IN THE SUPREME COURT OF FLORIDA

WALTER DANIEL CZUBAK,

Appellant,

vs. Case No. 72,363

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PASCO 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 January 16, 1986, a Pasco County grand jury indicted the Appellant, WALTER DANIEL CZUBAK, for the first-degree murder of Thelma Peterson on October 20-21, 1985. (R. 1083) Court-appointed counsel filed a motion requesting that the court appoint independent counsel to represent Czubak during penalty phase in the event of his conviction of first-degree murder. (R. 1194-95) The motion was heard and denied March 18, 1988. (R. 976-78)

Daniel Czubak was tried by jury March 21-24, 1988, Judge Wayne L. Cobb presiding, and found guilty as charged. (R. 1202-08, 1212) Penalty phase was held the following day. The jury recommended the death penalty by a nine to three vote. (R. 969, 1213) At sentencing on March 31, 1988, the judge sentenced Czubak to death. (R. 1056, 1210, 1243) Written findings supporting the death sentence were filed on April 7, 1988. (R. 1252-54)

On April 8, 1988, Czubak filed a Second Amended Motion for New Trial. (R. 1250-51) The motion was denied at a hearing held on April 29, 1988. (R. 1059-74, 1258) On that date, Czubak filed a Notice of Appeal to this Court pursuant to Article V, Section 3(b)(1) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(1)(A)(i). (R. 1652) Czubak's trial counsel and the Public Defender for the Tenth Judicial Circuit were appointed to represent Czubak in this appeal. (R. 1245)

STATEMENT OF THE FACTS

A. Guilt Phase

On November 2, 1985, Deputy Ken Jackson of the Pasco County Sheriff's Department found an abandoned car in an orange grove along Bailey Hill Road between Dade City and Zephyrhills, Florida. (R. 383) The green Malibu automobile was registered to Thelma Peterson, 81, of Zephyrhills. (R. 383-84, 361) Detective Gary Pierce of the Zephyrhills Police Department later testified that they found Thelma Peterson's driver's license and her pacemaker card under the front seat of her car. (R. 456-57)

When the dispatcher was unable to reach Mrs. Peterson by phone, Deputy Jackson contacted Deputy Arnew, requesting that he go to her house to determine why the car was in the grove. (R. 384-85) Upon his arrival, Arnew requested Jackson's assistance because he smelled an odor coming from the house. The deputies requested further assistance from the Zephyrhills Police Department. (R. 385)

The officers discovered an unlocked door in the carport. They opened the door a crack and observed a decomposed body on the couch. (R. 386, 393, 397) When they entered the house after the arrival of "crime scene security," they found a badly decomposed body on the couch and glass particles around the area. (R. 393-97) The left hand was missing from the body, apparently eaten by two small dogs in the house. (R. 404, 431-32)

Laura Rousseau, from the Florida Department of Law Enforcement ("FDLE"), was also at the scene. Rousseau identified

the top portion of a bottle and a green nightgown found in the trash can outside near the carport. (R. **411-12)** She also identified a pair of eyeglasses found on the coffee table in front of the couch. (R. **413)** Rousseau identified photographs of broken pieces of glass found on the couch by the victim's body and a watch and ring found on the floor by the couch. (R. **415-17)** She collected these and various other items for testing and fingerprinting. (R. **412-20)** Rousseau testified that she "dusted" the house but found fingerprints only in the back bedroom. (R. **461-66)**

Leslie Bryant of FDLE testified that **18** of the **27** latent fingerprints taken from the house and car were not Czubak's. (R. **673, 680, 697)** Bryant was not asked to and did not compare the fingerprints with any other known fingerprints. **(R. 697)**

Katherine Warniment, also from FDLE, testified that she was able to assemble a bottle from the various pieces of broken glass found on the couch and floor. The pieces were all originally part of the broken bottle neck and, thus, all came from the same bottle. (R. **647, 651-60, 653)**

Kathy Gunther, FDLE, testified that there was human blood type O on the green nightgown. (R. **664-66)** She was not able to determine Thelma Peterson's blood type. (R. **667)** Her testing also showed human blood type O on the eyeglasses. (R. **669)** A piece of glass found on the floor by the couch contained blood type O. (R. **671)** Ms. Gunther examined seven items of Czubak's clothing but found no blood stains. (R. **570)**

The medical examiner, Dr. Edward Corcoran, testified that

the victim's body was severely decomposed. It was skeletonized in portions where it appeared that the two dogs had eaten part of the leg and a hand. There was no clothing on the body. (R. **429-32)**

Dr. Corcoran performed an autopsy after the body was transported to the medical examiner's office in Largo. (R. **433)** Based upon the degree of decomposition and the dehydration changes, he determined that the victim had been dead for at least a week. (R. **434)** Inside the body, he found a pacemaker which was given to the Zephyrhills Police Department. (R. **436)** The body was identified as that of Thelma Peterson from the serial number on the pacemaker. (R. **442, 450-51)** The district sales manager of a manufacturer of pacemakers later testified that he examined the pacemaker and found that it functioned properly. (R. **471-72)**

Dr. Corcoran's examination revealed that Mrs. Peterson's hyoid bone, thyroid cartilage or Adam's apple, and two other projections on top of her Adam's apple were fractured, indicating death by manual strangulation. Dr. Corcoran testified that the fracture of the hyoid bone would not be consistent with strangulation referred to as a "choke hold,'' by an arm. (R. **444)** He could not determine whether Mrs. Peterson was conscious when she was strangled. (R. **437, 441, 446)** He could not tell whether Mrs. Peterson was struck on the head with a bottle because of the decomposition. (R. **440)**

Mrs. Peterson's daughter, Thelma Keithley of Hammond, Indiana, testified that her mother had been a widow for about **25** years. After her husband died, Mrs. Peterson lived with a man

named Sid Richardson for a number of years. Mr. Richardson died a couple years earlier. (R. **479, 481-82)** Mrs. Keithley said that she generally kept in touch with her mother by telephone weekly. (R. **479-81)** Prior to the homicide, however, she had not heard from her mother for two weeks. (R. **481)**

Mrs. Keithley testified that she once talked to Danny Czubak by telephone while he was living with her mother during the two months prior to her death, (R. **482)** During her last conversation with her mother, she said that her mother "hollered" to Danny, who was apparently going to the store, and asked him to bring back some dog food. (R. **484-85)**

Mrs. Peterson's granddaughter, Susan Keithley, also of Zephyrhills, testified that her grandmother was living with a man known as Dan, or Danny, from September to November of **1985.** (R. **474)** She never met Danny but she talked to him on the telephone on September **22** or **23, 1985,** when she called her grandmother. (R. **476)** She said that Danny was "more or less trying to convince us that my grandmother was all right and we didn't have to worry about her because he was there." She said that Danny also mentioned that he "wasn't after her money." They were "just enjoying each other's company." Susan did not talk to her grandmother again. (R. **478)**

Art Young testified that he had known the Appellant, Danny Czubak, for about three years. (R. **506-07)** When Czubak came to Zephyrhills to visit him, Mr. Young gave Czubak a job taking care of his trailers, collecting the rent, and maintaining the grounds. (R. **508)** Czubak lived in one of Young's trailers until

he met Thelma Peterson. (R. 511) He helped Mr. Young's wife set up a health food store by designing the layout. (R. 509, 515) Although Czubak and Young were personal friends, they eventually had a "falling-out" because Czubak took a decanter from Young's house. When confronted with the theft, Czubak said he took the decanter because he had an alcohol problem. (R. 510) Young said that he saw Czubak and Thelma Peterson together frequently and they appeared to get along quite well. (R. 514-15)

Lenny Gooselin owned and worked at Lenny's Tavern from 1985 to 1987. (R. 495-96) Thelma Peterson frequented his tavern about two or three times a week. (R. 496-97) Between 10:00 a.m and noon, she would have three or four beers. (R. 497) Occasionally, she came in the afternoon about 2:00 and had two or three beers. (R. 502) At some point, she began to come to the bar with Czubak. By the time they got to his bar, they had already had a few beers. (R. 503) They would each have a sandwich and some beers and leave. Gooselin testified that they seemed to get along all right although Mrs. Peterson was considerably older than Danny.[1] (R. 498)

Janet Grinstead met Thelma Peterson at Arnie's Tap, a bar in Zephyrhills, four or five months before Sid died. (R. 523-24) She took care of Mrs. Peterson's yard for about a year. (R. 525) She testified that Mrs. Peterson was very lonely after Sid's death. For this reason, she started dating younger men and taking them

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[1] Gooselin testified that he had believed Thelma Peterson was only in her sixties. (R. 498-99) Mrs. Peterson was 81 at the time of her death. (R. 361) Daniel Czubak was 38 years old. (R. 1078)

home. (R. **525)** Mrs. Peterson told Janet that she took these men home for sex. (R. **531)** Janet testified that Sweet Tim (about 27 years old), Jerry the Painter (about **43),** and another young man had all "wound up" at Thelma's house at some time.[2] **(R. 533)**

Janet met Danny Czubak with Thelma at Arnie's Tap in August or September of **1985.** (R. **527)** Sometimes she would see Thelma in the bar alone while Danny was gone with the car.[3] (R. 532) Other times Danny was with her. (R. **527-28)** At times she saw Thelma in other neighborhood bars. (R. **530-31)** Thelma and Danny seemed to get along well. (R. **532)** Janet stopped by Mrs. Peterson's house about the 19th to 21st (presumably October) and saw Thelma and Danny. They appeared to be getting along. (R. ***528)***

Dorothy Schultz lived on Bailey Hill Road in Zephyrhills when she met the Appellant, whom she knew as Danny Bax, at the Anchor Inn. (R. **535-37)** She knew Thelma Peterson through the Eagles Club but never actually met her. (R. **537)** Schultz testified that she saw Danny again a couple weeks after she first met him at a trailer owned by Art Young.[4] (R. **537, 555)** She claimed that Danny drugged her that night by putting phenobarbital in her

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[2] Lenny Gooselin testified earlier that he had heard of Sweet Tim and Jerry the Painter but did not know them. He said he had seen Thelma try to take home a man named Davy, about *27* years old, on one or two occasions. (R. **504)**

[3] Larry Eskelund testified that he owned a garage near Peterson's house. Czubak brought her car there one time during September or October and he replaced the water pump. (R. **516-20)**

[4] Schultz testified that she was formerly a prostitute for Art Young who was a pimp. (R. **560-61)**

coffee. Schultz said she was tied up in a chair naked and forced to have sex with a pit bull dog. About six people were there including her nephew and his girlfriend. (R. **555)** She saw Danny cut the head off the pit bull dog with a bayonet. (R. **556-59)**

According to Schultz's testimony, her mother picked her up at the trailer the next morning, apparently having learned her whereabouts from Schultz's nephew, and took her to the hospital. (R. **558-59)** Schultz said she told her mother about being tied up and what had happened to her. (R. **561)** Her mother later testified, however, that, although she picked up her daughter at the trailer that morning to take her to a scheduled doctor's appointment, nothing unusual had occurred. (R. **590-92)**

Schultz testified that on October 21, **1985,** she called Thelma Peterson's home and asked for Danny.[5] Mrs. Peterson told her Danny didn't live there anymore.[6] (R. **538-39)** Mrs. Peterson sounded like she "was at her last breath.'' (R. **566)** Schultz then called Lenny's Tavern and left a message for Danny. (R. **539)** She called Mrs. Peterson's house again but no one answered. (R. **540)**

Schultz said she later received a phone call from Danny who asked her where she lived. He told her that he would be "up

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[5] Dorothy Schultz testified on cross-examination that she had Thelma Peterson's phone number because Danny wrote it down on her social security papers. She denied having seen Danny, however, from June until he came to her house in October. (R. **563)** She said that Danny stopped her while she was crossing the street in June and gave her Mrs. Peterson's phone number. (R. **564)**

[6] Defense counsel objected on hearsay grounds because Thelma Peterson was not available as a witness. The judge overruled the objection, giving no reason. (R. **538-39)**

in a few minutes." When he did not immediately arrive, she called Mrs. Peterson's house again and Danny answered. This was about 7:15 p.m. (R. **541)** Danny allegedly said, "Babe, you couldn't have called at a better time." He told her he was coming to her house. (R. **540)** Several hours later, Czubzk called from a pay phone because he could not find the house. (R. **541-42)** He finally showed up several hours later, about 3:30 or 4:00 in the morning. (R. **542)**

According to Schultz, Czubak hadn't shaved, was very sweaty, and wore stained clothing. He said, "Babe, you don't know what it's like to live in Hell with that old bitch. We don't have to worry about it anymore." (R. **543)** Schultz said Danny had three scratch marks on the side of his neck. (R. **543)** Her mother later testified that she visited her daughter almost every day and that she never observed any scratches or bruises on Danny. (R. **592-95)**

Dorothy Schultz testified that Czubak came and left several times after his first arrival, driving Mrs. Peterson's car. (R. **544)** He later parked the car behind the greenhouse. (R. **544-45)** He brought in jewelry, old coins, food, televisions, a police scanner, a mink stole, and various other items which he said his aunt had given him.' (R. **545, 551)** The mink stole had the initials "TP" on it until Danny took them off and threw them away.[8] (R. **546)**

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[7] Mrs. Keithley, the victim's daughter, identified numerous items, including a television, jewelry, two watches and a mink stole, that belonged to her mother. (R. **488-92)**

[8] Detective Pierce testified that he found the initials in a trash bag at Dorothy Schultz's house and pinned them to the mink stole which was in evidence at trial. (R. 616)

Czubak stayed at Dorothy Schultz's house for about a week. (R. **547)**

Defense counsel asked Schultz if it ever occurred to her that Danny "had done something." She said she had mentioned it to her Uncle Billy who was going to have Danny investigated. She asked him not to, however, because she was afraid of being hurt by what she would find out. (R. **571)** When defense counsel attempted to clarify her fear, Dorothy Schultz blurted out that, if she had had her Uncle Billy investigate Danny, she "would have known who he was, an escaped convict."[9] (R. **572)**

Schultz's mother, Margaret Hensel, testified that she met Danny Bax through her daughter. (R. **581-82)** She identified a check that Danny gave her to put in her account when he left. She said that he told her his aunt gave him the check. She put the check in her account and gave Czubak the money. (R. **585)**

On November **4, 1985,** Dorothy Schultz and her mother drove Czubak to the bus station in Tallahassee. (R. **547, 588) He** told them he wanted to go to a northern town and that he had stored the car in an old barn. (R. **547, 550-51, 587)** At the bus station, Dorothy's mother took several polaroid pictures of Dorothy and Danny before he left on the bus. (R. **548)**

Czubak called Dorothy later to ask her to send him the police scanner and some other items. By then Schultz had talked to Detective Pierce who told her that Czubak had killed Thelma

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[9] Following the next question and answer, defense counsel requested a mistrial. The court denied the motion because the witness's response was part of her answer to defense counsel's question. (R. 572-73)

Peterson. (R. **569)** She had a tap on her phone (R. **550)** and advised Detective Pierce when he called. (R. **623)** Detective Pierce thus learned that Czubak was in Corpus Christi, Texas, and brought him back to Florida. (R. **623)**

