IN THE SUPREME COURT OF FLORIDA

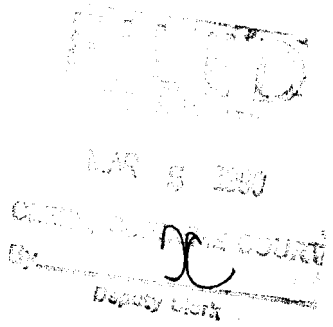
ROBERT LEWIS BUFORD,

Appellant,

vs. Case No. 72,592

STATE OF FLORIDA,

Appellee.



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

INITIAL BRIEF OF APPELLANT

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

STEVEN L. BOLOTIN
ASSISTANT PUBLIC DEFENDER

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

ATTORNEYS FOR APPELLANT

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PRELIMINARY STATE

Appellant, ROBERT LEWIS BUFORD, was the defendant in the trial court, and will be referred to in this brief as appellant or by name. Appellee, the State of Florida was the prosecution, and will be referred to as the state. The original record on appeal (case no. 54,010), which includes the trial transcript, will be referred to by use of the symbol "TR." The present record on appeal on resentencing (case no. 72,592) will be referred to by use of the symbol "SR." All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Robert Buford was charged by indictment returned December 13, 1977 with first degree murder of Toni Wright, capital sexual battery, and burglary. (TR13-14) The case went to trial on March 27-31, 1978 before Circuit Judge William A. Norris, Jr. and a jury. Appellant was found guilty as charged on all three counts. (TR919-20, 1105-07) The case proceeded immediately into the penalty phase, after which the jury recommended life imprisonment on both the murder and sexual battery convictions. (TR982-83, 1108-09) The next morning, the trial judge overrode the jury's life recommendations and sentenced appellant to death on both counts. (TR1139, 1143-50)[1]

On July 23, 1981, this Court affirmed appellant's convictions and the death sentence for murder, but vacated the death sentence for sexual battery based on Coker v. Georgia, 433 U.S. 584 (1977). Buford v. State, 403 So.2d 943 (Fla. 1981). Petitions for certiorari by appellant and by the state were denied by the U.S. Supreme Court. Florida v. Buford, 454 U.S. 1163 (1982); Buford v. Florida, 454 U.S. 1164 (1982).

On May 17, 1983, appellant's petition for habeas corpus was denied by this Court. Buford v. Wainwriaht, 428 So.2d 1389 (Fla. 1983). Certiorari was again denied. Buford v. Wainwriaht, 464 U.S. 956 (1983). Appellant's motion for post-conviction relief

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[1] A concurrent fifteen year sentence was imposed for the burglary conviction. (TR1140, 1151)

pursuant to Fla.R.Cr.P. 3.850 was denied in the trial court, and the denial was affirmed. Buford v. State, 492 So.2d 355 (Fla. 1986).

Appellant then filed a petition for habeas corpus in the U.S. District Court for the Middle District of Florida. On May 15, 1987, District Judge Elizabeth A. Kovacevich denied the writ as to the convictions, but granted it as to sentencing, finding that the trial judge had failed to consider non-statutory mitigating circumstances, in violation of Lockett v. Ohio, 438 U.S. 586 (1978) and Hitchcock v. Duaaer, 481 U.S. 393 (1987). (SR257-58) After the Eleventh Circuit's affirmance, Buford V. Dugger, 841 F.2d 1057 (11th Cir. 1988), the case was remanded for a penalty phase evidentiary hearing and resentencing before the trial court. (SR258)

Following the recusal of Judge Norris (see SR219), the penalty phase evidentiary hearing was held before Circuit Judge Joe R. Young on April 11-12, 1988. At sentencing on June 1, 1988, Judge Young reimposed the death penalty. (SR212-14, 218-121) This appeal follows.

STATEMENT OF THE FACTS

The evidence presented at appellant's 1978 trial is summarized in this Court's opinion in Buford v. State, 403 So.2d 943, 944-46 (1981).[2] To briefly recapitulate, the evidence showed that at approximately 3:00 a.m. on Sunday, November 6, 1977, appellant returned to his father's home (where he was staying) and was greeted by his sister Annette. Appellant was breathing hard, had white oxydized paint on his bare back, and appeared to be drunk. He told his sister that if anybody came looking for him to say he had been home since 11:00 p.m. In a few moments, he broke down and said he might have killed a lady with a brick. He started to implicate a person known as "Fat Boy", but stopped, saying he was not going to involve anyone else.

At 7:00 o'clock that morning, Lewis Wright noticed that his seven year old daughter, Toni, was missing, and called the police. Soon afterward, Toni's body was found next to a nearby church. She was lying on her back with her dress pulled up around her chest. Her underpants had been removed, and were later found nearby. There were injuries to her head and dried blood on her head and face. Near the body were pieces of a shattered and bloodstained concrete block.

During that day, at his father's house, appellant alternated between talk of leaving town and talk of turning himself in to the

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[2] Record references to the original trial transcript will be used only with respect to those facts not specifically set forth in the opinion.

authorities. After learning that his sister had spoken to the police and that they wanted to talk to him, appellant voluntarily went to the police station. After he was arrested and advised of his rights, appellant signed a waiver and said "I did it." The police took a tape recorded statement, in which appellant said that he had been drinking with his friends. He couldn't remember if he went home, but he thought he did. He went out again and got it in his mind to steal something. He broke into the Wright residence through a back window. Upon entering he saw the girl lying there, picked her up, and carried her out the back door. He took her behind the church, and had her lie down and remove her clothing. Appellant removed his own clothing, placed his finger in her vagina, and then took it out. She did not cry out or say anything at that point. He then asked her to put his penis in her vagina. She did not put it far in, but "just let the head lay on it." Appellant did not force his penis any further in, and he ejaculated almost immediately. Toni started screaming and would not stop. Appellant picked up a concrete block and dropped it twice on her head. He told the police he was not trying to kill her, but only trying to make her stop screaming. The victim had recognized appellant.

When the doctor was examining appellant and taking samples, he pointed out a set of scratches on his body; appellant said "Those were not made by the little one." Laboratory analysis of a blood spot on the jeans appellant was wearing on the night in question indicated that it was of the same type as Toni Wright's

blood. A pubic hair was discovered in the victim's vagina, and another pubic hair was found on her abdomen. She was too young to have pubic hair of her own. The hair found in the vagina was of Negroid origin and consistent with the sample taken from appellant, and both contained an unusual starchy substance. There was no testimony regarding any comparison of the hair found on her abdomen. (TR441, 512-15, 641, 648)

At trial, appellant testified that although he had participated in the sexual battery, it was Darrell Lavon Wilson, known as "Fat Boy", who killed Toni Wright. Appellant had been drinking heavily with various friends throughout the day. (TR787-95) He split a six pack of beer with Jacob Faison, and they smoked some marijuana. (TR787) Later they went to appellant's cousin's apartment, where everybody was smoking reefers. (TR787) At the cousin's, "we had drunk about half a case" [of beer]. (TR788) Appellant and his cousin left and went to the park, where "I bought him a six-pack and he bought me a six-pack." (TR789) When it was getting dark, appellant went home, took a bath and changed clothes; then went back out to Jackson Park, where he ran into Michael Barnes. (TR788-89) They went to the liquor store, bought a half pint of scotch and drank it on their way to Tiki's bar. (TR790) After they left Tiki's, they ran into Marshal Hayes, who wanted to get some more to drink. (TR790) The three of them headed back to the Eighth Street Liquor Store. (TR791) Appellant testified:

> --- [W]hen we went we got there and they, you know, I don't remember, you know, buying no two fifths of -- two bottles of wine like he say he did. I don't remember what we had bought.

(TR791)

Something was bought there, and appellant guessed he was the one that bought it, though he did not remember for sure. (TR791) They headed back toward Tiki's, drinking on the way. (TR792) At the bar, they talked to some girls and danced for a while, then decided "to go get some more drunk." (TR792) At the liquor store they ran into Nathan Youngblood. (TR793) Appellant asked Youngblood, who had a car, to drop him off at Ellie's Barbeque Stand. (TR793) After they were dropped off, appellant and Marshal Hayes ate sandwiches and headed back toward Jackson Park. (TR793) The park was as far as appellant remembered going with Hayes, although he didn't remember Hayes leaving him. (TR794) Nor did he remember going back to Tiki's. (TR794)

Asked how much he had had to drink that day, appellant said "Well, I had drunk a whole lot. Enough to get, to have me drunk staggering on the way home." (TR795)[3] In addition to the beer, liquor, and marijuana, appellant had done some "crystal tea", which

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[3] Further defense evidence regarding appellant's intoxication on the night of November 5-6, 1977 was presented in the 1988 resentencing hearing through the testimony of Richard Bennett. See p. 16 - 17 of this brief. Barnes, Hayes and Youngblood all testified as state witnesses in the 1978 trial. The testimony of Barnes and Hayes more or less corroborated appellant's description of their drinking and their movements. (TR488-93, 498-500, 502) Both Barnes and Hayes stated that when the three of them were together they bought two bottles of M-D 20-20 wine and drank it. (TR491-93, 499) Barnes testified that he could not tell whether appellant was drunk at that time. (TR493) Hayes, when asked if appellant was drunk, replied "Not that I can tell, he wasn't." (TR501) Youngblood stated his opinion that appellant was drinking but wasn't drunk. (TR507)

he described as "THC, some, uh, a drug type of pill." (TR795):

> ... [I]t make you laugh a lot and it make you, make you, you know, can't control yourself a little bit. You know, you walking down the sidewalk, feet step up in the air and look like there is about four or five of them, you know.
>
> Q. Four or five what?
>
> A. Foots prints.
>
> Q. Makes you feel like you have four or five feet?
>
> A. Yeah, looks like you just going up in the air.
>
> Q. Did that pill have that effect on you on November 5th?
>
> A. Yeah.

