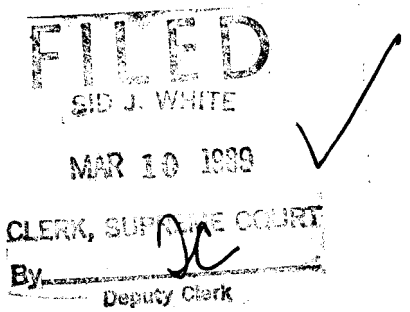
IN THE SUPREME COURT OF FLORIDA

ROBERT C. COX,
Defendant/Appellant,

vs.

STATE OF FLORIDA,
Plaintiff/Appellee.

CASE NO. 73,150



APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Sharon Zellers was murdered around New Year of 1979; Robert C. Cox was indicted for the murder on February 25, 1988 (R1974) 1/ while serving a 9 year prison term in California for kidnapping, assault with a firearm, and assault with a deadly weapon. (R1377, State's Exhibit 5) Cox moved to dismiss the indictment due to the pre-indictment delay by the State of Florida. (R2104-08) Cox also moved for discharge based upon a violation of the Interstate Agreement on Detainers, in that he was not brought to trial within 180 days of his demand for final disposition of the murder charge. (R2109-12) Following hearings (R1337-94), the motions were denied. (R2200,2187)

Trial occurred in the Circuit Court for Orange County, the Honorable Richard F. Conrad presiding. At the conclusion of

1/ (R) refers to the record on appeal in the instant case, Florida Supreme Court Case Number 73,150.

the state's case defense counsel moved for a judgment of acquittal, arguing in detail that the evidence was legally insufficient to support a murder conviction (R979-90), in th t it failed to prove venue (R993), any underlying felony to support a felony murder (R993-97), and/or premeditation. (R998-1009) The court granted an acquittal to the charge of felony first-degree murder (R1027), but denied relief on all other grounds. (R992-993, 1011). Cox rested without presenting any testimony. (R1011) Cox personally refused to waive application of the statute of limitations for the lesser included offenses of murder (R1020-22), so the verdict form contained only two options; guilty of first-degree premeditated murder and not guilty. (R2281) After a day and a half of deliberations and multiple jury questions Cox was found guilty of first-degree premeditated murder. (R2281)

PENALTY PHASE

The penalty phase occurred two months later on August 29, 1988. Prior to the hearing Cox personally waived the statutory mitigating circumstance of no prior significant history of criminal activity. (R1537) Over strenuous objection, the state presented as "rebuttal" the testimony of one of Cox's childhood friends to establish that Cox had, as a youth, been arrested for burglarizing an auto parts store. (R1847-49) Cox also personally waived instructions on all statutory mitigating circumstances except for the age of the defendant at the time of the crime and any other aspect of the defendant's character or record. (R1853) After deliberating for 2½ hours the jury recommended by a seven

to five vote that a death sentence be imposed. (R1932) Accordingly, a death sentence was imposed September 30, 1988. (R1940-43) In a separate order, the judge found as aggravating circumstances that Cox had previously been convicted of a felony involving the use of threat or violence to the person and that the capital felony was especially heinous, atrocious or cruel. (R2509-17) (See Appendix A) The court found as mitigation Cox's behavior in prison and Cox's military record and conduct. (R2511-12) A motion for new trial was denied September 29, 1988. (R2518) A timely notice of appeal was filed October 6, 1988 (R2521), and the Office of the Public Defender was appointed to represent Robert Cox for the purpose of his appeal based on a finding of indigency. (R2520) This brief follows.

STATEMENT OF THE FACTS

Nineteen-year-old Sharon Zellers worked at Walt Disney World. (R451-52) On December 29, 1978 she was seen by a co-worker talking to a maintenance man at the Disney World complex, and afterward she became upset. (R495-96) The next day she was called in to work from 1 P.M. until 10 P.M. (R453-54) When Zellers was not home by midnight her father twice drove to the Disney World parking lot and back home searching for her. (R457,461-67) He then called the sheriff's office and reported his daughter missing. (R469-70)

Zellers' automobile, a 1966 Ford Falcon, was found January 3, 1979 near Orlando in an orange grove next to Sand Lake Road between Apopka and 1-4 in Orange County, Florida. (R472-75, 497-99) Zellers' purse was found on the front passenger-side floorboard of the Falcon; it contained a large black comb, a wallet, a change purse containing $12.00, i.d. cards, driver's license, a hair brush, cigarettes, and a zippered bag. (R523-25, State's Exhibit 20) The police found shoe prints on the inside of the windshield and the post separating the front and back seat windows (R526-29,619-20). On January 4, 1979 the police searched a sewage lift station located near the Falcon and therein found the fully-clothed body of Sharon Zellers. (R472-75,481,504-08) State's Exhibit 13 is an aerial photograph depicting the orange grove, the Falcon, a portion of Sand Lake Road, and the sewage lift station as they were in 1979. (R514)

Zellers' blood alcohol content was .069%. (R787) Zellers could have been alive as late as January 2, 1979. (R787)

The medical examiner concluded that Zellers died as a result of multiple blunt force injuries to the head that caused brain injury. (R777) He observed fourteen wounds to the head, and noted that all but one could have been made with the same weapon. (R772) Two head injuries were potentially fatal (R763,769-70), but the doctor did not believe that death was immediate. (R777) The amount of blood found in various wounds indicated that Zellers survived possibly 20 to 30 minutes after being injured. (R773-74) Zellers also received injuries to the left lower rib cage, the back of each forearm, contusions on the left back along the upper margin of the shoulder blade, and a contusion below the right buttock on the right upper thigh; a fracture to the ninth rib on the left side was potentially fatal because it punctured the lung prior to death. (R778-80,786) Zellers was identified through the dental records. (R783,819-20)

The right side of the Falcon was damaged. (State's Exhibits 3 and 4) Zellers' watch was found approximately six feet behind the Falcon (R539-43), but no tire prints, footprints, fingerprints or bloodstains were found outside the vehicle. (R537) The bottom portion of the Falcon's rear seat, which had been in the Falcon on December 30, 1978 (R477), was missing. (R537-39) An expert in shoe comparison (R609-14) concluded that there was better than a 50-50 chance that the shoe print on the inside of the windshield was made by Zellers' shoe. (R619-20, State's Exhibits 22,23 and 24)

A bloodstain on the Falcon's dashboard was type A blood. (R865) Zellers' blood was type A. (R855-58) A bloodstain

on the upholstery was type O (R866), as was a bloodstain on the steering column. (R865) Cox has type O blood, as does 45% of the population. (R870) No enzyme tests were performed on the blood. (R872-73) A DNA comparison test was conducted and the results were inconclusive. (R1343,2211) The police obtained loose hair from the front seat (R533-34), three of which are consistent with Cox's chest hair. (R530-33,886,940) The state expert testified that hair comparison is not a positive means of identification; different people have hair with the same characteristics. (R948)

The sewage lift station where Zellers' body was found is 340 feet from a Days Inn motel. (R683-84) Room 3303 was on December 30-31, 1978 registered to Robert Cox. (R673-75, State Exhibit 28) The room was also occupied by Cox's parents. (State Exhibit 49) A security guard at the Days Inn testified that on December 31, 1978 he investigated a complaint concerning an injured person attempting to enter room 2303. (R636-37) The guard's investigation led to room 3303 where he was asked by Cox's mother to provide help to her son who, though very bloody around the face and mouth, had no bruises or scratches. (R638) The guard tried to talk to Cox, who was at that time wearing only sweat pants (R641), but due to his injury Cox could only communicate by writing messages. Cox explained that he had been injured in a fight with a black man at Skate World and had been brought back to the motel by a passerby. (R650-51) Cox's notes to the security guard were not preserved. (R651). Cox passed out on the bed. (R641). An ambulance was called and Cox was taken to the hospital. (R641-42)

The surgeon who performed the surgery on Cox was contacted shortly thereafter by Detective Hansen (R916). After reviewing his operative notes, the surgeon could not determine whether or not Cox's wound had been self-inflicted. (R912-913) When testifying at Cox's trial almost ten years later the surgeon was unable to recall the injury (R908), but his notes reflected that "almost 3/4 of an inch of Cox's tongue had been bitten off.'' (R907) The surgeon stated that it is possible for a person to bite off his own tongue if struck hard enough on the chin, and a bruise would not necessarily result. (R915) The surgical technologist who assisted in Cox's surgery testified that "about a third of the front portion of the tongue was gone. It had been bitten off very obviously". (R717-22) While testifying, the witness drew a representation of the injury as she remembered it the sketch was introduced into evidence over defense objection as State Exhibit 36. (R721,737) The state presented no evidence whatsoever that Cox could not have bitten his own tongue in the manner depicted in State Exhibit 36, or that Zellers bit the tongue of her murderer. Rather an expert forensic odontologist, as requested by the police, examined Zellers' teeth in January, 1979 for the presence of any foreign tissue and could find none. (R821)

A deputy who worked off-duty as a security guard at Skate World on December 30, 1978 testified that no fights occurred at Skate World on that date. (R953-54) On cross-examination, he clarified that his opinion was based on the premise that, although he worked inside that night and did not

patrol the parking lot outside where the fight was alleged to have occurred, he would have been informed of such a fight by others. (R957-62) Similarly, a disc jockey/floor guard who also worked inside Skate World in December of 1978 testified that he recalled no fight occurring on December 30, 1978. (R970) Cox's automobile was parked in a parking lot approximately 100 yards west of Skate World. (R975) An officer testified that, although he could recall nothing else whatsoever about Cox's automobile, he looked inside it with his flashlight when he brought Cox's father to the automobile and saw no blood. (R976-77)

Robert Cox was an adopted child. (R1767) He was born in Wichita, Kansas and grew up in Springfield, Missouri. (R1764) He was described by neighbors as not being afraid of hard work. (R1777) He assisted neighbors with their chores, was active in church programs and was considered a leader in the neighborhood. (R1782-85) Cox married in 1979 and has a young son (R1328). Cox enlisted in the United States Army and participated in the Grenada invasion. (R1839-40) He personally prevented one of his soldiers from hurting a Grenada student who was mistakenly believed to be an enemy soldier. (R1840-42) Cox became a member of the Airborne Rangers, a very elite group of servicemen (R1842), he was the most highly decorated soldier in his company. (R1722) He was soldier of the year in 1979. (R1723) He obtained a candidacy to Officer Candidate School and was about to receive a commission as a First Lieutenant when he pled guilty to charges of kidnapping and assault in California. (R1706-08)

While imprisoned in California Cox corresponded with his son three to four times a week. (R1332) His conduct in prison was exemplary. One supervisor who "very, very seldom" testifies for inmates testified that Cox gained the position of an inmate coordinator and overseer who dealt with the inmates and assisted them with their problems. "And he was absolutely excellent at that, and that's why I am here." (R1780) Several instructors from the California Department of Corrections testified that Cox's performance as their assistant was outstanding. One testified that "Bob was a very calm, collected, bright, helpful person in and out of the classroom. He was labeled a good guy, not a bad guy." (R1798) Cox is the first inmate she ever scored as superior in every category available. (R1798) She testified that Cox was placed in Deuell as opposed to Susanville, which is a lower-security facility, because a hold had been placed on him by Florida for the offense of first-degree murder. (R1802) Another instructor testified that Cox took a personal interest in assisting inmates who were soon to be released. He described Cox as an excellent worker who did much work on his own initiative, including creating computer programs to assist inmates in relocating after release. (R1807-11)

SUMMARY OF ARGUMENTS

POINT I: The evidence that Robert Cox murdered Zellers is legally insuffici nt to support the verdict because the evidence fails to exclude the presumption of Cox's innocence. There is no direct evidence that Cox is the person who murdered Zellers, and the circumstantial evidence is legally insufficient to support that conclusion beyond a reasonable doubt. The conviction violates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Art. 1, Sections 9 and 16, Florida Constitution. The conviction must be reversed and Cox discharged from Florida custody.

POINT 11: The trial judge, on his own motion and over defense objection, excused a statutorily qualified prospective juror who did not request to be excused from service. The judge further prevented questioning of the prospective juror whereby a record could be created for appellate review. Such a cavalier ruling in a capital case over timely objection was an abuse of discretion which denied Cox state and federal constitutional rights to a jury trial and Due Process. A new trial is required.

POINT 111: The trial judge excused for cause, over defense objection, a juror who unequivocally asserted that she could and would follow her oath as a juror. Her excusal violated state and federal constitutional rights to due process and a jury trial composed of a fair cross-section of the community. Accordingly, the conviction must be reversed and the matter remanded for retrial.

POINT IV: Based on Zellers murder, Florida placed a detainer against Cox while he was imprisoned in California. Cox immediately requested final disposition of the Florida charge pursuant to the Interstate Agreement on Detainers. That Agreement required that Cox be brought to trial within 180 days from the date of the requested final disposition of the charges upon which the detainer was based. Florida failed to try Cox within the prescribed 180 day period. Accordingly, the conviction must be reversed and Cox discharged forthwith.

POINT V: The state waited nine years to indict Cox for Zellers' murder. During that time, the state developed no new information and destroyed information except that which was beneficial to its case. The delay effectively prevented Cox from conducting any meaningful investigation concerning Zellers' murder or his own alibi. He was by the unnecessary and intentional delay deprived of his Fifth and Fourteenth Amendment rights to Due Process. Accordingly, the conviction must be reversed and Cox discharged.

POINT VI: The trial court made several erroneous rulings on evidentiary matters. Those errors singularly and cumulatively violate Due Process, denied Cox a fair trial, and otherwise render the death penalty unreliable under the Eighth and Fourteenth Amendments.

POINT VII: Prior to the penalty phase Cox waived the statutory mitigating circumstance of no significant prior criminal history.

The state and the court accepted that waiver. While presenting testimony, defense counsel scrupulously avoided opening the door for the state to use such testimony. Over objection, the state presented testimony concerning Cox's arrest for burglary when 16 years old to "rebut the characteristics of leadership" that had been established by the defense. The use of such testimony over objection denied Cox his right to due process and a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution and Art. 1, Sections 9 and 16 of the Florida Constitution. Further, reliance on non-statutory aggravating factors renders the death penalty unreliable under the Eighth Amendment of the United States Constitution and Art. 1, Sec. 17 of the Florida Constitution. The death penalty must be vacated.

POINT VIII: The death penalty is being imposed in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments, in that the judge rather than the jury is determining the presence of substantive elements of the crime upon which imposition of the death penalty is based. The statutory aggravating factors are substantive elements of the crime which actually define which first-degree murders can be punished by death. The trial court denied Cox his Sixth Amendment right to a jury trial by denying a timely request that the jury use a special verdict form whereby they would determine the presence of the statutory aggravating circumstances. Accordingly, the death penalty must be reversed and the matter remanded for imposition of a life sentence.

POINT IX: The death penalty in Florida is being arbitrarily and capriciously applied as a result of vague and inspecific statutory language. Decisions of this Court have not provided consistent results under the same or substantially similar facts. Moreover, this Court has applied the wrong standard of review concerning the presence of mitigating circumstances. Instead of consistently providing plenary review in all cases, this Court considers itself bound to an abuse of discretion standard unless the jury recommends life. The death penalty statutes in Florida facially and as applied violate the Fifth, Sixth, Eighth, and Fourteenth Amendments. The death sentence must be reversed and a sentence of life imposed.

POINT X: Imposition of the death penalty in this case violates the Eighth Amendment because of vague, misleading and improper jury instructions and argument. Of the two aggravating factors found by the trial judge, one (an especially heinous, atrocious or cruel murder) is unconstitutionally vague. That aggravating factor was not defined with sufficient clarity to restrict the discretion of the jury when the death sentence was recommended or the judge when the death sentence was imposed. The instructions and argument unconstitutionally distorted the weighing process used in recommending and imposing the death sentence, and incorrectly state the law in Florida. Accordingly, the death penalty must be reversed and the matter remanded for a new penalty phase.

POINT XI: The trial judge gave the state advance permission to cross-examine Cox concerning guilt if Cox testified during the penalty phase, even if Cox totally avoided the issue when testifying. That ruling was erroneous and it prevented Cox from addressing his sentencer and as such Cox was denied rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments.

POINT I

THE CONVICTION FOR FIRST-DEGREE MURDER VIOLATES THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE 1, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BECAUSE THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT THE GUILTY VERDICT.

The trial court granted an acquittal for first-degree felony murder because the state failed to prove an underlying felony. (R1027) The trial judge erred by not also granting an acquittal to the charge of first-degree premeditated murder because the state's evidence is legally insufficient to support a guilty verdict; the proof fails to exclude the reasonable possibility that someone other than Robert Cox killed Sharon Zellers and/or that the killing was not premeditated. The evidence of Cox's guilt is entirely circumstantial, consisting of the reasonable inferences to be drawn from the facts established by competent testimony.

Those facts are not is dispute. Zellers worked and was last seen alive at Disney World at 9:40 p.m. on December 30, 1978. (R453-54,493) Her father began looking for her around midnight on December 30, 1978 without success. (R461) The sheriff's office was notified and deputies responded to the house around 1:00 p.m. on December 31, 1978. (R469-71) Zellers' Falcon was found in an orange grove near Orlando on January 3, 1979. (R683, 472,499) Zellers' body was found nearby in a sewage lift station on January 4, 1979. (R481) The proximity of the sewage lift station to the Falcon is depicted in State's Exhibit 6.

An autopsy revealed that Zellers received numerous injuries to the head, body, arms and hands, many of which were characterized as "defensive" wounds. (R771,778-80) Three wounds were potentially fatal (R786), but the cause of death was brain injury caused by blunt force trauma to the head. (R777) Zellers lost a fingernail prior to death and bleeding from that and other wounds established that Zellers lived for approximately one-half hour after the injuries were inflicted. (R773-74) Zellers could have been alive on January 2, 1979. (R787) At the time of the autopsy Zellers' blood alcohol content was .069% (R787); a percentage of .10 creates a legal presumption of being under the influence of alcohol. Section 316.193, Florida Statutes (1987).