Dorothy Schultz admitted that her hearing was poor and that she wore a hearing aid although she did not yet wear a hearing aid in **1985.** (R. **551-52) In 1985,** she wore glasses and was on phenobarbital and dilantin for epilepsy.[10] (R. **553)** She denied that she was under the care of Dr. Majumdar, a psychiatrist at the Human Development Center, although admitted to having seen her in **1983** or **1984.** (R. 553) She said Dr. Majumdar had released her and that she did not see her in **1985** or 1986.[11] **(R. 554)**

Dr. Radha Majumdar, a psychiatrist, testified for the defense[12] that she saw Dorothy Schultz at the Human Resource Center on November **14, 1985,** November **21, 1985,** December **19, 1985,** and January 23, **1986.** (R. **690-94)** She said Schultz had a hysterical or histrionic personality disorder. Persons with this disorder are very impulsive, seductive, and suggestible. They see, imagine, and

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[10] Dr. Radha Majumdar testified that she treated Dorothy Schultz for epilepsy during that time, continuing her dilantin and phenobarbital. (R. 700) These medications, taken together, calmed the brain level, preventing seizures. (R. 700)

[11] When the State rested, defense counsel moved for a judgment of acquittal, arguing that there was no evidence that Czubak killed Thelma Peterson or that the killing was premeditated. (R. **685)** The court denied the motion. (R. **686)**

[12] Defense counsel obtained a court order permitting him to depose Dr. Majumdar and to inquire into the mental health of witness Dorothy Schultz. Dr. Majumdar was ordered to answer all pertinent questions. (R. **686-87)**

exaggerate things. Histrionics have difficulty with interpersonal relationships, especially with the opposite sex. Dr. Majumdar said that Schultz possessed most of these characteristics. (R. **695)**

Histrionics also have visual hallucinations although Dr. Majumdar was not certain she had seen Dorothy Schultz with visual hallucinations. (R. **695, 699)** She had observed in the clinic, however, that Schultz related gross distortions many times. (R. **701)** This personality disorder does not come and go but is always present. Accordingly, Schultz was suffering from the disorder in November of **1985.** (R. **697)**

Kurt Montanye, an inmate at Avon Park Correctional Institution, testified that in November **or** December of **1985,** when he was living in Zephyrhills, Eugene Ragsdale told him that he had killed someone and taken her money. Ragsdale said he "yoked her out," meaning that he either grabbed her from behind with the crook of his arm or choked her with his hands until she passed out or died. Montanye did not ask Ragsdale who he had "yoked out" because everybody thought Ragsdale was a liar.[13] (R. 715, 717)

Leon Illig testified that he was incarcerated at Martin Correctional for the murder of Ernie Mace, an older man from Zephyrhills. (R. **723)** He said that Eugene Ragsdale slit Mr. Mace's

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[13] Montayne testified that he knew Leon Illig and Cindy LaFlamboy, two other defense witnesses, but that he had not talked to either of them about his testimony in this case. He said that neither of them was present when Ragsdale told him about killing the old lady in Zephyrhills. (R. 717-721)

throat after the two of them broke into his trailer to rob him.[14] Ragsdale and Illig were not arrested for the murder of Ernie Mace until January of 1986. (R. 727) Illig said that, in December of 1985, he had a conversation with Eugene Ragsdale at a trailer where Illig and Cindy LaFlamboy were living. Cindy asked Ragsdale where he got some rings and other jewelry, some of which he gave to Cindy. (R. 724-25) Ragsdale said that he got them from an elderly lady in Zephyrhills that he killed. (R. 724-25) Illig admitted that Ragsdale was known as a liar. (R.727)

Cindy LaFlamboy testified that she had known Ragsdale since 1973. (R. 731-32) She said that in November or December, 1985, Ragsdale gave her a gold watch and ring as a Christmas present. When she asked him where he got the jewelry, he told her not to ask questions. (R. 733) Later in December, however, when Leon Illig was present, Ragsdale told her that he killed Thelma Peterson and that's where he got the jewelry. (R. 734) Again in January of 1986, while she was driving Ragsdale to Alabama to see his parents, he told her that he broke into Peterson's house and took the ring and watch. (R. 735) During the same conversation, he told her he killed Ernie Mace. (R. 735)

Cindy testified that she gave the jewelry to Detectives Fay Wilber and Gary Pierce. (R. 736-37) Both Wilber and Pierce later denied receiving a ring or watch from Cindy. (R. 755, 766)

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[14] On cross-examination, Illig clarified that he and Ragsdale originally went to Mace's house to collect money that Mace owed Ragsdale. He also admitted that Ragsdale claimed that it was Illig who slit Mace's throat. (R. 728)

Cindy reported that she told both detectives that Ragsdale said he had killed Peterson the first time they questioned her in January of 1986. (R. 741) In rebuttal, both Wilber and Pierce denied that Cindy told them Ragsdale killed Thelma Peterson.[15] Wilber said that Cindy told him Ragsdale burglarized Peterson's house. (R. 754, 766) Pierce said that his investigation into Peterson's death revealed no suspects other than Czubak. (R. 768) Defense counsel brought out on cross-examination, however, that Cindy said in her July, 1986, deposition concerning the murder of Ernie Mace, that Ragsdale told her he killed Thelma Peterson. [16] (R. 742-43)

Cindy testified that she told the police where Ragsdale was in Alabama. She said Detective Bill McNulty called Ragsdale on the telephone.[17] Cindy then clarified that "[o]ne of them there called because Bill McNulty -- they told me Bill McNulty flew to Alabama." (R. 744-45) In rebuttal, Detective McNulty testified that he never called Ragsdale in Alabama. He said he believed it

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[15] Both Detective Wilber and Detective Pierce testified in rebuttal that in their opinion Cindy was high on drugs during her trial testimony that day. (R. 756, 765)

[16] Defense counsel proffered testimony of Eugene Ragsdale, a resident of the Dade City jail. (R. 705-08) To each question asked, Mr. Ragsdale responded, "Holding the Fifth." (R. 705-08) Defense counsel requested that he be permitted to ask the same questions to Mr. Ragsdale in the presence of the jury but the trial court declined to allow it. (R. 708) The court found Mr. Ragsdale to be unavailable as a witness for purposes of the statements against interest exception to the hearsay rule. (R. 709)

[17] At this point, the prosecutor told the judge that McNulty was in the courtroom, that he had not heard this before and that he might call McNulty as a witness. The court permitted him to ask McNulty to leave. (R. 744)

was Ragsdale's brother who implicated Ragsdale in the Mace murder. (R. 761-63) He admitted, however, that it was possible that someone told Cindy he called Ragsdale in Alabama.[18] (R. 764)

Following closing arguments and jury instructions,[19] the jury found the Appellant guilty as charged. (R. 886-87)

B. Penalty Phase

The penalty phase of the trial commenced the following day. (R. 890) Alan Spence, a correctional officer at Daytona Beach Community Correctional Center, testified on behalf of the state. He said that Czubak was previously incarcerated at the correctional center for robbery with a firearm. (R. 897-99) On July 24, 1985, while on work release, Czubak escaped by walking away from his assignment as custodian and driver for the center. (R. 899-903)

Margaret Angell testified for the defense that, while she was investigating Czubak's case, Czubak gave her various pictures and drawings. (R. 910-12) They were offered into evidence to show Czubak's artistic ability. (R. 912-13) Angell also identified wood

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[18] Defense counsel objected to McNulty's testimony, alleging a discovery violation, because the State had not listed McNulty as a witness. He also argued that there was a sequestration violation because McNulty was sitting in the courtroom during some of Cindy LaFlamboy's testimony which he was being called to impeach. The judge overruled the objections because the prosecutor "knew nothing about it until she testified about that." (R. 749) He granted the defense a continuing objection to McNulty's testimony. (R. 750)

[19] Prior to charge conference defense counsel renewed his motion for judgment of acquittal which was again denied. (R. 780-81) Defense counsel requested the expanded definition of excusable homicide. The court denied his request. (R. 783-85)

carvings that Czubak made for Linda Young. (R. **914)** Patricia Eble, employed at the Public Defender's Office, identified drawings that Czubak made for her husband, an attorney at the Public Defender's Office. (R. **918-919)** She said her husband intended to have the drawings framed for his office. (R. **919)**

Jim Grantham, warden of the East Pasco Detention Center, testified that Czubak had not been a disciplinary problem while incarcerated at the center. (R. **923-24)** Grantham explained that he passes information to the inmate population through "cell representatives" who meet at various times. (R. **924)** Czubak was "cell representative" for his cell. (R. **923-24)**

The judge instructed the jurors to consider the following three aggravating factors: **(1)** the crime **was** committed while the Appellant was under sentence of imprisonment; **(2)** the Appellant had previously been convicted of a felony involving the use or threat of violence; and **(3)** the crime was heinous, atrocious or cruel. (R. **961)** He instructed them to consider in mitigation any aspect of the defendant's character. (R. **962)**

C. Sentencing

On March **31, 1988,** the judge sentenced Czuba to death in accordance with the jury recommendation. (R. **1056)** He found only two aggravating circumstances: (1) the crime was committed while the Appellant was under sentence of imprisonment; and **(2)** the Appellant had previously been convicted of a felony involving the use or threat of violence. He found no mitigation. (R. **1056)**

SUMMARY OF THE ARGUMENT

I: During cross-examination, key prosecution witness Dorothy Schultz blurted out that Czubak was an escaped convict. The trial court denied defense counsel's motion for mistrial because "it was part of her answer." Schultz's unresponsive testimony that Czubak was an escaped convict was clearly not admissible. § 90.404(2), Fla. Stat. (1987). Equally clearly, it was not "invited." Even the judge agreed that it was not harmless. Accordingly, Czubak must be granted a new trial.

II: Over defense objection, the prosecutor introduced into evidence a number of extremely gruesome photographs of the decomposed body of the victim. In addition to the decomposition, one hand had been eaten and a leg partially eaten by two small dogs in the house. The photographs were not relevant to any material issue because the body was no longer in the same condition as when the murder occurred. They were extremely prejudicial and should not have been admitted. A new trial is required.

111: The prosecutor elicited prejudicial hearsay testimony on three occasions. One instance was a hearsay statement made by the deceased victim of the homicide. The other two instances involved hearsay statements by Detective Pierce concerning matters he learned during his investigation. In neither case did he name the informant. These hearsay statements were all introduced to prove

the truth of the matters and were clearly inadmissible hearsay. There was no exception to the hearsay rule which would justify the admission of any of them. Their admission was error.

IV: Over defense objection, the trial judge allowed Detective Bill McNulty, who was not on the state's witness list, to testify in rebuttal. His rebuttal testimony contradicted the testimony of defense witness Cindy LaFlamboy on redirect. No Richardson hearing was held. Additionally, McNulty's testimony violated the witness sequestration rule because McNulty was in the courtroom during part of LaFlamboy's testimony, and impermissibly allowed the state to impeach LaFlamboy on a collateral matter. McNulty's testimony cast a shadow on Cindy LaFlamboy's credibilitity, which was crucial to the defense case. The trial court's failure to hold the required Richardson hearing was per se reversible error, requiring a new trial.

V: The state presented no evidence that the murder of Thelma Peterson was premeditated. Both the evidence and the version of the crime suggested by the prosecutor during closing argument supported the theory that the murder was committed during an argument, in the heat of passion. Thus, the circumstantial evidence was consistent with innocence of first-degree murder. Accordingly, a judgment of acquittal of premeditated first-degree murder must be granted.

VI: There are two contexts in which the jury is instructed on excusable homicide: (1) when the defense of excusable homicide is presented by evidence in support thereof; and (2) as a part of the trial court's instruction on the lesser included offense of manslaughter. In this case, the second context was not applicable because the jury convicted Czubak of an offense two steps above manslaughter. As to the first context, however, the trial court committed reversible error by refusing to give the long form instruction, as requested by counsel, instead of the short form definition given in the introduction to homicide.

VII: Defense counsel filed a pretrial motion requesting that the trial judge appoint separate counsel to represent Czubak for the penalty phase. He alleged that because of his defense that Czubak did not commit the murder, his credibility with the jury would be lost if Czubak were found guilty of first degree murder, and he then would not be able to provide effective representation during penalty phase. The judge denied the motion. Thus, defense counsel was forced to choose between continuing to profess that Czubak was innocent and presenting extensive mitigation evidence. Moreover, because counsel's credibility was tainted by his defense that Czubak was innocent, the jury probably gave little weight to his argument for a life sentence. Thus, Czubak received ineffective assistance because of state interference with the ability of counsel to render effective assistance.

VIII: Over defense objection, the trial judge instructed the jury on the heinous, atrocious or cruel aggravating factor, although he did not find the factor in his written sentencing order. No evidence supported the instruction. Because some of the jurors may have based their decisions on this factor, the jury advisory recommendation was unreliable, resulting in an eighth amendment violation. Additionally, this aggravating factor is unconstitutional because it is so broad that a juror might believe that all murders were heinous, atrocious or cruel.

IX: The trial judge failed to consider the mitigation presented in determining his sentence. He found that none of the mitigation presented rose to the level of a mitigating circumstance to be weighed in his penalty decision. He should have instead weighed the mitigation against the two aggravating factors that he found to determine his sentence. Thus, Czubak's sentence of death was unconstitutionally imposed in violation of the eighth and fourteenth amendments to the United States Constitution.

X: The death penalty was reserved by the legislature for only the most aggravated and unmitigated of first-degree murder cases. The case at hand involved a domestic dispute. The two aggravating factors were not related to the murder itself. Thus, the strangulation of Thelma Peterson was clearly not one of the most aggravated first-degree murder cases and the death penalty is not an appropriate penalty.

ARGUMENT

ISSUE I

THE COURT ERRED BY FAILING TO GRANT DEFENSECOUNSEL'SMOTIONFORMISTRIAL WHEN STATE WITNESS DOROTHY SCHULTZ BLURTED OUT THAT DANNY CZUBAK WAS AN ESCAPED CONVICT, IN VIOLATION OF SECTION 90.404, FLORIDA STATUTES.

During her cross-examination, key prosecution witness Dorothy Schultz blurted out that Czubak was an escaped convict. (R. 572) Defense counsel moved for mistrial. The court denied his motion because "it was part of her answer" to defense counsel's question. (R. *573)* Relevant testimony was as follows:

> Q. (defense on cross) After Danny came there that night and you saw these things, these scratches that you claim you saw --
>
> A. (Dorothy Schultz) Sir, I went to the doctor's the next day because I was -- that was in the process of getting my teeth out and I went to the doctor's the next day.
>
> Q. Well, when did it ever -- Dorothy, did it ever occur to you that Danny had done something?
>
> A. Yes, it did, and I had mentioned it to my Uncle Billy and he was going to have Danny investigated.
>
> Q. Uncle Billy?
>
> A. Yes. William Finch. I asked Uncle Billy not to because I was afraid I would be hurt by what I would find out.
>
> Q. You would be hurt by Danny or be hurt how? How would you be hurt?
>
> A. Be hurt.
>
> Q. Emotionally?

A. By finding out that Danny had done something.

Q. Well, that's why I am asking you, was it Detective Pierce who put it in your mind?

A. No, sir. No, sir. You're wrong.

Q. I'm wrong?

A. You're very wrong. If I had my Uncle Billy turn around and have him investigated, I would have known who he was, an escaped convict. Right? Detective Pierce has nothing to do with my suspicions, which I should have opened my eyes.

Q. Okay. How often would your mother come over during that week and have supper with you and Danny?

A. My mother would come over every day.

Q. Can we approach, briefly?[20]

. .

MR. SESTAK: I didn't solicit that comment about the escaped convict, you know, and I am in a posture of asking ---

THE COURT: She said escaped?