(TR795-96)

After returning home, appellant went out again and decided to steal something. (TR796) Going down the road he ran into Darrell Wilson. (TR796) Wilson asked appellant to come with him to go move something. (TR797) Heading up the street by the Wright house, appellant staggered into the yard, started out, and was pushed back in again by Wilson. (TR797-98) Wilson forced open the window of the house and told appellant to go in. Appellant refused because the people knew him. Wilson climbed through the window, and when he did not come back out right away, appellant headed up the street. A few minutes later, appellant encountered Wilson again. He was carrying Toni Wright. When Wilson asked her if she knew them, she said she knew appellant but did not know Wilson. Wilson carried her to the back of the church and told her

to lie down. Appellant had sexual intercourse with her, while Wilson watched. She did not scream at that time. Appellant then got dressed and was getting ready to leave, when Wilson commenced sexual intercourse with Toni, and she started screaming. Appellant turned around and saw Wilson drop a concrete block on the girl's head. Appellant begun struggling with Wilson, but Wilson (who was much bigger than appellant) threw him up against the wall and dropped the brick again. Appellant told Wilson he had killed her, and ran home. (TR800) He was met at the door by his sister. (TR801) He was crying, and he told her he had killed someone. (TR801) He started to tell her about Fat Boy (Wilson), but stopped because he didn't want to get him involved. (TR801)

The police officers learned about Darrell Wilson from appellant's sister long before trial. At deposition, Detective Nipper also stated that appellant had told them about Wilson's involvement during their initial interview. (TR835-36)[4] According to Nipper, Wilson was eliminated as a suspect because members of his family gave him an alibi. (TR830-31)

The trial judge instructed the jurors that they could find appellant guilty of first degree murder if they found either (a) that he had killed the victim from a premeditated design to effect her death (TR880), or (b) that he had killed her, whether or not from a premeditated design, while engaged in the perpetration of

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[4] At trial, Detective Nipper did not recall giving this answer, but he acknowledged that it was reflected in the transcript of the deposition. (TR835-36)

a sexual battery (TR882), or (c) that the victim had been killed by a person with whom appellant had associated to commit some unlawful act. (TR877-78)

After deliberating for four hours, the jury questioned the court as to whether the indictment charged only premeditated murder. (TR913-14) The jury also placed brackets around the segment of their written copy of the jury instructions which dealt with felony-murder. (TR917, 1069) The phrase ''premeditated murder" on the jury's copy of the indictment was also underlined. (TR13, 917) The court instructed the jury, over defense counsel's objection, that the indictment could support a charge of felony murder as well as premeditated murder. (TR917) After this question was answered, the jury reached its verdicts in less than fifteen minutes. (TR918)

B. THE 1988 PENALTY HEARING

Elizabeth Clayton, appellant's mother, testified that she was 16 years old when he - her oldest child - was born. (SR28) [Appellant was 19 at the time of the offenses (SR31)]. He was a "blue baby." (SR30) Elizabeth was unmarried and did not want the child. (SR28) She still felt like a child herself, and did not want a baby to interfere with her life. (SR28-29) There was some uncertainty about who was the child's father. (SR29) Elizabeth thought it was Johnny Buford, and she married him four months later. (SR28-29, 33-34)

After appellant was born, Elizabeth had five more children in rapid succession. (SR30-31) She really didn't want any of them,

but "they didn't give us anything to take at that time to keep you from having babies." **(SR30-31)**

Elizabeth liked to party, gamble, and drink. **(SR32-33)** She would drink "until I would get drunk and fall out", and the children would have to bring her "something to upchuck in", and put her to bed. (SR32, **39)** In retrospect, she acknowledged that she had been an alcoholic. (SR32) Although she was married to Johnny, she had lots of other men in her life. (SR34) They would come to the house and drink; and Johnny would "be there drinking right along with us." (SR34)

Whenever the children got on her nerves, Elizabeth would pack up and leave. **(SR32-34)** She would go by herself to New York or anywhere, and stay away for three or four months, sometimes longer. (SR33) She never made any arrangements for the children to be taken care of, but just left them on their own. **(SR34-35)** Their father, Johnny, was just like a child himself, ***so*** the responsibility to take care of the younger children always fell on appellant. (SR33, **43-44)** Appellant had to see to it that the other children had food to eat and clean clothes to wear, and to make sure they went to school and came home at a certain time. **(SR38-39)** If appellant was ten years old during any given one of these episodes, then the youngest of the five other children in his care was four. (SR39) One Christmas, when appellant was about eleven, Elizabeth's mother had her put in jail for neglecting the children. **(SR39-40)** On those occasions when she was at home, Elizabeth would "whip" appellant when he didn't do what he was

told; and also for things the other children did, because "he was responsible for what they did because he was the oldest." **(SR37-38)**

Appellant's father Johnny had had brain surgery after getting hit in the head with a stick in a fight with one of Elizabeth's friends. **(SR33, 35-36)** Johnny, too, was an alcoholic. **(SR40)** He would drink and forget to take his medication for his brain injury, and he would have seizures. **(SR40)** When drunk, Johnny would become abusive and fight with his wife in the presence of the children; on at least one occasion he cut her. **(SR41)** When Johnny was drunk or having a seizure, appellant was the one who had to take care of him. **(SR42-43)**

Elizabeth kept a supply of alcohol in the house at all times. **(SR45)** When appellant was about thirteen, she began to notice that liquor "would be missing and I guess -- assumed they drank it." **(SR45-46)** Appellant was also swiping his grandmother's valium. **(SR46)**

Appellant did well in school until the eighth grade, but then "I guess it got too much for him, you know, trying to *go* to school and take care of the kids and all the responsibility. So he would be tired and he would play hooky." **(SR43-44, 51)** Around that time, appellant also started coming to school drunk or high, and he kept getting suspended. **(SR51-52)** The school officials usually couldn't find Elizabeth, *so* they called appellant's grandmother. **(SR51-52)** Elizabeth would talk to appellant about his going to school drunk, "but I wasn't meaning anything I was saying." **(SR52)**

Appellant would "go to school good for about a month or so or two months and three months, and then I guess it would hit him again. He wanted his drinking; he wold drink." (SR52) After a while, he just stopped going to school. (SR43-44, 51)

Appellant's drinking and drug problem got progressively worse as he got further into his teens. (SR47, 50) When he was seventeen Elizabeth tried to get him into Arcadia but they would not accept him. (SR47) At eighteen going on nineteen, he would go out drinking with his friends, and on several occasions they would just drive up and dump him in the yard. (SR49-50) For about two or three weeks prior to the crime, at age nineteen, appellant was staying with Johnny in the projects, and drinking even more heavily than Elizabeth was accustomed to. (SR47-48) During that couple of weeks, most every time she saw him he was staggering drunk. (SR48)

Willie Rose Bennett, appellant's aunt and Elizabeth Clayton's sister, testified that appellant lived with her from the age of two to four, and for a few months in 1974 (when he would have been about sixteen). (SR55-56) When appellant was younger, his mother drank heavily and at times would just up and leave, but by 1974 "she was gone all the way from the family." (SR57) At that time appellant was taking and using prescription drugs from his father and his uncle. (SR58-59) According to Ms. Bennett, appellant:

> --- loved to stay with me and he, you know, at the time he wouldn't abide by my rules. *So* I would say you got to go, boy. And *so* then he would like come back and he'd do right for a week, and naturally I'm going to leave him with me, so. But the reason I say he wasn't doing

> right because he was drugged out and drunk. When he was at his right self, he was the best child, you know, just as good as mine. But most of the time he was drugged out and drunk.

