be especially heinous, atrocious or cruel by the trial court in which the defendant was sentenced to life.

Recently, the Utah Supreme Court considered the applicability of the Utah equivalent to Florida's § 921.141(5)(h) aggravating circumstance where the facts showed seven stab wounds along with scratches, scrapes and bruises. State v. Tuttle, Case

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

**No. 20068** (Utah April **12, 1989) [45** Cr L Rptr **20871.** The court wrote:

> The record contains no evidence that Tuttle intended to do or in fact did anything but kill his victim by stabbing her. Even though this method is gory and distasteful, there is absolutelyno 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 Godfrev[14] - Wood[15] category and is sufficiently distinguishable from other intentional killings to make its perpetrator eligible for the death penalty. For these reasons, we find the application of section **76-5-202(1)(g)** to the facts of this case contrary to the intention of the statute, as we construe it in light of Godfrev and Wood.

Slip opinion at p. **36.** Similarly, except perhaps for inflicting a single blow to the face, the perpetrator here did nothing other than kill Anderson by stabbing her.

The trial court inferred that Anderson "suffered while she futilely struggled for her life" **(R334),** but any such suffering was of short duration. Dr. Cochran's testimony showed that death would have occurred within a few minutes at most after the stab to

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[14] Godfrey v. Georgia, **446** U.S. **420, 100** S.Ct. **1759, 64** L.Ed.2d **398 (1980).**

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

the heart, which was most likely the first wound inflicted. (R753-754, 757-758)

Furthermore, nothing in the evidence indicates that Appellant desired that Anderson suffer at all. It appears that he stabbed her in panic and fright after he was unable to escape by prying open the windows that had been painted shut. In Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1983) this Court noted that "[t]he fact that the victim lived for a couple of hours in undoubted pain and knew that he wasfacing [sic] imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies." See also Demps, in which the stabbing victim was taken to two hospitals before he finally expired. Similarly, here the fact that Anderson may have lingered for a few brief moments did not render her killing especially heinous, atrocious or cruel, particularly where there was no evidence Appellant intended that she suffer, and no evidence that she was subjected to any type of protracted ordeal.

## ISSUE IX

THE TRIAL COURT ERRED IN FAILING ADEQUATELYTOCONSIDERTHEMITIGATING EVIDENCE PRESENTED HEREIN AND IN NOT PROPERLYWEIGHINGTHEAGGRAVATINGAND MITIGATING CIRCUMSTANCES.

In Roaers v. State, **511** So.2d **526** (Fla. **1987)** this Court described the duties of the trial judge when considering evidence in mitigation:

> ....[W]e find the trial court's first task in reaching its conclusion is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

**511** So.2d at **534.**

The judge may not refuse to consider any relevant mitigating evidence presented. Stevens v. State, **14** F.L.W. **513** (Fla. Oct. **5, 1989);** Eddinas v. Oklahoma, **455** U.S. **104, 102** S.Ct. **869, 71** L.Ed.2d **1 (1982).**

In his written sentencing order, the court below did not discuss any specific non-statutory mitigating circumstances, but nonetheless concluded that "sufficient mitigating circumstances

which would require a lesser penalty [than death] do **not** exist." (R336 -- emphasis in original).

At the sentencing hearing of February 29, 1988 the court did state that he saw some remorse in Appellant, as well as a desire to live within the confines of the rules while he was in custody, a suggestion that Appellant would like to help other prisoners with their problems, and a desire to establish a rapport with his children. (R1071) The court concluded, however, that these factors did "not qualify to the Court as the type of mitigation contemplated." (R1071)

The court failed to fulfill his duty under Roaers to first find all potentially mitigating elements supported by the evidence. In Floyd v. State, 497 So.2d 1211 (Fla. 1986) this Court identified two other potential nonstatutory mitigating circumstances that the trial court failed even to mention here, which were supported by the evidence: that Appellant's father was dead, and his mother was an alcoholic. 497 So.2d at 1215.

Additional mitigating circumstances emerged at Appellant's penalty retrial which the court was legally bound to at least consider, such as the fact that he was a good worker, and generally displayed a pleasant, non-violent, even temperament. See Stevens; McCampbell v. State, 421 So.2d 1072 (Fla. 1982).

Furthermore, it is not clear what the court meant when he found that the few mitigating circumstances he did discuss did not qualify "as the type of mitigation contemplated." Contemplated by whom? In Lamb v. State, 532 So.2d 1051, 1054 (Fla.

1988) this Court, citing Rogers, remanded for resentencing because the trial court's conclusion that none of the mitigation "rose to the level of a mitigating circumstance to be weighed in the penalty decision" was ambiguous as to whether the judge properly considered all mitigating evidence or whether he found that the aggravation outweighed the mitigation. The court's remarks here were similarly ambiguous. His findings were not rendered with the "unmistakable clarity" required where a sentence of death is imposed. Mann v. State, 420 So.2d 578, 581 (Fla. 1982).

In further appears that the court did not engage in a proper weighing of aggravating versus mitigating circumstances. At the sentencing hearing the court concluded there were two aggravating circumstances and no mitigating and said, "I cannot ignore that score." (R1072) Contrary to what the court seemed to think, the sentencing weighing process

> to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). Section 921.141 of the Florida Statutes requires

> the trial judge to logically consider the relationship between aggravating circumstances listed therein and mitigating circumstances and arrive at a sentence based upon reason.

Mikenas v. State, 367 So.2d 606, 610 (Fla. 1978). The court thus should have analyzed the aggravating circumstances he found together with the mitigating circumstances discussed above to arrive at a proper sentence.

The sentencing weighing process was further skewed in favor of death by the court's consideration of two improper aggravating circumstances. In his written sentencing order the court expressed his personal belief that the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, but felt himself bound by this Court's rejection of these aggravating factors in its opinion in Floyd. (R333-334) While the court may not have officially considered these two aggravators, they were obviously on his mind, as he took the time to include them in his sentencing order, and played some part in his decision to sentence Appellant to death. Here, as in Barclay v. State, 470 So.2d 691 (Fla. 1985), the injection of improper aggravating factors into the proceedings demonstrated that the court failed to follow the correct weighing process.

## CONCLUSION

Appellant, James Floyd, respectfully prays this Honorable Court to reduce his death sentence to a sentence of life imprisonment. In the alternative, Appellant asks this Court to grant him a new penalty proceeding before a jury. If neither of these forms of relief is forthcoming, then Appellant requests a new sentencing hearing before a different judge.

## 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 30th day of November, **1989.**

Respectfully submitted,

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