MR. SESTAK: She said an escaped convict. I must ask for a mistrial. I would ask the Court to take it under advisement, you know.

THE COURT: I am going to deny your motion. I think you were asking her questions. It was part of her answer.

(R. 572-73)

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[20] Defense counsel's objection and motion for mistrial, made after one additional question and answer, was timely. Johnston v. State, 497 So.2d 863, 869 (Fla. 1986) (objection and motion for mistrial after four additional questions asked and answered was timely); Jackson v. State, 451 So.2d 458, 461 (Fla. 1984); Roban v. State, 384 So.2d 683, 685 (4th DCA), rev. denied, 392 So.2d 1379 (Fla. 1980) (motion for mistrial made after three more questions were asked was within time frame for contemporaneous objection).

Defense counsel argued again in his motion for new trial that this error required a mistrial. (R. 1063) He told the judge about a newspaper article in which one of the jurors was quoted as having said that, once he found out that Czubak was an "escapee," he started "putting two and two together." (R. 1065). Although the trial judge ruled that the testimony was not error because defense counsel "elicited" the comment, he also found that the testimony could not be considered harmless. (R. 1072).

Schultz's unresponsive testimony that Czubak was an escaped convict was clearly not admissible. § 90.404(2), Fla. Stat. (1987). Equally clearly, it was not "invited." See e.g., Simeon v. State, 520 So.2d 81 (Fla. 3d DCA 1988). Even the judge agreed that it was not harmless. (R. 1072)

A. The testimony was inadmissible.

If the prosecutor had attempted to prove that Czubak committed an escape, such evidence would not have been admissible. There was no theory under which the evidence could have come in. Unless a defendant places his character in issue, it may not be attacked by the state. See Von Carter v. State, 468 So.2d 276, 278 (Fla. 1st DCA 1985).[21] References to a defendant's past contacts with law enforcement have been deemed error in numerous cases. See e.g., Henderson v. State, 463 So.2d 196 (Fla. 1985) (defendant wanted by other states); Loftin v. State, 273 So.2d 70 (Fla. 1973)

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[21] Although the prosecutor did not elicit the unwelcome testimony in this case, it was the state's key witness who blurted out the information.

(reference to mug shots); Periu v. State, 490 So.2d 1327 (Fla. 3d DCA 1986) (officer's testimony that he recovered stolen vehicles from defendant's body shop before). The introduction of such evidence is precisely what the "Williams rule" is intended to prevent.

Williams rule evidence is a special application of the general rule that all relevant evidence is admissible unless excluded by a rule of evidence.[22] Evidence of other crimes or misconduct perpetrated by the defendant may be admitted only if relevant to a material fact in issue. Bryan v. State, 533 So.2d 744, 746 (Fla. 1988). Evidence of other crimes is not admissible if its sole purpose is to demonstrate the defendant's bad character or propensity to commit crimes. Castro v. State, 547 So.2d 111, 115 (Fla. 1989); Straisht v. State, 397 So.2d 903, 908 (Fla. 1981), cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981); Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); § 90.404(2), Fla. Stat. (1987).

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[22] The "Williams rule," codified in the Florida Evidence Code at (90.404(2)(a), Fla. Stat. (1987), was derived from Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S. Ct. 102, 4 L. Ed. 2d 86 (1959), in which this Court held that similar fact evidence of a prior criminal act is admissible if relevant except to prove bad character or criminal propensity. Section 90.404(2)(a) of the Florida Evidence Code provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

In Jackson v. State, 451 So.2d 458 (Fla. 1984), for example, the trial court admitted testimony from a state witness that at some prior time the defendant had pointed a gun at him and bragged that he was a "thoroughbred killer." On appeal, this Court could "envision no circumstance'' in which the testimony could be "relevant to a material fact in issue." 451 So.2d at 461. Although the testimony showed that Jackson may have committed an assault and may have killed before, neither was relevant to the case. Quoting from Paul v. State, 340 So.2d 1249, 1250 (3d DCA 1976), cert. denied, 348 So.2d 953 (Fla. 1977), the Jackson court stated:

> There is no doubt that this admission would go far to convince men of ordinary intelligence that the defendant was probably guilty of the crime charged. But, the criminal law departs from the standard of the ordinary in that it requires proof of a particular crime. Where evidence has no relevancy except as to the character and propensity of the defendant to commit the crime charged, it must be excluded.

340 So.2d at 1250 (citation omitted).

That Czubak was an "escaped convict" likewise established nothing more than criminal propensity. It revealed two crimes -- the escape and the offense for which Czubak was incarcerated when he escaped. Neither offense was similar to the one for which he was on trial. Thus, the evidence was not relevant. See Castro v. State, 547 So.2d 111 (Fla. 1989). It was inadmissible.

B. The Error was Not Invited.

Defense counsel's question was whether it occurred to Schultz that Danny had "done something." The line of questioning

had nothing to do with Danny's past or prior record. The context of the cross-examination shows clearly that defense counsel was asking Schultz if it occurred to her when Czubak came to her house the night of the murder, under the circumstances she described, that he might have robbed or killed Thelma Peterson. The implication was that Schultz did not suspect that Danny killed Peterson until Detective Pierce told her he committed the crime. There was no way that defense counsel could have anticipated Schultz's nonresponsive statement.[23]

Shortly before the testimony set out above, Schultz admitted that Detective Pierce told her that Czubak killed Thelma Peterson. (R. 569) Defense counsel then elicited testimony that when Danny arrived at Schultz's house on the night of the homicide, his clothes were stained, he told her she didn't have to worry about Thelma anymore, and he had scratches on his neck. (R. 570-71) He then asked her if it ever occurred to her that Danny had "done something." He obviously meant the murder.

When Schultz seemed to be evading the question, defense counsel suggested that perhaps it was Detective Pierce who "put it in her mind," "it" being that Danny had killed Thelma Peterson. (R. 572) In response to this suggestion, Schultz blurted out that,

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[23] The testimony of Dorothy Schultz and her psychiatrist showed that Schultz suffered from mental problems. Much of her testimony was confusing and was not completely responsive. Because Schultz was the state's key witness and her credibility was shaky, it was imperative that defense counsel question her closely. At the same time, however, because of her mental condition, he was in danger of eliciting nonresponsive testimony harmful to his client.

if she had had her Uncle Billy investigate Danny, she would have known he was an escaped convict; that Pierce had nothing to do with it; and that she should have "opened her eyes." (R. **572)**

Most cases where courts have found that error was invited concern situations in which defense counsel agreed to the procedure used by the court, intentionally solicited objectionable evidence, or failed to object or to move for a mistrial. See e.g., Pope v. State, **441** So.2d **1073** (Fla. **1983)** (defense counsel invited error by stating that he had no reason to doubt unavailability of a state witness, thus precluding further inquiry into his unavailability); Clark v. State, **363** So.2d **331, 334-35** (Fla. **1978)** (defense counsel may not make improper comment or suggest that friendly witness make "spontaneous" improper comment to gain mistrial; counsel must make contemporaneous objection); Meek v. State, **474** So.2d **340** (4th **DCA),** aff'd **487** So.2d **1058** (Fla. **1985)** (objectionable response elicited by defense counsel who made no motion to strike nor motion for mistrial). In some cases, defense counsel also rejected the court's offer to give a curative instruction. See e.g., Sullivan v. State, **303** So.2d **632, 635** (Fla. **1974);** Hicks v. State, **362** So.2d **730** (Fla. **3d** DCA **1978).**

Objectionable comments are "invited" only when, unlike Schultz's comment, they are responsive to the question asked. In Jackson v. State, **359** So.2d **1190** (Fla. **1978),** cert. denied, **439** U.S. **1102, 99** S.Ct. **881, 59** L.Ed.2d **63** (1979), for example, the objectionable comment was elicited on cross-examination and was invited by defense counsel. Counsel kept asking the sheriff why

the questioning of the defendant in a "question and answer form" was stopped. 359 So.2d at 1193-94. Finally, the sheriff read a statement or report which stated that the defendant said he wanted a lawyer -- that was why the dialogue changed from a question and answer format. Thus, the sheriff's testimony was responsive to defense counsel's question. See also Copeland v. State, 457 So.2d 1012, 1018 (Fla. 1984) (defense counsel opened door because witness's answer was expressly responsive to question). When the testimony is not responsive, as in our case, it is not invited. See Simeon v. State, 520 So.2d 81 (Fla. 3d DCA 1988).

Simeon is similar to our case. During cross-examination, defense counsel asked the codefendant who was testifying pursuant to a plea bargain if he remembered the terms of his guilty plea. The codefendant responded that he "went through a lie detector test." The court reversed, holding that defense counsel's request for a mistrial should have been granted. 520 So.2d at 82. Although the state argued that the error was invited, the court disagreed. Defense counsel's question called only for a yes or no answer. Additionally, defense counsel was attempting to lay a foundation for further inquiry into the terms of the plea bargain which might have affected the witness's credibility. Thus, the statement was not responsive. The Simeon court found that, in context, the co-defendant's "egregious lie detector statement can only be regarded as a volunteered, uninvited response which the appellant is not precluded from challenging." 520 So.2d at 83.

In another similar case, Frazier v. State, 425 So.2d 192

(Fla. 3d DCA 1983), defense counsel asked a state witness whether he ever asked the defendant if he took the carpeting. The witness responded that they just polygraphed everyone and he flunked the polygraph. The appellate court reversed, finding "classic grounds for a mistrial because the damning evidence could not be cured by a cautionary instruction." 425 So.2d at 193. The court rejected the state's contention that the comment was invited because defense counsel's question "in no way related to a polygraph examination or the results thereof; the witness' answer was non-responsive and entirely volunteered." Id.

The Second District reversed in Brown v. State, 472 So.2d 475 (Fla. 2d DCA 1985), finding that the circuit court was "clearly in error in affirming on a notion of invited error." Id. at 477. The trial court had ruled prior to trial that the state could not elicit testimony that the defendant tried to get into the victim's pocket prior to the actual theft of his wallet. Finding the pretrial ruling correct, the Second District noted that evidence of criminal activity not charged is inadmissible to show bad character or propensity to crime. Id. at 476-77.

At trial, defense counsel asked a state witness during cross-examination if the only thing he saw the defendant do was run. The witness responded that he had "seen her try to get into Earl's wallet and he told her no." Brown, 472 So.2d at 476. This was precisely the evidence excluded prior to trial. Quashing the circuit court's affirmance, the Second District held that "[t]he petitioner had every right to claim error in the unsolicited and

previously prohibited testimony . . . ." 472 So.2d at 477-78.

Schultz's comment that Czubak was an escaped convict was equally egregious. As in Frazier, Simeon, and Brown, it was volunteered and unwelcome. As was true in Simeon, defense counsel clearly had a different purpose in asking his question -- to elicit from Schultz that she did not suspect that Czubak killed Thelma Peterson until Detective Pierce suggested it. Again like Simeon, the question -- whether Detective Pierce put it into her head that Danny had "done something" -- required only a yes or no answer. Schultz's answer was, "Oh no. Oh no, sir. You're wrong." Even if defense counsel's response of "I'm wrong?" invited an explanation, it did not invite the response that, if she'd had her uncle investigate Czubak, she would have known that he was an escaped convict.

In requesting a mistrial, defense counsel told the judge that he did not solicit the comment. (R. 573) The judge held that the comment was not error because it was part of the witness's answer to defense counsel's question. (R. 573) Thus, the jury was not even told to disregard the comment. See Finklea v. State, 471 So.2d 596, 597 (Fla. 1st DCA 1985) (testimony about defendant's prior criminal act, elicited by co-counsel, was too prejudicial for jury to disregard; thus, defense counsel's failure to request cautionary instruction did not preclude review). In the case at hand, defense counsel was not in a position to request a curative instruction because the judge found the testimony was not error.

C. A Case In Point.

Robinson v. State, 520 So.2d 1 (Fla. 1988) is instructive because of its clearly distinguishable characteristics. Prior to trial, Robinson's counsel and the prosecutor entered into a stipulation pursuant to which the defense admitted that Robinson fired the fatal shots and the prosecutor agreed not to bring out the fact that Robinson had allegedly stolen the murder weapon in a prior burglary. At trial, however, when the prosecutor attempted to admit into evidence a gun resembling the one allegedly used to commit the murder, defense counsel objected and asked the witness, "Detective West, you don't know whether the weapon was exactly like this or a different length barrel, do you?" 520 So.2d at 4. The detective responded that he did because the weapon was reported "on the stolen list, the burglary list."

Defense counsel immediately told the judge that he didn't invite the comment. The judge disagreed. Id. He found that the remark had "gone right over the jury's head, had been invited by defense counsel, and was harmless." 520 So.2d at 5.

This Court agreed that the remark was harmless but for different reasons. First, the evidence would have been admissible but for the stipulation. Thus, only the stipulation was violated. The nature and context of the comment further convinced this Court that the remark was harmless.

Robinson is distinguishable from our case for three reasons. First, the evidence that Czubak was an escaped convict would not have been admissible under any circumstance. Second,

unlike defense counsel in Robinson who should have known that his question might elicit such a response because of his pretrial stipulation, defense counsel in the instant case had no way of knowing or even suspecting that his question would elicit such a response. Third, the nature and context of the comment did not render it harmless. In Robinson, the witness did not say that the defendant committed the robbery. He could have bought the gun from the robber. In our case, Schultz said specifically that Czubak was an escaped convict. We know that the comment did not go over the heads of all of the jurors because one of them later told a news reporter that when he heard that Czubak had escaped, he started putting "two and two together." (R. 1056) Accordingly, based upon this Court's reasoning in Robinson, Schultz's comment was inadmissible, uninvited, and was not harmless.

D. The Error was Not Harmless.

Our criminal justice system requires that the elements of a criminal offense be established beyond a reasonable doubt without resorting to the character of the defendant or the fact that he might have a propensity to commit crime. The admission of improper collateral crime evidence is "presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Castro, **547** So.2d at **115;** Peek v. State, **488** So.2d **52, 56** (Fla. **1986);** Straight, **397** So.2d at **908.**

In Castro, the state rebutted the presumption because the defendant confessed three times to the murder. 547 So.2d at 115. Czubak's defense was that he did not commit the crime. Three defense witnesses testified that someone else confessed to the crime. Thus, the evidence was far from overwhelming.

Escape was a particularly serious charge for the jury to hear about for two reasons. First, it may have engendered fear that Czubak was an armed and dangerous felon. The jurors were not told that he walked away from a work release program (R. 899-903), that no one was injured, and that no violence occurred. They may have imagined a daring and dangerous escape over prison walls, involving weapons, hostages and injuries to prison guards. Hearing only that Czubak was an "escaped convict" was worse than hearing the whole story. Second, Schultz's remark told the jurors that Czubak committed two crimes -- escape and the offense for which he was incarcerated when he escaped. They were not told the nature of the offense and may have suspected murder.

One of the jurors inplied to a newspaper reporter that the error affected his verdict, ie, that he "started putting two and two together." (R. 1065) Thus, Schultz's remark clearly affected the verdict. See Castro, 547 So.2d at 115 (error harmless only "if it can be said beyond a reasonable doubt that the verdict could not have been affected by the error"); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). A new trial is required.