(SR59)

Doris Barns is another of appellant's aunts and Elizabeth's sisters. **(SR60-61)** She testified that appellant was "more or less the head of his family" from as early as age eight or nine. **(SR61-62)** His mother was gone most of the time, "being young ... enjoying life as I can see." (SR62) She would be going to various bars and houses and places. **(SR63)** Appellant's father, Johnny, was a "street-goer" too, and would be out looking for her. **(SR63)** Also he had serious mental problems from his head injury. **(SR66-67)** That left appellant in charge of the other children. **(SR63)** On occasion, appellant would come out to his aunt's and tell her they had no lights and nothing to eat. **(SR63-64)** She would go get them and bring them back to her house, feed and bathe them, and put them to bed. **(SR63-64)** However, from April to November each year, Ms. Barns would go up north to work, and would not be available to help out. (SR65) That left only appellant's grandmother that they could turn to for assistance. **(SR65-66)**

Appellant's sister, Geraldine Buford, testified that both of their parents were drunks. **(SR79, 85)** They would get into fights and stab each other. **(SR87)** Their mother would also beat the children. **(SR79, 88-89)** From the age of about nine, appellant had the responsibility of taking care of the younger children. **(SR79-81)** He made sure they ate, bathed, and went to school, and he did

all of the cooking. **(SR83)** On those occasions when their mother was working, he would get money from her to buy food; other times he would have to steal. **(SR83-84, 93)** Geraldine would sometimes run away from home. **(SR87-88)** When she did, it was appellant, rather than their mother, who was concerned and went out looking for her. **(SR88)** Appellant started using alcohol and drugs when he was about fourteen. **(SR89-91)** Geraldine also got into alcohol at an early age, but she stopped drinking so much because she learned from appellant's experience. **(SR91-93)** He told her its not good for you; it gets you in trouble. **(SR92)**

Junior Buford, the youngest of the siblings, testified consistently with the other family members that both of the parents drank and physically fought, and their mother would leave for weeks at a time or longer. **(SR114-15)** Appellant looked after the other children. **(SR115)** Junior was only thirteen when the crime occurred. **(SR116)** Afterwards, he would visit appellant in prison, and went to see him at the county jail every day since he had been back for resentencing. **(SR117-18)** Appellant talked to him about the dangers of drugs and alcohol, that they can make you lose control. **(SR117-18)** Junior testified that he loves and respects his brother. **(SR118)**

Thomas Hodge was a Lakeland police officer from **1954** to **1975. (SR70)** At the time, there were only four black police officers on the force, and Hodge was primarily responsible for patrolling the black area of town. **(SR70)** He came in contact with the Buford family and became aware of their situation. **(SR70-72)** On several

occasions, Officer Hodge went to their apartment in the Lake Ridge Homes and found the children unsupervised. (SR72) The place was very dirty and unkempt. (SR72-73) Johnny Buford, the father, was mentally unbalanced as a result of a beating, and did not seem to be aware of what was going on. (SR72-74) Hodge never saw any change in the conditions of the Buford home and family, but he believed he had no alternative but to leave it to the parents and hope for the best. (SR74-76)[5]

H.R.S. administrator Ann Steele testified that, in her opinion, appellant was not old enough to take care of his younger sisters and brother (or even to take care of himself) at the age when that responsibility fell upon him by default. (SR108) From the testimony she had heard, she believed that this was a case of child neglect which would have warranted H.R.S. intervention. (SR110-11) It did not sound as if the children could have been returned home. (SR110)

Richard Bennett is appellant's cousin; they are the same age. (SR95) When they were younger Richard didn't see appellant much, but in their mid-teens they would see each other nearly every day in the street. (SR96-97) Sometimes they hung out together, and

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[5] Hodge testified that, unless the juvenile committed a crime, no child protection services were available at the time. (SR75-76) Ann Steele, who had supervised H.R.S. child abuse investigators for the past two decades, subsequently testified that Officer Hodge had been mistaken. (SR103-05, 107) In cases of child neglect, beginning in 1971, HRS had the authority to pick up children and place them in emergency shelters or foster care, or recommend a change in custody. (SR105, 110) However, H.R.S. was not as active as it is today, and it was not surprising to her that the officer was uninformed. (SR107)

sometimes they didn't. (SR96) When Richard would see him, appellant was "drunk half the time, just about all the time really." (SR97) Richard and appellant would go to the grove to pick fruit, and afterwards they would drink Mad Dog. (SR97) That is "MD, 20/20, Morgan David", a cheap wine - "You get high off it real fast." (SR97) Richard explained that you could get drunk on half a bottle apiece, and they usually drank three times that much. (SR98) This was when they were fifteen or sixteen years old. (SR98) Eventually Richard and appellant started going their separate ways, but Richard still saw him frequently because "he was hanging with my brother." (SR98) They would also run into each other on the street and have a few drinks. (SR99) Asked how often appellant was intoxicated, Richard replied "Just about every time I seen him." (SR99)

On the night of the crime, Richard was with his brother and another friend, and they ran into appellant in front of Tiki's bar. (SR99-100) "And we seen him, you know, and he come up to us, hey, man, get your drunk self away from us. What's wrong with you, man?" (SR100) Richard's brother gave appellant a slight push and he fell down, breaking a bottle of 20/20 wine that he had in his pocket. (SR100, 102) They picked him up, brushed him off, "kind of apologized to him and everything", and went on their way. (SR100, 102) Appellant was going to get some more to drink. (SR100) He was, in Richard's words, "staggering drunk." (SR102)

Dr. Thomas McClane, a psychiatrist, had interviewed appellant and several of his relatives, and had reviewed various documents

and reports pertaining to the case. (SR119-24, 129) He testified that appellant's mother, Elizabeth, had been too young to take care of a baby; she was immature and alcoholic, and she abused medications. (SR126) Appellant had the responsibility for his younger siblings thrust upon him, "which he apparently exercised fairly well for a youngster between nine and thirteen." (SR126) Then he began to drink and abuse drugs, "and that rather dominated his life on up to the time of the offense." (SR126)

For a period of three or four years prior to the crime, his cousins Richard and Ranard almost never saw him when he wasn't obviously under the influence of alcohol or drugs. (SR127) His usual pattern was to drink until he passed out or fell asleep. (SR134) Appellant would get drunk every night, and many times he would wake up in a house with no idea how he had gotten there. (SR127) Dr. McClane stated that there was "overwhelming evidence that [appellant] was a serious heavy alcoholic." (SR128, 166) He was in an intoxicated state nearly every night since the age of fifteen or sixteen, "and to a lesser but still substantial degree even ... back a few years before that." (SR165) His alcohol problem was "so overwhelming and so severe" that any abuse of drugs such as Valium was more or less cumulative and would not necessarily complicate the prognosis. (SR166)

Dr. McClane spoke with Ranard and Richard Bennett about their encounter with appellant in front of Tiki's bar on night of the offense. (SR128) Appellant was so drunk that he was staggering and his speech was grossly slurred. (SR128) He was trying to get

in with them and continue the evening; but they did not want him to come along because he was so drunk and irrational. (SR129) As appellant pressed into the group, Ranard put his hand out and shoved him gently, more to keep him from going forward than an actual push. (SR129) Appellant fell backward, breaking a bottle of wine in his rear pocket, and began to cry. (SR129) Ranard and Richard walked away shaking their heads. (SR129)

It was Dr. McClane's opinion that appellant was intoxicated at the time of the offense. (SR132, 135) His ability to distinguish right from wrong, and to form a specific intent, would have been substantially impaired but not obliterated. (SR137) With regard to the mitigating circumstance provided in Fla.Stat. 921.141(6)(f), Dr. McClane expressed the opinion that appellant's ability to appreciate the criminality of his conduct, and his ability to conform his conduct to the requirements of law, both were substantially impaired (through probably neither was totally obliterated). (SR138, 145)[7]

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[6] Dr. McClane had read the trial testimony of Michael Barnes, Marshal Hayes, and Nathan Youngblood, who were in appellant's company during portions of the evening. (SR129) They had rather minimized the degree of appellant's drunkenness, while Richard and Ranard said he was so grossly intoxicated he could barely stand up. (SR130) Dr. McClane attributed their differing observations to the fact that Richard and Ranard were not as intoxicated themselves; the perception of intoxication being in the eye of the beholder. (SR130-31)

Asked about the significance of appellant's having given the police a fairly detailed statement, Dr. McClane explained that a substantially intoxicated person may or may not remember much of what occurred while he was in that state. (SR139) Ability to recall does not easily correlate with blood alcohol level, except in a gross sense, and it varies from individual to individual.

FOOTNOTE CONTINUED ON NEXT PAGE

Dr. McClane further testified that appellant was under mental and emotional disturbance throughout his entire life after the first six or seven years. **(SR142-43)** As for the time of the offense, "it really depends partly on whether one considers severe alcoholic intoxication [is] an extreme mental or emotional disturbance, and I'm not sure about the medical legal part of that issue. Certainly from the purely psychiatric sense I do as I've described earlier." **(SR143)**

Dr. McClane testified that he believed that the crime was an isolated event which occurred in an intoxicated state, and **not** "a pattern of a sexual pervert with a propensity toward children." **(SR165, 168)** In response to the trial court's question, McClane stated that he would not classify appellant as amoral. (SR167)

At the close of the testimony, the state offered into evidence the three mental evaluations done on appellant prior to his trial by Drs. Niswonger, Kaplan, and Montero. **(SR168-69, TR19-21, 42-48)** The defense introduced the **1982** psychiatric evaluation done by Dr. Amin. **(SR169, 9-12)**

Dr. Kaplan's report stated that appellant had admitted to a long history of alcohol abuse beginning at age fourteen. **(TR19)** "He stated that he drinks heavily on a daily basis and will frequently consume up to twenty dollars worth of alcohol per day."