The right side of Zellers' Falcon was dented and damaged. (R543, State's Exhibit 3) Zellers' watch was found in the sand in the orange grove six feet behind the Falcon. (R540, 547,679) Type A and type Θ blood stains were found in the interior of the car. (R517-23,561-66) Zellers had type A blood (R855-58); Robert Cox has type Θ, as does 45% of the world population. (R870) No enzyme testing was performed on the blood. (R872-73) A DNA comparison test was inconclusive. (R1343) A footprint found on the inside of the windshield on the passenger's side was "more likely than not" made by one of Zellers' shoes. (R616,620) As shown by State's Exhibits 30-34, boot tracks were present on one of the Falcon's seats. (R687-88) The bottom portion of the rear seat was missing. (R477,538-39) Hair found in the Falcon is consistent with chest hair from Cox; the hair is also consistent with hair from other people. (R940,948)

Zeller's father believed that his daughter normally went home via a route that took her by Skate World and Scaggs-Albertsons. (R480) Zellers would sometimes take other routes home, but would call home if she did so (R484): Zellers called home during a break from work at Disney World on the day she became missing but was unable to contact her parents. (R486-87) Zellers was timid around strangers and would not permit a stranger in her car. (R484) There is no evidence that Zellers knew Cox.

On December 30 through December 31, 1978, Robert Cox stayed with his parents at the Days Inn Motel. (State's Exhibits 28, 49) The perimeter of the Days Inn property is approximately 340 feet from the sewage lift station wherein Zellers' body was found. (R683-84) On December 30, 1978 Cox, in an injured condition, returned to his motel room. The tip of Cox's tongue had been bitten off and he was bleeding. He was taken to Mercy Hospital after explaining to a security guard via an unpreserved, written communication that he had been in a fight with a black man at Skate World and had been given a ride back to the motel. The surgeon who operated on Cox's tongue was contacted a short time after the operation by Deputy Hansen and, after reviewing his operative notes, the surgeon could not determine whether Cox's wound had been self-inflicted. (R916,912-13). The surgeon's notes reflect that about 3/4 of an inch of Cox's tongue had been bitten off (R907), but the doctor had no independent recollection of the injury. (R907) The surgical technologist who assisted the surgeon recalled nearly ten years later that "about

a third of the front portion of the tongue was gone. It had been bitten off very obviously." (R722) The technician sketched her recollection of the injury. (State's Exhibit 36) The state presented no evidence that Cox could not have bitten his own tongue in the manner depicted in State's Exhibit 36. In January 1979 an expert forensic odontologist searched for foreign tissue in Zellers' teeth after having been requested to do so by deputies and was unable to find any. (R821)

On January 12, 1979, after having returned to his Army base in Georgia, Cox gave a sworn statement concerning the fight at Skate World. (State's Exhibit 49) He stated:

> I and my mother and father arrived in Orlando 12-30-78 after dark[.] We went to one Days Inn and they were all full. So they sent me to another motel. At that Days Inn Motel I got a room, then we went to the restaurant there at the motel to eat. After eating I wanted to go and see what Orlando had to do. I was driving around for a while. I saw a spotlight in the sky so I headed for it. Once I got there I went up to it and went in. It was a bar, restaurant. I thought I spent very little time there, 'cause there were too many Navy men around. So I left and went driving around again. I saw Skateworld, so I thought I would stop in and see how nice their skating rink was. So I park[ed] my car in the back and went up to the front. I went up to the window and asked if I could go in and see how it was. I had a Coke and left. I was walking back to my car when I saw four blacks and three whites arguing. I walked over and said take it easy and don't cause any trouble or the cops will come and bust you all. So then a big black man hit me while I was talking. I went down on the pavement and my mouth was bleeding. I thought my teeth were broken but then I noticed my tongue was hanging out, then it came all the way

> off. It scared me so the first thing I thought of was to get back to the motel. I got in my car and started driving looking for anything familiar. I was shaking and I was scared. After some time of driving I gave up looking for it, and tried to find Skateworld again. I found it again, and I pulled up in the store parking lot when I saw an older man. I stopped and parked my car and ran over to him. I had a map of where my mother was, and I tried telling him to take me there. He kept asking me if I was okay. I just nodded and asking for my mother. He took me back to the motel where I got out of the car and ran to the second to room 2303 and started pounding on the door. These people told me to go away and I then realized that I was at the wrong room. I then ran upstairs to my mother's room 3303 and she got help for me and I was taken to the hospital. At the time of this statement I had legal counsel present.

To refute Cox's statement, the state presented the testimony of two people who worked inside of Skate World to establish that no fight occurred outside in the parking lot. (R953-62,970) The state further presented the testimony of a police officer who noticed no blood in Cox's car early that morning when he looked into the car with a flashlight after dropping off Cox's father to drive the car back to the motel. (R976-77) This evidence is legally insufficient to establish that Robert Cox, and no other person, killed Sharon Zellers. Accordingly, as a matter of law, Cox is entitled to reversal of the murder conviction and discharge.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, (1970). Cox's conviction violates the Due Process Clause and as a matter of law the judge

erred in denying the motion for judgment of acquittal because the circumstantial evidence is legally insufficient to overcome the presumption of innocence.

> Under Florida law, where there is no direct evidence of guilt and the state seeks a conviction based wholly upon circumstantial evidence, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hyposthesis of innocence. (citation omitted). The basic proposition of our law is that one accused of a crime is presumed innocent until proved guilty beyond and to the exclusion of a reasonable doubt, and it is the responsibility of the state to carry its burden. (citation omitted). It would be impermissible to allow the state to meet its burden through a succession of inferences that required a pyramiding of assumptions in order to arrive at the conclusion necessary for conviction. (citations omitted).

Torres v. State, 520 So.2d 78, 80 (Fla. 3d DCA 1988). See Posnell v. State, 393 So.2d 635, 636 (Fla. 4th DCA 1981)("Where the state fails to meet its burden of proving each and every necessary element of the offense charged beyond a reasonable doubt the case should not be submitted to the jury and a judgment of acquittal should be granted."); Kickasola v. State, 405 So.2d 200, 201 (Fla. 3d DCA 1981)("[E]vidence which furnished nothing stronger than a suspicion, even though it tends to justify the suspicion that the defendant committed the crime, is insufficient to sustain a conviction.")(emphasis added). It is well established in Florida that a case that rests exclusively on circumstantial evidence must exclude all reasonable hypotheses of innocence.

> It is the responsibility of the State to carry its burden. When the State relies upon purely circumstantial

> evidence to convict an accused, we have always required that such evidence not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. (citations omitted).
>
> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, it is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is sufficientto suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.

Davis v. State, 90 So.2d 629, 631-32 (Fla. 1956)(emphasis added).

The case against Cox is entirely circumstantial. There is NO direct evidence of his guilt. There was no motive shown for Cox to commit the crime, which is a valid consideration in circumstantial evidence cases. See Daniels v. State, 108 So.2d 755,759 (Fla.1959)("Where proof of the crime is circumstantial motive may become both important and potential."

The state was required to prove beyond a reasonable doubt that:

1. SHARON ZELLERS is dead
2. The death was caused by the criminal act or agency of Robert Cox.
3. There was a premeditated killing of Sharon Zellers.

Section 782.04(1)(a), Fla. Stat.; Fla.Std. Jury Ins. in Criminal Cases, p.63. The state proved and it is undisputed that Sharon

Zellers is dead. It is expressly submitted, however, that the state failed as a matter of law to sufficiently prove either that Zellers' death was caused by the criminal act or agency of Robert Cox or that the killing was premeditated. Accordingly, as a matter of law, Cox is entitled to reversal of his conviction and immediate discharge from custody in Florida.

THE STATE FAILED TO PROVE THAT ZELLERS' DEATH WAS CAUSED BY THE CRIMINAL ACT OR AGENCY OF ROBERT COX.

What competent evidence exists that Cox, and no other person, killed Zellers? The state relied on the inferences to be drawn from four areas of proof:

1. Hair comparison evidence.
2. Boot track evidence.
3. Proximity of Cox to Zellers' body and automobile.
4. Blood comparison evidence.

HAIR COMPARISON:

The hair comparison evidence established at most that three hairs found in Zellers' vehicle in 1979 are consistent with Cox's chest hair. A hair comparison analysis was conducted by an expert hair analyst in 1979, and the results were either inconclusive or favorable to Cox [2/]. (R892,896) The testimony of the other expert establishes ~~at most~~ that Cox's chest hair is

2/ On direct examination for the state, Greg Scala identified as Exhibit 48 slides he prepared in 1979. The prosecutor then moved in limine to restrict cross-examination of Scala by the defense, stating, "Mr. Scala performed certain examinations back in 1979. An examination which the state has not chosen to offer. The motion in limine is to restrict the defense to the scope of direct examination. That is preparation of the slides." (R892)

consistent with hair found in Zellers' automobile in 1979. The expert testified:

> [O]ne hair is never identical in all of its features to another hair. The natural process of growth doesn't allow that. Everything, almost everything's unique in nature and hair is one of those things. It has many characteristics that are consistent and within a relatively small range on a person's body, but no hairs are ever identical in all respects.

(R934). The expert admitted that more than once he personally observed two people with indistinguishable hair characteristics. (R940,944) The expert testified that comparing hair is not like comparing fingerprints, in that hair comparison does not provide a positive means of identification. (R948)

> Q. (Defense Counsel): Is it possible that the hairs you examined in those State's Exhibits came from someone other than Mr. Cox?
>
> A. (Expert): Yes, that's possible.
>
> Q. Can you tell this jury the age of that hair that you looked at?
>
> A. Not with any accuracy other than it's obviously since puberty, but --
>
> Q. Can you tell them how long the hair had been in the car?
>
> A. No.
>
> Q. So you can't tell them it was a week old?
>
> A. No.
>
> Q. Or a decade old?
>
> A. No.

(R946-47) (emphasis added). Florida appellate courts have not hesitated to reverse convictions that are founded upon such

equivocal identification evidence. For example, in Horstman v. State, 530 So.2d 368 (Fla. 2d DCA 1988) the Second District Court of Appeal reversed a second-degree murder conviction because the circumstantial evidence proving identification (hair and blood comparison testimony) was too equivocal to negate the possibility that someone other than the accused shot the victim.

> The strongest evidence implicating Horstman in Peterson's murder is the hair that was found on her body. Although hair comparison analysis may be persuasive, it is not 100% reliable. Unlike fingerprints, certainty is not possible. Hair comparison analysis, for example, cannot determine the age or sex of the person from whom the hair came. The state emphasizes that its expert, Agent Malone, testified that the chances were almost non-existent that the hairs found on the body originated from anyone other than Horstman. We do not share Mr. Malone's conviction in the infallibility of hair comparison evidence. Thus, we cannot uphold a conviction dependent upon such evidence.

Horstman, 530 So.2d at 370. See Jackson v. State, 511 So.2d 1047 (Fla. 2d DCA 1987)(First-degree murder conviction reversed due to the legal insufficiency of identification of murderer based on bite-mark comparison, hair comparison, and statement of the accused).

The hair found in the Falcon was brown (R944) and curly (R946) with a tapering tip (R946) and a medulla (R945-46). The state's expert conceded that these characteristics are the most common for chest hair. (R944-46) Even if the hair comparison evidence provided a positive means for identification, the state would be required to show that the hair could only have been left in the victim's Falcon during the commission of the crime to allow the trier of fact to legally infer that the identity of the

murderer was Robert Cox. See Jaramillo v. State, 417 So.2d 257 (Fla. 1982). The state did not prove that the hair could only have been placed in the automobile at the time of the murder. There is no way of knowing how long the hair was present in the Falcon. This equivocal identification evidence, viewed in a light most favorable to the state, shows at most that at some point in time a person with hair consistent with Robert Cox's hair might [3/] have been in Zellers' automobile.

BOOT TRACK EVIDENCE:

When seen at the hospital, Cox was wearing sandy black military-style boots. (R696-701) James Pierpoint testified that tracks depicted in State's Exhibits 30-33 are "typical of Army boots that Airborne Ranger and Special Forces troops wore during the time frame that [the pictures] were taken." (R887) He explained that these soles were not regular Army issue (R688-89) "The soldier would have them resoled. It was not uncommon to buy a brand new pair of Cochran jump boots out of the exchange, go to a local shoe repair shop and have the Vibrum style soles placed on those boots because it gave better traction than the original soles." (R689) Pierpoint went even further and stated that he could preclude these tracks as having been made by a Vibrum type sole because characteristics ~~of the~~ Vibrum ~~sole were~~ missing! (R689) This testimony is absolutely useless! Pierpoint is

3/ Significantly different than a fingerprint, a hair can originate with an individual and thereafter be transferred in his or her absence.

saying that these tracks are made by imitations of what some Rangers sometimes wore, and even then, what some Airborne Rangers commonly did to their boots has no relevance whatsoever to what Robert Cox did to his Army boots unless and until the state produces competent evidence that Cox altered his boots. Indeed, the contention that these tracks originated from Army boots is baseless because Pierpoint stated that this sort of sole can be put on any type boot, by anyone, military or civilian, and could be purchased at shoe repair shops everywhere. (R692-93)

> An expert witness may testify only in his or her area of expertise. An expert opinion must not be based on speculation, but on reliable scientific principles. See Delap v. State, 440 So.2d 1242 (Fla. 1983). This medical examiner was not qualfied as an expert in shoe patterns. Her testimony was neither reliable nor scientific and should not have been allowed.

Gilliam v. State, 514 So.2d 1098, 1100 (Fla. 1987).

Pierpoint's testimony is simply worthless. Viewed in a light most favorable to the state, it establishes that boot prints, either civilian or military, maybe even boots that were imitations of boots that some Airborne Rangers wore, were left at some point in time on the seat of Zellers' Falcon. This testimony, viewed in a light most favorable to the verdict and in conjunction with the hair comparison testimony, utterly fails as a matter of law to provide competent, substantial proof that Robert Cox and no other person murdered Zellers. Such equivocal proof fails to overcome the legal presumption of innocence.

PROXIMITY OF COX TO ZELLERS' BODY AND AUTOMOBILE:

On December 30-31, 1978, Robert Cox rented a room for himself and his parents at the Sand Lake Days Inn Motel, which had a capacity of 720 people. (R647) (State's Exhibit 49) The edge of the Days Inn property was approximately 340 feet from where Zellers' body was found (R684) and near where Zellers' Falcon was abandoned. The medical examiner determined that Zellers could have been alive on January 1, 1979, and possibly but less probably on January 2, 1979. (R788) Thus, Zellers could still have been alive two days after Cox and his parents checked out of the motel. See Davis v. State, 90 So.2d 629 (Fla. 1956) (Evidence that defendant killed his wife legally insufficient where wife may have been killed after he was in police custody).

Zellers was last seen around 10 p.m. of December 30, 1978. The period of time wherein she could have been killed spanned all of December 31, all of January 1, and possibly January 2. Three days. The "proximity" of Cox to the area where Zellers' body and automobile was discovered during a portion of this time fails to prove beyond a reasonable doubt that Cox, and no other person, murdered Zellers. The state failed to present competent evidence that Cox was any closer than approximately 340 feet to the area where the body was found at a time when the body may or may not have been there. In circumstantial evidence cases, the consistently critical factor in determining the sufficiency of evidence to allow the question to go to the jury is the presence of direct evidence placing the defendant with the victim at or very near the time of death. Cf. Bundy V. State, 471 So.2d 9, 12

(Fla.1985)(Two witnesses identified Bundy as person at scene of abduction driving white van stained with victim's blood type); Heiney v. State, 447 So.2d 210, 211 (Fla.1984)("The victim's mother and his wife later positively identified Heiney as having been with the victim the day prior to his death. They both testified at trial."); Bundy v. State, 455 So.2d 330 (Fla.1984)("The principal items of evidence [include] the identification testimony of a resident of the Chi Omega sorority house who briefly saw Bundy in the house."); Peavey v. State, 442 So.2d 200, 201 (Fla. 1983)(unexplained presence of defendant's fingerprints on victim's cashbox); Williams v. State, 437 So.2d 133 (Fla.1983)(Defendant called victim's sister from scene and reported finding victim murdered); Rose v. State, 425 So.2d 521, 522 (Fla.1983)("The evidence reveals that the defendant was the last person seen with [the victim] at the bowling alley on the night she disappeared"); Welty v. State, 402 So.2d 1159, 1163 (Fla.1981)("Welty's own statement to the authorities which was introduced into evidence placed him in [the victim's] bedroom at the exact time of the murder."); Clark v. State, 379 So.2d 97, 101 (Fla.1980)("There was no question as to the identification of Clark or the fact that Clark's Blazer was identified as being in the bank's parking lot at the precise time that the victim was abducted."); North v. State, 65 So.2d 77, 78 (Fla.1952)("Only the appellant and [the victim] were present at the time of her death"); Green v. State, 408 So.2d 1086,1087 (Fla. 4th DCA 1982)("Ms. Parillo testified that when she entered the lot, there was no one in the parking lot other than the appellant and the elderly man that was killed.

Ms. Parillo positively identified the appellant, both at the lineup and in court[.]").

In each of the foregoin ca es where the circumstantial evidence was found legally sufficient to support the verdict, the state was able to unequivocally establish through direct evidence (eyewitness, fingerprint, or admission) that the defendant was with the victim at or near the time of death. In cases where the circumstantial evidence was found to be legally insufficient for the case to have been submitted to the jury, the state was unable by direct evidence to unequivocally place the defendant in the presence of the victim at or near the time of death. Cf. Jaramillo v. State, 417 So.2d 257, 258 (Fla.1982)(First-degree murder convictions reversed where state failed to prove that accused's fingerprints had been left at murder scene at time of the crime and no other); Davis v. State, 90 So.2d 629, 630 (Fla. 1956)(Murder conviction reversed where "There is not one item of direct evidence that connects him with the crime for which he was convicted."); Head v. State, 62 So.2d 41, 42 (Fla.1952)(Manslaughter conviction reversed where accused's automobile was seen being erratically driven at high speed near the scene of a body, but "to conclude from the testimony in this record offered for the purpose of showing that the deceased was killed by being struck by an automobile, would be at best a haphazard guess.")

The direct evidence presented by the state in this case is that Cox rented a motel room with his parents on the night Zellers disappeared and stayed there for one evening. This was but the first day in the three-day range during which Zellers

could have been killed based on the testimony of the state's expert pathologist. The probative force of such testimony does not amount to substantial, competent evidence upon which to rest a conviction for first-degree murder.

BLOOD COMPARISON TESTIMONY/BITE MARK:

The testimony viewed in a light most favorable to the verdict establishes that a type A bloodstain (Zellers' blood type) was found on the dashboard of her Falcon (R521-23,865), and that a type O bloodstain was on the passenger's side upholstery (R516-18,866) and the steering column (R865). The reasonable inference to be drawn from this, viewed in a light most favorable to the verdict, is that a person with O type blood (45% of the world's population) was injured while in Zellers' automobile. Cox was indeed injured during a portion of the time when Zellers was missing. However, the evidence is simply legally insufficient to establish that Zellers bit off a portion of Cox's tongue, thereby injuring Cox while he was in Zellers' Falcon.