ISSUE II

THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTORTO INTRODUCE INTOEVIDENCE PHOTOGRAPHSOFTHEVICTIM'SPARTIALLY DECOMPOSEDANDDOG-EATENBODYBECAUSE THE PHOTOGRAPHSWERENOT RELEVANTAND ANY PROBATIVE VALUE WAS OUTWEIGHED BY UNFAIR PREJUDICE.

Over defense objection, the prosecutor introduced into evidence eight extremely gruesome photographs of the decomposed body of the victim. (R. 611-13) In addition to the decomposition, one of Thelma Peterson's hands had been eaten off and a leg was partially eaten by two small dogs in the house. (R. 606) The photographs were not relevant to any material issue. They did not show Peterson's body as it appeared at the time of the homicide but, instead, showed it in the condition in which it was found nearly two weeks later. The photographs were extremely prejudicial and should not have been admitted. A new trial is required.

As with other evidence, the initial test for the admissibility of photographs is relevancy. Straight v. State, 397 So.2d 903 (Fla. 1981). Even if photographs are relevant, however, they are inadmissible if their probative value is outweighed by the danger of unfair prejudice or confusion of issues. § 90.403, Fla. Stat. (1987). Photographs should not be admitted if the gruesomeness of the portrayal is so inflammatory as to create undue prejudice in the minds of the jurors and distract them from a fair and unimpassioned consideration of the evidence. Leach v. State, 132 So.2d 329, 332 (Fla. 1961); see also Swan v. State, 322 So.2d

485, 487 (Fla. 1975) (photographs served only to create passion).

To be relevant, photographs must be probative of an issue in the case. For example, in United States v. De Parias, 805 F.2d 1447 (11th Cir. 1986), the photograph of the decedent identified the victim and the means of death. Similarly, in Wriaht v. State, 265 So.2d 361, 362 (Fla. 1972), the photographs were admissible to establish identity and to show the wounds inflicted. In Grossman v. State, 525 So.2d 833, 837 (Fla. 1988), photographs of the victim and the crime scene were probative of the method and cause of death. In Reddish v. State, 167 So.2d 858, 863 (Fla. 1964), however, photographs of the dead bodies were not relevant because the cause of death had been clearly established and there were no facts in issue which necessitated or justified their admission.

In the case at hand, the gruesome photographs of the decedent were not relevant to prove any issue in the case. Her decomposed body was unrecognizable. Identity was proved by the number on her pacemaker which was taken from inside the body at the autopsy. (R. 436, 442, 450-51) The medical examiner determined cause of death at the autopsy -- bones in the neck were fractured. He could not tell whether she had been hit over the head with the bottle. (R. 440, 444) The photographs of the decomposed body did not reveal any wounds caused by the perpetrator and were not probative of the cause of death.

The prosecutor argued that the photographs showed the position of the body and its relation to other items such as the victim's glasses, slippers and afghan. (R. 607-09) None of these

factors is probative of any issue. The position of the coffee table and the afghan are not probative of what occurred. We know that Mrs. Peterson was murdered and that whoever did it must have been between the coffee table and the couch. There was another unobjectionable photograph that depicted the eyeglasses on the table. (R. 1280)

The position of the body was probably changed because of the dogs eating parts of her limbs. They probably pulled Mrs. Peterson's leg off the couch while chewing on it. The two dogs may well have moved her slippers and even the afghan. The positions of these items only caused the jurors to speculate as to what could have happened and were not at all probative of what actually did happen to Mrs. Peterson. Most importantly, none of these photographs were probative of the main issue in the case -- who killed Thelma Peterson. They only incited the jurors to want to convict someone -- and Czubak was on trial.

In Gomaco Corporation v. Faith, 14 F.L.W. 1853 (Fla. 2d DCA Aug. 4, 1989), the court reversed and remanded for a new trial because of the unnecessary introduction of photographs that were gruesome, offensive and inflammatory. They depicted the defendant's severed foot shortly after the accident and prior to his surgery. The court found that, although the pictures might have been tangentially relevant, they did not independently establish any material part of the defendant's case, nor were they necessary to corroborate any factual issue. Because the court could not say that the inflammatory photographs did not permeate the entire trial

and prejudice the appellant, it reversed for a new trial. Id.

The case at hand is the same. Once the jurors saw the disgusting photographs of Mrs. Peterson's badly decomposed and dog-eaten body, it would have been difficult for them not to visualize the decomposed body throughout the trial, thus permeating the trial with prejudice toward the Appellant. The photographs did not depict anything that the perpetrator did to Mrs. Peterson, but what her dogs and time did to her body. Thus, they were not relevant and were extremely and unfairly prejudicial.

Defense counsel objected only to the photographs that depicted the decomposed body. (R. **602-11)** These were State Exhibits R (R. **1272),** S (R. **1273),** T (R. **1274),** W (R. **1277), 20** or **OO** (R. **1278),** 2P or PP (R. **1279),** 2R or RR (R. **1281),** and **2S** or SS. (R. **1282)** He objected because the photographs were "fairly gruesome . . . to put it mildly." He argued that the medical examiner could not determine death by the outward appearance of the body; that it was not relevant that dogs were in the house; and that the sole purpose of the photographs was to inflame the jury. (R. **606).** The court admitted that the photographs were "grisly" but found that they were probative and admitted them. (R. **610-11)**

The photographs objected to were as follows:

1. Exhibit R (R. **1272)** showed the decomposed body on the couch were it was found. Lying across the afghan on the floor was the left leg, with only the bare bone remaining from the knee down. The foot was missing. The photograph also showed that the

left hand was missing from the arm. The body appears dark gray in color and looks wet and slimy.

The prosecutor argued that, although the testimony indicated that Peterson kept a neat house, this photograph showed the coffee table ajar, "indicating that somebody was in there." It also showed the right slipper on top of a piece of glass. (R. **607)** We know of course that someone was in there, and the position of her slipper was irrelevant.

2. Exhibit **S** (R. **1273)** depicted Peterson's hair and, presumably, her head, although it is difficult to discern in the picture. Defense counsel noted that, although the picture showed glass around Peterson's head, that was not probative because of the testimony of witnesses that glass was all around and because glass was in the bag at the medical examiner's office. The position of the glass around the head is irrelevant. Furthermore, there was no evidence of how or when the bottle was broken.

3. Exhibit T (R. **1274)** is one of the more nauseating shots, showing a portion of Peterson's carcass with the left arm protruding and the hand eaten away. **As** the prosecutor explained, the photograph showed a piece of glass on the couch between the arm bone and the body, and showed "where the lady's left hand would have been." (R. **609)** The prosecutor argued that the picture showed the missing hand right over where the watch would have been, and that he expected defense testimony that another suspect, Eugene Ragsdale, entered the house and took the watch and ring. (R. **609)**

There was defense testimony to that effect. Leon Illig

testified that Ragsdale said that he got some rings from an elderly lady in Zephyrhills that he killed. (R. 724-25) These rings were not connected to the ring on the floor at Peterson's house. Cindy LaFlamboy testified that Ragsdale gave her a watch and a ring. (R. 733) He claimed that he killed Peterson and took the jewelry. (R. 734) Ragsdale also told Cindy, however, that he broke into Mrs. Peterson's house and took the watch and ring from her arm as it fell from the couch. (R. 735)

This picture did not show the watch and ring, of course. It showed only the missing hand. Other photographs, to which defense counsel had no objection, showed the watch and ring on the floor. (R. 1267, 1270) Even if the prosecutor needed to show the watch and ring to convince the jury that they were on floor, he did not need to show Peterson's arm and missing hand. This photograph did not show the relationship of the jewelry to the hand.

4. Exhibit W (R. 1277), like 20 or OO (R. 1278), showed the exposed bone and what remained of Peterson's left leg. It also showed her glasses on the coffee table. The prosecutor argued that it showed the location of the glasses on the table and better illustrated how far or close the table was from the couch. (R. 608) The position of the coffee table and of Peterson's glasses on the table were completely irrelevant. The prosecutor noted that 2Q or QQ (R. 1280), to which there was no objection, showed blood on the glasses. (R. 608) Exhibit W did not depict blood on the glasses, however, and the jurors would not have been able to tell that it was blood without expert testimony anyway.

5. Exhibit 20 or ΘΘ (R. 1278) is perhaps the most sickening picture of all. It is a close-up of Peterson's left leg from just above the knee down to the bottom of the exposed leg bone where the foot is missing. It depicts the inside tissue of Mrs. Peterson's dog-eaten leg where the blackened skin is torn apart.

The prosecutor argued that this photograph was relevant to show that Peterson's leg was on top of the afghan. (R. 607) So what? The afghan apparently fell or was placed on the floor but this tells us nothing about the homicide. He noted also that there was glass under the afghan. (R. 607-08) Although we were not able to find the glass under the afghan in the picture, that too was irrelevant. The position of the pieces of glass on the floor tells us nothing.

6. Exhibit 2P or PP (R. 1279) showed only a portion of Peterson's leg and was not as inflammatory as the other pictures although, if it had been the only such photograph shown to the jurors, they certainly would have been appalled. The prosecutor said that this photograph was relevant to show that the right slipper was away from the body and to depict a watch on the floor. (R. 608) Other photographs, to which there was no objection, illustrated the watch and ring on the floor. The position of the right slipper tells us nothing. The dogs may have moved it. The watch probably fell off when the dogs ate Peterson's hand. This did not result from any action of the perpetrator.

7. Exhibit 2R or RR (R. 1281) depicted Peterson's decomposed body on the couch and is a front pose, taken from

between her legs, showing the decomposed genital area. The prosecutor noted that Exhibits R and RR depicted the same thing from different ends of the couch, but that he preferred Exhibit R. (R. 608) Apparently then, his argument as to relevance was that Peterson's leg was on the afghan on the floor. The dogs probably pulled the leg onto the floor while eating the meat from the bone days after the homicide.

8. Exhibit 2S or SS (R. 1282) is another photograph of Thelma Peterson's decomposed body on the couch where it was found, taken from across the living room. The prosecutor argued that this photograph was relevant because of the presence of the afghan underneath the table, the staining pattern on the top of the couch, and because Peterson's daughter said her mother kept an afghan on the couch. (R. 607) The presence or absence of the afghan was irrelevant. The staining pattern on the couch could have been there for years. Even if it was recent, we do not know what caused it, or what it had to do with Peterson's death. This photograph was irrelevant and inflammatory because of its gruesome depiction of the badly decomposed body.

* * * * *

The prosecutor used these sensational and inflammatory photographs to argue to the jurors that they should convict the Appellant. He suggested, with no evidence to support his argument, that Czubak had or tried to have sexual intercourse with the victim:

> Look at this evidence, these pictures. Look how that crime occurred. Whoever hit Mrs.

> Peterson in the head with that bottle, whoever did it, didn't take the jewelry and run. The first thing that person did was to rip her nightgown off of her, to take her glasses off of her face and lay them on the table. Look at the position of her body with her legs spread laying back on the couch. . . .
>
> And I submit to you, ladies and gentlemen, based upon that evidence, whoever killed that woman was trying to have intercourse with that woman either before or after she died.

(R. 847) Although the photographs depicted Peterson's body with one leg hanging off the couch, there was no evidence of a sexual battery. It is most likely that the dogs pulled Peterson's leg from the couch while eating it. Even if Peterson had sexual intercourse, the evidence showed that Peterson and Czubak were living together as lovers. (R. 531) Thus, the prosecutor's argument was not probative and was intended only to further inflame the jurors and divert their attention from the real issue -- who killed Mrs. Peterson.

In Jackson v. State, **359** So.2d **1190, 1192-93** (Fla. **1979),** this Court cautioned "the prosecutors of this state that gory and gruesome photographs admitted primarily to inflame the jury will result in a reversal of the conviction." Because Czubak's trial was tainted by the prejudicial and inflammatory photographs, in violation of the fifth, sixth, and fourteenth amendments to the United States Constitution and article I, sections 9 and 16, of the Florida Constitution, Czubak must be granted a new trial.

ISSUE III

THE ERRONEOUS ADMISSION OF HEARSAY EVIDENCE ON THREE SEPARATE OCCASIONS REQUIRES A NEW TRIAL.

The prosecutor elicited inadmissible hearsay evidence on three occasions, as follows:

A.

State witness Dorothy Schultz testified that on October 21, 1985, the day the homicide apparently took place, she called the home of Thelma Peterson and asked to talk to Danny. Over defense objection, she was permitted to testify that Mrs. Peterson told her that Danny did not live there anymore. (R. 539) Giving no reason, the judge overruled the objection.[24] (R. 537-38)

This testimony was especially prejudicial to Danny Czubak

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[24] The testimony was as follows:

> DOROTHY SCHULTZ: I called Thelma's home to talk to Danny. Thelma answered the phone.
>
> MR. SESTAK (defense counsel): Judge, I am going to object to any hearsay statements made by somebody not here, obviously.
>
> MR. VAN ALLEN (prosecutor): Obviously not here.
>
> THE COURT: I am going to overrule the objection.
>
> MR. SESTAK: Yes, sir.
>
> MR. VAN ALLEN: Thelma answered the phone?
>
> DOROTHY SCHULTZ: She answered the phone and she said that Danny didn't live there anymore.

(R. 538-39)

because it provided the only potential motive for the murder. The other witnesses testified that Czubak and Peterson got along well. The prosecutor used Schultz's hearsay testimony to connect Czubak to the murder, noting Schultz's testimony that when she called back later, Czubak answered and allegedly said that her timing "couldn't have been better." (R. 818) This suggested that Czubak went back to make amends and ended up killing Mrs. Peterson.

The statement was obviously introduced to prove the truth of the matter. If Czubak no longer resided with Peterson, this would suggest a possible motive for the murder. Therefore, the statement was clearly inadmissible hearsay. §§ 90.801(1)(c), 90.802, Fla. Stat. (1987); see Bauer v. State, 528 So.2d 6, 7 (Fla. 2d DCA 1988); Wells v. State, 492 So.2d 712, 715 (Fla. 1st DCA 1986) (although relevant to show motive, hearsay did not qualify under any recognized exception and was inadmissible).

There was no exception to the hearsay rule which would justify the admission of this hearsay statement. See § 90.803, Fla. Stat. (1987). The state of mind exception, § 90.803(3), Florida Statutes (1987), was not applicable. That exception allows extrajudicial statements only if the declarant's state of mind is at issue in the case or to prove or explain the declarant's subsequent conduct. State v. Correll, 523 So.2d 562, 565 (Fla. 1968). The statement was not admissible to prove Peterson's state of mind because her state of mind was not an issue. See Lee v. State, 429 So.2d 813 (Fla. 2d DCA 1983); Bailey v. State, 419 So.2d 722 (Fla. 1st DCA 1982).

As in Bailey, the statement was "obviously offered to prove the state of mind or motive of the defendant, a purpose for which the hearsay exception created by § 90.803(3)(A) . . . does not apply. 419 So.2d at 722 (citations omitted); see also Wells, 492 So.2d at 716 (state of mind exception available only to show the declarant's state of mind); Lee, 429 So.2d at 813. Nor did the hearsay statement explain any subsequent conduct of the witnesses. §90.803(3)(a)(2).

B.