FOOTNOTE 7 CONTINUED

(SR139) Dr. McClane also mentioned the phenomenon of confabulation, in which the now sober person "fills in" the gaps in his memory. **(SR139)** See also the psychological report of Dr. Jamal Amin. **(SR11, 169)**

(TR19) On the day of the offense, he and a friend consumed between them a case of beer and a fifth of whiskey. (TR19) Dr. Kaplan had concluded that appellant, while legally sane and competent to stand trial, appeared to have a serious alcohol problem requiring treatment. (TR20) Dr. Montero's report notes that appellant "claims to drink a lot everyday, both beer and hard liquor, and also to having smoked marijuana on a regular basis since age 13. He also has taken speed and claims to have taken two pills the night of the alleged offense as well as acid." (TR47) Dr. Niswonger concluded that "[m]ost important, [appellant manifests] such a lack of impulse control and a lack of feeling for others, at least when under the influence of alcohol, as to render possible his commission of the offenses with which he is charged." (TR44)

Dr. Amin observed that, as the oldest male child of alcoholic and irresponsible parents, appellant "became prematurely viewed by himself and the rest of the family as a father figure with enormous responsibilities for which he was ill-equipped." (SR10) Appellant's abuse of drugs - particularly alcohol - "started at the early age of 14 in order to escape the reality of overwhelming anxiety and depression. Finally, he became *so* physiologically and psychologically dependent on alcohol that he lost control over its consumption." (SRll-12) Dr. Amin concluded, based on interviews with appellant and his friends and relatives, that appellant displayed numerous characteristics consistent with a severe alcoholic disorder. (SR12)

C. RESENTENCING

Defense counsel, orally and in written memoranda, urged the court to impose a life sentence in accordance with the Tedder standard[8] and the recommendation of the jury. (SR1-8, 13-15, 20-21, 185-92, 202, 205-07, 234-42) Nevertheless, on June 1, 1988, the trial judge resentenced appellant to death. (SR212-14, 218-21) In his sentencing order, Judge Young recounted the procedural history of the case, and noted that the Florida Supreme Court had affirmed Judge Norris' earlier override of the jury's life recommendation. (SR218-19) Judge Young wrote:

> This poses somewhat of a judicial paradox in that the Florida Supreme Court has previously affirmed not only the convictions, but the sentence to death and the specific findings of aggravating circumstances and mitigating circumstances. The Florida Supreme Court further approved the finding that the mitigating circumstances were insufficient to outweigh the aggravating circumstances. Thus it appears that the law of the case has been established, Johnson v. Duaaer, ____ So. 2d ____, 13 FLW 261 (Fla. 1988), (specially concurring opinion J. Barkett and J. Kogan). Presumably, this Court is to determine whether the additional "non-statutory" mitigating circumstances tip the scales in favor of life versus death. On the other hand, it is not clear whether this Court is to re-weigh the entire evidence, disregarding the lengthy appellate track record, the law of the case, and start afresh, re-weighing each and every one of the factors and circumstances.
>
> In the final analysis the same result obtains regardless of which course of analysis and decision apply.
>
> Judge Norris initially found as aggravating circumstances:

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

> "(1) ... the capital felony, that is, the murder of Toni Annette Wright, ... was committed while the Defendant, Robert Lewis Buford, was engaged in the commission of the crime of sexual battery...
>
> (2) ... further ... that the capital felony was especially heinous, atrocious and cruel..."

Judge Norris further found as mitigating circumstances as to the first degree murder and sexual battery, the following:

> (1) The defendant has no significant history of prior criminal activity and this is a mitigating factor.
>
> (2) That the defendant was nineteen years of age and that is a mitigating circumstance.

If, as posed above, this Court is to re-weigh all of the evidence, not merely the new "non-statutory" mitigating evidence, the Court finds and agrees that the two aggravating circumstances are conclusively established.

As to the mitigating circumstances, the evidence, even that presented by the Defendant at the non-statutory mitigating circumstances hearing, revealed that the defendant had, in fact, been engaged in criminal activity, including stealing, consumption of alcohol and drugs by a minor, etc., which might cast doubt on the first finding that there was no "significant history of prior criminal activity." However, this Court would still find such to be a mitigating factor within the meaning of Section 921.141(6)(g), Florida Statutes (1981).

However, if this Court were re-weighing all the evidence of aggravating and mitigating circumstances, this Court could not concur with the finding that nineteen years of age was a mitigating factor, since the evidence presented at the non-statutory circumstances hearing demonstrated the maturity and experience of this nineteen-year-old man who had allegedly

> reared his five younger brothers and sisters almost single-handedly, even stealing to assist in that endeavor. Justice Shaw stated in Echols v. State, 484 So.2d 568 (Fla. 1985) that age is but one factor to be considered, every murderer has one. See Peek v. State, 395 So.2d 492 (Fla. 1980) (nineteen years of age not a mitigating circumstance).
>
> The new evidence presented at the hearing on the non-statutory mitigating circumstances demonstrates a case of neglect, poverty, and lack of parental care or support. Most importantly, however, the evidence failed to establish that this background had any bearing or effect on the horrible crimes committed by the defendant. Lara v. State, 464 So.2d 1173 (Fla. 1985). Therefore, it is the judgment and conclusion of this Court that the mitigating circumstances, whether statutory or non-statutory, do not outweigh the aggravating circumstances, that the prior Judgment and Sentence of death is just, appropriate and is hereby confirmed.

(SR219-21)

The trial judge's sentencing order contains no findings or discussion regarding appellant's alcoholism and drug abuse, the evidence of his intoxication on the night of crime, or Dr. McClane's testimony that his ability to appreciate the criminality of his conduct and his ability to conform his conduct to the requirements of law were substantially impaired. Most importantly, the judge's order does not address the crucial question under the Tedder standard of whether, in light of the mitigating evidence presented at trial and on resentencing, reasonable people could differ from the conclusion that death was the appropriate sentence.

SUMMARY OF THE ARGUMENT

In a capital case, the jury's recommendation reflects the conscience of the community, and is entitled to great weight. A trial judge may not override a jury's recommendation of life imprisonment unless the facts suggesting a sentence of death are "so clear and convincing that virtually no reasonable person could differ." When the record contains any significant mitigating evidence - whether statutory or non-statutory - to support the life recommendation, then the trial judge may not override it.

In the present case, there was substantial evidence from which reasonable people could find at least three, and probably four, statutory mitigating factors [(1) age [19]; (2) no significant history of prior criminal activity; (3) substantial impairment of appellant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law; and (4) extreme mental or emotional disturbance], along with a number of significant non-statutory mitigating circumstances arising from appellant's deprived and neglected childhood; his family history of alcoholism; his assumption of the responsibility (because of the parents' default) of taking care of his five younger siblings at an age when he was far too immature to cope with it; and the resulting anxiety and depression which contributed (along with the example set by his parents) to his becoming a serious alcoholic by his mid-teens, and to his being intoxicated on alcohol and/or drugs virtually every night for the three or four years preceding the

commission of the offense. From appellant's 1978 trial testimony, corroborated by the testimony of Richard Bennett and Dr. McClane on resentencing, reasonable people could conclude that he was drinking heavily and using marijuana and pills throughout the day and night of the crime, and was "staggering drunk" and incoherent by the time he encountered his cousins in front of Tiki's bar. Dr. McClane testified that, in his opinion, appellant was intoxicated at the time of the offense. The crime was out of character for appellant, who had no prior history of violence or sexual deviancy. [Contrast Wasko v. State, 505 So.2d 1314 (Fla. 1987) with Dobbert v. State, 328 So.2d 433 (Fla. 1976)]. Dr. McClane stated the opinion, in response to the trial court's question, that the crime was not the act of a person devoid of morals and "not a pattern of a sexual pervert with a propensity toward children", but rather a bizarre, isolated event which occurred in a state of intoxication. Clearly, in light of all of this mitigating evidence, reasonable people could differ as to the appropriate sentence, notwithstanding that the case involved the killing of a child. Wasko v. State, 505 So.2d 1314, 1318-19 (Fla. 1987) (opinion of the Court and specially concurring opinion of Justice Ehrlich); cf. Holsworth v. State, 522 So.2d 348, 355 (Fla. 1988).