Specifically, Zeller's teeth were examined by an expert in forensic odontology (R813-14), and he could find no evidence that Zeller's had bitten anyone prior to her death.

> Q: (Prosecutor) Were you able then to reach an opinion based on your visual examination and your comparison of the x-rays, comparison of the individual teeth, to a reasonable degree of medical certainty as to the identification of the maxilla and mandible and the dental records in this case?
>
> A: (Dr. Ford) Yes, I was.
>
> Q: And what is that identification?

A: That the maxilla and mandible that were given to me by the detectives from the Orange County dental or Orange County Sheriff's Department were those of Sharon Zellers.

Q: Did you examine the teeth for any tissue that was not the victim's tissue, when you received the teeth in this case?

A: Yes. I was asked to do *so,* yes.

Q: Was any such tissue present?

A: I did not find any, no.

(R821).

Any conclusion that Zeller's bit her assailant, much more her assailant's tongue, is simply baseless speculation. Significantly, the doctor who performed the surgery on Cox's tongue was contacted by Detective Hansen shortly after the surgery occurred (R 916), but the surgeon was unable to tell whether Cox's wound was self-inflicted:

Q: (Defense Counsel) You spent about forty-five minutes with that tongue, didn't you?

A: (Dr. Taggart) Approximately.

Q: And you could not tell whether he bit his own tongue or someone else did, could you?

A: I don't remember. It's ten years ago.

Q: You took operative notes, didn't you?

A: Yes.

Q: And you actually reviewed those during this deposition that you had back on May 5th?

A: Yes.

Q: And that was on May 5th with Miss Cashman?

A. I believe so.

Q: And Mr. Ashton was also there, as were Mr. Lauten from the state attorney's office, correct?

A: I believe so.

Q: And you were -- you took an oath to tell the truth there with the court reporter, correct?

A: Yes.

Q: All right. Do you recall being asked the question, "Were you able to determine whether the tongue'' -- and counsel, that's page fifteen, line twentv-three -- "were vou able to determine whether the tongue had been cut off because his teeth bit through it or because someone else's did?"

A: I presume I was asked that.

Q. Do you recall?

A: I recall that I was not sure.

Q: You don't recall your answer, "After reviewing your notes, really I couldn't tell."?

A: That's logical.

Q: Would you like to . . .

A: I can accept that as my answer.

(R912-13). Forensic odontology has been recognized as an area of scientific expertise in Florida. See Bundy v. State, 455 So.2d 330 (Fla. 1984); Mitchell v. State, 527 So.2d 179 (Fla. 1988). Bite mark identification is not a subject for lay person opinion. Rather, it is a highly technical field of expertise:

A bitemark is not an accurate representation of the teeth that caused

> its impression. To understand this, one must consider the bite dynamics and its effects on the impression made by the teeth. The lower jaw (mandible) is movable and delivers the bite force against the upper jaw (maxilla) which is stationary. The upper teeth hold the substance which is being bitten as the lower teeth approach for the purpose of cutting the substance. When referring to bitemarks in skin, this would mean that the skin is curved between the upper and lower teeth as the lower jaw moves up to cut the tissue, the skin is stretched away from its normal curvature between the teeth. It will be considerably out of shape when the force is actually inflicted that causes the skin to be pinched between the upper and lower teeth. In this whole process, the skin itself has not been stationary, because it tends to slip along the upper teeth until they catch hold when the bite occurs.

Scientific Evidence in Criminal Cases, (Second Ed. 1978), §16.05, pp. 651-652.

The state's evidence establishes that Zellers fought and received numerous defensive wounds including loss of a fingernail. Her shoe prints were on the windshield; a speaker in the rear of the Falcon was shattered. Yet other than an injured tongue, Cox was wholly unmarked.

> Q. (Prosecutor) Where was this blood?
>
> A. (Mr. Works) Facial area. Around the mouth.
>
> Q. Did you see any other marks to this person. Did you see any marks to this person?
>
> A. Not really.
>
> Q. Did you see any bruises or scratches on this person?
>
> A. None at all.

(R639).

Q. (Prosecutor) Describe any marks that you saw on his face.

A. (Ms. Porter) There were no other marks on his face that I noted.

Q. No bruises?

A. No.

Q. Were there any scratches?

A. No.

(R725) Cox explained that he was unexpectedly struck a single time during a fight at Skate World and that his tongue was severed. The security guard at Skate World admitted that fights routinely occur at Skate World **(R953),** he was just unaware of one occurring on December **31, 1978.**

In sum, the state's evidence is more consistent with the premise that Cox did not murder Zellers than that he did. If it is assumed that the hair and blood in Zellers' car belonged to Cox, it then has to be assumed that Zellers bit off a portion of Cox's tongue prior to being murdered <u>but inflicted no other injuries</u> **. . .** not even a scratch! That inference is unlikely in light of the state's evidence showing that Zellers fought her attacker, evidence including but not limited to the complete loss of one fingernail. The assumption that Cox is the murderer is also inconsistent with the testimony that Zellers would not permit a stranger to enter her automobile. Had Cox, a stranger, attempted to do so near Skate World, surely Zellers would have put up a ruckus that would have been reported to either the floor guard or the disc jockey who worked inside Skate World. Pursuant

to McArthur v. State, 351 So.2d 972 (Fla. 1977), as a matter of law the state's evidence is insufficient to support the verdict because it fails to exclude the possiblity that some person other than Robert Cox killed Sharon Zellers.

> A review of prior decisions of this Court in similar cases is not helpful to the analysis required here, since the nature and quantity of circumstantial evidence in each case is unique.
>
> In general, the jury received two categories of circumstantial evidence — scientific and non-scientific. Our study of both types leads us to conclude that, on balance, neither is inconsistent with innocence.

McArthur, 351 So.2d at 976; ~~see also~~ Fowler v. State, 492 So.2d 1344, 1347 (Fla. 1st DCA 1986)("Conviction returned by jury could not be sustained by the court unless there was competent and substantial evidence inconsistent with any reasonable hypothesis of innocence.").

All of the state's evidence can be believed and still the proof is consistent with Cox's innocence because there is no competent, substantial proof showing that Zellers bit her assailant's tongue at the time of the murder. Instead the expert forensic odontologist could find ~~no~~ foreign tissue lodged in Zellers' teeth. Cox's injury included a severed artery which was bleeding "fairly heavily" (R721) and he passed out (R641) after communicating with the Days Inn security guard who followed a "trail of blood" from room 2303 to 3303. (R648) A person who saw Cox walking from room 2303 to 3303 described Cox as "bloody." (R637) The slight amount of blood in the Falcon is much more consistent with having come from a person severely scratched than

coming from a person who was bleeding profusely from a severed artery. A person scratched with such ferocity that a fingernail was lost would undeniably bleed and exhibit injuries that would be readily observable; significantly, Cox displayed no externally visible injuries. As a matter of law, pursuant to McArthur, supra, the evidence is insufficient to support the verdict. The conviction must be reversed, not only because the state failed to prove that Cox was the murderer, but also because the state failed to prove a premeditated murder.

INSUFFICIENT EVIDENCE OF PREMEDITATION

For a killing to constitute premeditated murder in the first degree the state must establish not only that the accused committed the act resulting in the death of another, but also that before committing the act he formed a definite purpose for a sufficient time to be conscious of a well-defined purpose and intention to kill. Purkhiser v. State, 210 So.2d 448 (Fla. 1968). Premeditation is the one essential element distinguishing first-degree murder from second-degree murder. See Wilson v. State, 493 So.2d 1019, 1021 (Fla. 1986)("Premeditation is more than a mere intent to kill; it is a fully formed conscious purpose to kill."); Owens v. State, 441 So.2d 1111 (Fla. 3d DCA 1983). More than an intent to kill must be shown to sustain a first-degree murder conviction. Tien Wang v. State, 426 So.2d 1004 (Fla. 3d DCA 1983).

The state at trial argued vehemently that Zellers bit off a portion of Cox's tongue prior to her death. The prosecutor

asserted, "Ladies and gentlemen, Sharon Zellers marked him. God bless her, she marked that man. She marked that man with a mark that he will carry for the rest of his life. And for nine years that mark stayed on that man. We didn't know where it was." (R1080). Assuming, arguendo, that Cox was the assailant and Zellers did bite his tongue off, can it reasonably be said beyond a reasonable doubt that his response to such an act constitutes first-degree premeditated murder? If Cox was Zellers' assailant, he may well have intended to inflict severe injury upon her for biting off a portion of his tongue, but as a matter of law that provoked reaction does not equate with a deliberate, conscious purpose to effect the death of another. Though premeditation can be proved by circumstantial evidence, as a matter of law that evidence must be inconsistent with any premise other than that the person was killed by someone consciously intending to do so before it is sufficient to support a conviction for first-degree premeditated murder.

The evidence in this case is legally inadequate to support the conviction because the evidence fails to establish that Robert Cox was Zellers' murderer. There is no direct evidence that is inconsistent with the legal presumption that Cox is innocent. Therefore, the state failed to adequately prove that the death of Sharon Zellers was caused by the criminal act or agency of Robert Cox. Assuming that Cox was Zellers' assailant, the evidence supports the reasonable conclusion that the fatal blows were struck out of rage and pain, that is, as a totally non-premeditated reaction to having a portion of his

tongue severed. See Mitchell v. State, 527 So.2d **179,** 182 (Fla. 1988)("A rage is inconsistent with the premeditated intent to kill someone[.]") (emphasis added). The injuries that were inflicted on Zellers, though severe, were not such that would allow the jury to conclude beyond a reasonable doubt that Zellers' assailant deliberately and consciously intended that she be killed, especially where the testimony establishes that Zellers lived for an appreciable amount of time after the injuries were inflicted. Had her assailant been intending that she be killed, ample opportunity was present whereby Zellers could have been readily dispatched. In fact, assuming that Cox was the assailant and that Zellers bit through his tongue, thereby severing an artery, it would seem that he would have hastened to kill Zellers so he could quickly hide her body and seek medical assistance rather than have her linger for at least half an hour before dying.

As a matter of law, the evidence in this case is simply inadequate. The conviction rests on pure speculation. A first-degree murder conviction that rests on such equivocal evidence violates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 9 and 16 of the Florida Constitution. Accordingly, the conviction must be reversed and Cox discharged from Florida custody.

POINT II

THE UNJUSTIFIED EXCUSAL OF PROSPECTIVE JUROR SMITH OVER DEFENSE OBJECTION VIOLATED THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE 1, SECTIONS 9, 16 AND 22 OF THE FLORIDA CONSTITUTION.

Judge Cycmanick presided over jury selection on the first day of trial. He refused to use a written juror questionaire that had been prepared by the trial attorneys with prior approval of Judge Conrad (the trial judge). (Rll-17) Thus, all that the trial attorneys knew about the prospective jurors was that the jurors were statutorily qualified to serve as jurors under Section 40.013, Fla.Stat. Beginning at 1:30 P.M. (R9), the entire venire was questioned as a group, and the names were taken of those prospective jurors with prior knowledge of the case or feelings about the death penalty. (R18-45) Those whose names had not been taken were allowed to adjourn until 4:30 P.M. while the identified jurors were individually questioned. (R46) One of those without prior knowledge of the case or feelings either way about the death penalty was Ms. Smith. The individual questioning of the possibly tainted jurors ran well past 4:30, the time Ms. Smith was instructed to return by Judge Cycmanick. The following occurred:

> (JUROR IN)
>
> THE COURT: This is for counsels' benefit. This is Marion Smith, who did not have any questions concerning areas that we are talking about, but she has a child care, day care problem. Your child need to be picked up at 5:30?
>
> MS. SMITH: Yes.

THE COURT: I will excuse you at this point for the balance of, of today. You need to report back tomorrow morning at 9:45 in the central jury room. They will tell you when to report back to this trial or not. We'll go ahead and let you go at this point. Thank you.

(JUROR OUT)

THE COURT: I think I'm going to excuse her. She has got a child care problem this evening. I would like to go ahead with the jury.

MR. LAUTEN: What number is she?

MR. ASHTON: You're going to excuse her completely or just from --

THE COURT: Completely. We have 50 some jurors, prospective jurors, so I think we want to try to select a jury for the trial of the case this evening if we can. We may not do that, but --

MR. ASHTON: That's up to YOU. That's fine.

MR. SIMS: We would object, Your Honor. We didn't discuss whether there was some alternative means and she is one of the 54 that were randomly picked. We'd like to have the opportunity to investigate her qualifications on this jury.

THE COURT: Before there's too much writing and complaining and moaning and groaning, she's been sending notes in here for the past half hour her child needs to be picked up at day care. That why I needed to bring her in.

(R119-120)(emphasis added). The exclusion of Ms. Smith as a juror over defense counsel's objection denied Cox Due Process and the right to a jury trial of his peers guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 16 of the Florida Constitution.

It was a denial of due process for the trial judge to sua sponte excuse a qualified juror and simultaneously prevent defense counsel from ascertaining and/or making a record of that juror's ability, desire, and qualifications to serve as a juror. See Dennis v. United States, 339 U.S. 162, 168 (1950)("[T]he trial court has a serious duty to determine the question of actual bias, and a broad discretion in its rulings on challenges therefor . . . . In exercising its discretion, the trial court must be zealous to protect the rights of an accused."); See also, Piccirrillo v. State, 329 So.2d 46 (Fla. 1st DCA 1976). Not only was Ms. Smith not biased, she did not even ask to be excused from sitting as a juror. See Wainwright v. Witt, 469 U.S. 412 (1985). Her exclusion from the jury venire denied Cox a fair cross-section of jurors from which to select his jury, and it provided the state with an unfair advantage by eliminating from the venire an absolutely neutral juror.

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.

B. Cardozo, The Nature of the Judicial Process 141 (1921). The foregoing was quoted by this Court in Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980) where the limit of judicial

discretion was determined to be whether "reasonable men could differ as to the propriety of the action taken by the trial court." Canakaris, 382 So.2d at 1203. No reasonable person could conclude that Ms. Smith was subject to summary exclusion from Cox's jury over defense objection. Absent a request from one of the parties or the juror and, indeed, absent even a glimmer of bias or hardship, it is patently unreasonable and certainly not "zealous" safeguarding of the rights of a defendant in a capital trial for a judge to summarily exclude from the venire a wholly unbiased prospective juror who, well after 4:30 P.M., informs the judge that she must pick up her child at 5:30 that evening. (R119) This cavalier ruling of the court denied Cox a jury composed of a fair cross-section of the community in violation of the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Florida Constitution. Further, the refusal of the trial judge to permit defense counsel from examining Ms. Smith concerning her qualifications and/or desire to be a juror in this cause denied Cox the ability to make a record and, accordingly, due process of law under the Fifth and Fourteenth Amendments. If this Court rejects the argument in Point I, supra, that the circumstantial evidence is too tenuous to support the verdict, the conviction must be reversed and the matter remanded for retrial due to the unreasonable exclusion of Ms. Smith from Cox's jury.

POINT III

THE TRIAL COURT VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. 1, SECTION 22 OF THE FLORIDA CONSTITUTION BY EXCUSING FOR CAUSE, OVER DEFENSE OBJECTION, A JUROR WHO WAS IN ALL RESPECTS QUALIFIED TO BE A JUROR AND/OR IN REFUSING TO STRIKE FOR CAUSE A JUROR WHO WAS STRONGLY IN FAVOR OF THE DEATH PENALTY.

The contrast between the acceptance of death-prone jurors and the rejection of anti-death jurors is striking. Ms. McKessick stated to the court at the very beginning of her individual voir dire, "I mean, as long as I wasn't handing the sentence down, it wouldn't bother me. But I just don't know if I could come to that conclusion that, I don't know if it wouldn't affect my way of thinking, you know. That's my meaning." **(R240).** She indicated to the prosecutor that she would lean toward a sentence of life imprisonment, but that she could and would follow the law:

> PROSECUTOR: Okay. Let me take it one step beyond that. The judge is going to instruct you later on what you're to apply. The law that's to be applied. Do you feel that you could follow the judge's instructions? As difficult as it may be, do you feel that you could follow those instructions and weigh those two factors, the good and the bad?
>
> MS. MCKESSICK: I feel I could, but I feel when I know the death penalty is going to be in, I would weigh the other way. That's what I'm being honest about.
>
> PROSECUTOR: You would? Okay. Given your last statement that you kind of lean the other way, do you think that would impair your ability or interfere with your ability to follow the judge's instructions?

> MS. MCKESSICK: No, I would follow the instructions and do --
>
> PROSECUTOR: Now I am a little confused.
>
> MS. MCKESSICK: What I am saying is I just don't, I don't know how I would mentally handle it. I would feel that I would go [sic] anything but, I really don't know how to explain what I am trying to.

(R245). Mc McKessick concluded by stating that, though it would be difficult, if the law and the evidence showed that death was appropriate, she would uphold her oath as a juror. (R246)

The prosecutor, in moving that McKessick be excused for cause, argued, "While she said she would do her best to follow the law, she said on three different occasions that her tendency is going to be to vote for life; is going to be very difficult for her to vote for the death penalty. And I believe under the standard in Witt, which I will cite, 469 U.S. 412, that she is, she should be excused for cause because she would not be able to give the state a fair hearing on the issue of the death penalty.'' (R247) Defense counsel argued that Ms. McKessick was simply voicing that it would be a difficult decision to make, but that did not amount to substantial impairment under Witt. (R247-48) The court ruled:

> I have the overall perception, not just isolated sentences, this lady would have a difficult time rendering a fair and impartial verdict with respect to the death penalty. That's the overall perception that I get from all -- not isolated answers and questions that each of you have posed to me, but from all of her responses to the questions. So I'm going to excuse her for cause.

(R249). This ruling denied Cox his Sixth and Fourteenth Amendment rights to a jury comprised of a fair cross-section of the community, and violates the Eighth Amendment by rendering imposition of the death penalty unreliable, capricious and arbitrary following a recommendation from a jury of tainted composition.

The constitutional standard to be used to determine if a juror may be excused for cause is not whether the juror would have a difficult time imposing the death penalty, but rather it is whether the juror's views about the death penalty "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." Wainwright v. Witt, 469 U.S. 412, 424 (1985). The Court noted:

> As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality. (citation omitted). It is then the trial judge's duty to determine whether the challenge is proper. This is, of course, the standard and procedure outlined in [Adams v. Texas, 448 U.S. 38], but it is equally true of any situation where a party seeks to exclude a biased juror. See, e.g., Patton v. Yount, 467 U.S. 1025, 1036, 81 L.Ed.2d 847, 104 S.Ct. 2885 (1984)(where a criminal defendant sought to excuse a juror for cause and the trial judge refused, the question was simply 'did [the] juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestations of impartiality have been believed').