The error was compounded because the prosecutor asked Detective Gary Pierce if his investigation revealed that Thelma Peterson was afraid of Czubak. Pierce said "Yes, sir." (R. 622) During closing, the prosecutor brought this up again. (R. 821) Defense counsel did not object but tried to rebut the evidence in closing by noting other testimony that they got along fine. He questioned why Peterson did not tell her daughter and granddaughter if she was afraid of Danny. (R. 831)

Again, Peterson's state of mind was not an issue. "A homicide victim's state of mind prior to the fatal event generally is neither at issue nor probative of any material issue raised in a murder prosecution." Kelley v. State, 543 So.2d 286, 288 (Fla. 1st DCA 1989). The Kelley court found that extrajudicial statements become admissible only when the need for the statements overcomes the possible prejudice because the defendant claims self-defense, that the victim committed suicide, or that the death was accidental. Id. None of these theories was advanced in this case.

As discussed in subsection C, infra, the state cannot evade the hearsay rule by not asking the witnesses the source of their information or the basis of their testimony. See Postell v. State, 398 So.2d 851, 854 (3d DCA), rev. denied, 411 So.2d 384 (Fla. 1981), and other cases discussed infra. Pierce's testimony was actually worse than the Postell situation because the detective was not asked what he did as a result of his investigation, but what he heard. In other words, he was asked to repeat the hearsay itself without identifying the declarant. This was certainly a violation of Czubak' right to confront the witnesses against him.

The Kelley court found that the inadmissible hearsay was a material feature of the prosecution's case. 543 So.2d at 288. In the case at hand, the two hearsay statements discussed in subsections A and B herein provide the only alleged evidence of a motive for the murder -- that Czubak had moved out and that Peterson was afraid of him. No other evidence suggested either of these facts. Thus, the prejudice to Czubak was substantial.

C.

There was yet another instance in which the judge allowed inadmissible hearsay in this case. Over defense objection, the court allowed the prosecutor to ask Detective Pierce, "As a result of what the people in the neighborhood told you, what did you begin looking for? Somebody? Some thing?" Pierce said, yes, "Daniel Walter or Walter Daniel." Defense counsel objected to the hearsay, but the judge said it was an effective way of getting around the hearsay rule. The objection was denied. (R. 618-19).

The state cannot evade the hearsay rule by the simple expedient of not asking the witnesses the source of their information or the basis of their testimony. The Third District Court of Appeal rejected this

> wooden application of the hearsay rule and the confrontation clause of the Sixth Amendment. [The court held] that where . . . the inescapable inference from the testimony is that a non-testifying witness has furnished the police with evidence of the defendant's guilt, the testimony is hearsay, and the defendant's right of confrontation is defeated, notwithstanding that the actual statements made by the non-testifying witness are not repeated.

Postell, 398 So.2d at 854 (footnote omitted); accord Beatty v. State, 486 So.2d 59, 60-61 (Fla. 4th DCA 1986) (officer repeated information received from anonymous caller); Davis v. State, 483 So.2d 11 (Fla. 3d DCA 1986) (inescapable inference from officer's testimony that he developed lead from interviews with witnesses at scene).

In Postell, the trial court permitted an officer to testify that he had a conversation with a witness at the scene of the crime. As a result of this conversation, he and two other officers "responded" to the defendant's residence where they found and arrested the defendant. 398 So.2d at 853. Reversing, the Postell court held that "[w]hen the logical implication to be drawn from the testimony leads the jury to believe that a non-testifying witness has given the police evidence of the accused's guilt, the testimony should be disallowed as hearsay." 398 So.2d at ***855.***

In Jimenez v. State, 535 So.2d 343, 345 (Fla. 2d DCA 1988), the Second District held that the introduction of an informant's testimony through other witnesses effectively deprived appellant of the right to confront witnesses against him. The case at hand is the same. We can only speculate as to what Pierce heard, based upon what he did. Pierce probably learned only that Czubak had been living with Peterson. Defense counsel objected and moved for a mistrial, however, because of the obvious implication that someone suggested to Pierce that Czubak committed the crime.

The right to confrontation is a fundamental constitutional right. "The essential principle of the hearsay rule is that for the purpose of securing trustworthiness of testimonial assertions, and of affording the opportunity to test the credit of the witness, such assertions are to be made in court, subject to cross-examination. . . . In short, the insidious diminution of the precious rights of confrontation and cross-examination, through some literal application of the rule against hearsay, cannot be tolerated." Postell, 398 So.2d at 856 (citations omitted). The erroneous admission of hearsay in this case resulted in an extremely prejudicial violation of Czubak's sixth amendment right.

D.

In Postell, 398 So.2d at 856, the only non-hearsay testimony linking the defendant to the crime was questionable eyewitness identification by the victim. In this case, we don't even have that. Instead, we have circumstantial evidence. The state cannot show beyond a reasonable doubt that these three

cumulative hearsay errors did not affect the verdict. See Heuring v. State, 513 So.2d 122 (Fla. 1987) (cumulative errors required reversal); Freeman v. State, 538 So.2d 936, 937 (Fla. 2d DCA 1989) (errors cumulatively tainted defendant's constitutional right to fair trial); State v. DiGuilio, 491 So.2d 1129, 1136-39 (Fla. 1986) (reviewing court may not find error harmless unless it is shown beyond a reasonable doubt that the error did not contribute to the verdict). A new trial is required.

ISSUE IV

THE COURT COMMITTED PER SEREVERSIBLE ERROR BY ALLOWING DETECTIVE MCNULTY TO TESTIFY ON REBUTTAL, OVER DEFENSE OBJECTION AND WITHOUT A RICHARDSON HEARING, BECAUSE THE STATE DID NOT PROVIDE HIS NAME IN DISCOVERY.

Over defense objection, the trial judge allowed Detective Bill McNulty, who was not on the state's witness list, to testify in rebuttal. His rebuttal testimony contradicted the testimony of defense witness, Cindy LaFlamboy, on redirect. No Richardson hearing was held. Additionally, McNulty's testimony violated the witness sequestration rule because he was in the courtroom during part of LaFlamboy's testimony. McNulty's testimony concerned a collateral matter and was not relevant to prove any issue in the case. Instead, it cast a shadow on Cindy LaFlamboy's credibility which was crucial to the defense case.

Cindy LaFlamboy, a key defense witness, testified that Eugene Ragsdale confessed to her that he committed the homicide for which Czubak was on trial.[25] (R. 739-40) On redirect examination, she testified that she told law enforcement officers where Ragsdale was in Alabama. (R. 743) She said Detective Bill McNulty called Ragsdale on the telephone. (R. 744) At this point, the prosecutor told the judge that McNulty was in the courtroom, that he had not heard this before and that he might call McNulty as a witness. The

[25] Eugene Ragsdale was called to testify outside the presence of the jury and invoked the protection of the fifth amendment in response to each question asked. (R. 705-08)

court permitted him to ask McNulty to leave. (R. **744)** Cindy LaFlamboy then clarified that "[o]ne of them there [at the sheriff's department] called because Bill McNulty -- they told me Bill McNulty flew to Alabama." (R. **744-45)**

Defense counsel objected when the prosecutor called McNulty to testify in rebuttal, alleging a discovery violation and a sequestration violation:

> MR. SESTAK (defense counsel): I have got an objection to Mr. McNulty testifying, Judge.
>
> THE COURT: What is your objection?
>
> MR. SESTAK: Judge, first of all, there is a discovery violation. He hasn't been listed as a witness. Second of all, there is a sequestration violation. He has been sitting here and was sitting here through some of Ms. LaFlamboy's testimony and I think that you have -- the only thing that he could possibly come in is as perhaps impeachment to her testimony.
>
> THE COURT: I understand that Mr. Van Allen knew nothing about it until she testified about that. I am going to overrule your objection, allow him to testify to that one particular point. . . .

(R. **749)** The judge granted defense counsel a continuing objection to McNulty's testimony. (R. **750)**

In rebuttal, Detective McNulty testified that he never called Ragsdale in Alabama. He said he believed it was Ragsdale's brother who implicated Ragsdale in the Mace murder. (R. **761-63)** He admitted, however, that it was possible that someone told Cindy he called Ragsdale in Alabama. (R. **764)**

The state is required to disclose to defense counsel, within fifteen days after written demand by the defendant, "[t]he

names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto." Fla. R. Crim. P. 3.220(a)(1)(i) (emphasis added). Rule 3.220(f) also provides that if, subsequent to compliance with the rules, a party discovers additional witnesses which he would have been under a duty to disclose, they must promptly be disclosed in the same manner as required for initial discovery. As sanctions for a discovery violation, the court may, among other remedies, grant a mistrial or prohibit the undisclosed witness from testifying. Fla. R. Crim. P. 3.220(j) (1987).[26]

On March 21, 1986, defense counsel filed a comprehensive demand for the discovery. (R. 1116) McNulty's name was not on the list provided by the state. (R. 1119-22) The prosecutor did not deny that he had never furnished McNulty's name to defense counsel in discovery.

A defendant is entitled to the names of all persons known by the state who have information pertaining to the charge -- not just those persons the state intends to call as witnesses. Hickey v. State, 484 So.2d 1271, 1273 (Fla. 5th DCA 1986); Wortman v. State, 472 So.2d 762, 765 (Fla. 5th DCA 1985). Because McNulty was an investigator at the Pasco County Sheriff's Office, involved in the investigation of Eugene Ragsdale (R. 762), the prosecutor knew that he had information relevant to Czubak's defense that Ragsdale

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[26] The new discovery rules which became effective July 1, 1989, provide that, in the case of a willful discovery violation, the court "shall" (formerly "may") subject counsel to appropriate sanctions. Fla. R. Crim. P. 3.220(n)(2).

killed Thelma Peterson. The fact that McNulty was in the courtroom evidences his interest in this case. Moreover, the prosecutor's knowledge that McNulty was in the courtroom, and that McNulty had not called Ragsdale in Alabama, show that he had talked with McNulty and knew he had information relevant to Czubak's defense. The prosecutor argued in closing that he knew about Czubak's defense well prior to the trial:

> Don't act under the mistaken impression that everything that you have heard during the past three, four days is new to anybody but you.
>
> July of **1986,** Mr. Sestak told you about the deposition. Cindy LaFlamboy in July **of 1986** said that she told Wilber or Pierce that Ragsdale committed this murder. So, it is nothing new. And yet here we are, almost two years later. Pierce said that nothing in his investigation has indicated to him that anybody other than this defendant Walter Daniel Czubak killed Thelma Peterson and it is not that this idea of Ragsdale is new. It has been around for a year and half, two years.

(R. **845-46)**

Richardson v. State, **246** So.2d **771** (Fla. **1971),** requires that the trial judge hold a hearing when the state has failed to comply with the discovery rules. The hearing must cover at least the following three questions: **(1)** whether the violation was inadvertent or willful; **(2)** whether it was trivial or substantial; and, most importantly, (3) whether it affected the defendant's ability to prepare for trial. Id. at **775;** Cumbie v. State, **345** So.2d **1061, 1062** (Fla. **1977).** This Court has repeatedly found that failure to hold a Richardson hearing is per se reversible error without regard to the harmless error rule. See e.g., Brown v. State, **515** So.2d

211, 213 (Fla. 1987); Smith v. State, 500 So.2d 125 (Fla. 1986).

The trial judge did not ask any of the questions required by Richardson. He noted only that the prosecutor did not know in advance what the defense witness was going to say. This is no excuse for failing to list a potential witness. If a party could call an unlisted witness in rebuttal any time a witness said something unanticipated, there would be no point having discovery rules. Although the prosecutor did not know exactly what LaFlamboy would say, he knew the subject of her testimony -- Ragsdale's confession to the crime, and that McNulty investigated the Ernie Mace murder to which Ragsdale confessed. Thus, he knew McNulty had information about the defense and could have anticipated that he might be needed as a rebuttal witness.

Rebuttal witnesses are included within the operation of the rule. Lucas v. State, 376 So.2d 1149, 1151 (Fla. 1979); Kilpatrick v. State, 376 So.2d 386, 388 (Fla. 1979). In Smith, 500 So.2d at 126, this Court expressly refused to exempt from the Richardson requirement, the admission of a previously undisclosed statement on rebuttal. The court concluded that:

> [t]he admission of the statement as rebuttal evidence does not make it any more appropriate than admitting it during direct examination. There is neither a "rebuttal" nor an "impeachment" exception to the Richardson rule.

500 So.2d at 127 (citations omitted). The trial judge's ruling in the instant case reflected his apparent belief that there was a rebuttal or an impeachment exception to the Richardson rule because he admitted McNulty's impeachment testimony over defense objection

with no inquiry at all.

LaFlamboy's testimony concerned the investigation and apprehension of Ragsdale -- an entirely collateral matter. Thus, McNulty's rebuttal testimony would not have been admissible for any purpose other than to impeach Cindy LaFlamboy's credibility. The Florida Evidence Code allows impeachment only under certain circumstances, one of which is "[p]roof by other witnesses that material facts are not as testified to by the witness being impeached." § 90.608(1)(e), Fla. Stat. (1987). The facts about which McNulty attempted to impeach LaFlamboy's credibility were not material. A witness cannot generally be impeached on a collateral matter. See Gonzalez v. State, 538 So.2d 1343, 1345 (Fla. 4th DCA 1989); Pate v. State, 529 So.2d 328, 329 (Fla. 2d DCA 1988); Gelabert v. State, 407 So.2d 1007 (Fla. 5th DCA 1981).

Moreover, LaFlamboy's testimony suggested not that she lied, but only that she was uncertain about who called Ragsdale. She first said McNulty made the call; then said it may have been a different officer. She never said, and in fact denied, that she called or was asked to call Ragsdale. McNulty admitted that someone might have told LaFlamboy that he called Ragsdale in Alabama. LaFlamboy also said she told the officers that Ragsdale was in Alabama. This was not inconsistent with McNulty's testimony that Ragsdale's brother turned him in. (R. 744-45, 761-63)

In closing, the prosecutor argued that Cindy changed her testimony after McNulty left the courtroom: "Cindy LaFlamboy says Bill McNulty told me to make a phone call and then sees Bill

McNulty, says well maybe it wasn't Bill." (R. **852)** There is no evidence that she changed her testimony because she saw McNulty. It was probably the prosecutor's action in immediately removing McNulty from the courtroom that caused her to wonder if she said something that was incorrect and to reconsider whether it might have been a different officer. Thus, the sequestration violation made the error worse.

The rule of witness sequestration is intended to prevent a witness's testimony from being influenced by the testimony of other witnesses. Wriaht v. State, **473** So.2d **1277, 1280** (Fla. **1985).** McNulty was asked to leave the courtroom after Cindy mentioned the phone call. (R. **744)** We do not know to what extent McNulty's testimony was influenced by what he heard in court. The judge did not inquire. Thus, the state benefitted from its violation of both the discovery and the sequestration rules.

Czubak was prejudiced by the unexpected rebuttal testimony of Detective McNulty. Had defense counsel been informed that McNulty was a potential witness, he might have attempted to verify LaFlamboy's testimony before allowing her to testify to details that she was not clear about. He could have deposed the other detectives to determine who, if anyone, did call Ragsdale. He could then have either questioned Detectives Wilber and Pierce concerning Ragsdale's apprehension or avoided questioning Cindy LaFlamboy concerning the call to Ragsdale.

Although Cindy LaFlamboy was probably just confused about the telephone call, or misunderstood what the detectives told her,

the jurors may well have thought that she intentionally lied. She was the key defense witness. Her credibility was crucial because she testified that Eugene Ragsdale confessed to the murder of Thelma Peterson. This prejudice adversely affected Czubak's rights under article I, section 16, of the Florida Constitution, and the confrontation clause of the United States Constitution, because the error undermined the credibility of a key defense witness.