ARGUMENT

ISSUE I

THE TRIAL JUDGE ERRED IN IMPOSING A SENTENCE OF DEATH, AS THERE WAS EXTENSIVE EVIDENCE OF STATUTORY AND NON-STATUTORY MITIGATING FACTORS TO SUPPORT THE JURY'S LIFE RECOMMENDATION, AND REASONABLE PEOPLE COULD DIFFER AS TO WHETHER DEATH OR LIFE IMPRISONMENT WAS THE APPROPRIATE SENTENCE.

A. THE OVERRIDE WAS IMPROPER UNDER THE TEDDER STANDARD

In a capital case, the jury's recommendation reflects the conscience of the community, and is entitled to great weight. McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982); Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983); Wasko v. State, 505 So.2d 1314, 1316 (Fla. 1987); Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988). A trial judge may not override a jury's recommendation of life imprisonment unless the facts suggesting a sentence of death are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); see e.g. Cannady v. State, 427 So.2d 723, 732 (Fla. 1983); Huddleston v. State, 475 So.2d 204, 206 (Fla. 1985); Amazon v. State, 487 So.2d 8, 12 (Fla. 1986); Fead v. State, 512 So.2d 176, 178-79 (Fla. 1987); Holsworth v. State, supra, 522 So.2d at 354. When the record contains any significant mitigating evidence - whether statutory or non-statutory - to support the life recommendation, then the trial judge may not override it. Welty v. State, 402 So.2d 1159, 1164 (Fla. 1981); Gilvin v. State, 418 So.2d 996, 999 (Fla. 1982); McCampbell v. State, 421 So.2d at 1075;

Cannady v. State, 427 So.2d at 731; Herzoa v. State, 439 So.2d 1372, 1380-81 (Fla. 1983); Holsworth v. State, 522 So.2d at 353-54; Perry v. State, 522 So.2d 817, 821 (Fla. 1988). And, as reaffirmed most recently in Cochran v. State, 547 So.2d 928, 933 (Fla. 1989), the Tedder rule, as consistently applied by this Court at least since 1985, means exactly what it says.9

In the present case, there was substantial evidence from which reasonable people could find at least three, and probably four, statutory mitigating factors [(1) age [19]; (2) no significant history of prior criminal activity; (3) substantial impairment of appellant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law; and (4) extreme mental or emotional disturbance], along with a number of significant non-statutory mitigating circumstances arising from appellant's deprived and neglected childhood; his family history of alcoholism; his assumption of the responsibility (because of the parents' default) of taking care of his five younger siblings at an age when he was far too immature to cope with it; and the resulting anxiety and depression which contributed (along with the example set by his parents) to his becoming a serious alcoholic by his mid-teens, and to his being intoxicated on alcohol and/or drugs

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9 The decision in appellant's original appeal was issued in 1981. Note also that, of the six even earlier override affirmances relied on in Judge Norris' 1978 sentencing order and in this Court's 1981 opinion [see 403 So.2d at 948 and 954], four of those defendants ultimately were resentenced to life, and the appeal of a fifth is still pending. See Part B of this Point on Appeal (The Decision in Appellant's Original Appeal is Not "Law of the Case").

virtually every night for the three or four years preceding the commission of the offense. From appellant's 1978 trial testimony, corroborated by the testimony of Richard Bennett and Dr. McClane on resentencing,[10] reasonable people could conclude that he was drinking heavily and using marijuana and pills throughout the day and night of the crime, and was "staggering drunk" and incoherent by the time he encountered his cousins in front of Tiki's bar. Dr. McClane testified that, in his opinion, appellant was intoxicated at the time of the offense. Clearly, in light of all of this mitigating evidence, reasonable people could differ as to the appropriate sentence, notwithstanding that the case involved the killing of a child. Wasko v. State, 505 So.2d 1314, 1318-19 (Fla. 1987) (opinion of the Court and specially concurring opinion of Justice Ehrlich); cf. Holsworth v. State, 522 So.2d at 355 ("Despite the depravity of the crime, we find the mitigating evidence sufficient to support a life recommendation").

Appellant's age of nineteen at the time of the crime was a circumstance which reasonable people could find in mitigation. See, especially, Norris v. State, 429 So.2d 688, 690 (Fla. 1983) ("When reviewed in light of Tedder, we find that the trial judge erred in imposing death. Norris was nineteen years old, suffered from a drug abuse problem, and claimed to have been intoxicated at the time of the crime"). See also McKennon v. State, 403 So.2d

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[10] And also corroborated by the psychiatric evaluation of Dr. Amin and, to a lesser extent, those of Drs. Kaplan, Niswonger, and Montero.

389, 391 (Fla. 1981) (where there was one mitigating circumstance [age 18] and one aggravating circumstance [HAC], trial court erred in overriding life recommendation); Cannady v. State, 427 So.2d at 727 and 731 (life recommendation could properly have been based in part on defendant's age [21]); Huddleston v. State, 475 So.2d at 206 (in override case, defendant's age of 23 could properly have been considered by the jury as a mitigating factor); Amazon v. State, 487 So.2d at 13 (defendant's age [19] and emotional immaturity were mitigating factors in support of life recommendation); Freeman v. State, **547** So.2d 125, 129 (Fla. 1989) (defendant's age [22], dull-normal intelligence, and history of abuse during childhood provided sufficient mitigating evidence to support recommendation of life imprisonment).

In appellant's 1978 trial, even the prosecutor told the jury that appellant's age of nineteen "probably does apply" as a mitigating circumstance. (TR956) Judge Norris found age as a mitigating circumstance. Unquestionably, then, reasonable people could find appellant's age to be a significant mitigating factor, especially when considered in the context of his impoverished and neglected childhood and his teen-age alcoholism and drug abuse. Because of his parents' drunkenness and irresponsibility, appellant was thrust, from as early as age nine or ten, into the role of protector and care-giver for his five younger siblings. This does not mean that he was an uncommonly mature child. To the contrary, the evaluation of Dr. Amin, the testimony of Dr. McClane, and the observations of relatives, all indicate that appellant was too

immature to cope with such responsibility, and the resulting anxiety and depression was a major contributing cause of his turning to alcohol, street drugs, and other people's prescription medications, by the age of fourteen.

Judge Young, using the non-statutory mitigating evidence to negate the statutory mitigating circumstance, stated:

> ... [If] this Court were re-weighing all the evidence of aggravating and mitigating circumstances, this Court could **not** concur with the finding that nineteen years of age was a mitigating factor, since the evidence presented at the non-statutory circumstances hearing demonstrated the maturity and experience of this nineteen-year-old man who had allegedly reared his five younger brothers and sisters almost single-handedly, even stealing to assist in that endeavor. Justice Shaw stated in Echols v. State, 484 So.2d 568 (Fla. 1985) that age is but one factor to be considered, every murderer has one. See Peek v. State, 395 So.2d 492 (Fla. 1980) (nineteen years of age not a mitigating circumstance).

(SR220-21)

Both the judge's reasoning, and his reliance on Echols and Peek, are faulty. Peek does not say nineteen years of age is not a mitigating circumstance; rather, it says that "[t]here is no per se rule which pinpoints a particular age as an automatic factor in mitigation." 395 So.2d at 498. Moreover, Peek is not a life recommendation case, and the Tedder standard therefore did not apply. In contrast, in the life recommendation case of Huddleston v. State, 475 So.2d at 206, this Court, after quoting the Tedder principle, said:

> From this record we cannot say that the jury was unreasonable in recommending life imprisonment. The trial judge specifically

> found one statutory mitigating factor to be present, i.e., that Huddleston had no significant history of prior criminal activity. § 921.141(6)(a), Fla.Stat. (1983). In addition there was evidence presented that Huddleston had a history of drug abuse and that at the time of the homicide he had a very troubled personal life because he had just lost his job, his girlfriend was pregnant and wished to put the baby up for adoption contrary to his wishes, and his parents were on the verge of getting a divorce. Huddleston's age at the time of the commission of the crime, twenty-three, was also Presented as a mitiuating factor. While there is no automatic mitisating or aggravatina factor, Peek **v.** State, 395 So.2d 492 (Fla.), cert. denied, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981), we have held that the aae of the defendant, twenty-one, could be considered by the jury as a mitiaatinq factor. Cannady **v.** State, 427 So.2d 723 (Fla. 1983). Considering these factors we cannot say that the facts suggesting a sentence of death are ***so*** clear and convincing that virtually no reasonable person could differ.

See also McKennon; Norris; Freeman.

As regarding the trial judge's reference to the Echols case, that was a life recommendation case, but the defendant there was a fifty-eight year old businessman and contract murderer. Under those facts, this Court was surely warranted in finding no truly mitigating significance in Echols' age. However, under the very different circumstances of appellant's nineteen years, reasonable people could consider his age a significant mitigating factor supporting a sentence of life imprisonment. Huddleston; Cannady; Norris.