Witt, 469 U.S. at 423-24 (emphasis added).

Thus, in this case, the burden is on the State to demonstrate through questioning that Ms. McKessick was *so* biased

that she lacked impartiality. Certainly bias such that would exclude her for cause is not demonstrated by a statement that she would "lean" in favor of life imprisonment, any more than a statement that a juror leans toward imposition of the death penalty.

Significantly, none of the jurors who stated they could follow the law and be impartial even though they were "strongly" in favor of the death penalty were disbelieved and excused for cause. Mr. Sosa stated that he felt "very strongly" in favor of the death penalty **(R62,64),** at one point indicated that it would be impossible for him to recommend a life sentence **(R63),** modified that to state that the defense would have to overcome a burden for him to recommend life **(R67),** and concluded by stating he would follow the law **(R68).** The trial judge denied defense counsel's motion to strike for cause **(R70-71).** The discrepency between the refusal to strike Sosa for cause when compared to striking McKessick for cause is irreconcilable. Cox exhausted all of his peremptory challenges, some being used on jurors that Judge Cycmanick refused to strike for cause. **(R422-27)** The procedure resulted in a pool of prospective jurors inclined toward imposition of the death penalty. This denied Cox Due Process under the Fifth and Fourteenth Amendments, Equal Protection under the Fourteenth Amendment, the right to a jury of ones peers under the Sixth Amendment, and the right to a reliable sentence under the Eighth Amendment. It would be an unreasonable standard for the law to require a juror to be absolutely neutral with respect to the imposition of the death penalty in order to insulate him

or her from a motion to excuse for cause, especially where the issue is so controversial and subject to manipulation.

Here the jurors were invited to freely and honestly discuss their feelings toward imposition of the death penalty. Read in context, Ms. McKessick simply stated that taking someone's life is a serious matter, and she would treat it as such. The state failed to demonstrate such a lack of impartiality that Ms. McKessick was subject to a challenge for cause where, unequivocally, Ms. McKessick stated that she would and could follow the law. Her unwarranted excusal violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Wainwright v. Witt, supra; Chandler v. State, 442 So.2d 171 (Fla. 1983). Reversal and a new trial are required.

POINT IV

THE TRIAL COURT ERRED IN REFUSING TO DISMISS THE CHARGE AGAINST COX DUE TO THE STATE'S VIOLATION OF THE INTERSTATE AGREEMENT ON DETAINERS.

Florida entered into the Interstate Agreement on Detainers because "charges outstanding against prisoners, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions produce uncertainties which obstruct programs of prisoner treatment and rehabilitation." Section **941.45** (1), Fla.Stat. In pertinent part, Section **941.45(3)(a)** states:

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint; provided that, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

Further the statute specifically provides that "This section shall be liberally construed *so* as to effectuate its purpose." Section **941.45(9),** Fla.Stat. **(1987).**

The dates relevant to this point are as follows:

February, 1986 Cox serving 9 year prison term in California. (R1377).

October 1, 1986 Cox transferred to higher security facility with resulting loss of privileges and gain time following notification of California authorities by Orange County Sheriff's Deputies that Cox under investigation for first-degree murder (Defense Exhibit 1, R1378-81)

Dec. 15, 1987 Detainer placed on Cox by Florida (R1381, Eefense Exhibit 2).

Dec. 16, 1987 Cox requested disposition of untried charges in accordance with Section 1389, Penal Code of California (Defense Exhibit 2, R1382)

June 14, 1988 180 day period to dispose of charges expires.

June 14, 1988 Hearing on defendant's Motion for Discharge. Defendant's Motion for Discharge denied. (R2187)

Violation of this agreement by the party states results in a violation of federal law under the Compact Clause, Article 1, Section 10 of the United States Constitution. Cuyler v. Adams, 449 U.S. 433 (1981).

> Article III of the Agreement provides the prisoner initiated procedure. It requires the warden to notify the prisoner of all outstanding detainers and then to inform him of his right to request final disposition of the criminal charges underlying those detainers. If the prisoner initiates the transfer by demanding disposition (which under the Agreement automatically extends to all pending charges in the receivina state). the authorities in the receiving state must bring him to trial within 180 days or the charges will be dismissed with prejudice, absent good cause shown.

Cuyler, 449 U.S. at 444 (emphasis added). "The prisoner has the initial burden of making a written request for final disposition, and upon doing so the state has the burden to bring him to trial

within 180 days. Failure to try a defendant within the time period results in a dismissal. (citations omitted)." State v. Edwards, 509 So.2d 1161, 1162 (Fla. 5th DCA 1987). The time provision set forth in the Interstate Agreement on Detainers takes precedence over those set forth in Fla.R.Crim.P. 3.191. Shewan v. State, 396 So.2d 1133 (Fla. 5th DCA 1981).

The provisions of the Agreement are mandatory, and the failure of the Orange County prosecutor to bring Cox to trial before June 14, 1987 entitled Cox to the dismissal of the indictment with prejudice. State v. Roberts, 427 So.2d 787 (Fla. 2d DCA 1983); O'Connell v. State. 400 So.2d 136 (Fla. 5th DCA 1981); See United States v. Mauro, 436 U.S. 340 (1978); Romans v. District Court, 633 P.2d 477 (Colo. 1981); People v. Bentley, 121 Mich.App. 36, 328 N.W.2d 389 (1983). Accordingly, the trial court erred in denying the Motion for Dismissal. The conviction must be reversed and Cox discharged forthwith.

POINT V

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISMISS DUE TO PREINDICTMENT DELAY.

Cox moved to dismiss the indictment, alleging that the preindictment delay violated his due process rights under the Fifth and Fourteenth Amendment to the United States Constitution pursuant to U.S. v. Lindstrom, 698 F.2d 1154 (1983). A hearing was had by Judge Conrad on June 14, 1988. (R1337-75) Detective Hansen, an 18 year veteran with the Orange County Sheriff's Office (R1339), was the lead investigator in this case. (R1339-40) He contacted witnesses who stayed at the Days Inn Motel in January of 1979 and, after talking with them, disposed of their names, addresses, and statements. (R1340) Detective Hansen indicated that statements obtained from individuals at Walt Disney World also were destroyed. (R1341) He indicated that specific individuals were interviewed as suspects in the murder and were eliminated as a result of having hair samples taken. (R1341) The names of those individuals whose hair was tested were des royed along with the detectives' notes (R1341-43). The officer testified that different procedures in hair analysis have come about since 1979. (R1343) The detective indicated that he destroyed his notes as he completed his reports. (R1345) The officer indicated that he did not destroy any notes with respect to anyone who might have had a motive for killing Sharon Zellers' until after that person had somehow been eliminated as a suspect. (R1348) The officer at this time had to conclude that those witnesses had nothing to say of value because he had destroyed

their names and addresses, and they would not have been destroyed otherwise. (R1350) Detective Hansen's interview with the surgeon who performed the surgery on Cox's tongue turned out to be especially critical at trial, where the doctor could not remember after ten years anything of Cox's injury without referring to his notes. (R912-13)

Mark Pellham, a state expert in serology, was in 1979 profficient in testing blood for six enzymes and serum protein. (R1352-54) Although an enzyme test was requested in 1979 to compare known blood from Robert Cox to blood contained in samples taken from the inside of the Falcon automobile, those enzyme tests were for unexplained reasons never done (R1355-56), and the blood samples from the Falcon were not stored in conditions whereby they could now be tested for the presence of such enzymes. (R1356-57) Such tests either could have further implicated Cox or exonerated him. (R1359) Due to the way in which the blood was stored, even had Robert Cox been indicted in 1979, the enzyme tests could not have been performed due to the deterioration of the blood samples. (R1360-61) A sworn affidavit in the court file shows that Days Inn destroys its guest registration records after thirteen months. (R1367-68)

Defense counsel argued that, due to the delay in indicting Cox, the state was able to prevent the defendant from conducting his own investigation concerning the circumstantial evidence compiled by the state and thereby prevent him from refuting it. (R1369-70) The testimony establishes that in this case evidence was lost as a direct result of the pre-indictment

delay. The police destroyed the names and statements of people; they failed to preserve blood and hair samples; the names of the guests at the Days Inn Motel were also lost. Significantly, no new evidence was discovered by the police in the 9 years of their investigation[4/], but the 9 year delay in prosecuting Cox provided the state with a tremendous tactical advantage insofar as limiting Cox's ability to conduct an independent investigation to develop evidence of his own to rebut the state's circumstantial evidence. It appears that the investigation in Florida was concluded until Cox pled guilty to committing the crimes in California, and thereafter Florida re-opened the investigation, causing Cox to be transferred from a minimum security prison (Susanville) to a more secure prison (Deuell), with resulting loss of privileges and opportunities for gain time.

It was only after Florida placed a detainer on Cox (See Point IV) that Cox was able to demand disposition of the charge. By waiting, Florida gained the tactical advantage of depriving Cox of the ability to independently investigate the circumstances of the murder in any meaningful way or to obtain exculpatory evidence that would have refuted the state's circumstantial evidence case. The 9 year indictment delay violated Cox's right to Due Process under the Fifth and Fourteenth Amendments. The conviction must be reversed and Cox discharged.

4/ It appears that the prosecution believed that the evidence was too weak to sustain a conviction, and that the prosecution was commenced solely to appease Zellers' family. (R2399-2400)

POINT VI

THE TRIAL COURT ERRED IN NUMEROUS EVIDENTIARY RULINGS DURING THE GUILT AND PENALTY PHASE OF TRIAL, RESULTING IN A VIOLATION OF COX'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS, A FAIR TRIAL, CONFRONTATION OF WITNESSES, AND A RELIABLE SENTENCE.

The trial court made several incorrect rulings in reference to the evidence that was introduced during the guilt and penalty phase of trial. These rulings violated the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Specifically, the state introduced State's Exhibit 29, which was a sample of blood taken from room 3303 of the Days Inn Motel on January 6, 1979. (R680-82) In reference to this exhibit, the expert serologist testified:

> Q. Now, I want to ask about State's Exhibit twenty-nine which is your Q-3. And now tell us on this particular exhibit, what tests you performed and how the test was run. And again, you can refer to your other diagram here.
>
> A. On Q-3, I went through the standard procedures to determine if blood was present. If human blood was present, and the antigenic material present. I ran it on the 10th of January, and there was insufficient material to rerun it on the 11th. I had some antigenic material, but it was not in a condition that I was willing to report out.
>
> Q. All right. Tell us what reaction or result you got in performing this test.
>
> A. There was activity in the A row.
>
> Q. All right. Did you perform the same tests as you described?
>
> A. Yes.

Q. And were all the A, B and H control the same as they should be?

A. Correct.

Q. You say there was some activity in the A row. Can you explain what you mean by that? What actually was there?

A. When the, the threads were added, the anti-sera was watched. It gave me preliminary indications that a type A was present. I came back on the 11th to reconfirm it and I did not get the activitv that I felt confident in reporting out.

Q. All right. So what result, if any, or what indication, if any, did you get from this test, even though it may not be conclusive?

A. Human blood was present.

Q. Did you get any indication, although not conclusive, as to the blood type?

A. Well, again, there was A activity, but I reported it out as inconclusive based upon the second running of the sample.

Q. Excuse me?

A. There was insufficient amount of sample.

Q. So, I am sorry. Say again the second time you ran it, what was the problem?

MS. CASHMAN: Objection. Asked and answered.

THE COURT: Objection's overruled.

A. It was inconclusive.

Q. All right. So if you would, as to Q-3, just put a question mark.

A. (witness complies)

Q. Yes.

A. I reported it out as inconclusive.

Q. I understand that. What I am trying to -- I want you to signify something on that chart indicating what the initial reaction was. Phrase it any way you like, but just something to reflect what that was. If you want to put slight A or whatever your records reflect as to the reaction of the test.

MS. CASHMAN: I am going to object, Your Honor. I believe the expert has told us it was inconclusive.

MR. ASHTON: Your Honor. the expert told us the results of an initial test with some reaction. I just simply want that to be reflected on the chart.

THE COURT: Objection's overruled.

Q. (MR. ASHTON): Place it any way you can accurately phrase what happened with the first test. And whatever words you want to use. What you might want to do, if you like to make it clearer, is to put the date, you had some activity on one date and another date, it was inconclusive. Just to make it accurate. Separate those two. Now, is it possible, in your opinion, that the lack of reaction on the second test on January 11th was due to a small or insufficient amount of sample? Is that possible?

A. I don't believe so.

Q. Okay. To what do you credit the fact that you got A activity initially and then inconclusive the next day, if you know?

A. I don't know. That's the reason why I reported it out as inconclusive.

(R866-69)(emphasis added). The chart was introduced into evidence as State's 44. (R871) In closing argument, the prosecutor used the chart and testimony as follows:

Now, we heard evidence of scientific examination of certain items

> taken from the car. The first was by Mark Pellham. Mark Pellham told you that the victim's blood type was type A. Told you that the Defendant's blood type was type O. He told you that in this car he found two types of blood. Both type A and type O. The victim's type; the Defendant's type. Again, is that simply another coincidence? But interestingly enough, exhibit Q-3, which I have in my hand, which was taken, as you recall, from the Defendant's hotel room from the bathroom, the very small, minute amount of blood, interestingly enough, the test said some A activity. And A is Karen Zellers' blood type.
>
> I'm not telling you that that test result proves conclusively that it was Sharon Zeller's blood. It doesn't. But it's another fact for you to consider.
>
> And I submit to you that based on all of the evidence in this case, you can conclude very easily that that was Sharon Zellers' blood, some of it; some of it was his.

(R1094-95). The trial court erred in allowing the prosecutor to mischaracterize the expert's testimony. The prosecutor was establishing his own facts and contradicting the testimony of his own witness. The state expert testified that he could not conclude what type blood was contained in State's Exhibit 29, other than that it was human blood. To contradict this testimony the state must present competent evidence, not repeated prosecutorial questioning until an equivocal response is obtained.

It has long been recognized that "a party putting up a witness thereby holds him worthy of credit[.]" Montgomery v. Knox, 23 Fla. 595, 3 So. 211, 215 (1887). A party is normally bound by the uncontradicted testimony of their own witness. Davis v. Lofton, 75 So.2d 813, 815 (Fla. 1954); See People v. Reed, 40 N.Y. 204, 352 N.E.2d 558, 560 (1976)("It is at the very

least a questionable situation where a prosecution witness, put upon the stand to testify to the circumstances of a shooting, is contradicted by the prosecutor in almost every facet of her testimony - save one."). The interests of justice require that a party at times present contradicting evidence:

> CONTRADICTION: In a similar practical vein, a party should be able to present all available evidence that tends to support the party's case without regard to the fact that it may tend to impeach because it may contradict previous testimony of a witness called by that party (Fla. Stat. §90.608(1)(a), (1981), or because it proves that material facts are not as testified to by some previous witness called by the party. Under prior law a party calling a witness that proved adverse was required to satisfy the trial judge that the calling party had been surprised or entrapped by the testimony before the calling party could introduce a prior inconsistent statement of that witness. Although presenting a prior statement of the witness inconsistent with his present testimony is a general method of impeachment, see §90.608(1)(a), Fla.Stat. (1981), its use as to a witness that was presumed to be helpful but who turned out to give prejudicial testimony is often not introduced so much for true impeachment as for the purpose of getting the prior statement before the jury for its consideration as substantive evidence. In any event, the previous requirement of surprise in order to introduce prior inconsistent statements has now been eliminated by present section 90.608(2), Florida Statutes (1981).

Epp v. Carroll, 438 So.2d 31, 37 (Fla. 5th DCA 1983). The prosecutor in this case, however, did not present contradictory testimony, but rather offered Mark Pellham as an expert witness in serology and then, over defense objection, tailored his testimony to reflect that an expert test indicated that type A

blood was found in room 3303 of the Days Inn Motel on January 6, 1979. By overruling defense counsel's timely objection, the testimony of the witness [i.e., that the blood type test was inconclusive] was not what was reflected on State's Exhibit 44 [i.e., that type A blood results were initially achieved by testing State's Exhibit 29]. The expert's opinion that the test was inconclusive was contradicted by argument of the prosecutor but not by competent evidence.

The ruling was error, and it was not harmless. The state established only that the blood sample came from somewhere in room 3303, but not how long it had been there. See Jaramillo v. State, 417 So.2d 257 (Fla. 1982). Even bearing that qualification in mind, the erroneous ruling reasonably could have influenced the jury's verdict based on the extreme tenuousness of the wholly circumstantial evidence of guilt and the prosecutor's use of the exhibit in closing argument.

The state also introduced testimony concerning hair samples taken from Cox in 1979. (R879-81) Prior to introduction of the exhibit, defense counsel sought to voir dire the witness concerning his dealings with the items sought to be introduced into evidence. The following occurred:

> Q. (DEFENSE COUNSEL): If I could approach the witness, Your Honor. This manilla envelope was sent to you when, sir?
>
> A. (BY EXPERT): This manilla envelope was sent -- it was -- I have to refer to my notes.
>
> Q. That's fine you can refer to your notes.

A. The date it was submitted but I actually received it March 1, where that's when the manilla envelope was in my possession. On or about March 1.

Q. Okay.

A. Are you interested in that or when it was actually submitted to the laboratory?

Q. Well, it was submitted to the lab, then it went to you on March 1st --

A. Right.

Q. Correct? And then you would have opened it at some point?

A. Right. Well that's -- I opened it on March 1st.

Q. You opened it on March 1. And it was at that point that you used it to make some comparisons?

PROSECUTOR: Objection, Your Honor. This is not part of the voire dire for the dmission of the evidence.

THE COURT: Objection sustained.

(R882-83). Thereafter, the state successfully moved in limine to restrict Cox from cross-examining the witness concerning anything other than the witness' preparation of the slides. (R892) It is respectfully submitted that the Court's ruling violated the defendant's Sixth Amendment right to cross-examination. Pointer v. Texas, 380 U.S. 400 (1965). The ruling further denied the defendant due process and the right to a jury trial under the Fifth and Sixth Amendments.