Even if there had been no obvious prejudice, failure to hold a Richardson hearing when a discovery violation is alleged is per se reversible error. Brown, 515 So.2d at 213; Smith, 500 So.2d at 125. The purpose of a Richardson hearing is to determine whether a violation is harmless. Smith, 500 So.2d at 126. It ferrets out procedural, rather than substantive, prejudice. Id.; Wilcox v. State, 367 So.2d 1020, 1023 (Fla. 1979). A reviewing court cannot determine whether the error was harmless unless the defense had an opportunity to respond to the Richardson questions. Smith, 500 So.2d at 126. Failure to hold such a hearing is particularly egregious here because the Appellant's life was at stake. See Cooper v. State, 336 So.2d 1133, 1137-38 (Fla. 1976), cert. denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977). Accordingly, Czubak must be given a new trial.

ISSUE V

THE TRIAL COURT ERRED BY DENYING DEFENSECOUNSEL'SMOTION FOR JUDGMENT OF ACQUITTAL OF FIRST DEGREE MURDER BECAUSE THE STATE FAILED TO PRESENT SUFFICIENTEVIDENCEOFPREMEDITATION.

The state presented no direct evidence that the murder of Thelma Peterson was premeditated. Premeditation, of course, may be shown by circumstantial evidence. Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). Because Peterson's body was badly decomposed, the medical examiner was able to discern only that Peterson died from manual strangulation. (R. 444) The question then is whether the fact of strangulation was sufficient to prove premeditation.[27]

As in any criminal case where the State attempts to establish guilt by circumstantial evidence, the evidence must be both consistent with guilt and inconsistent with any reasonable hypothesis of innocence. Wilson v. State, 493 So.2d 1019, 1022 (Fla. 1986); McArthur v. State, 351 So.2d 972 (Fla. 1977). The question is whether the evidence failed to exclude all reasonable hypotheses of innocence. Heiney v. State, 447 So.2d 210 (Fla.

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[27] At the close of the State's case, defense counsel moved for a judgment of acquittal, arguing that the prosecution failed to prove the element of premeditation. Defense counsel told the court that he was not arguing that the homicide was not felony murder because the state had presented no evidence of it. (R. 685) The Appellant was not charged with felony murder. (R. 1083) At the close of the defense case, defense counsel argued that (1) the state failed to prove the defendant committed the crime; and (2) it could have been third degree felony murder, with the felony being grand theft. The court again denied the motion. (R. 780-01)

1984), cert. denied, 469 U.S. 930, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984); Rose v. State, 425 So.2d 521 (Fla. 1982), cert. denied, 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983).

Premeditation is defined by this Court in the often quoted Sireci case as:

> a fully-formed conscious purpose to kill which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues. Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act. Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of his victim is concerned.

399 So.2d at 967 (citations omitted).

Although the strangulation of Mrs. Peterson would support the hypothesis of premeditation or guilt, it would also support a reasonable hypothesis of lack of premeditation or innocence as to the first-degree murder charge. Her assailant may have intended to quiet her and to stop before causing death. Because Peterson was 81 years old, her neck bones were probably brittle and easily broken. Thus, the homicide may have been effected almost instantly. Evidence establishing only a suspicion or probability of guilt is not sufficient. McArthur, 351 So.2d at 976 n.12.

In State v. Bingham, 40 Wash. App. 553, 699 P.2d 262 (1985), aff'd, 105 Wash. 2d 820, 719 P.2d 109 (1986), the court

considered a homicide committed by manual strangulation. That court noted that three to five minutes of continuous pressure on the windpipe would be required to cause death by strangulation.[28] Although this would be sufficient time to permit deliberation, the evidence was insufficient to prove that the assailant actually deliberated. The court concluded that:

> The fact of strangulation, without more, leads us to conclude that the jury only speculated as to the mental process involved in premeditation. This is not enough.

699 P.2d at 265. In its en banc affirmance, the Supreme Court of Washington stressed that "to allow a finding of premeditation only because the act takes an appreciable amount of time obliterates the distinction between first and second degree murder." State v. Binsham, 105 Wash. 2d **820, 719** P.2d **109, 111 (1986).** "Premeditation is a separate and additional element to the intent requirement for first degree murder." Binsham, **719** P.2d at **113.**

Similarly, in Austin v. State, **382** F.2d **129, 136** (D.C. Cir. **1967),** the court noted that "the crux of the issue of premeditation and deliberation is not the time involved but whether the defendant did engage in the process of reflection and meditation. . . . The 'appreciable time' element is subordinate, necessary for

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[28] In the instant case, the strangulation may have been much quicker because of Peterson's age. In Hounshell v. State, **61** Md.App. **364, 486** A.2d **789, 793 (1985),** the court distinguished the case in which strangulation was accomplished by pressure to the throat from the case in which there was a fracture or sudden blow to the throat. In our case, death was caused by fractures to the hyoid bone and other bones in the neck. (R. **444)** This might have taken only a moment instead of three to five minutes as in Bingham.

but not sufficient to establish deliberation." In Austin, the defendant stabbed a woman whose nearly lifeless body was retrieved from a river mutilated and nude except for a piece of clothing around her neck. **382** F.2d at **132.** Remanding the case for entry of judgment of second degree murder, the court stated:

> The facts of a savage murder generate a powerful drive, almost a juggernaut for jurors, and indeed for judges, to crush the crime with the utmost condemnation available, to seize whatever words or terms reflect maximum denunciation, to cry out murder "in the first degree." But it is the task and conscience of a judge to transcend emotional momentum with reflective analysis. The judge is aware that many murders most brutish and bestial are committed in a consuming frenzy or heat of passion, and that these are in law only murder in the second degree. The Government's evidence sufficed to establish an intentional and horrible murder -- the kind that could be committed in a frenzy or heat of passion. However, the core responsibility of the court requires it to reflect on the sufficiency of the Government's case.

382 F.2d **129, 138-39** (D.C. Cir. **1967).**

The planned presence of a weapon has been held adequate evidence to allow the issue of premeditation to go to the jury. Bingham, **719** P.2d at **113** (citation omitted); see also State v. Gitting, **45** Wash. App. **369, 725** P.2d **445 (1986).** In the instant case, no weapon was used. Although Peterson may have been hit over the head with a wine bottle, it is equally likely that the bottle was broken during a struggle.

Czubak's actions after the homicide do not evidence premeditation. Schultz's testimony of the many phone calls and prolonged period of time before Czubak arrived at her house

suggests that he was confused and upset and did not know what to do or where to go. He did not attempt to hide the body.

The evidence in this case suggests a "heat of passion" killing rather than a premeditated murder. See Forehand v. State, **126** Fla. **464, 171** So. **241** (Fla. **1936)** ("heat of passion" killing is second degree murder). Czubak made no prior threats and was unarmed. In fact, the evidence showed that he and Peterson generally got along quite well. The most reasonable explanation, therefore, is the one suggested by the prosecutor -- that Peterson's death resulted from a heated dispute.

The prosecutor suggested that Czubak and Peterson argued, causing Czubak to strangle her:

> There was something that occurred in that house that afternoon, an argument, something, because Thelma Peterson says Danny doesn't live here anymore. Something happened in that house. And after that phone call, Danny Czubak went back to that house. Why? To talk Thelma into taking him back.

(R. 847) He also argued that the evidence showed sexual activity:

> The first thing that person did was to rip her nightgown off of her, to take her glasses off of her face and lay them on the table. Look at the position of her body with her legs spread laying back on the couch.
>
> . . .
>
> And I submit to you, ladies and gentlemen, based upon that evidence, whoever killed that woman was trying to have intercourse with that woman either before or after she died."

(R. 847) Thus, the prosecutor himself presented a reasonable hypothesis that the strangulation was not premeditated, but was perpetrated in the heat of passion.

In general, where there is substantial, competent evidence to support a jury verdict of guilt as to the offense charged, the question of whether the evidence was inconsistent with any reasonable hypothesis of guilt becomes a jury question. Heiney, 447 So.2d 210; Rose, 425 So.2d 521. Nevertheless, when a criminal conviction is based solely on circumstantial evidence, it is the appellate court's duty to reverse the conviction if the evidence, even though strongly suggesting guilt, fails to eliminate any reasonable hypothesis of innocence. Jackson v. State, 511 So.2d 1047, 1048 (Fla. 2d DCA 1987); see also Horstman v. State, 530 So.2d 368 (Fla. 1988) (state failed to present substantial, competent evidence sufficient to enable jury to exclude every reasonable hypothesis of innocence).

The facts presented by the state in this case failed to show premeditation. In fact, the version espoused by the prosecutor during his closing argument supported the theory that the murder was committed during a sexual battery or in the heat of passion. Thus, the circumstantial evidence was consistent with innocence as to first-degree murder. A judgment of acquittal of premeditated first-degree murder must be granted.

ISSUE VI

THE TRIAL COURT ERRED BY REFUSING TO GIVE THE LONG FORM INSTRUCTION ON EXCUSABLE HOMICIDE BECAUSE THE DEFENSE WAS SUPPORTED BY THE EVIDENCE.

In Rojas v. State, 14 F.L.W. 577 (Fla. Nov. 22, 1989), this Court found that the trial court erred by failing to instruct the jury on justifiable and excusable homicide in conjunction with the manslaughter instruction, but did not decide whether the evidence warranted the longer instruction on justifiable or excusable homicide. 14 F.L.W. at 579 n.3. The issue in this case is whether the trial court erred by refusing to give the long form excusable homicide instruction requested by defense counsel when the evidence supported the defense of excusable homicide.

The trial judge instructed the jury that a killing that is excusable or justifiable is lawful. (R. 858) He then defined excusable homicide, using the short form definition as follows:

> The killing of a human being is excusable and therefore lawful when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution and without any unlawful intent or by accident or misfortune in the heat of passion, upon any sudden and sufficient provocation or upon a sudden combat without any dangerous weapon being used and not done in a cruel or unusual manner.

(R. 858-59) At the end of the manslaughter instruction, the judge instructed that "the defendant cannot be guilty of manslaughter if the killing was either justifiable or excusable homicide as I have previously explained those terms to you." (R. 862)

Defense counsel clearly and repeatedly requested the long

form excusable homicide instruction:

MR. SESTAK (defense cousel): If we could go back one moment, Judge. The Court is going to give excusable homicide?

THE COURT: I will give the --

MR. VAN ALLEN (prosecutor): Justifiable and excusable.

THE COURT: The first part, justifiable and excusable, the first part, that explanatory page.

MR. SESTAK: Yes, sir.

THE COURT: Not anything else.

MR. SESTAK: Would you not give the other definition of excusable homicide or the more --

THE COURT: I don't know why. Are you requesting it?

MR. SESTAK: Yes, sir.

THE COURT: Pardon me?

MR. SESTAK: Yes, sir.

THE COURT: On what basis?

MR. SESTAK: Well, I think that the State, through the introduction of some photographs, certainly the introduction of the bottle, the pictures of the head with the bottle under it, all indicate that there was a struggle or something, glasses on the table with blood on them, stains that are on the couch, I don't know how they -- what caused those. The table pushed out. It all could go to an argument of heat of passion. These people were living together. There has been testimony that they lived together as lovers.

THE COURT: Excusable is doing any lawful act by lawful means using ordinary caution without any unlawful intent, whether accident or misfortune, in the heat of passion.

MR. SESTAK: I am looking at the one in heat

> of passion brought upon by provocation sufficient to decrease the mind of an ordinary person.
>
> THE COURT: What evidence is there that there was --
>
> MR. SESTAK: I am not suggesting there was direct evidence of it. I think there has been circumstantial evidence of it.
>
> THE COURT: Are you going to argue that?
>
> MR. SESTAK: Judge, I don't know if I am going to argue it or not, but obviously what I am going to argue is not guilty.[29]
>
> THE COURT: Yes. Well, I don't see any reason for any expanded explanation of excusable homicide.

(R. 785) Defense counsel twice renewed his request for the expanded definition of excusable homicide. (R. 798, 871)

There are two contexts in which the jury is instructed on excusable homicide: (1) when the defense of excusable homicide is presented by evidence in support thereof; and (2) as a part of the trial court's instruction on the lesser included offense of manslaughter. Smith v. State, 539 So.2d 514, 516 (Fla. 2d DCA 1989). In the instant case, the second context is not applicable because the jury convicted Czubak of an offense two steps above manslaughter which, this Court held, renders the error harmless. See Rojas, 14 F.L.W. at 579 n.1; Banda v. State, 13 F.L.W. 451 (original opinion July 19, 1988), on rehearing, 536 So.2d 221 (Fla. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1548, 103 L.Ed.2d 852

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[29] At the hearing on his motion for new trial, defense counsel told the judge that he could have argued excusable homicide if the judge had given the instruction. (R. 783-85)

(1989); Abreau v. State, **363** So.2d **1063** (Fla. 1978).[30] As to the first context, however, the trial court committed reversible error by refusing to give the long form instruction, as requested by counsel,[31] in place of the short form definition given in the introduction to homicide.

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[30] In his motion for new trial, defense counsel also alleged that the court erred by refusing to give the complete instruction on excusable homicide in conjunction with the manslaughter instruction. (R. **783-85)** The court denied the motion, holding that (1) counsel did not preserve the objection as to the manslaughter instruction; and (2) the jury could easily look back to the earlier definition of excusable homicide. (R. **1071)** Although we do not agree that counsel did not preserve the objection, this Court found adequate the standard jury instruction on manslaughter that was given in this case. Rojas, 14 F.L.W. at **579** n.2.

[31] The long form instruction reads as follows:

> An issue in this case is whether the killing of (victim) was excusable.
>
> The killing of a human being is excusable if committed by accident and misfortune.
>
> In order to find the killing was committed by accident and misfortune, you must find the defendant was:
>
> 1. a. doing a lawful act by lawful means and with usual care and
>
> **b.** acting without any unlawful intent.
>
> 2. in the heat of passion brought on by a sudden provocation sufficient to produce in the mind of any ordinary person the highest degree of anger, rage or resentment that is *so* intense as to overcome the use of ordinary judgment, thereby rendering a normal person incapable of ref1ection.
>
> **3.** engaged in sudden combat. However, if a dangerous weapon was used in the combat or the killing was done in a cruel or unusual manner, the killing is not excusable.

Fla. Std. Jury Instr. (Crim.) Excusable Homicide, p. **76.**

It is well established that a defendant has the right to a jury instruction on the law applicable to his theory of defense, if requested, when any evidence introduced at trial supports the defense. Gardner v. State, 480 So.2d 91, 92 (Fla. 1985) (voluntary intoxication); Bryant v. State, 412 So.2d 347, 350 (Fla. 1982) (independent act); Wenzel v. State, 459 So.2d 1086, 1087 (Fla. 2d DCA 1984) (excusable homicide). Plenty of evidence supported the defense of excusable homicide in the instant case. As noted by defense counsel, the evidence was circumstantial rather than direct. (R. 785)

No one witnessed the homicide and Czubak did not testify. The evidence supporting excusable homicide, however, need not be introduced through defense witnesses. Evidence elicited during cross-examination of a prosecution witness is sufficient for a jury instruction on the defense. Gardner, 480 So.2d at 92-93. Furthermore, the fact that counsel could have argued the defense to the jury did not render the error harmless because the jury must apply the law given in the court's instructions -- not the law argued by counsel.[32] Gardner, 480 So.2d at 93.