Reasonable people could also consider as persuasive mitigating circumstances appellant's family history of alcoholism [see Burch v. State, 522 So.2d 810, 813 (Fla. 1988)]; his impoverished and

neglected childhood [see e.g., Brown v. State, 526 So.2d 903, 907 (Fla. 1988)], and the fact that he was a serious alcoholic (and a drug abuser) from the age of fourteen until his arrest for murder at nineteen [See Pentecost v. State, 545 So.2d 861, 863 (Fla. 1988); Masterson v. State, 516 So.2d 256, 257-58 (Fla. 1987); Huddleston v. State, 475 So.2d at 206; Norris v. State, 429 So.2d at 690]. Strangely, the only mention in the trial court's sentencing order of appellant's consumption of alcohol and drugs is to "cast doubt" on the finding of the "no significant history of criminal activity" mitigating factor.[11] There is no discussion of whether appellant's addiction to alcohol, his use of street drugs and other people's prescription medications, and his intoxication at the time of the offense were established as non-statutory mitigating factors. See Roaers v. State, 511 So.2d 526, 534-35 (Fla. 1987). Nor was there any discussion of or findings concerning Dr. McClane's testimony that appellant's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law were substantially impaired. Nor was there any analysis, under the Tedder principle, of whether reasonable people could find that these statutory and non-statutory mitigating factors existed. Instead, Judge Young essentially appears to have limited himself to confirming or negating the aggravating and mitigating factors found ten years earlier by Judge Norris. Judge Young stated:

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[11] Nevertheless, Judge Young went on to find that the "no significant history" mitigator did apply.

> The new evidence presented at the hearing on the non-statutory mitigating circumstances demonstrates a case of neglect, poverty, and lack of parental care or support. Most importantly, however, the evidence failed to establish that this background had any bearing or effect on the horrible crimes committed by the defendant. Lara v. State, 464 So.2d 1173 (Fla. 1985). Therefore, it is the judgment and conclusion of this Court that the mitigating circumstances, whether statutory or non-statutory, do not outweigh the aggravating circumstances, that the prior Judgment and Sentence of death is just, appropriate and is hereby confirmed.

(SR221)

Lara, however, like Peek, was a death recommendation, not a life recommendation, case. In that decision, the only mitigating circumstance arguably applicable was Lara's abused childhood, and this Court upheld the conclusion that his actions in committing the murder were not significantly influenced by his childhood experience. In the present case, in contrast, reasonable people could find that the commission of this crime by appellant (who had no history of violence or sexual deviancy) while in a state of intoxication was directly related to his childhood and adolescent experiences. Appellant became a teen-age alcoholic and drug abuser as a means of escape from the pressure and anxiety of his intolerable family situation. A child of ten or twelve should not be forced to steal to buy food for his five younger siblings - that is something out of Charles Dickens. H.R.S. administrator Steele described what she had heard as a case of child neglect serious enough to have warranted removal of the children from the home. Dr. McClane testified that appellant was under mental or emotional

disturbance for "his whole life after the first six or seven years." (SR142)

Both of appellant's parents were drunks, and there was always a supply of liquor (and prescription pills) in the house. At fourteen, appellant began following their example. Around the eighth grade, appellant (who had done well before) began showing up at school drunk or high, and getting suspended. From his mid-teens on - for about three or four years before the murder - he was in an intoxicated state just about every night; his pattern was to drink until he passed out. (SR134, 165) His friends and relatives rarely saw him when he was not drunk. (see SR47-50, 59, 99) According to Dr. McClane, "the alcohol problem was so overwhelming and *so* severe that even if there was a serious problem of abuse of say Valium or something, since that was one of the drugs, I don't think that would necessarily complicate the prognosis." (SR166)

Clearly, then, there is a compelling nexus between appellant's childhood experience and his alcoholism,[12] and there is an equally strong connection between his alcoholism and the crime, since the evidence is overwhelming that he was intoxicated when he committed it. See Holsworth v. State, 522 So.2d at 354 (life recommendation was reasonable where there was sufficient evidence for jury to have

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[12] A parallel can be drawn with Masterson v. State, 516 So.2d at 257-58, in which the defendant's alcohol and drug abuse was caused or exacerbated by post-traumatic stress disorder, as a result of his experiences in Vietnam. Masterson, like appellant, had consumed substantial amounts of drugs and alcohol on the day of the murder. This Court held that the trial court's override of the life recommendation was improper under the Tedder test.

concluded that defendant's conduct was affected by his use of drugs and alcohol); Norris v. State, 429 So.2d at 690 (trial court erred in overriding life recommendation; defendant "was nineteen years old, suffered from a drug abuse problem, and claimed to have been intoxicated at the time of the crime); see also Masterson v. State, 516 So.2d at 258; Buckrem v. State, 355 So.2d 111, 113-14 (Fla. 1978). In Read v. State, 512 So.2d at 178-79, this Court said

> First, we find that sufficient evidence was presented during the sentencing phase to establish a reasonable belief in the minds of jurors that appellant was under the influence of alcohol. The jury in the present case could have weighed this evidence and reasonably concluded that the appellant acted under the effects of alcohol. This Court freauentlv has reversed iurv overrides where the iurv could have found alcohol or drua abuse as a mitigating circumstance. Huddleston v. State, 475 So.2d 204, 206 (Fla. 1985); Cannady v. State, 427 So.2d 723, 731 (Fla. 1983); Phippen v. State, 389 So.2d 991, 993 (Fla. 1980); Buckrem v. State, 355 So.2d 111, 113-14 (Fla. 1977). In Amazon v. State, 487 So.2d 8 (Fla.), cert. denied, ___ U.S. ___, 107 S.Ct. 314, 93 L.Ed.2d 288 (1986), for instance, we held improper an override where, among other mitigating factors, there was "some inconclusive evidence that [appellant] had taken drugs the night of the murders" along with "stronger" evidence of a drug abuse problem. Id. at 13. Similarly, in Norris v. State, 429 So.2d 688 (Fla. 1983), we vacated an override sentence because of evidence that appellant suffered a drug problem and claimed to be intoxicated at the time of the murder. Id. at 690. We find that the evidence of intoxication presented in the present case is more substantial than that offered in Amazon and Norris.

In the present case, not only could reasonable people have found appellant's chronic alcoholism as a mitigating circumstance,

but, as in Fead, the evidence that he was intoxicated during the commission of the crime is much more substantial than that offered in **Amazon** and **Norris**. Appellant testified at trial that he had been drinking with friends throughout the day and the night. He had consumed a large amount of beer, as well as scotch, strong wine, marijuana, and "crystal tea" [THC], to the point where he was staggering drunk, and felt like he had four or five feet and was going up in the air. (SR787-95) Michael Barnes and Marshal Hayes, who were with appellant during portions of the evening, more or less corroborated appellant's description of their drinking and their movements, though Barnes could not tell whether appellant was drunk at the time , and Hayes did not think he was drunk. All three of the psychological evaluations which were prepared before trial (and subsequently introduced by the state in the resentencing hearing) noted appellant's long history of alcohol abuse, and his drinking and drug use on the day of the offense. (TR19, 44, **47)** Dr. Kaplan concluded that appellant had a serious alcohol problem requiring treatment, and Dr. Niswonger stated that "[m]ost important, [appellant manifests] such a lack of impulse control and a lack of feeling for others, at 1east when under the influence of alcohol. as to render possible his commission of the offenses with which he is charaed." (TR44) (emphasis supplied).

In the evidentiary hearing on resentencing, further corroborative testimony was presented, as well as the expert opinions of Drs. McClane and Amin. Appellant's mother, Elizabeth Clayton, testified that his drinking problem had gotten

progressively worse as he got further into his teens, but for the two or three weeks immediately prior to the crime he was drinking even more heavily than she was accustomed to. (SR47-48) He was staggering drunk most every day. (SR48) Richard Bennett, his cousin, testified that it had gotten to the point where appellant was intoxicated "[j]ust about every time I seen him." (SR99) Richard and his brother ran into appellant in front of Tiki's bar on the night of the murder. Because he was stumbling and incoherent, they didn't want him to come along with them. (see SR128-29) "And we seen him, you know, and he come up to us, hey man, get your drunk self away from us. What's wrong with you, man?" (SR100) Richard's brother gave appellant a slight shove and he fell down, breaking a bottle of Mad Dog 20/20 wine that he had in his pocket. (SR100, 102) They picked him up, brushed him off, and went on their way. Appellant, who was, in Richard's words, "staggering drunk", was going to get some more to drink. (SR100, 102)

Dr. McClane expressed the opinion that, in November 1977 and for at least three or four years before that, appellant was a "serious heavy alcoholic." (SR128, 165-66) It was his further opinion that appellant was intoxicated at the time of the offense, and that his capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law were

substantially impaired. (SR132, 135, 145)[13] Dr. McClane testified that appellant had been under mental and emotional disturbance for his whole life from the age of six or seven. As to the question of extreme mental or emotional disturbance at the time of the offense, McClane said that it depends partly on whether one considers severe alcoholic intoxication as falling within the legal definition of this mitigating factor.[14] (SR143) "Certainly from the purely psychiatric sense I do as I've described earlier." (SR143) Reasonable people therefore could have considered appellant's alcohol and drug intoxication at the time of the crime as either establishing both statutory "mental mitigating circumstances" [see Fead v. State, 512 So.2d at 179, Amazon v. State, 487 So.2d at 13] or as a persuasive non-statutory mitigating circumstance [Fead; Holsworth; Masterson; Norris; Buckrem]. Either way, the trial judge's override was improper under the Tedder standard. See Cannady v. State, 427 So.2d at 731 (where there was psychiatric testimony that "due to extensive drug usage [defendant] was suffering from some mental or emotional disturbance and was unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law", trial court improperly overrode life recommendation; even though the judge was not

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[13] Dr. McClane's conclusions were consistent with the findings made by Dr. Amin, whose evaluation of appellant was submitted into evidence by the defense. (SR9-12, 168-69)

[14] It can. See Fead v. State, 512 So.2d at 179 (jury could reasonably have found that defendant acted under extreme mental or emotional disturbance, as a result of his alcohol consumption and his jealousy).

necessarily compelled to agree with his conclusions, the expert's testimony that these mitigating factors applied provided a reasonable basis for the recommendation of life imprisonment);[15] see also Brown v. State, 526 So.2d at 908.