Defense counsel moved to exclude the testimony of James Pierpoint. (R559,2241-60) Cox asserted that Pierpoint was not an expert in shoe pattern comparison/analysis, and that an expert

opinion must not be based on speculation but instead on scientific principles. (R2241) Just prior to Pierpoint testifying, a hearing was had on Cox's motion. (R559) The "expert" opinion is based on the testimony proffered to the court before Pierpoint testified. (R560-574) The court clarified the purpose of Pierpoint's testimony prior to making his ruling as follows, "

> THE COURT: Can I ask you a question to make sure that I have got it in perspective? As I understand what we are talking about here, the opinion that you wish to elicit from this witness is, as follows: That based upon his past experience, which I will use generically, and after examining exhibits T, U, V, and W, he is prepared to render an opinion that the sole, as depicted on those four exhibits, are of a type similar to a military style sole, sometimes commonly used by Airborne Rangers. And as brought out on cross-examination, can be worn on any military type boot. Is that, in essence, what you are saying?''
>
> PROSECUTOR: Yes, sir. I would not go so far, for reasons of legal argument I'm going to make, the use of the word opinion may not exactly be correct. It's more an active recognition. That he recognizes the style. But the word opinion in acceptable, also. One thing I want to make sure, we are not offering him as an expert witness. He's not an expert. We are not offering him as one. We are offering him as a lay witness. And I have some arguments whenever the Court's ready.

(R575). Defense counsel argued vehemently that Pierpoint's opinion was totally irrelevant. (R577-578) Counsel further argued that Pierpoint's testimony as a layperson concerning shoe pattern testimony is impermissible under this Court's decision in Gilliam v. State, 514 So.2d 1098 (Fla.1987). Counsel further

argued that the testimony was unreliable and unscientific. (R581) The court ruled, "So I'm going to permit him to testify to the extent and only to the extent that he testified to here today, that it is nothing more than a similar type pattern. That's based upon what the man told us concerning his past experiences of over, I guess twenty years in the military. So that's my ruling." (R581-82) The court abused its discretion and denied the defendant a fair trial by allowing the state to present the opinion testimony of this lay witness which is speculative, unfounded, irrelevant and extremely prejudicial.

During the guilt phase and during the penalty phase, the state was permitted over objection to introduce testimony concerning irrelevant characteristics of the victim. Specifically, during the guilt phase, the state presented the testimony of Kevin Ciullo, who was an electronic technician who worked at Disney World with the victim. (R488) When the witness was asked by the State Attorney what Sharon Zellers' demeanor at work was and how she acted generally (R490-491), the witness over objection answered, "Well at first she was pretty shy, just like normal employees are. She was always very, not real outgoing. Very shy person. She was very friendly with most of the people out there. She didn't have any enemies that I know of." (R492) During the penalty phase, the state sought to present the testimony of Jeffrey Zabel, who dated Sharon Zellers. (R1687-88) Defense counsel objected and argued that the character traits of Sharon Zellers were inadmissible pursuant to the Eighth Amendment and Booth v. Maryland, 486 U.S. ___, 107 S.Ct. 2529 (1987). The trial

judge ruled, "Okay. I'm going to let you go as I told you, but you can ask how, you know, she reacted, towards strangers, that's all I'm going to let you do and that's it." (R1690) Therafter, the prosecutor asked:

> Q. Mr. Zabel, can you tell me from your knowledge of Sharon Zellers how Sharon reacted towards strangers?
>
> A. Well, initially she was shy to myself. Once we introduced each other, there was a common denominator in that she knew who my family was.
>
> Q. In general, as opposed to just with you, can you tell me what her reaction was to strangers? Whether she was trusting of them, outgoing, shy? Can you tell us what her reaction was?
>
> A. She was shy.
>
> Q. Did you ever know Sharon Zellers to go anyplace with someone that she had just met once or had just met, a stranger?
>
> DEFENSE COUNSEL: Same objection, Your Honor.
>
> THE COURT: Objection's overruled.
>
> A. Not, not to my knowledge. She was quiet. I have always seen her with someone she knew.

(R1691).

The state sought to present the duplicitious testimony of Jody Shaw concerning Zellers' characteristics, defense counsel objected and a proffer occurred. (R1693-94) Over objection, the court ruled that because the testimony was short, he was going to allow it. (R1695) The objection was overruled and Ms. Shaw testified that Sharon Zellers was a cautious person, that she never went with a stranger or a person that she did not know.

(R1698-99) The state then presented the testimony of Angela Gleason as follows:

Q. (PROSECUTOR): Would you state your name?

A. My name is Angela Gleason.

Q. And where do you live?

A. My address?

Q. Just what city.

A. Orlando.

Q. Back in 1978 and preceding that, did you know a young lady by the name of Sharon Zellers?

A. Yes, I did.

Q. How long had you known Sharon prior to her death?

A. Since she was two years old. So about seventeen years.

Q. What was your relationship with her?

DEFENSE COUNSEL: Objection, Your Honor.

PROSECUTOR: Your Honor, if the jury --

THE COURT: That's a preliminary question. Objection's overruled.

Q. What was your relationship with Sharon?

A. We were best friends.

Q. Did that relationship continue until the time of her death?

A. Yes.

Q. Now, can you tell the jury what was Sharon's attitude or reaction towards strangers, men or anybody that she didn't know prior?

A. She was very much an introvert. Very shy. Wouldn't talk to strangers

type person. When I would introduce her to people that I knew that she did not know, she wouldn't even -- she would just barely say hello to them, but she wouldn't carry on a conversation or anything.

Q. Have you -- do you recall any instance in the time you knew Sharon in which she would go someplace: get into a car with someone in her car who was a complete stranger to her?

A. No.

Q. Voluntarily?

DEFENSE COUNSEL: Objection, Your Honor. The state's asking about a specific instance. I believe the ruling had been they were not allowed to inquire into that.

THE COURT: I think -- I understand what you're saying. Objection's overruled.

Q. I don't if the jury heard your answer. That was your answer?

A. No.

Q. Thank you.

(R1699-1701). During closing argument in the penalty phase, the prosecutor used that testimony as a non-statutory aggravating factor as follows:

Finally, ladies and gentlemen, the court will instruct you that a possible mitigating circumstance is any other circumstance of the offense, once again, being Sharon Zellers' murder. Ladies and gentlemen, Sharon Zellers was brutally murdered. Sharon Zellers was senselessly murdered. Sharon Zellers was tortured in the course of being murdered. Robert Cox was pitiless upon Sharon Zellers. Robert Cox had no conscience when he murdered Sharon Zellers. There isn't one single fact, not one, about Robert Cox's murder of Sharon Zellers which mitigates it.

> He beat this nineteen years old woman who was shy and cautious, afraid of strangers, he beat her into submission and death. He beat her fourteen times. The worst possible act to this cautious, fearful, shy, woman materialized. That a stranger whom she did not know, took her against her will, took her out into a dark area, beat her head until she was dead. We know from her habits that she was fearful of strangers. And this stranger beat her to death. Ladies and Gentlemen, there is no circumstance about this crime that exists as a mitigator. And there is no mitigating circumstance that outweighs any individual aggravating circumstances, much less all three of them taken together.

(R1908).

This evidence and argument violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and made the jury recommendation unreliable pursuant to Booth, supra. Further, the state was in this case arguing as a nonstatutory aggravating circumstance the character traits of the victim.

During the testimony of Sharon Zellers' father, the state strove to establish the route taken by Sharon Zellers on the night she disappeared. Defense counsel objected when the state asked Zellers' father what route Sharon Zellers took, arguing that the response would necessarily rest on speculation in that there was no way her father could know what route Zellers took that evening. (R480) The objection was overruled. The answer is patent speculation and the court erred in permitting the witness to answer the question over objection.

During closing argument in the guilt phase, the prosecutor argued, "This man had bitten off his tongue; had, had cut through an artery in his tongue; was bleeding profusely. Got in his car, drove around and didn't leave one drop of blood in the car. Not one drop. Edwin Sarver told you he looked in that car and there was not one single drop. He used a flashlight and there was not one drop. He told you that Robert Cox's father was there with him; picked up that car. And I submit to you, ladies and gentlemen, that if there was blood in that car, and Edwin Sarver was wrong, that Robert Cox's father knows it." Defense counsel immediately and vehemently objected, arguing that the state was shifting the burden to Cox to present testimony and commenting upon Cox's exercise of his right to remain silent. (R1099) The prosecutor argued that he had researched the matter and believed the comment to be proper. (R1099-1100) The court ruled, "Well, I don't find the argument to be prejudicial. I don't think it's prejudicial, so I'm going to deny the motion for mistrial but I really suggest that, you know, on a few things you're really walking a tight rope. And if you want to do that, I'm not going to prognosticate and tell you not to. I am simply suggesting to you that, you know, we have got lots of good things to talk about and be careful what you say." (R1100) During the guilt phase, Cox had exericised his right to remain silent and presented no testimony of any sort. The state admittedly was aware of the impropriety of arguing in a manner that shifted the burden to the defendant. By intentional disregard of the precedent clearly establishing that such is an improper argument, it

is apparent that the argument was calculated and made in gross disregard of Cox's constitutional right to remain silent and to due process. The overruling of Cox's objection and denial of the motion for mistrial denied Cox a fair trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

During deliberation, one of the many questions of the jury was that they be provided a magnifying glass. (R1228-1230 Defense counsel objected, arguing that the rules of criminal procedure did not provide for the jury having a magnifying glass (R1228-29, Fla.R.Crim.P. 3.400) and that use of a magnifying glass by the jury to microscopically scrutinize the exhibits was tantamount to the jury receiving additional evidence after retiring to deliberate. (R1230) In this regard, the jury could perceive "evidence" during deliberation that the defendant had no meaningful opportunity to explain, contradict or address, such as where an enlargement is provided during the state's use. Cox had absolutely no notice during presentation of evidence that the jury would be provided a magnifying glass to search for things not apparent to the naked eye. This ruling violated due process and the right to confrontation guaranteed by the Fifth, Sixth, and Fourteenth Amendments and Article I, Sections 9 and 16 of the Florida Constitution.

The trial court overruled Cox's objection to having the jury instructed on the statutory aggravating factor of a cold, calculated and premeditated capital felony, where that legislation did not exist at the time of the offense. (R1859)

Notwithstanding this Court's decision in Combs v. State, 403 So.2d 418 (Fla. 1981), and Stano v. Dugger, 524 So.2d 1018 (Fla. 1988), it is respectfully submitted that the giving of this instruction violated the ex post facto clause of the United States Constitution. Article I, Section 10, United States Constitution. The presence of that invalid statutory aggravating factor made the jury recommendation unreliable under the Eighth Amendment to the United States Constitution and otherwise denied Due Process under the Fifth and Fourteenth Amendments.

Prior to trial, defense counsel moved for an evidentiary hearing in order to demonstrate that Florida's death penalty constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. (R2071) The motion was denied. (R2115) As noted by the United States Supreme Court in Solem v. Helm, 463 U.S. 277 (1983) "[N]o penalty is per se constitutional." Ibid at 290. In Helm the Court held that punishment must be proportionate to the crime or it violates the Eighth Amendment prohibition against cruel and unusual punishment.

Appellant contends that the proportionality of punishment to crime is always subject to reasonable review. Constitutional principles of due process are dynamic, not static. Specific examples in the death penalty context can be found in Furman v. Georgia, 408 U.S. 238 (1972), where the Supreme Court did a drastic 180 degree reversal from McGautha v. California, 402 U.S. 183 (1971) and expressly reversed itself from approving the constitutionality of a death penalty imposed by a jury with

"untramelled discretion." Similarly in Buford v. State, 403 So.2d 943 (Fla. 1981), cert denied 454 U.S. 1163 (1982) and Coker v. Georgia, 433 U.S. 584 (1977), the Supreme Court after prior rejections of the argument finally "held that the punishment of death for the rape of an adult woman violates the cruel and unusual punishment clause of the Eighth Amendment because it is grossly disproportionate and excessive in relation to the crime committed." Buford, 403 So.2d at 950. More recently, in Enmund v. State, 458 U.S. 781 (1982), it was held that the Eighth Amendment does not permit imposition of the death penalty on a defendant who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing occur or lethal force be used. Viable arguments exist that require evidentiary predicates. See Sullivan v. Wainwright, 464 U.S. 109 (1983)(footnote 3); Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985).

Fundamental principles of due process and justice require that a statute remain susceptible to impartial judicial scrutiny. For such scrutiny to be meaningful, a defendant must have the right to present evidence to support his position. Pender v. State, 432 So.2d 800 (Fla. 1st DCA 1983); Brown v. State, 431 So.2d 247 (Fla. 1st DCA 1983); Hawthorne v. State, 408 So.2d 801 (Fla. 1st DCA 1982); Picirrillo v. State, 329 So.2d 46 (Fla. 1st DCA 1976). Preclusion of the right to present relevant evidence bearing on the constitutionality of the statute under which the defendant is to be put to death is a denial of due process.

It is well established that a defendant is constitutionally entitled to a fair trial by an impartial jury. It has long been a premise of law that, in a close case, errors that otherwise might be considered harmless amount to reversible error when considered cumulatively. Porter v. State, 84 Fla. 552, 94 So. 680 (1922); Harris v. State, 53 So.2d 827 (Fla. 1951). "While a defendant is not entitled to a perfect trial, he must not be subjected to a trial with error compounded upon error." Perkins v. State, 349 So.2d 1234 (Fla. 2d DCA 1980).

Cox is not seeking a perfect trial, only the fair trial to which he is constitutionally entitled. It is respectfully submitted that the foregoing errors, considered individually and/or cumulatively, resulted in reversible error.

POINT VII

THE TRIAL COURT VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. 1, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION BY PERMITTING THE STATE TO IMPROPERLY USE TESTIMONY OF NON-VIOLENT CRIMINAL ACTIVITY BY COX AFTER DEFENSE COUNSEL TIMELY OBJECTED TO THE TESTIMONY AND HAD PREVIOUSLY WAIVED THE STATUTORY MITIGATING CIRCUMSTANCE OF NO SIGNIFICANT PRIOR CRIMINAL HISTORY.

At the beginning of the penalty phase, Cox waived the statutory mitigating circumstance of no prior significant criminal history. (R1537) That stipulation was accepted by the state. (R1537) However, during cross-examination of a defense witness who testified about Cox's youth, the following cross-examination by the state transpired:

> Q. (PROSECUTOR): Mr. Bicket, not all of Mr. Cox's examples were favorable ones, were they?
>
> A. (WITNESS): Explain yourself, please.
>
> Q. Well, you are -- had you heard that as a teenager --
>
> (DEFENSE COUNSEL): Objection, Your Honor. May we approach?
>
> THE COURT: Wait a minute. I didn't, I couldn't hear.
>
> (DEFENSE COUNSEL): I am sorry. Objection, Your Honor. May we approach? I think I know what area --
>
> (PROSECUTOR): I imagine he does, yes, sir.
>
> (Discussion at Bench)
>
> (PROSECUTOR): Judge, *so* you know the question I am going to ask, Your Honor,

is that if the witness is aware of whether the Defendant was arrested and confessed to the commission of a burglary at age 16. That's what the question's going to be.

(DEFENSE COUNSEL): We questioned on the areas of his work ethic and his leadership on the athletic field. I think that getting into juvenile conviction goes beyond what we discussed.

(THE COURT): Let me see what you got.

(PROSECUTOR): Okay, Your Honor.

(THE COURT): I don't mean caselaw. Let me see the conviction.

(PROSECUTOR): No, sir. Not a conviction. He was arrested. He confessed that he did it to this man. He was put on pre-trial diversion and he successfully completed it. An arrest can be used to -- an arrest can be used when a character witness testifies because character -- because the arrests are something that goes to a person's character. In this case we are in a penalty phase. The Defendant's character, his acts can be put into evidence. His character is what he's done. The defense has brought in every little good act he's ever done in his life.

THE COURT: I understand.

PROSECUTOR: I believe I have the right to bring out bad acts.

THE COURT: Okay.

DEFENSE COUNSEL: We - we waived the mitigator of no significant prior record. We are asking specifics and we have tried to limit it to certain areas. And I don't believe that we have opened up that he's just -- I don't think we ever asked the question was he a good boy; was he a good man; did he stay out of trouble. We are saying did he bus tables well; did he hustle in the softball field. Two different things.

THE COURT: Wait a minute.

PROSECUTOR: Yes, sir.

THE COURT: Okay. Have you had a chance to look at this?

DEFENSE COUNSEL: No, sir.

THE COURT: I will give you a second.

PROSECUTOR: There are two other Florida state cases I would cite for the court reporter.

THE COURT: Let me see.

PROSECUTOR: Greenfield v. Florida, 336 So.2d 1205 and Robinson v. State, 339 So.2d 33. On the issue of defense's waiver of the prior history, I would cite to the court case of Muehlman v. State, 503 So.2d 310 and Parker v. State, 476 Southern Reporter 134. Both supreme court cases.

DEFENSE COUNSEL: Those cases both concern the defense calling a psychiatrist to give an expert opinion and in that limited circumstance, despite a waiver, this sort of questioning is allowed. Mr. Bicket isn't a psychiatrist.

PROSECUTOR: That's correct, judge, but just as a psychiatrist's opinion is based on certain facts, a character witness is based on facts.

DEFENSE COUNSEL: Mr. Bicket's opinion we have elicited is not character evidence in that he talks about specifics he viewed. It's not -- I didn't ask him an overall black king [sic] question about how do you feel as he is a leader; as a worker, but those two situations as a worker he saw, as a leader, he witnessed, sharing the same team. And this is the evidence of non-statutory aggravators. And taking that all into account, I don't believe they should be able to get this particular arrest at the age of 16 into evidence.

PROSECUTOR: Just to be clear for the record, the testimony is not just the arrest. Mr. Cox's admission that he did it. Broke into an auto parts store.

DEFENSE COUNSEL: The state's trying to make this a non-statutory aggravator.

THE COURT: No. They're saying that it's proper. That's not true. I don't believe that's the case. I think what they're doing, saying is that this is a matter of impeachment, going to the predicate of, of any opinions these people have with respect to the character of the defendant. And that's probably, a character in a very broad term.

DEFENSE COUNSEL: If that's the case, then it's not, it's not relevant. Being arrested is not relevant to whether you're a good worker and had a specific job at a specific time in your life.

THE COURT: All right. As to this witness, from what I have heard, I'm not going to let you do this because I don't, I think that they really limited their direct examination to a very narrow area. I'm not ruling that I disagree with the premise upon which you are proposing. I am saying that based upon the testimony of this witness on direct examination, that it's very narrow. And all he went into -- he being Mr. Sims, yeah, Mr. Sims -- went into his teaching and how he worked with the prisoners. It's a very narrow area.