The prosecutor introduced evidence of excusable homicide when Dorothy Schultz testified that Thelma Peterson told her on the apparent day of the homicide that "Danny" did not live there anymore (R. 538-39), and when she described his arrival at her house that night, sweaty and with scratches on his neck. (R. 543) The

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[32] See note 29, supra.

state introduced evidence supporting the theory when Laura Rousseau, of FDLE, identified portions of a bottle found by the victim's head. (R. **415-17)** The prosecution introduced testimony supporting the defense when Janet Grinstead indicated that Thelma Peterson and Czubak were living together as lovers and testified that Peterson picked up younger men in bars and brought them home for sexual purposes. (R. **525-33)**

Defense counsel elicited some of this same evidence on cross-examination. (R. **405, 442-44,** for example) Additionally, he elicited testimony from the medical examiner on cross-examination that the pattern of the neck fractures was not consistent with a rope or other object having been placed around the victim's neck, and that the larynx could be fractured by a blow to the throat. (R. **444-45)** Defense counsel repeatedly introduced evidence that, prior to the day of the homicide, Czubak and Peterson got along well. (R. **498, 514, 528, 532)**

All of this testimony supported the theory that Czubak killed Peterson in the heat of passion brought on by a sudden provocation sufficient to produce in the mind of an ordinary person the highest degree of anger, rage or resentment that is so intense as to overcome the use of ordinary judgment, thereby rendering a normal person incapable of reflection, or in sudden combat without the use of a weapon. The evidence suggested that Peterson and Czubak may have had a sudden and violent struggle because Peterson brought home another lover and/or asked Czubak to move out. Testimony that they were getting along well earlier and that no weapon

was used supported the theory that the discord and struggle were sudden and in the heat of passion.

Peterson's death by strangulation may have happened very quickly because of her advanced age. Her bones were probably weak and brittle. The medical examiner testified that her death was caused by fractures to the hyoid bone and other bones in the neck. (R. **444)** See Hounshell v. State, **61** Md.App. 364, **486** A.2d **789, 793 (1985)** (fracture or sudden blow to the throat may produce death more quickly than pressure to throat).

In Spaziano v. State, 522 So.2d 525 (Fla. 2d DCA **1988),** as modified by Tobey v. State, 533 So.2d **1198** (Fla. 2d DCA **1988),** the Second District held that "Spaziano's trial counsel was ineffective for failing to object to an erroneous instruction on the defense of justifiable and excusable homicide where evidence was presented to support that defense." Tobey, 533 So.2d at **1199.** In Spaziano, the trial court gave only the short form definition of excusable homicide. Spaziano, 522 So.2d at 526. The appellate court found that the failure to give the complete (long form) excusable homicide instruction was error, in addition to the trial court's error in failing to give a complete manslaughter instruction. Id. Clearly then, had counsel objected to the trial court's failure to give the long form instruction on excusable homicide when evidence was presented to support the defense, the court's failure to give the requested instruction would have required a new trial. This is exactly the situation in the case at hand. In this case, however, counsel requested the long form instruction and

objected repeatedly when the court refused to give it.

In the Rojas case, this Court noted that, "[i]n those cases in which there is evidence to support the defenses of justifiable or excusable homicide, the standard jury instructions provide for longer and more explicit instructions to be given on these defenses." 14 F.L.W. at 579 n.3. The authorities cited above require that the instruction be given when requested. Accordingly, a new trial is required in this case.

ISSUE VII

THE COURT ERRED BY DENYING DEFENSE COUNSEL'S MOTION TO APPOINT SEPARATE COUNSEL TO REPRESENT THE APPELLANT DURING THE PENALTY PHASE.

Defense counsel filed a pretrial motion requesting that the trial judge appoint separate counsel to represent Czubak for the penalty phase. (R. **1194)** He alleged that, because of his defense that Czubak did not commit the murder, his credibility with the jury would be lost if Czubak were found guilty. In support of his motion, defense counsel argued at the March **18, 1988,** hearing that he knew from prior experience that an attorney who argues for an acquittal necessarily loses credibility if the jury convicts the defendant of first degree murder, adversely affecting his representation at the penalty phase when he argues mitigation.[33] (R. **977)**

The court denied his motion. (R. **978).** The judge noted that Czubak was not entitled to a perfect trial but merely to reasonable representation. He stated further that the jurors were intelligent enough to understand the different arguments and they "wouldn't weigh against him at all." (R. **978)**

What defense counsel feared occurred. The jury found Czubak guilty, leaving defense counsel in the position of arguing mitigation at penalty phase. As a result, he presented very little mitigation. Had he not been forced to choose between continuing

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[33] Defense counsel advised that his tardiness in filing the motion resulted from his discovery of new evidence which would enable him to argue for acquittal rather than a lesser offense or an insanity defense. (R. **977-78)**

to profess his client's innocence or admitting guilt and presenting extensive mitigation, Czubak might well have received a life recommendation and sentence.

We know that Czubak was an alcoholic. Art Young testified to that at trial. (R. **510)** Various other witnesses testified that Czubak was in the bars drinking with Thelma Peterson every day. (R. **502-03, 527-28, 535-37)** Lenny Gooselin testified that Czubak and Thelma Peterson had already drunk a few beers by the time they arrived at his bar about **10:00** in the morning. (R. **503)** Evidence **of** impairment through drug or alcohol abuse must be considered in mitigation. Hardwick v. State, **521** So.2d **1071, 1076** (Fla. **1988).** Yet no such mitigation was presented.

No member of Czubak's family testified. Czubak must have had family members somewhere. The jury heard nothing about his childhood, his family, whether he had been married or fathered children, or his military or employment background. Czubak had either a good childhood, to which some family member or friend could testify, or a bad childhood, to which his psychiatrists or other witnesses could testify. Instead, his life was left totally blank prior to his sudden appearance in Zephyrhills after his escape from prison in **1985.**

No psychiatric testimony was presented. We know that two psychiatrists were on the witness list but that defense counsel decided not to call them. (R. **892-93).** Just prior to penalty phase, the prosecutor asked whether Dr. Meadows and Dr. McClain, who were on the defense witness list, would testify. He noted that

they were appointed to assist in the preparation of penalty phase testimony and that their reports were privileged. Defense counsel advised that he did not plan to call them to testify. (R. **892-93)** Although we have no way of knowing for certain, it seems likely that their mitigation testimony would have implicated Czubak in the homicide and further destroyed counsel's credibility. This may well have been the reason counsel decided not to call them.

Defense counsel's concern over his credibility was not imaginary. In Jones v. State, **528** So.2d 1171, **1175** (Fla. 1988), defense counsel had the same concern. The defendant filed a Rule 3.850 motion alleging ineffective assistance because his counsel did not present psychiatric testimony during penalty phase. At the evidentiary hearing on the motion, defense counsel justified not putting the psychiatrist on the stand during penalty phase because to do *so* would have been contrary to his theory of the case. As in the case at hand, he had spent the entire trial saying that the defendant did not commit the murder. To tell the jury during penalty phase that the defendant committed the crime because he was paranoid would have destroyed any credibility he had with the jury. This court found his decision not to call the psychiatrist a reasonable tactical decision. Id.

Although counsel's decision in the instant case may have been a reasonable tactical decision, it denied Czubak a fair penalty phase trial. The judge noted that Czubak was not entitled to a perfect trial. On the other hand, he was entitled to "effective" counsel, Strickland v. Washinaton, **466** U.S. **668, 691, 104** S.Ct.

2052, 80 L.Ed.2d 674 (1984), and to present mitigation evidence. In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the United States Supreme Court determined that the eighth amendment to the United States Constitution requires that the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence. In Riley v. Wainwright, 517 So.2d 656 (Fla. 1988), this Court held that Lockett applies equally to the jury's recommendation of sentence. 517 So.2d at 657-659. The Riley court based its holding in part on Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1921, 95 L.Ed.2d 347 (1987), in which the Court found a Lockett violation even though the judge and jurors heard the mitigating evidence because their consideration was restricted to the statutory mitigating factors.

The instant case is worse. The jurors never heard the statutory or nonstatutory mitigation that might have been presented had defense counsel not been forced to choose between 1) presenting extensive mitigation and losing credibility, or 2) omitting the mitigation and maintaining his credibility to effectively argue for a life sentence in his closing. Had Czubak been represented by the public defender, counsel would not have been forced to make this decision. When the public defender represents a client in a death penalty case, a different lawyer is always available to represent the client during penalty phase if he is convicted. In this respect, Czubak was denied the same representation provided to defendants who are represented by the public defender.

The United States Constitution defines the basic elements

of a fair trial largely through the sixth amendment right to counsel. Strickland v. Washington, 466 U.S. 668, 691-92, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In Strickland, the United States Supreme Court adopted a "reasonably effective assistance" standard for assessing the performance of counsel. The Strickland court held that the same standard applies to a capital sentencing proceeding such as that provided by Florida law. Counsel's role at a penalty phase proceeding is to ensure that the adversarial process works to produce a just result. 466 U.S. at 687.

The case at hand is not like Strickland, in which counsel did not conduct a thorough penalty phase investigation, or like Holsworth v. State, 522 So.2d 348 (Fla. 1988), in which defense counsel failed to prepare for the penalty phase of the trial. We do not know to what extent defense counsel prepared for the penalty phase in the case at hand because he was effectively prevented from presenting much mitigation by the pretrial order denying his motion for separate counsel for penalty phase.[34] Because defense counsel's credibility was tainted by his defense that Czubak was innocent, the jury probably gave little weight to his argument for a life sentence. Thus, Czubak received ineffective assistance of counsel because of state interference with the ability of counsel to render effective assistance. See e.g., United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

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[34] We do know that two psychiatrists were appointed to help prepare for penalty phase. (R. 892) Thus, it appears that counsel was prepared but made a tactical decision not to call the witnesses.

The government violates the right to effective assistance when it interferes with the ability of counsel to make independent decisions about how to conduct the defense. Strickland, **466** U.S. at **686.** State interference with counsel's assistance raises a presumption of prejudice. In such circumstances, prejudice is *so* likely that case by case inquiry into prejudice is not worth the cost. Strickland, **466** U.S. at **692;** Cronic, **466 U.S.** at **658.** The presumption that counsel's assistance is essential requires the conclusion that a trial is unfair if the accused is denied counsel at a critical stage of his trial. The Supreme Court has uniformly found constitutional error when counsel was totally absent or prevented from assisting the accused during a critical stage of the proceeding. Cronic, **466** U.S. at **658** & n.25.

Constitutional error results when counsel entirely fails to subject the state's case to meaningful adversarial testing. Cronic, **466** U.S. at **658.** There may be circumstances of such magnitude that although counsel is available to assist the accused, the likelihood that even a competent lawyer could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct. See e.g., Davis v. Alaska, **415** U.S. **308, 94** S.Ct. **1105, 39** L.Ed.2d **347 (1974)** (defendant denied right of effective cross-examination); Powell v. Alabama, **287** U.S. **45, 53** *S.Ct.* **55, 77** *L.* Ed. **158 (1932)** (court appointed unprepared Tennessee lawyer in highly publicized capital offense "with whatever help the local bar could provide").

The case at hand presents a similar situation. Although

counsel was there to assist Czubak throughout the penalty phase, the action of the trial court in failing to appoint new counsel rendered his assistance totally ineffective. He was effectively precluded from presenting meaningful mitigation. Moreover, if the jury no longer believed in defense counsel's integrity or credibility, nothing that he said subjected the State's case for death to a meaningful adversarial testing. The prejudice created by his guilt phase argument that Czubak was innocent was such that no lawyer in defense counsel's position, no matter how competent, could provide effective assistance. Defense counsel's loss of credibility rendered him ineffective and tainted the jury's sentencing advisory opinion, violating the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

Showing actual prejudice in a case such as this is unnecessary because the conduct of counsel does not cause the prejudice. The prejudice arose from the circumstances that put counsel in the position of representing a convicted defendant at penalty phase the day after he proclaimed his innocence during guilt phase. Had the trial court granted defense counsel's motion to appoint new counsel for penalty phase, the prejudice could have been avoided.

There is no assurance that counsel's assistance produced a just penalty phase result. See Strickland, 466 U.S. at 686 (criteria for judging ineffective assistance claim is whether counsel's conduct so undermined proper functioning of adversarial process that trial could not be relied on as having produced just

result). The jury recommended death by a 9 to 3 vote even with the small amount of mitigation presented. Had separate counsel been appointed, and had that counsel presented psychiatric testimony, evidence of alcoholism, and evidence of Czubak's childhood and background, the jury recommendation might well have been life. A life recommendation would have materially changed the sentencing decision. See Walsh v. State, 418 So.2d 1000 (Fla. 1982); Tedder v. State, 322 So.2d 908 (Fla. 1975).

A key aspect of the penalty phase proceeding is that the sentence be individualized. Lockett, 438 U.S. 586. It cannot be individualized if the jurors are reacting to their distrust of defense counsel rather than making a rational decision based on the evidence and the law. Thus, the jury's advisory opinion was tainted and should not have been relied upon by the trial court in sentencing. Because the advisory opinion can be a "critical factor" in whether a death sentence is imposed, LaMadline v. State, 303 So.2d 17, 20 (Fla. 1974), a new penalty phase with a new jury is required.

ISSUE VIII

THE TRIAL COURT ERRED BY INSTRUCTING THE JURORS ON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING FACTOR.

Section 921.141(5) of the Florida Statutes enumerates certain statutory aggravating factors which the judge and jury may consider in determining whether to impose the death penalty. Only those circumstances may be considered by the sentencer. § 921.141 (5), Fla. Stat. (1987); Miller v. State, 373 So.2d 882 (Fla. 1979); Purdy v. State, 343 So.2d 4 (Fla. 1977). Misapplication of the sentencing statute produces the arbitrariness and capriciousness condemned in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), which Florida's death penalty statute was designed to remedy. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Thus, an incorrectly imposed death sentence violates the eighth and fourteenth amendments to the United States Constitution.

Over defense objection, the court instructed the jury on the heinous, atrocious or cruel ("HAC") aggravating factor set forth in section 921.141(5)(h), Florida Statutes.[35] (R. 929-30, 961) In his written findings supporting the death sentence, however, the trial court did not find that the crime was heinous,

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[35] The trial court instructed the jury on three statutory aggravating factors: 1) that the defendant was under sentence of imprisonment; 2) that he was previously convicted of a violent felony (armed robbery with a firearm); and (3) that the crime was heinous, atrocious or cruel. Defense counsel objected only to the third factor. (R. 929).

atrocious or cruel. (R. 1252-57) Because the factor was clearly not supported by the evidence, the jury should not have been instructed to consider it.

The heinous, atrocious or cruel aggravating factor is intended to apply "where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). Thelma Peterson died from manual strangulation caused by fractures of the bones in her neck. (R. 444) Because she was elderly, the strangulation probably occurred very quickly. She may have first been hit over the head with a wine bottle. If so, she may have been unconscious when she was strangled, and may not have known what happened to her. Once a victim loses consciousness, he or she cannot suffer the pain contemplated by the "heinous, atrocious or cruel" aggravating factor. Jackson, 451 So.2d 463 (Fla. 1984). There were no additional acts that set the crime apart from other capital felonies, and no evidence that the crime was unnecessarily torturous to the victim. The trial judge apparently agreed because he did not mention this factor in his written findings.