Finally, reasonable people could consider, in favor of a life sentence, the fact that appellant had no history of violence [see Pentecost v. State, 545 So.2d at 863], and that in the opinion of Dr. McClane the crime was not the act of a person devoid of morals and "not a pattern of a sexual pervert with a propensity toward children", but rather a bizarre, isolated event which occurred in a state of intoxication. (SR165-68) Both Judge Norris and (somewhat more grudgingly) Judge Young found the statutory mitigating factor of "no significant history of prior criminal activity." The fact that appellant, in his childhood, sometimes had to steal to feed his younger sisters and brother, and the fact that the stress of his situation turned him into a teen-age alcoholic, does not negate the applicability of this mitigating factor, as even Judge Young ultimately recognized. Reasonable people could therefore consider it, along with all of the other mitigating evidence in this case, as a basis for a sentence less than death. Cannady; Pentecost; see also Wasko v. State, 505 So.2d at 1318; Irizarry v. State, 496 So.2d 822, 825 (Fla. 1986);

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[15] This Court further observed in Cannady that "[t]he jury's recommendation of a life sentence could also have been partially based upon [the defendant's] lack of significant criminal activity and upon his age" [21 in that case]. Both of these statutory mitigating factors also exist in the instant case.

Huddleston v. State, 475 So.2d at 206; Rivers v. State, 458 So.2d 762, 764-65 (Fla. 1984). Consistent with the Tedder principle, appellant's sentence should be reduced to life imprisonment.[16]

B. THE DECISION IN APPELLANT'S ORIGINAL APPEAL IS NOT "LAW OF THE CASE"

One additional matter needs to be addressed. This Court's 1981 opinion affirming appellant's death sentence is **not** "law of the case", and does not control the outcome of the present appeal. There are several reasons why this is so. First of all, and most importantly, a great deal of the mitigating evidence in this case was developed in the 1988 penalty hearing (which was ordered as a result of the Hitchcock errors[17] committed in the 1978 penalty phase), and therefore was not considered in the original appeal. As recognized in Steele v. Pendarvis Chevrolet, 220 So.2d 372, 376 (Fla. 1969), "When a subsequent hearing or trial develops different facts and different issues, the 'law of the case' doctrine will not preclude a conclusion at variance with the initially adjudicated result. Furlong v. Leybourne, 171 So.2d 1 (Fla. 1964)." The intervening evidentiary proceeding and resentencing are the

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[16] Undersigned counsel would note that a sentence of life imprisonment for the murder can be made to run consecutive to the life sentence for sexual battery which appellant is already serving [see TR1150, SR176-78]. This would mean he would not even be eligible for parole consideration until he had served fifty years in prison. See Wasko v. State, 505 So.2d at 1318-19 (Justice Ehrlich, specially concurring) ("defendant may never be able to walk the streets again and the interests of society will have been served without the taking of his life by electrocution").

[17] Hitchcock v. Duaaer, 481 U.S. 393 (1987).

critical facts here which distinguish this case from Johnson v. Dugger, 523 So.2d 161 (Fla. 1988), cited in the trial judge's sentencing order.[18]

Secondly, even if the "law of the case" doctrine were otherwise applicable, this Court has the power and responsibility - especially in a case involving the death penalty - to reconsider its prior ruling "in exceptional circumstances and where reliance on the previous decision would result in manifest injustice." Preston v. State, 444 So.2d 939, 942 (Fla. 1984); Strazzula v. Hendrick, 177 So.2d 1 (Fla. 1965); Harris v. Lewis State Bank, 482 So.2d 1378, 1383 (Fla. 1st DCA 1986). This is clearly such a case. If this Court were to rely in whole or in part on its earlier decision, it would have the effect of carrying over the constitutional error of the 1978 penalty phase onto the present sentencing proceeding and appeal. Moreover, when the original appeal was decided in 1981, this Court had not yet settled on a consistent standard of review in life override cases. See Cochran v. State, 547 So.2d 928, 933 (Fla. 1989). However, as further recognized in Cochran:

> Clearly, since 1985 the Court has determined that Tedder means precisely what it says, that the judge must concur with the jury's life recommendation unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So.2d at 910.

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[18] Unlike the present case, Johnson was not an appeal from a new death sentence imposed on resentencing. Instead, Johnson simply sought to re-raise the issue on habeas corpus after it had been decided adversely to him on appeal.

Judge Norris in his 1978 sentencing order, and this Court in its 1981 opinion, relied on six even earlier decisions in which death sentences imposed over jury life recommendations were affirmed. Buford v. State, 403 So.2d at 948 and 954. The subsequent history of those cases is as follows:

> 1. Hov v. State, 353 So.2d 876 (Fla. 1977). Hoy's sentence was commuted to life imprisonment in June 1980 by the Governor and cabinet.
>
> 2. Barclay v. State, 343 So.2d 1266 (Fla. 1977). After granting Barclay a new appeal, this Court reduced his sentence to life imprisonment, finding (contrary to its earlier opinion) that there was a rational basis for the jury's life recommendation. Barclav v. State, 470 So.2d 691, 695 (Fla. 1985).
>
> 3. Dobbert v. State, 328 So.2d 433 (Fla. 1976). Dobbert was executed on September 7, 1984.
>
> 4. Douulas v. State, 328 So.2d 18 (Fla. 1976). Douglas was resentenced to death after the original sentence was vacated in federal court. The appeal is pending in this Court; oral arguments were heard in September 1986.
>
> 5. Gardner v. State, 313 So.2d 675 (Fla. 1975). Gardner's death sentence was vacated by the U.S. Supreme Court. On resentencing in May 1977 the trial judge imposed a sentence of life imprisonment.
>
> 6. Sawyer v. State, 313 So.2d 680 (Fla. 1975). Sawyer's sentence was reduced to life imprisonment by the trial court in August 1976 pursuant to Fla.R.Cr.P. 3.800. See Witt v. State, 387 So.2d 922, 931-32 and n.2 (Fla. 1980) (Justice England, concurring).

Thus, of the six early override cases relied on in the original sentencing order and the original opinion, four have ultimately resulted in life sentences, and a fifth is still

pending. The exception - Dobbert - is plainly distinguishable from the instant case. The only thing the two cases have in common is that they involve the killing of a child (in Dobbert, two children), but appellant's case is much more comparable to Wasko v. State, 505 So.2d 1314 (Fla. 1987) than to Dobbert. In Dobbert, the evidence "showed premeditated and continuous torture, brutality, sadism, and unspeakable horrors committed against all [four of the defendant's] children" over a period of years. 328 So.2d at 437. The defendant murdered his nine year old daughter "by continuous beatings, kicking, hitting with fist and other objects, choking, sewing up her cuts with needle and thread and other torture and depriving her of medical care and finally murdered her, placed her body in a plastic garbage bag and buried her in an unknown and unmarked grave." 328 So.2d at 436. Dobbert also murdered his seven year old son, and tortured his two other children who survived. In contrast, appellant's crime, as reprehensible as it was, was a "bizarre, isolated event" (SR168) committed in a state of intoxication by a teen-age alcoholic with no history of violence. See Wasko v. State, 505 So.2d 1318 (Justice Ehrlich concurring). In Dobbert, in sharp contrast to appellant's situation, there were no mitigating circumstances. 328 So.2d at 437. Dobbert was "a man of mature physical and mental years", with a record of violent crimes against his children. Unlike the present case, there was no evidence that Dobbert was intoxicated at the time of his crimes, or that his capacity to appreciate the criminality of his conduct or to conform his conduct

to the requirements of law were substantially impaired.