PROSECUTOR: That's not this one Your Honor. That was the one before. This is the gentleman who knew him as a child. Talked about his leadership abilities, by example.

THE COURT: Right, okay. But it's very narrow.

PROSECUTOR: Judge, our position, he asked him if he had been going to church with him since he was a young child and was he a leader. And he asked him in the context of athletics. If he led, if he led other men, other young men in

athletics or in any endeavor, and they developed a character that he was a leader. We feel we should be able to ask did you know that this leader was, arrested for burglary. And he knows 5/ that. He confessed to him. And it's our position that goes directly to leadership qualities, whether he's committed a crime.

THE COURT: I'm going to sustain the objection.

PROSECUTOR: Then, Your Honor, in that case I would like for the court to order this witness to remain so we can call him in rebuttal. I believe, at this point, based on what we have already heard, his rebuttal to other witnesses.

THE COURT: That may be.

PROSECUTOR: Yes sir. I would like him to be ordered to stay.

(R1821-26). Following conclusion of the presentation of defense testimony, the state in fact called Mr. Bicket in "rebuttal". Defense counsel again objected. Defense counsel noted that this was the same question that was dealt with before, but the court noted that the state was now calling Mr. Bicket as its own witness. (R1847-48) Defense counsel argued that the presentation of the testimony by them had been very limited to specifics about work ethic, Cox's projects that he did in his neighborhood as a youth, and his leadership qualities demonstrated by those things (R1848). The prosecutor countered by stating, "Judge, this is another one of his projects in the neighborhood. It's proper

5/ If the witness knows about Cox's arrest, and the prosecutor knows that the witness knows, what valid reason is there for the prosecutor to ask this line of questions?

rebuttal." (R1848). The trial court overruled the objection (R1848), and the witness was examined by the state as follows:

> THE COURT: All right, sir. You may proceed.
>
> Q. (PROSECUTOR): Do you recall the question?
>
> A. (MR. BICKET): Go ahead and repeat it.
>
> Q. Do you recall an incident in Mr. -- when Mr. Cox was a teenager, when he was arrested?
>
> A. Yes.
>
> Q. Do you -- did you speak to him about what he did and how he came to be arrested?
>
> A. Yeah. He didn't want to talk very much about it because it really scared him bad. I mean he was --
>
> Q. What did he tell you he did?
>
> A. He was in an auto parts store.
>
> Q. Now was he just in it during business hours or did he enter it in an illegal fashion?
>
> A. Well, obviously, since you're bringing it up, it's probably after hours.
>
> Q. Well, what did he tell you?
>
> A. He didn't say very much about it. I heard about it, like we said yesterday, I heard on the news the next morning. He was gone for a couple of days. When he finally got back in touch with me, he was very scared. He had the you-know-what scared out of him and he said really, he said, hey, I'm not going to do anything like this anymore.
>
> Q. Sir, did he or did he not acknowledge to you that he broke into an auto parts store?

A. Yes.

Q. Did he tell you why?

A. No.

PROSECUTOR: No further questions.

(R1848-49). Significantly, when Cox later filed waivers of other statutory mitigating circumstances and was questioned by the trial judge concerning the voluntariness of those waivers, the following occurred:

> THE COURT: * * * And what you're telling me here is the truth and you're making a free and voluntary and fully informed waiver?
>
> A. (MR. COX): Yes, I am, Your Honor.
>
> THE COURT: Okay, good.
>
> MR. COX: I do have a question I do want to ask you.
>
> THE COURT: Ask me.
>
> MR. COX: Okay. Now, I submitted a waiver to you earlier. I believe it was yesterday.
>
> THE COURT: Regarding prior criminal activity.
>
> MR. COX: Yes, that one. And you accepted my waiver is that correct?
>
> THE COURT: I got it right here.
>
> MR. COX: Right. And the reason I ask that is that I just didn't understand during the proceedings why we had an agreement between the state and myself for that waiver, and you accepted that waiver, and then Mr. Ashton brought out the thing that we waived earlier when he rebutted with Mr. Bicket. I don't understand why that was allowed.

> THE COURT: Mm-hmm. You need to talk to your attorney. She will explain it to you.
>
> MR. COX: Okay. I just though I would ask you.

(R1880-81). Several recent cases establish that it is prejudicial error for the trial court and the state to accept a defendant's waiver, for the defendant to act in reliance on that waiver, and to then have the very purpose of the waiver defeated by the state presenting evidence concerning the subject matter of the waiver.

For example, in Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 1986), this Court held that appellate counsel was ineffective in failing to raise in the direct appeal of a murder conviction and death sentence an issue concerning the trial court's error in allowing the state to present evidence rebutting the existence of a statutory mitigating circumstance before the defense had presented any evidence of a lack of criminal record and in the face of defense counsel's stated intention not to rely on or present evidence concerning that statutory mitigating circumstance. "The error enabled the state to undercut [the] defense by depicting the Defendant as an experienced criminal in a way not sanctioned by our capital felony sentencing law." Fitzpatrick, 490 So.2d at 940.

In Robinson v. State, 487 So.2d 1040 (Fla. 1986) this Court vacated a death penalty where the state, in cross-examining several defense witnesses during the penalty phase, asked such questions as: "Are you aware --- the defendant went back to the jail and committed yet another rape?" Robinson, 487 So.2d at 1042. As in this case, the state in Robinson argued that the

questions were permissible to explore the witness' credibility. In vacating the death penalty, this Court stated:

> In arguing to the court and in closing argument the state gave lip service to its inability to rely on these other crimes to prove the aggravating factor of previous conviction of violent felony. Section 921.141(5)(b), Fla.Stat. (1983); Dougan v. State, 470 So.2d 697 (Fla. 1985). Arguing that giving such information to the jury by attacking a witness' credibility is permissible is a very fine distinction. A distinction we find to be meaningless because it improperly lets the state do by one method something which it cannot do by another. Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial. We find the state went too far in this instance.

Robinson, 487 So.2d at 1042. In Dougan v. State, 470 So.2d 697 (Fla. 1985) the state presented evidence and argument that the defendant had been indicted for a second crime at the time of the sentencing proceeding. This Court reversed, holding "the plain language of [section 921.141(5)(b)] precludes considering mere arrests or accusations as aggravating factors; only convictions of violent felonies may be used. (citations omitted).'' Dougan, 470 So.2d at 701 (emphasis added).

Recently, in Hildwin v. State, 531 So.2d 124 (Fla. 1988) this Court allowed the state to present testimony of the victim of an alleged sexual battery to rebut testimony of the defendant's non-violent character:

> We hold that, during the penalty phase of a capital trial, the state may rebut defense evidence of the defendant's non-violent nature by means of direct evidence of specific acts of violence committed by the Defendant provided, however, that in the absence of such

> conviction for any such acts, the jury shall not be told of any arrests or criminal charges arising therefrom.

Hildwin, 531 So.2d at 128. Applying that same reasoning in th instant case, it cannot be said that defense counsel in any way opened the door for the state to present testimony concerning the Cox's arrest while a teenager for burglary of an auto parts store. Indeed, a denial of due process has occurred where defense counsel submits a waiver concerning an area of mitigation, the state and the court accept that waiver and defense counsel acts in strict reliance on that waiver by carefully tailoring the testimony that is presented on direct, only to have the state, with the court's permission, present the very testimony that the defendant sought to avoid by waiving the statutory mitigating factor.

> The tat is entitled to rebut Defendan 's evidence of no prior criminal activity by evidence of criminal activity. However, testimony that defendant had a reputation as an arsonist and was called "the torch," without any evidence of actual involvement in such criminal activity, does not rise to the level of evidence criminal activity, and denies defendant the fairness in the weighing process that the statute contemplates and that justice mandates.
>
> We have previously held that the state may not use mere arrests or accusations as factors in aggravation. (citation omitted). Nor have we allowed pending charges, or mere arrests not resulting in conviction, to be used as aggravating factors. (citations omitted). The evidence here is reputational only; Appellant was never arrested or charged with any of these arsons. None of the witnesses offered first hand knowledge of Appellant's participation in these crimes. (citations omitted). Whatever doctrinal distinctions mav abstractlv be devised

> distinguishing between the state establishing an aggravating factor and rebutting a mitigating factor, the result of such evidence will be the same; improper considerations will enter into the weighing process. The state may not do indirectly that which we have held they may not do directly.

Dragovich v. State, 482 So.2d 350, 354-55 (Fla. 1986) (emphasis added).

During closing argument the prosecutor in this case addressed **Cox's** "commission" of the burglary of the auto parts store: "And you heard testimony that he had Christian beliefs and teachings; went to church when he lived in Springfield growing up. And yet you heard that he committed a burglary to an auto parts store when he was a teenager in the midst of this Christian training."(R1904) "You heard that he was a good teenager, but he committed those acts." (R1905) Thus, not only did **Cox** give up the opportunity to convince the trier of fact that he did not have a prior significant criminal history and receive nothing in return, the defense attorneys carefully tailored the testimony that was presented to the jury in order to avoid opening the door for the state to present such testimony. Allowing the state to improperly present that testimony after **Cox** acted in reliance on the waiver violated Due Process and the right to a fair trial under the Fifth and Fourteenth Amendments. The death penalty was rendered unreliable under the Eighth Amendment due to the state's use of a non-statutory aggravating factor. Accordingly, the death penalty must be vacated and the matter remanded for a new penalty proceeding.

POINT VIII

THE DEATH PENALTY WAS IMPOSED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. 1, SEC. 9, 16, AND 22 OF THE FLORIDA CONSTITUTION BECAUSE THE JURY DID NOT DETERMINE THE EXISTENCE OF STATUTORY AGGRAVATING CIRCUMSTANCES THAT DEFINE WHICH FIRST-DEGREE MURDERS ARE PUNISHABLE BY DEATH.

Three members of this Court have now recognized that the death penalty in Florida is being unconstitutionally applied. Specifically, in Burch v. State, 522 So.2d 810 (Fla.1988), in the context of what constitutional function the jury plays in capital cases in Florida, Justice Shaw stated the following in a dissenting opinion joined in by Justices Ehrlich and Grimes:

> [O]ur decision to vacate the death sentence rests entirely on the advisory recommendation of the jury which has rendered no factual findings on which to base our review. This treatment of an advisory recommendation as virtually determinative cannot be reconciled with e.g., Combs, and our death penalty statute. Moreover, the situation of largely unfettered jury discretion is disturbingly similar to that which led the Furman court to hold that the death penalty was being arbitrarily and capriciously imposed by a jury with no method of rationally distinguishing between those instances where death was the appropriate penalty and those where it was not. Absent factual findings in the advisory recommendation, any distinctions we might draw between cases where the jury reconmends [sic] death and those where it recommends life must, of necessity, be based on pure speculation. This is not a rational system of imposing the death penalty as Furman requires.

Burch v. State, 522 So.2d 810, 815 (Fla.1988)(Shaw, Ehrlich and

Grimes, JJ., dissenting)(emphasis added).

If the jury recommendation has no more force than a breath of wind to steer the sentencer to a correct sanction, then prosecutors may without apprehension demean the role of the jury in issuing what is a hollow recommendation and assuage the jurors' fears over the consequences of a ballot for death. See Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Such a jury recommendation is but a facade. If the Tedder standard is too arbitrary, inspecific and speculative to yield constitutionally consistent results as agreed upon by three members of this Court, then by all means move away from it! But to what end? How will review by this Court be any more consistent with no weight whatsoever given the nebulous jury recommendation? The constitutionally required answer is for the jury to make all the factual determinations that are required to impose the sentence (which is the constitutional function of the jury), for the trial court to use those findings in imposing sentence (which is the constitutional function of the trial judge), and for this Court in its appellate capacity to review the trial court's use of the factual findings when a death sentence is imposed.

The undersigned has presented substantially this same issue in Wright v. State, 437 So.2d 1277, (Fla. 1985), Peede v. State, 474 So.2d 808 (Fla. 1985), Provenzano v. State, 497 So.2d 1177 (Fla. 1986), Remeta v. State, 522 So.2d 825 (Fla.1988), Hildwin v. State, 531 So.2d 124 (Fla. 1988), Cherry v. State, Sup.Ct.Case No. 71,341, and Jones v. State, Sup.Ct.Case No.

72,461. Concededly the issue is usually summarily ignored. However, at least one court now agrees with the undersigned that a procedure whereby the jury does not find the aggravating factors upon which the death penalty is imposed violates the Fifth, Sixth, Eighth and Fourteenth Amendments. See Adamson v. Ricketts, 44 Cr.L. 2265 (9th Cir. 1989). For the reasons set forth in Adamson, supra, as amplified more particularly below and as applied to this case, it is once again submitted that the death penalty in Florida is unconstitutional because the jury does not determine the presence of the statutory aggravating factors.

Citing Lee v. State, 286 So.2d 596 (Fla. 1st DCA 1973), mod. Lee v. State, 294 So.2d 305 (Fla. 1974) and Dobbert v. Florida, 432 U.S. 282 (1977), Cox moved to have Section 921.141 Fla.Stat. declared unconstitutional because, if that statute is considered procedural law, it was never adopted by the Supreme Court of Florida. (R2073, denied at 2113). Alternatively, at the penalty phase charge conference, Cox requested to have the jury use a special verdict reflecting which statutory aggravating circumstances, if any exist based on the jury's perception of the facts. (R1865) The refusal of the trial judge to have the jurors determine the presence of the statutory aggravating circumstances denied Cox his state and federal constitutional rights to Due Process and a jury trial. Further, as noted by the dissent in Burch, supra, the generic jury recommendation injects arbitrary and capricious imposition of the death penalty in violation of the Eighth Amendment by preventing meaningful and consistent appellate review.

The trial judge found two statutory aggravating circumstances to have been proved beyond a reasonable doubt by the testimony and proof presented during the trial and the penalty phase, those being an especially heinous, atrocious or cruel murder and prior convictions of violent felonies. (See Appendix A) However, the state argued to the jury that 3 statutory aggravating factors justify imposition of the death penalty in this case.

"[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." Patterson v. New York 432 U.S. 197, 210, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). "Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which - were they to be tried in a federal court - would come within the Sixth Amendment's guarantee." Duncan v. Louisiana, 391 U.S. 145, 149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)(footnote omitted). But see Richmond v. Arizona, 434 U.S. 1323, 98 S.Ct. 8, 54 L.Ed.2d 34 (1977).

This Court has unequivocally held that the aggravating circumstances set forth in §921.141(5), Fla.Stat. are substantive law that "actually define those crimes, when read in conjunction

with Fla.Stat. §§782.04(1) . . . F.S.A. to which the death penalty is applicable in the absence of mitigating circumstances." Morgan v. State, 415 So.2d 6, 11 (Fla. 1982);

> The aggravating circumstances of Section 921.141(6) Florida statutes actually define those crimes, when read in conjunction with Florida Statutes 782.04(2). . ., to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury.

State v. Dixon, 283 So.2d 1, 9 (Fla. 1973)(emphasis added). "By delineating the circumstances in which the death penalty may be imposed, the legislature has not invaded this Court's prerogative of adopting rules of practice and procedure. We find that the provisions of section 921.141 are matters of substantive law insofar as they define those capital felonies which the legislature finds deserving of the death penalty." Vaught v. State, 410 So.2d 147, 149 (Fla. 1982). Substantive considerations that "actually define" which first-degree murders are punishable by death are elements of the crime which must be proved beyond a reasonable doubt and found by a jury. Florida requires at least one statutory aggravating circumstance to be proved beyond a reasonable doubt before the death penalty is statutorily authorized. See Banda v. State, 13 FLW 709 (Fla. Dec. 8, 1988). If, for a death sentence at least one aggravating circumstances must exist and be proved beond a reasonable doubt before the death penalty is authorized, and where many of the statutory aggravating circumstances depend on the very facts determined by the jury in rendering a guilty verdict (e.g., an especially heinous, atrocious or cruel murder),

the jury is the entity that must determine the presence of the factors. After all, it is not the stigma of being a convicted first-degree murderer that most affects those convicted of this crime, but the death penalty if it is imposed.

Florida's first-degree murder statute lumps all first-degree murders together, be they committed from an act of premeditation or the unlawful killing of a human being during the commission of an enumerated felony. **S782.04** Fla. Stat. **(1987).** Insofar as the punishment that attends first-degree murder, the statute provides that the unlawful killing of a human being committed with premeditation or during the commission of a particular felony is first-degree murder, punishable as provided in **S775.082,** and goes on to state, "In all cases under this section, the procedure set forth in **5921.141** shall be followed in order to determine sentence of death or life imprisonment." **S782.04 (1),** Fla. Stat. **(1987).**

> A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than **25** years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in **S921.141** results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

Section **775.082(1),** Fla.Stat. **(1987).**

Cox moved prior to the penalty phase to have the jury determine which aggravating circumstances apply to his case. The motion was denied. **(R1865)** Thereafter, the judge found that the murder was committed in an especially heinous, atrocious or cruel

manner and that Cox has previously been convicted of a violent felony. **(R2478-86)** The Constitution requires that the jury make those factual findings. So, too, does Section **921.141(2)** Fla. Stat. **(1987)** Specifically, in pertinent part, Section **921.141(2)** provides:

> **ADVISORY** SENTENCE **BY** THE JURY. - After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (c) Whether sufficient aggravating circumstances as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(emphasis added). Implicit in the above-emphasized portion of the statute is the requirement that the jury actually find which, if any, aggravating circumstances before moving on to find and consider mitigating circumstances; this statutory requirement heretofore has been disregarded. It is respectfully submitted, especially in light of the timely, specific request by Cox, that the jury is required by §921.141(2) and the Fifth, Sixth, Eighth and Fourteenth Amendment to unanimously determine the existence of aggravating circumstances when and if the jury recommends a sentence of death, and that thereafter the trial judge may reject but not supplement those findings of statutory aggravating circumstances when and if the death sentence is imposed. The findings issued by the trial court pursuant to §921.141(3), Fla. Stat. **(1987)** must incorporate the express findings of the jury,

but the trial court no longer would be free to find the presence of statutory aggravating circumstances that may have been expressly rejected by the jury based on credibility determinations.

The refusal of the judge to have the jury use a special verdict form in the penalty phase violated the constitutional right to a jury trial. Amendments VI, XIV, United States Constitution. The death sentence must be reversed.