In Jackson, the defendant shot the victim in the back, then drove to a remote area, wrapped him in plastic bags and shot him again before putting him in the trunk while still alive. Nevertheless, the court found the HAC aggravating factor inapplicable because "the record contains no evidence that [the victim]

remained conscious more than a few moments after he was shot in the back the first time. Therefore, he was incapable of suffering to the extent contemplated by this aggravating circumstance." **451** So.2d at **463.** In this case, there was no evidence to suggest that Peterson was conscious more than a few moments, if that long.

Aggravating factors must be proven beyond a reasonable doubt before they can be considered by the judge or jury. Atkins v. State, **452** So.2d **529, 532** (Fla. **1984).** Yet, the prosecutor encouraged the jurors to base their sentence on speculation. He argued that Peterson must have struggled while being strangled. (R. **951)** He also argued that the evidence suggested a sexual battery:

> Look at this evidence, these pictures. . . . The first thing that person did was to rip her nightgown off of her, to take her glasses off of her face and lay them on the table. Look at the position of her body with her legs spread laying back on the couch. . . .
>
> Mr. Sestak says it wasn't sexual battery.[36] Sexual battery is rape. And I submit to you, ladies and gentlemen, based upon that evidence, whoever killed that woman was trying to have intercourse with that woman either before or after she died.

(R. 847) If the jurors found the HAC aggravating factor applicable based on such speculation, their advisory recommendation was clearly unreliable.

The prosecutor compounded the error by arguing in support of the HAC aggravating factor that Czubak was much bigger and stronger than the "old woman." (R. **951)** Based on the prosecutor's

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[36] We could find no such argument by defense counsel in his closing argument.

reasoning, the homicide would have been mitigated if the Appellant had killed a large man.

In Maynard v. Cartwright, **486** U.S. ____, **108** S.Ct. **1853, 100** L.Ed.2d **372 (1988),** the United States Supreme Court found the Oklahoma aggravating circumstance, "especially heinous, atrocious or cruel," unconstitutionally vague and overbroad under the eighth amendment because the language gave the sentencing jury no guidance as to which first degree murders met the criteria. The Court noted that the Oklahoma Court of Criminal Appeals had not adopted a limiting construction which could cure its overbreadth. Consequently, the sentencer's discretion was not channeled to avoid the risk of the arbitrary imposition of the death penalty. The ordinary person could honestly believe that every intentional taking of human life is "especially heinous." Cartwrisht, **108** S.Ct. at **859.**

Florida's statute gives no more guidance than does Oklahoma's. A reasonable juror might well conclude that this aggravating circumstance applied to all murders unless there was a question of self-defense or accident. Application of the factor has become the rule rather than the exception in Florida. See Mello, Florida's "Heinous, Atrocious, or Cruel" Aggravating Circumstance: Narrowins the Class of Death-Eligible Cases Without Making it Smaller, **13** Stetson L. Rev. **523 (1984).**

Although this Court adopted a limiting construction of the "heinous, atrocious or cruel" aggravating factor, see Proffitt v. Florida, **428** U.S. 242, **96** S.Ct. **2960, 49** L.Ed.2d **913 (1976),** the

standard jury instructions do not include the definitions which supposedly narrow the applicability of the HAC factor. In the instant case, the jurors were given the vague standard instruction that they could find "the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.[37] (R. 961) They were not informed of the limiting construction given by this Court in cases such as State v. Dixon, 283 So.2d 1 (Fla. 1973), in which the court stated:

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

Dixon, 283 So.2d at 9.

In Oklahoma, the jury is the sentencer and must make written findings of which aggravating factors were found. Maynard v. Cartwright. In Florida, the jury's recommendation is advisory and no such findings are made by the jury. Thus, we do not know whether some or all of the jurors found Czubak's crime heinous, atrocious or cruel. There is a reasonable possibility, however,

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[37] In Smalley v. State, 14 F.L.W. 342 (Fla. July 6, 1989), this Court found that the defendant failed to object to the jury instruction on the HAC aggravating factor, thus waiving the point. In the instant case, although defense counsel did not object to the wording of the instruction, he objected to the jury being instructed on the factor at all.

that at least some of the jurors found this aggravating circumstance applicable and that at least one of those jurors joined in the death recommendation. If the jurors had not been instructed on the factor, or even if they had been given the limiting definition, their recommendation might have been life.

In the Florida scheme of attaching great importance to the jury recommendation, it is critical that the jury be given adequate guidance *so* that its recommendation is rational and appropriately given the great weight to which it is entitled. When, as here, the jury is not given correct or adequate instruction, its penalty verdict may be based on caprice or emotion, or an incomplete understanding of the law.[38] Although a Florida jury recommendation is advisory rather than mandatory, it can be a "critical factor" in determinining whether a death sentence is imposed. LaMadline v. State, **303** So.2d 17, 20 (Fla. **1974).** Because the jury was instructed on the HAC aggravating factor, Czubak's death sentence was unreliable, thus violating his constitutional rights under the eighth and fourteenth amendments to the United States Constitution.

We are aware that this Court rejected similar arguments in Smalley v. State, 14 F.L.W. **342** (Fla. July **6, 1989),** but request that the court reconsider this important constitutional question.

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[38] For example, the gruesome photographs of the victim's decomposed and dog-eaten body might easily suggest to a jury that the factor applied. Although the decomposed body was atrocious and vile, the condition of the body when it was discovered should not have been considered in determining whether the murder itself was heinous, atrocious or cruel. See Dixon, **283** So.2d at **9.**

ISSUE IX

THE TRIAL COURT ERRED BY FAILING TO CONSIDER THE MITIGATION EVIDENCE.

In Roaers v. State, 511 So.2d 526 (Fla. 1987), this Court pointed out that a "finding" that no mitigating factors exist has been construed in several different ways: "(1) that the evidence argued in mitigation was not factually supported by the record; (2) that the facts, even if established in the record, had no mitigating value; or (3) that the facts, although supported by the record and also having mitigating value, were deemed insufficient to outweigh the aggravating factors involved." Id. at 534. Quoting from Lockett v. Ohio, 438 U.S. 586, 804-05, 98 S.Ct. 2958, 2964-65, 57 L.Ed.2d 973 (1978), the Roaers court reiterated that the trial court may not be precluded from considering any mitigation the defendant proffers as a basis for a sentence less than death. 511 So.2d at 534. "[N]either may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. . . . The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." Roaers, 511 So.2d at 534 (quoting from Eddinas v. Oklahoma, 455 U.S. 104, 114-15, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982) (emphasis in original)).

Applying these principles, the trial court must first determine whether the facts alleged in mitigation are supported by the evidence. The court must then determine whether the facts

established are "of a kind capable of mitigating the defendant's punishment, i.e, . . . extenuating or reducing the degree of moral culpability for the crime committed." Finally, the sentencer must determine whether the factors are of sufficient weight to counterbalance the aggravating factors. Roaers, 511 So.2d at 534. Citing Roaers, this Court remanded for resentencing in Lamb v. State, 532 So.2d 1051, 1054 (Fla. 1988) because the 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.

In the case at hand, Margaret Angell testified in mitigation that, while she was investigating Czubak's case, he gave her various pictures and drawings. (R. 910-12) They were offered into evidence to show Czubak's artistic ability. (R. 912-13) Angell also identified wood carvings that Czubak made for Linda Young. (R. 914) Patricia Eble identified drawings that Czubak made for her husband who intended to have the drawings framed for his office at the public defender's office. (R. 918-19) "Evidence of contributions to family, community, or society reflects on character and provides evidence of positive character traits to be weighed in mitigation." Rosers, 511 So.2d at 535.

Jim Grantham, warden of the East Pasco Detention Center, testified that Czubak had not been a disciplinary problem while incarcerated at the center. (R. 923-24) He said that Czubak was "cell representative" for his cell. (R. 923-24)

The evidence during guilt phase, showed clearly that Czubak was an alcoholic. He and Thelma Peterson, who apparently also drank a lot, frequented the local bars on a daily basis, starting early in the morning. (R. **496-503, 527-28)** Art Young testified that Czubak took a decanter from his home because Czubak was an alcoholic. (R. **510)** Pieces of a broken wine bottle were found by Peterson's body and the couch was stained, suggesting that Peterson and Czubak were drinking on the night of the homicide. (R. **415-17)** Evidence of impairment through drug or alcohol abuse must be considered in mitigation. Hardwick v. State, **521** So.2d **1071, 1076** (Fla. **1988);** see also Gardner v. Florida, **430** U.S. **349, 352, 97** S.Ct. **1197, 51** L.Ed.2d **393, 398 (1977);** Amazon v. State, **487** So.2d **8** (Fla.), cert. denied, **479** U.S. **914, 107** S.Ct. **314, 93** L.Ed.2d **288 (1986).**

The judge disregarded all of the mitigation evidence. He found that "no mitigating circumstances apply in this case." (R. **1253)** Although he vaguely referred to Czubak's artistic and leadership abilities, he concluded that "these attributes are not such as will constitute **a** circumstance that will mitigate his responsibility for the premeditated murder of Mrs. Peterson." (R. **1253)** The judge's comments clearly show that he did not consider the mitigation. He gave it no weight. His final conclusion that "no mitigating circumstances exist" **was** not a decision that the mitigation did not outweigh the aggravating factors but, instead, was a decision that the factors were not worth his consideration.

As in Lamb, the trial judge in the instant case found

that none of the mitigation presented "rose to the level of a mitigating circumstance to be weighed in the penalty decision." See Lamb, 532 So.2d at 1054. He should have instead weighed the mitigation discussed above against the two aggravating factors. Thus, Czubak's sentence of death was unconstitutionally imposed in violation of the eighth and fourteenth amendments to the United States Constitution. See Hitchcock v. Dugger, 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); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Rouers, 511 So.2d at 534. A new sentencing is required.

ISSUE X

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

In State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), this Court noted that the death penalty was reserved by the legislature for "only the most aggravated and unmitigated" of first-degree murder cases. 283 So.2d at 7. Part of this Court's function in capital appeals is to review the case in light of other decisions and determine whether the punishment is too great. 283 So.2d at 10. In this case, the trial court found no aggravating factors related to the murder itself. Thus, the strangulation of Thelma Peterson was clearly not one of the most aggravated of first-degree murder cases.

The sentencing judge found only two aggravating circumstances -- that Czubak was under sentence of imprisonment; and that he was previously convicted of a violent felony (armed robbery with a firearm). These circumstances were not related to the murder. They interrelated because Czubak was under sentence of imprisonment for the violent felony.[39]

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[39] A correctional officer at Daytona Beach Community Correctional Center testified that Czubak was incarcerated there for a 1981 conviction for robbery with a firearm. (R. 897-99) He had been transferred from Polk Correctional Institution to complete his thirteen year sentence. On July 24, 1985, while on work release, Czubak escaped by walking away from his assignment as custodian and driver for the center. (R. 899-903)

The trial judge stated in his written findings that "these attributes [Czubak's artistic and leadership qualities] are not such as will constitute a circumstance that will mitigate his responsibility for the premeditated murder of Mrs. Peterson." (R. 1253) Thus, he did not even consider the mitigation. Besides the evidence of Czubak's artistic and leadership (cell representative) qualities, there was substantial evidence that he was an alcoholic. See Issue IX, supra. Had the trial judge considered all of the mitigation evidence, he should have concluded that it overcame the two interrelated aggravating factors.

There have been numerous much more aggravated murders in which the defendant was sentenced to life. In Holsworth v. State, 522 So.2d 348 (Fla. 1988), for example, the defendant burglarized the mobile home of a mother and her daughter. Holsworth stabbed both, killing the daughter. Three years earlier he had attacked another woman in her mobile home during the early morning hours. Although the trial court found three aggravating factors (including HAC) and no mitigation, this Court found that Holsworth's conduct was affected by drugs and alcohol and that the jury might have believed other mitigation presented. Despite the depravity of the crime itself, this Court reduced Holsworth's sentence of death to life imprisonment in accordance with the jury's recommendation.

The death penalty is *not* generally cunsidered appropriate in the case of a homicide resulting from a heated domestic dispute. Garron v. State, 528 So.2d 353 (Fla. 1988); Wilson v. State, 493 So.2d 1019 (Fla. 1986). The evidence here supported the theory

that Czubak killed Peterson in the heat of passion during a domestic disturbance. Janet Grinstead indicated that Thelma Peterson picked up younger men in bars and brought them home for sexual purposes and that she and Czubak were living together as lovers. (R. 525-33) Czubak and Peterson may have had a sudden and violent struggle because Peterson brought home another lover and/or asked Czubak to move out. The evidence that they were getting along well and that no weapon was used supports the theory that the discord and murder were sudden and in the heat of passion.

The advisory jury recommendation in Wilson, 493 So.2d 1019, was death. The defendant killed his father and five-year-old cousin while attempting to murder his stepmother. The court found two aggravating circumstances -- a prior conviction of a violent felony and that the homicide was heinous, atrocious or cruel. They were not balanced by any mitigating factors. Nevertheless, this Court ordered the sentence reduced to life, concluding that murders caused by heated domestic confrontations do not warrant the death penalty.

In Garron, 528 So.2d 353, the defendant shot his wife and step-daughter. Citing Wilson, this Court found that the imposition of death for the killing of the step-daughter was not proportionally warranted. As in this case, the record showed "clearly a case of aroused emotions occurring during a domestic dispute. While this does not excuse the Appellant's actions, it significantly mitigates them." 528 So.2d at 361.

In Irizarry v. State, 496 So.2d 822 (Fla. 1986), the

defendant murdered his ex-wife with a machete and attempted to murder her lover. The trial court found four aggravating factors and only two mitigating factors. On appeal, this Court found that the jury could have reasonably believed that the appellant's crimes resulted from a passionate obsession, adding that "the jury recommendation of life imprisonment is consistent with cases involving similar circumstances." **496** So.2d at 825. The court ordered a reduction of the death penalty to life. Id.

In this case too, a life sentence would be consistent with other cases involving similar circumstances. Although most cases in which the sentence is reduced to life have been cases in which the jury recommended life, in Wilson, the jury recommendation was death. Like this case, Wilson involved a domestic dispute. Despite the jury recommendation, this Court reduced Wilson's sentence to life because of the nature of the crime.

Although the jurors recommended death in the case at hand, the recommendation likely resulted from their shock and abhorrence when they saw the badly decomposed body of Thelma Peterson. Czubak's moral culpability is simply not great enough to deserve a sentence of death. The crime was not a murder of strangers as in Holsworth, but a murder of passion, as in Irizarry and Wilson. Czubak and Peterson had lived together for two months as lovers. This was not one of the "unmitigated" first degree murder cases for which death is the proper penalty. Cf. Dixon, 283 So.2d at 7. Czubak's sentence should be reduced to life in prison.

CONCLUSION

For the above reasons, the Appellant, WALTER DANIEL CZUBAK, respectfully requests this Court to grant a judgment of acquittal or to reverse his conviction and remand for a new trial for second-degree murder because the state failed to prove that the murder was premeditated. If the Court does not grant this relief, Appellant requests that this Court reverse and remand for a new trial based on other errors discussed in this brief. As a lesser alternative, Appellant asks this Court to vacate his sentence of death and remand for the imposition of a life sentence or, if none of the above is granted, to award him a new penalty trial before a jury impaneled for that purpose, and a new sentencing.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to the Office of the Attorney General, Park Trammell Building, Room 804, 1313 Tampa St., Tampa, Florida, 33602, this 15th day of December, 1989.

Respectfully submitted,

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