Applying the **Tedder** standard to the evidence in appellant's case, it is clear that reasonable people could find at least three, and probably four, statutory mitigating circumstances and several significant non-statutory mitigating circumstances to weigh against the two aggravating factors of "especially heinous, atrocious, or cruel" and "committed in the course of a sexual battery." Reasonable people can differ as to whether death or life imprisonment is the appropriate sentence, and the trial court's override of the jury's life recommendation cannot be upheld. Tedder; McKennon; Huddleston; Amazon; Wasko; Masterson; Holsworth.

ISSUE II

THE TRIAL JUDGE ERRED IN CONSIDERING, IN HIS DECISION TO OVERRIDE THE LIFE RECOMMENDATION AND IMPOSE A DEATH SENTENCE, THE POSSIBILITY THAT APPELLANT COULD BE RELEASED SOMEDAY AND COMMIT THE SAME TYPE OF CRIME AGAIN.

After the close of the evidence in the penalty hearing, the trial judge raised the question of whether, in the event that he imposed a life sentence, he could run it consecutive to the life sentence appellant was already serving on the sexual battery, *so* as to result in a fifty year mandatory minimum before he could be considered for parole. (SR176-78) Both the prosecutor and defense counsel agreed that he could. (SR178) In the course of the discussion, the judge said:

> Mr. Pickard, is it conceivable -- let me just tell you up front one of my concerns on any death or life cases is if the crime is bad enough to consider the death Penalty, then my greatest concern through hook or crook he ever gets out and commits the same type crime again.

(SR176)

The trial judge ultimately imposed a death sentence. In Miller v. State, 373 So.2d 882, 886 (Fla. 1979), this Court held that "it was reversible error for the trial court to consider as an additional aggravating circumstance, not enumerated by the statute, the possibility that Miller might commit similar acts of violence if he were ever to be released on parole."[19] The trial

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[19] See also Teffeteller v. State, 439 So.2d 840, 845 (Fla. 1983) (prosecutor's comment to jury that, unless it recommended death, defendant would in due course be released from prison and kill again was inflammatory and "inexcusable prosecutorial overkill", necessitating a sentencing retrial).

court's statement in the instant case is comparable to that in Norris V. State, 429 So.2d 688, 690 (Fla. 1983):

> When reviewed in light of Tedder, we find that the trial judge erred in imposing death. Norris was nineteen years old, suffered from a drug abuse problem, and claimed to have been intoxicated at the time of the crime. The state produced no evidence that he intended to kill anyone, even though the conviction of first-degree felony murder is amply supported by the lethal assault on the deceased during commission of a burglary. At sentencina the trial iudae voiced concern over the possibility that Norris could be paroled somedav. an improper consideration by iudae or jury. See Miller V. State, 373 So.2d 882 (Fla. 1979). The record fails to disclose a justification for the trial judge's decision to override the jury's recommendation.

ISSUE III

THE JURY'S LIFE RECOMMENDATION COULD ALSO REASONABLY HAVE BEEN BASED ON QUESTIONS AS TO THE RESPECTIVE ROLES OF APPELLANT AND DARRELL WILSON IN THE HOMICIDE.

In his 1978 trial, appellant admitted that he sexually battered Toni Wright, but testified that it was Darrell Lavon Wilson, known as "Fat Boy", who actually killed her. According to appellant's sister Annette, when appellant arrived home on the night the crime occurred, he broke down and told her he might have killed someone, and began to implicate a person named Fat Boy, but stopped, saying he was not going to involve anyone else. The police learned about Wilson from appellant's sister. After his sister had gone to the police, appellant turned himself in and gave a tape recorded statement in which he described committing the crime by himself. Detective Nipper stated at trial that appellant had never mentioned Wilson, but in a deposition Nipper had volunteered that appellant had told them in their initial interview that he had been with another person, Fat Boy, and they both had sex with the victim. (TR835-36)[20] According to Detective Nipper,

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[20] The deposition included the following questions and answers:

> Q. Do you remember any reference to any other person being involved other than Mr. Buford?
>
> A. No.
>
> Q. You don't recall that?
>
> A. The initial interview that we had he told that he had been with another person, Fat Boy, and that both had sex with the little girl.

FOOTNOTE CONTINUED ON NEXT PAGE

Darrell Wilson was eliminated as a suspect because members of his family gave him a alibi.

The trial judge instructed the jurors that they could find appellant guilty of first degree murder if they found either (a) that he had killed the victim from a premeditated design to effect her death (TR880), or (b) that he had killed her, whether or not from a premeditated design, while engaged in the perpetration of a sexual battery (TR882), or (c) that the victim had been killed by a person with whom appellant had associated to commit some unlawful act. (TR877-78) While the prosecutor contended that appellant committed the crimes by himself, he twice urged the jury that even if it believed appellant's testimony it could still convict him of first degree murder on a felony murder theory, since he admitted the sexual battery. (TR1015-16, 1038-39)

After deliberating for four hours, the jury questioned the court as to whether the indictment charged only premeditated murder. The jury also placed brackets around the segment of their written copy of the instructions which dealt with felony murder. The phrase "premeditated murder" on the jury's copy of the indictment was also underlined. The trial court instructed the jury, over defense counsel's objection, that the indictment could

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FOOTNOTE 20 CONTINUED
(TR835)

At trial, Detective Nipper said that he did not recall giving that answer, and if he did it was in error, but he acknowledged that it was reflected in the transcript of the deposition. (TR836)

support a conviction of felony murder as well as premeditated murder. After this question was answered, the jury reached its verdicts in less than fifteen minutes. (see **TR913-18, 1069)**

Thus, there was evidence from which the jury could have found that Darrell Wilson was the instigator of the crimes and appellant an intoxicated follower.[21] See Barclay v. State, **470** So.2d **691, 694** (Fla. **1985).** The jury could have found, under the evidence and instructions, that Darrell Wilson actually killed the victim, and still found appellant guilty of first degree murder on a felony-murder theory. See Hawkins v. State, **436** So.2d **44, 47** (Fla. **1983).** Or - short of that - the jury could at least have questioned the respective roles of appellant and Wilson in this homicide. See Wasko v. State, **505** So.2d at **1318;** Harmon v. State, **527** So.2d 182, **189** (Fla. **1988);** Spivey v. State, **529** So.2d **1088, 1095** (Fla. **1988);** Pentecost v. State, **545** So.2d **861, 863** (Fla. **1989).** Therefore, in addition to all of the statutory and non-statutory mitigating circumstances discussed in Issue I, there was yet another reasonable basis for the jury's life recommendation, and the trial judge erred in overriding it.[22]

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[21] In the **1988** resentencing hearing, Dr. McClane testified that appellant's personality was consistent with being susceptible to the domination or influence of others. **(SR144-45)**

[22] Although the evidence of Darrell Wilson's involvement in the homicide was presented in appellant's **1978** trial, this issue has never been squarely addressed by this Court. In the original appeal, the argument was misconstrued as a "residual doubt" argument; the opinion states:

> If defendant's testimony were accepted as creating a reasonable doubt, he should not be

FOOTNOTE CONTINUED ON NEXT PAGE

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court vacate

FOOTNOTE 22 CONTINUED

> found guilty of murder in the first degree for his participation in the murder would not be proved. Defendant said he was leaving the scene, turned around when the victim screamed, and saw Fat Boy drop a concrete block on her head.
>
> A convicted defendant cannot be "a little bit guilty". It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy.
>
> This case is unlike Neary v. State, 384 So.2d 881 (Fla. 1980), where an accomplice receiving lesser punishment played a significant role in the perpetration of the criminal act. Here the defendant committed the murder or Fat Boy did it. This question was settled by the verdict of guilty.

Buford v. State, 403 So.2d at 953.

However, as previously discussed, under the evidence and the instructions in this case, the jury could have found that Wilson actually killed the victim, and still found appellant guilty as charged on a felony murder theory. The jury's question about felony murder during its deliberations, and its speedy return of a verdict after the question was answered, lend support that this is exactly what happened. This, therefore, is not a "residual doubt" argument, but rather goes to the recognized mitigating circumstance of comparatively lesser culpability vis-a-vis an accomplice. Barclay; Hawkins; Wasko; Harmon; Spivey; Pentecost.

In Buford v. State, 492 So.2d 355 (Fla. 1986), this Court rejected the contention that, under Enmund v. Florida, 458 U.S. 782 (1982), the Eighth Amendment prohibits imposition of a death sentence on appellant. That decision is not dispositive of the issue of whether the jury could reasonably have questioned the Tedder respective roles of appellant and Darrell Wilson in the homicide.

the death sentence, and remand for imposition of a sentence of life imprisonment without possibility of parole for twenty-five years, in accordance with the jury's life recommendation.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Room **804, 1313** Tampa St., Tampa, FL **33602, (813) 272-2670,** on this 2nd day of March, **1990.**

Respectfully submitted,

Steven L Bolotin

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

STEVEN L. BOLOTIN
Assistant Public Defender
P. O. **Box 9000** - Drawer PD
Bartow, FL **33830**
(813) 534-4200

SLB/an