POINT IX

THE FLORIDA DEATH PENALTY VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ART. 1, SEC. 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION BECAUSE THE AGGRAVATING AND MITIGATING CIRCUMSTANCES DO NOT GENUINELY LIMIT THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY; THE FACTORS ARE PRONE TO ARBITRARY AND CAPRICIOUS APPLICATION, ESPECIALLY WITH THE VACILLATING STANDARD OF APPELLATE REVIEW CAUSED BY THE PRESENCE OF A JURY RECOMMENDATION OF LIFE.

The bete noire of capital punishment is a procedure enabling arbitrary and capricious imposition of the death penalty. This occurs when too much discretion is afforded imposition of the death penalty. It was in response to the condemnation of arbitrary and capricious imposition of the death penalty in Furman v. Georgia, 408 U.S. 238 (1972) that the Florida Legislature enacted death penalty legislation embodying statutorily defined aggravating circumstances that must exist and outweigh mitigating factors before the death penalty is authorized. See Banda v. State, 13 FLW 709, 711 (Fla. Dec. 8, 1988) ("death penalty is not permissible under the law of Florida, as here, no valid aggravating factors exist".) The aggravating/mitigating circumstance comparison survived an Eighth Amendment challenge in Proffitt v. Florida, 428 U.S. 242 (1976). That court subsequently explained why the required consideration of specific aggravating/mitigating circumstances prior to authorization of imposition of the death penalty affords sufficient protection against arbitrariness and capriciousness:

> This conclusion rested, of course, on the fundamental requirement that each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of Furman itself. For a system "could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur." 428 U.S. at 196, n.46, 49 L.Ed.2d 859, 96 S.Ct. 2909. To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Zant v. Stephens, 462 U.S. 862, 877 (1983)(footnote omitted). Thus aggravating circumstances must be sufficiently definite to provide consistent application in the face of emotionally compelling facts, and aggravating circumstances that are too subjective and non-specific to be applied even-handedly are unconstitutional. See Maynard v. Cartwright, 486 U.S. __, 108 S.Ct.__, 100 L.Ed.2d 372 (1988)(aggravating circumstance of "especially heinous, atrocious or cruel" too indefinite); Godfrey v. Georgia, 446 U.S. 420 (1980)(aggravating circumstance of "outrageously or wantonly vile, horrible and inhuman" too indefinite).

Florida's death penalty system utilizes eleven statutory aggravating circumstances. It is respectfully submitted that when those circumstances are considered in pari materia the class of first-degree murderers who are eligible for the death penalty is not sufficiently restricted to preclude capriciousness

and arbitrariness in the imposition of the death penalty. Too much unbridled discretion is afforded the jury, the trial and the appellate courts when the sentence is recommended, imposed and reviewed. Three justices of this Court have agreed that the current procedure affords too much maneuverability in imposition of the death penalty. See dissenting opinion in Burch v. State, 522 So.2d 810, 815-16 (Fla. 1988)(Shaw, Ehrlich, Grimes, JJ., dissenting)(See Point VIII, supra).

The aggravating circumstances used in Florida are replete with highly subjective language:

> (5) AGGRAVATING CIRCUMSTANCES - Aggravating circumstances shall be limited to the following:
> (a) The capital felony was committed by a person under sentence of imprisonment.
> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
> (c) The defendant knowingly created a great risk of death to many persons.
> (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
> (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
> (f) The capital felony was committed for pecuniary gain
> (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
> (h) The capital felony was especially heinous, atrocious, or cruel.

> (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
>
> (j) The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.
>
> (k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his official duties if the motive for the capital felony was related, in whole or part, to the victim's official capacity.

§921.141(5), Fla.Stat. (1988 Supp.). The statutes provide no definition of the subjective terms found in either the aggravating or mitigating circumstances, so the courts and the juries are left to fend for themselves to determine when the factors exist.

The facial constitutionality of Florida's death penalty statute survived an Eighth Amendment challenge in Proffitt v. Florida, 428 U.S. 242, 253 (1976). The Court ruled that the statutes and procedures as then applied satisfied the Eighth Amendment. Proffitt, 428 U.S. at 927. Of the 21 death penalty cases reviewed at the time of Proffitt, this Court had reversed 7. It is respectfully submitted that more meaningful statistics now exist. Further, the definitions of the statutory aggravating and mitigating circumstances have since proved too broad to comport with constitutional requirements of specificity and consistency in application, and that the vagaries of unbridled discretion denounced in Furman v. Georgia, 408 U.S. 238 (1972) have returned in full force. See, Point VIII, supra.

In State v. Dixon, 283 So.2d 1 (Fla. 1973), which is perhaps the one most important Florida case relied on by the

United States Supreme Court in Proffitt, this Court rejected the contention that the statutory aggravating and mitigating circumstances were impermissibly vague, stating, "review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under circumstances in another case." Dixon at 10. This language is cited by the United States Supreme Court when the death penalty system in Florida was at first approved. Proffitt at 251.

It is respectfully submitted that trial courts and this Court have failed to consistently apply the statutory aggravating and mitigating factors. This Court has rendered decisions that are diametrically opposed to others containing virtually the same material facts. These decisions cannot be reconciled. Time and again this Court is belatedly acknowledging that prior approval of findings of aggravating factors were in fact improper. It is critical that the statutory aggravating factors be sufficiently specific so as to afford consistent application by this Court, which in turn provides the necessary guidance to the trial courts and the juries. This simply has not happened. The vacillation by this Court not only fails to provide sufficient guidance to the trial courts and the juries, it also demonstrates that the aggravating circumstances are too susceptible to interpretation to afford unerring application in the face of compelling facts with the procedure now being utilized. It is not only the application of a single vague factor that is the problem. Rather, the recurrent corrections in the application of most of the aggravating factors signals that the procedure now used is too error prone.

ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL

The bare wording of this aggravating circumstance is unconstitutionally vague. Maynard v. Cartwright, 486 U.S. __, 108 S.Ct. __, 100 L.Ed.2d 372 (1988). It is susceptible to arbitrary and capricious application. For example, in Raulerson v. State, 358 So.2d 826 (Fla. 1978) this Court approved the trial court's finding of a murder committed in an especially heinous, atrocious or cruel manner. After resentencing was ordered by the federal court for the middle district of Florida, Raulerson v. Wainwright, 408 F.Supp.381 (M.D. Fla. 1980), this Court struck the finding, after reviewing ~~the same~~ facts, stating, "We have held that killings similar to this one were not heinous, atrocious, and cruel. (citations omitted)." Raulerson v. State, 420 So.2d 567,571 (Fla. 1982).

Another example of patent inconsistency is found in the subjective view of what additional facts separate a murder from the norm. In Troedel v. State, 462 So.2d 392 (Fla. 1984) and Breedlove v. State, 413 So.2d 1 (Fla. 1982) this Court approved the application of this factor because, "the fact that the victims were killed in their home sets this crime apart from he norm." Troedel, 462 So.2d at 398. However, in Simmons v. State, 419 So.2d 316 (Fla. 1982) this Court disapproved the application of this aggravating factor, stating, ". . . the finding that the victim was murdered in his own home offers no support for the finding."). Simmons, 419 So.2d at 319.

In light of Maynard, supra, there can be no doubt but that the bare statutory language is too vague to comport with the

Eighth Amendment requirement of specific factors that channel the discretion of the sentencer. Belated review of a death sentence does not cure the taint, where the jury recommendation, which is accorded great weight and which must be followed unless no reasonable person could disagree, is rendered based on an unconstitutionally vague statutory factor. See Point X, infra.

GREAT RISK OF DEATH TO OTHERS

This Court has receded from a prior holding made in King v. State, 390 So.2d 315 (Fla. 1980) that affirmed the trial court's finding of the defendant having created a great risk of death or serious harm to others when the defendant set fire to his house. King was granted a resentencing by the Eleventh Circuit Court of Appeal due to ineffectiveness of trial counsel during the sentencing proceeding. King v. Strickland, 748 F.2d 1462 (11th Cir. 1984), cert denied, 471 U.S. 1016 (1985). On direct appeal to this court following resentencing, this Court, again reviewing the same facts, struck the aggravating factor previously approved in 1980, stating:

> On his original appeal, this Court affirmed the trial court's finding this aggravating factor and stated that "when the Appellant intentionally set fire to the house, he should have reasonably foreseen that the blaze would pose a great risk to the neighbors, as well as the firefighters and the police who responded to the call." 390 So.2d at 320. Upon reconsideration we find that this aggravating factor should be invalidated. In Kampff v. State, 371 So.2d 1007, 1009 (Fla. 1979), we stated:"'great risk' means not a mere possibility, but a likelihood or great probability." Furthermore, we have also

> said that "a person may not be condemned for what might have occurred." White v. State, 403 So.2d 331, 337 (Fla. 1981) cert. denied, 463 U.S. 1229 (1983). Only the victim was in the house when King set it on fire. That two firefighters suffered smoke inhalation and that the fire caused considerable damage to the house does not justify finding that this aggravating factor has been established. This case is a far cry from one where this factor can properly be found. E.g., Welty v. State, 402 So.2d 1159 (Fla. 1981) (setting fire to condominium when six elderly people were asleep in other units qualified as great risk of death to many persons).

King v. State, 514 So.2d 354,360 (Fla. 1987). If the King case "is a far cry from one where the factor can be properly be found", how did that factor get approved in the first case? How many trial courts have relied on the King decision rendered in 1980 that established the wrong standard for this aggravating factor? Further, how is it that this Court overlooked the Kampff decision upon which it now relies when that case was decided a year prior to King?

COLD, CALCULATED OR PREMEDITATED WITH NO PRETENSE OF MORAL OR LEGAL JUSTIFICATION

This Court's vacillation in its dealings with the statutory aggravating circumstances cannot help but breed confusion to those seeking to consistently apply the aggravating circumstances. For instance, in Caruthers v. State, 465 So.2d 496 (Fla. 1985) this Court disallowed a finding of a cold, calculated and premeditated murder where a robber shot a store clerk three times. This Court stated "the cold, calculated and premeditated factor applies to a manner of killing characterized

by heightened premeditation beyond that required to establish premeditated murder." Caruthers at 498 (emphasis added). Eight pages later, in the next reported decision, this Court approved the same factor, stating "this factor focuses more on the perpetrator's state of mind than on the method of killing. Johnson v. State, 465 So.2d 499, 507 (Fla. 1985)(emphasis added). Then in Provenzano v. State, 497 So.2d 1177 (Fla. 1986), this Court reverted to the prior standard, stating ". . . as the statute indicates, if the murder was committed in a manner that was cold and calculated, the aggravating circumstance of heightened premeditation is applicable." Provenzano at 1183. Recently, in Banda v. State, 13 FLW 709 (Fla. Dec. 8, 1988), this Court again returns to the subjective intent of the murderer. How are the trial courts to know which standard applies? Is it the defendant's state of mind or is it the manner in which the crime was committed?

Further, there is patent inconsistency in application of the second prong of the cold calculated or premeditated, without any pretense of moral or legal justification factor. In Banda v. State, 13 FLW, 709, 711 (Fla. July 14, 1988) this Court stated, "We conclude that, under the capital sentencing law of Florida, a 'pretense of justification is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide." (emphasis added). In Cannady v. State, 427 So.2d 723 (Fla. 1983), this Court disapproved the finding of a cold, calculated or premeditated murder because, according to

the defendant, the victim rushed at him before he was shot five times. "During his confession appellant explained that he shot Carrier because Carrier jumped at him. These statements establish that appellant had at least a pretense of a moral or legal justification, protecting his own life." Cannady at 730. Yet in Provenzano v. State, 497 So.2d 1177 (Fla. 1986) this Court approved that aggravating factor and rejected as a pretense of moral justification the uncontroverted fact that the victim (a courtroom bailiff) was repeatedly firing a pistol at the defendant when the bailiff was shot. ~~See also~~ Turner v. State, 13 FLW 426, 428 (Fla. July 7, 1988) (no pretense of moral justification where defendant believed victims [his wife and another woman] had a lesbian relationship resulting in defendant losing family).

PRIOR CONVICTION OF VIOLENT FELONY

In Hardwick v. State, 461 So.2d 79 (Fla. 1984) this Court approved utilization of a violent felony committed by a defendant upon a murder victim contemporaneous with the crime of murder to establish a prior conviction for a violent felony. "Where the evidence supports a finding of premeditated murder or where the violent felony is not a necessarily included element of felony murder, we cannot say that the separate acts of violence on one victim are less revealing of the violent propensities of the perpetrator than contemporaneous acts of violence on separate victims. We find no error here." Hardwick at 81. However, this Court has now receded from Hardwick. Patterson v. State, 513 So.2d 1257 (Fla. 1983). See also Wasko v. State, 505 So.2d 1314

(Fla. **1987).** If these aggravating circumstances are so clear, how are they being so consistently misapplied?

Yet another aberration concerns the trial court's use and this Court's review of lack of remorse by a defendant. In Pope v. State, **441** So.2d **1073** (Fla. **1983)** this Court held:

> [H]enceforth lack of remorse should have no place in the consideration of aggravating factors. Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor.

Pope at **1078** (emphasis added). Thus, the only way for a sentencer to even refer to remorse would seem to be an acknowledgement that it exists as a non-statutory mitigating factor, in that it would be virtually impossible for a trial judge to address every possible non-statutory mitigating circumstance and affirmatively state that it does not exist. Yet, when a sentencing order refers to an absence of remorse as a non-existent mitigating factor in a particular case, this Court will sometimes acknowledge the impropriety, as in Patterson, supra, and at other times determine that an acknowledgement of lack of a mitigating factor is not the same thing as using that same factor in aggravation. See Echols v. State, **484** So.2d **568, 575** (Fla. **1985)** (not improper to use no remorse to negate mitigation). The reasoning is but a semantical distinction without a meaning.

As previously noted, this Court rejected the contention that the aggravating circumstances are impermissibly vague, stating "review by this Court guarantees that the reasons present

in one case will reach a similar result to that reached under circumstances in another case." Dixon at 10. The foregoing examples cannot rationally be reconciled with that guarantee and they demonstrate that this Court needs to reconsider whether the current procedure employed to find and review statutory aggravating circumstances is sufficiently consistent *so* as to comport with constitutional requirements. These patent inconsistencies in application of the aggravating circumstances show that the tail is now wagging the dog.

Furthermore, Appellant feels constrained to point out that the guarantee of consistency between the same penalty for the same facts in different cases is suspect on at least four bases over and above vagueness, those being the trial judge rather than the jury finding the facts of the crime, limited exposure by this Court to other murder cases, the use of an improper standard to review the presence of mitigating factor, and a presumption of propriety of the death penalty in the presence of one aggravating circumstance and no mitigating circumstance. More specifically, in reference to the first observation, it is axiomatic that the jury determines what factually happened concerning the offense when the verdict concerning guilt is returned. A finding of guilt does not, however, include any of the statutory aggravating circumstances that must exist to authorize imposition of the death penalty. Under Section 921.141(2), the procedure which would render more consistent findings would be if, after a jury verdict of guilty of first-degree murder, a penalty phase occurs where the jury

unanimously finds in writing which aggravating factors exist depending on the facts they found when deciding guilt. The jury would still contemporaneously render a majority recommendation of either life or death. Review by the trial judge is then required if the death sentence is imposed, and he is further required to support that sentence in writing based upon the findings of the jury. The sentence and findings are then subject to appellate review by this Court. To do otherwise fosters inconsistency in the face of compelling facts or politics and otherwise violates the Sixth and Fourteenth Amendments. See Point VIII, supra.

Secondly, when this Court performs a proportionality review, this Court does not have the benefit of the facts and circumstances of other murder cases where the death penalty was not imposed other than by review of such cases on a discretionary basis pursuant to certified questions or decisions in express and direct conflict with other decisions. Art. V, Sec. 3(b), Fla. Const. (1986). In that respect the spectrum through which this Court views the facts determining the proportionality of imposition of the death penalty is geared solely to first-degree murder cases in which the death penalty was actually imposed, rather than the wider range of facts of other murder cases wherein the life imprisonment sanction is imposed by the trial court. Because the perception of this Court is as a matter of procedure unduly restricted an adequate and consistent proportionality analysis of first-degree murder cases cannot be performed.

Further, the guarantee of consistency is suspect because this Court at times considers itself bound to an abuse of

discretion standard insofar as determining the presence ~~vel~~ ~~non~~ of mitigating circumstances, but at other times embarks upon a plenary review of the record to discern the existence of either statutory or non-statutory mitigating circumstances. ~~See~~ Burch v. State, 522 So.2d 810, 815-16 (Fla. 1988)(Shaw J. dissenting); Amazon v. State, 487 So.2d 8 (Fla. 1986). The election of this Court not to provide plenary review in all cases effectively defeats the guarantee of consistent application of the death penalty. A trial court's finding of the non-existence of a mitigating circumstance is not entitled to the weight that this Court is affording it, and by not in every death case providing plenary review to determine the presence of mitigating factors this Court is failing to provide a truly accurate proportional analysis in violation of the Eighth Amendment.

It is respectfully submitted that a trial court's error in failing to recognize and consider relevant mitigating evidence contained in the record, instead of being condoned by this Court as an act of discretion, should be corrected by this Court when the uncontroverted presence of such mitigating evidence is pointed out on appeal. The failure of a trial judge to acknowledge as valid reasons for mitigation uncontroverted facts which were recognized in other cases (of which he may be and probably is unaware) as valid reasons for mitigation clearly results in discriminatory, arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments. Facts that constitute a reason to mitigate a sentence in one case must also constitute a reason to mitigate a sentence in another

case if the death penalty is to receive the promised consistent application. This Court has specifically recognized this premise in the death penalty context:

> We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same.

Slater v. State, 316 So.2d 539, 542 (Fla. 1975). ~~See also~~ State v. Dixon, 283 So.2d 1, (1973). At diverse times this Court acknowledges that mitigating evidence is present in the record yet at other times defers to a trial court's discretion to find such factors. If an appellate court myopically accepts the trial court's finding of no mitigating circumstances when there is a recommendation of death from the jury, why take the blinders off when there is a jury recommendation for life imprisonment? See Amazon v. State, supra; Pope v. State, 441 So.2d 1073,1076 (Fla. 1983).

Specifically, this Court has held that the trial judge is in as good a position as is the jury to determine the aggravating and mitigating circumstances, in that "the trial judge does not consider the facts anew. In sentencing a defendant, a judge lists reasons to support a finding in regard to mitigating or aggravating factors." Provenzano 497 So.2d at 1185. If all that is being accomplished is listing reasons, this Court is in an even better position than is the trial judge because this Court can better recognize what constitutes valid "reasons" that should have been considered by the trial court but were not,

simply because this Court reviews all the cases, whereas the trial judge only presides over a limited few. If appellate courts will provide plenary review to determine for themselves the voluntariness of a statement, which at least involves a quasi-factual determination, certainly that same degree of scrutiny and participation must apply to a matter as grave as imposition of the death sentence. See Miller v. Fenton, 474 U.S 104, 88 L.Ed.2d 405, 106 S.Ct. 445 (1985)(rejection of "presumption of correctness" as an issue of fact as to whether confession was voluntarily given). Again, it is stressed that for the death penalty to be constitutionally applied the "discretion" to impose that penalty must be kept at a minimum. Similarly, the discretion of an appellate court in affirming death penalties must be minimized. By allowing the trial judge such unbridled discretion in determining mitigating circumstances and in failing to perform an adequate independent analysis of the existence of mitigating circumstances, inconsistent application of the death penalty under the same facts results.

For these reasons it is respectfully submitted that, as now applied, the statutes governing imposition of the death penalty in Florida are impermissibly vague and are otherwise subject to unfair, capricious, arbitrary and discriminatory application. This Court has held that an Eighth Amendment challenge must be raised on direct appeal, even when not raised previously. See Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987). These errors were raised below in the form of a motion to have Section 921.141 declared unconstitutional. (R2084-88). The statute as

now applied violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 1, Sections 9, 16 and 22 of the Florida Constitution. Accordingly, the death sentence must be vacated and a sentence of life imprisonment imposed.

POINT X

IMPOSITION OF THE DEATH PENALTY IN THIS CASE IS UNCONSTITUTIONAL, IN THAT IT WAS BASED ON JURY INSTRUCTIONS AND ARGUMENT WHICH WERE VAGUE, MISLEADING, AND GROSSLY INCORRECT IN SIGNIFICANT AREAS.

The standard preliminary jury instruction in death penalty cases reads:

> The State and the Defendant may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that [this evidence when considered with the evidence you have already heard] [this evidence] is presented in order that you might determine first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any. At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

Prior to the penalty phase, defense counsel moved in writing to have the above-underlined portion replaced with, "If you find that there are sufficient aggravating circumstances that would justify the imposition of the death penalty, then you must consider the evidence in mitigation. It will be your duty to determine whether there are sufficient aggravating circumstances to outweigh the mitigating circumstances beyond a reasonable doubt." (R2406) The request was denied, and the standard instruction set forth above was in fact given. (R1542) The instruction, in standard form, was repeated when the jury was charged to render their advisory verdict. (R1921)

> As you have been told, the final decision as to what punishment is to be imposed is the responsibility of the judge. However, it is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> * * *
>
> If you find that the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for **25** years. Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. Among the mitigating circumstances that you may consider, if established by the evidence, are the age of the defendant at the time of the crime and any other aspect of the defendant's character or record and any other circumstance of the offense.

(R1921,1923-24)

In this regard, the standard jury instructions violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution by instructing the jury that the mitigating circumstances must "outweigh" the aggravating circumstances. Mitigating circumstances need not weigh "more" than aggravating circumstances. The mitigation must only be of such weight that imposition of the death penalty is unwarranted. By informing the jury that the mitigating circumstances must weigh "more" than the aggravating factors, the jury is given an unworkably vague standard,

the weighing process is distorted under the Eighth Amendment and the burden of persuasion is placed on the defendant in violation of the Fifth, Sixth and Fourteenth Amendments. The standard jury instructions are susceptible to being misunderstood by a reasonable juror, and as such a death recommendation based on such instructions is unreliable under the Eighth Amendment.

Taken literally, the standard instructions require that, for a life sentence to be recommended by the jury or imposed by the trial judge, the mitigating evidence must weigh more than ("outweigh") the aggravating circumstances. This is a burden of persuasion rather than a burden of production, and it results in the state bearing the burden of persuasion only *so* long as no mitigating evidence is introduced. This follows because the jury is instructed that the state only has to prove beyond a reasonable doubt that the death penalty is appropriate before any mitigation is shown. When mitigation is shown, the jury is then instructed that the mitigation must "outweigh" the aggravating circumstances. This shifting standard violates the Due Process Clause of the Fourteenth Amendment and renders the death penalty process unreliable under the Eighth Amendment.

> In this circuit, then, the state of the law is well settled. Capital sentencing instructions which do not clearly guide a jury in its understanding of mitigating circumstances and their purpose, and the option to recommend a life sentence although aggravating circumstances are found, violate the Eighth and Fourteenth Amendments.

Goodwin v. Balkcom, **684** F.2d **794, 801** (11th Cir. **1982).**

A presumption which, although not conclusive, has the effect of shifting the burden of persuasion on the defendant, is unconstitutionally deficient. The threshold inquiry is to determine the nature of the presumption the jury instruction describes. "That determination of words requires careful attention to the words actually spoken to the jury (citations omitted), for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." Sandstrom v. Montana, 442 U.S. 510, 514 (1979). The defective nature of this burden shifting instruction has been noted by this Court in Arrango v State, 411 So.2d 172 (Fla.1982), where this Court held that the instructions, when considered as a whole, do not effectively shift the burden of persuasion to the defendant. This Court expressly recognized, however, that the death penalty can only properly be imposed when the state shows that the aggravating circumstances outweigh the mitigating circumstances. Arrango, 411 So.2d at 174.

It is respectfully but expressly submitted that the standard instructions, even when considered in their entirety, do not fairly apprise the jury of their function or the burden that rests upon the state. Further, in light of the express, timely, written request by the defendant in this case to have the standard instructions clarified so that they clearly and unambiguously state the law, it is urged that the reversible error here has occurred. A defendant in a case with a penalty of this magnitude is absolutely entitled to unambiguous instructions.

PRESENCE OF UNCONSTITUTIONALLY VAGUE STATUTORY AGGRAVATING FACTOR

Prior to the penalty phase, defense counsel moved in writing for the trial court to define the operative terms used in the statutory aggravating circumstance of an "especially heinous, atrocious or cruel murder" as follows; "Heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others." (R2419) This language is the verbatim definition provided by this Court. State v. Dixon, 283 So.2d 1,9 (Fla. 1973). The requested definition was denied (R2419), and instead the court defined the aggravating circumstance as follows; "The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious, or cruel. What is intended to be included in the category of heinous, atrocious and cruel 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 the capital felonies. The conscienceless or pitiless crime which is -- which is unnecessary, unnecessarily tortuous to the victim." (R1923)

The definition provided by the trial judge completely fails to adequately guide the discretion of the sentencer and the jury was left with no more guidance than the bare wording of the statutory aggravating circumstance provides. Pursuant to Maynard v. Cartwright, 486 U.S. __, 486 S.Ct. __, 100 L.Ed.2d 372 (1988), the bare wording of this aggravating factor is unconstitutionally vague. The definition provided by the trial court in this case

added nothing that would channel the discretion of the jury in recommending the death penalty. Accordingly, the court committed reversible error by failing to adequately define to the jury this vague aggravating circumstance upon timely request.

The jury recommendation was also unconstitutionally tainted by instructions and comments that improperly demeaned the importance of the role of the jury in the sentencing process. These instructions and argument improperly described the role of the judge and jury assigned by Florida law and require correction on appeal because of timely and specific objection. See Pait v. State, 112 So.2d 380, 383-84 (Fla. 1959)(holding that misinforming jury of its role constitutes reversible error); Blackwell v. State, 76 Fla. 124, 79 So. 731, 735-36(1918) (same). In Caldwell v. Mississippi, 472 U.S. 320 (1985), the United States Supreme Court held that any suggestion to a capital sentencing jury that the ultimate responsibility for sentencing rests elsewhere violates the Eighth and Fourteenth Amendments to the United States Constitution. The Court noted that a fundamental premise supporting the validity of capital punishment is that the sentencing jury is fully aware of the magnitude of its responsibility.

> [An] uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presesnts an intolerable danger that the jury will in fact choose to minimize the importance of its role.

Caldwell, 472 U.S. at 333. Although the role of the jury in Florida is to recommend a sentence and not impose one, the reasoning of Caldwell applies due to the significance Florida places on the jury recommendation. See, Adams v. Wainwright, 804

F.2d 1526 (11th Cir. 1986), mod., 816 F.2d 1493 (11th Cir. 1987). A recommendation of life affords the capital defendant greater protection than one of death, in that it must be followed unless no reasonable person could conclude that life is an appropriate sentence. Tedder v. State, 322 So.2d 908 (Fla. 1975); Amazon, supra.

The jury was in this case was repeatedly subjected to the notion that the judge was responsible for the sentence.

> (Judge Cycmanick during voir dire): The jury's recommended sentence is advisory. It is not binding on the trial judge. In this case, on Judge Conrad. However, it is entitled and it will be given great weight.

(R26) A previous objection was lodged prior to this comment and overruled. (R9) During the voir dire proceedings, the word "advisory" or "recommendation" appears seventeen times in just the preliminary questioning. (R23-38) Individual voir dire of the prospective jurors was replete with the suggestion that the jurors rendered only an advisory or recommended sentence. At the inception of the penalty phase, the trial court instructed the jury as follows:

> THE COURT: Ladies and gentlemen, you have found the defendant guilty of murder in the first degree. The punishment for this crime is either death or life imprisonment without the possibility of parole for 25 years. The final decision as to what punishment shall be imposed rests solely with the judge of this Court. However, the law requires that you, the jury, render to the court an advisory sentence as to what punishment should be imposed upon the defendant.

(R1542) That instruction was immediately followed by prosecutorial argument stating, "and as the judge instructed you, we now come to the portion of trial where you will be asked to make a recommendation to the judge as to what the punishment should be." (R1543) That theme was repeated during the argument portion of the penalty phase.

> PROSECUTOR: You have found Robert Cox guilty of murder in the first degree. The judge will soon instruct you on the law that is to be applied to this portion of the proceedings. And one of the things that he will instruct you is that the final decision as to what punishment shall be imposed is the responsibility of the judge. However, it is your duty, it is your duty to follow the law that he will give you in these proceedings. And ladies and gentlemen, while it is his responsibility as to what sentence is to be imposed, you will give him and advisory verdict.
>
> DEFENSE COUNSEL: Objection, Your Honor, on Caldwell grounds.
>
> PROSECUTOR: If I could finish, Your Honor, I think I will clear that up.
>
> THE COURT: Objection's overruled.
>
> PROSECUTOR: Your verdict is a serious matter. You should treat it seriously. I suggest that the court will treat it seriously. It is not something that is to be approached lightly.

(R1886-87) The standard instructions given the jury, combined with the voir dire questioning and the argument of the prosecutor, intolerably led the jury to believe that the responsibility for the actual imposition of the sentence rested with the trial judge and not with them. In that regard, the role of the jury has been diminished in violation of the Eighth Amendment. Because the

jury may have been misled as to the importance of its recommendation and because the error was timely objected to by defense counsel and disregarded by the trial judge, the death sentence is unreliable under the Eighth Amendment.

The jury recommendation and accompanying death sentence is further unconstitutionally tainted by improper prosecutorial argument, over objection, concerning the applicablility of a statutory aggravating factor of which Cox had been acquitted. The refusal of the trial judge to use a special verdict form for the jury to identify the aggravating circumstances that they relied on in recommending the death penalty is especially pertinent here. Specifically, the prosecutor argued:

> PROSECUTOR: And I suggest to you, Ladies and Gentlemen, that the state of Florida has proved beyond and to the exclusion of every reasonable doubt that while Robert Cox was engaged in the Commission of Sharon Zellers' murder, he kidnapped her in the commission of that murder. You will recall the testimony of Charles Zellers. Charles Zellers is the father of this woman, Sharon Zellers.
>
> DEFENSE COUNSEL: Objection, Your Honor. No evidence of kidnapping through the factors I believe Mr. Lauten's trying to bring out.
>
> THE COURT: Your objection's overruled. The jury is going to be required to exercise their individual as well as their collective recollections as to what the evidence has shown.

(R1891). The trial judge, when listing the statutory aggravating circumstances, included Section 921.141(5)(d), which concerns a murder committed during the commission of a kidnapping. However, the trial court did not provide any definitions as to *any* felonies

other than first-degree premeditated murder, which was given during the guilt phase of trial. The presence of this instruction without adequate definition of the operative terms violates the Eighth Amendment. Further, since Cox was implicitly acquitted of having commited any other felony when the trial court granted the judgment of acquittal for first-degree felony murder, the presence of an instruction covering this aggravating factor is unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

It is respectfully and expressly submitted that the foregoing instructions, arguments and comments set forth in this point on appeal incorrectly state the law in Florida and are misleading to the jury concerning both the law and their role in the sentencing process. As such, these errors violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 9, 16, 17 and 22 of the Constitution of Florida.

POINT XI

THE TRIAL COURT ERRED DURING THE PENALTY PHASE BY PROVIDING THE STATE WITH CARTE BLANCHE AUTHORITY TO CROSS-EXAMINE THE DEFENDANT CONCERNING GUILT OR INNOCENCE, THEREBY INTIMIDATING THE DEFENDANT TO FOREGO ALLOCUTION.

Prior to the penalty phase, defense counsel moved in limine to preclude the state from cross-examining the defendant concerning guilt or innocence should he decide to take the stand. (R2381-82) The ruling violated the defendant's First, Fifth, Sixth, Eighth, and Fourteenth Amendment rights. The trial judge ruled (R1504) that the state could cross-examine Cox on guilt, even if Cox totally avoided the subject when testifying, relying on Thomas v. State, 249 So.2d 510, 512 (Fla. 3d DCA 1971) ("In cross-examining an accused the state is not to be confined strictly to the subjects of the direct examination.") and Daly v. State, 67 Fla. 1, 64 So. 358 (1914). Thomas did not concern the death penalty or a bifurcated trial proceeding; Daly, though concerning the imposition of the death penalty (for the crime of rape) did not concern the bifurcated nature of the penalty phase.

"He who offers himself as a witness is not freed from the duty to testify. The court (except insofar as as it is constitutionally limited), not a voluntary witness, defines the testimonial duty." Brown v. United States, 356 U.S. 148, 153 (1957).

> A court has a duty to protect the Fifth Amendment rights of witnesses. Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931). In some circumstances it may do so by limiting the scope of cross-examination to matters as to which the witness has

> waived his privilege by testifying on direct. (citations omitted).

United States v. Demchak, 545 F.2d 1029, 1031 (5th Cir. 1977). It is not uncommon for a defendant to seek a ruling prior to cross-examination by the State in order to restrict the questioning to proper inquiries. See United States v. Hearst, 563 F.2d 1331, 1338-43 (9th Cir. 1977). In Hearst, supra, defense counsel moved after the defendant had testified during trial for a ruling to limit cross-examination of the defendant to matters which had been expressly presented on direct. The court ruled that complete cross-examination of Hearst was proper because "[t]he central theme of her lengthy testimony was that from the moment of her kidnapping to the time of her arrest she was an unwilling victim of the SLA who acted under continual threats of death." Hearst, 563 F.2d at 1340.

In this case, however, Cox's guilt was no longer an issue, and Cox moved prior to testifying to preclude the state from cross-examining him on the issue of his guilt or innocence unless the matter was broached on direct examination. The ruling of the trial court that the topic of guilt-innocence was fair game during cross-examination in the penalty phase was not based on the testimony that had been presented, but rather on the misconception that, by taking the stand and offering himself as a witness, Cox was waiving his Fifth Amendment protection against self-incrimination.

> The only limitation on introducing mitigating evidence is that it be relevant to the problem at hand, i.e., that it go to determining the appropriate punishment. As the trial

> court did, we find the exulpatory evidence sought to be introduced irrelevant to King's sentence.

King v. State, 514 So.2d 354 (Fla. 1987). If presenting evidence concerning innocence is irrelevant to sentencing, how can presenting more evidence on guilt be relevant?

Substantially this same issue was peripherally addressed in McGautha v. California, 402 U.S. 183 (1971), vacated 408 U.S. 941 (1973) and rejected. Interestingly, though, the Supreme Court in McGautha, while rejecting this argument, also said, "In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." McGautha, 402 U.S. at 207. It is here contended that the Eighth and Fourteenth Amendments require that a defendant be allowed to address his sentencer(s) in a death case and personally present evidence concerning his character and the propriety of the death penalty without being subjected to cross-examination on irrelevant matters concerning guilt or innocence unless the defendant relies on such matters when presenting evidence or argument to the jury.

In Simmons v. United States, 390 U.S. 377 (1968) the Court held that a defendant may testify in a Fourth Amendment pretrial suppression hearing without fear that his testimony will be used against him at the subsequent trial on the merits. The Court reasoned that it would be intolerable to require that the defendant waive one constitutional right in order to assert

another. Simmons, 390 U.S. at 394. So, too, is it intolerable to require a defendant facing the death penalty to waive the Eighth and Fourteenth Amendment requirement of a personalized sentence and forego allocution and to address factors of character or background wholly unrelated to the particular offense for which he is to be sentenced lest he be subjected to cross-examination concerning guilt under penalty of perjury and/or lest he yield incriminating evidence that can subsequently be used during retrial by the state should the conviction be reversed.

It is respectfully submitted that the ruling of the trial judge in this case subjecting Cox to unrestricted cross-examination should he decide to testify during the penalty phase was erroneous and that it in fact tainted Cox's decision about whether to address his sentencer. The inability of Cox to address the jury without subjecting himself to answering the State's questions concerning his guilt or innocence of the offense violated the Fifth Amendment right against self-incrimination and the right to Due Process, the Eighth Amendment proscription against cruel and unusually punishments, and the Fourteenth Amendment right to Due Process. Accordingly, the death penalty must be reversed and the matter remanded for a new penalty phase before a new jury.

CONCLUSION

Based on the argument and authority set forth in this brief, this Court is respectfully asked for the following relief:

Points I, IV, V - to reverse the conviction and discharge the defendant;

Points 11, III, XI - to reverse the conviction and remand for a new trial;

Points VII, X, XI - to vacate the death penalty and remand for a new penaly phase;

Points VIII, IX - to vacate the death penalty and remand for imposition of a life sentence with no possibility of parole for twenty-five years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Robert A. Butterworth, Attorney General, **125** N. Ridgewood Avenue, fourth floor, Daytona Beach, Florida **32014** and to Mr. Robert C. Cox, **#113377,** P.O. Box **747**, Starke, Fla. **32091** on this 8th day of March 1989.

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ASSISTANT PUBLIC DEFENDER