IN THE SUPREME COURT OF FLORIDA

RICHARD BARRY RANDOLPH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 74,083

APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR PUTNAM COUNTY

INITIAL BRIEF OF APPELLANT

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SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

The defendant was charged by indictment with the offenses of first degree murder (either through premeditation or during the course of a robbery and/or sexual battery), armed robbery (with a knife or a ligature), sexual battery with a deadly weapon or use of force likely to cause serious personal injury, and grand theft of an automobile. (R 11-12) The defendant was arraigned and pleaded not guilty to the charges. (R 18)

The defendant filed pretrial motions seeking individual voir dire of potential jurors because of publicity surrounding the case and asking for a special verdict form for a jury determination of aggravating circumstances. (R 125-126, 129-132)

The defendant also moved to have the court declare the death penalty unconstitutional because the aggravating factor of heinous, atrocious, or cruel is unconstitutionally vague. (R 122-124) The motions were denied. (R 785-792)

The defendant was tried by a jury before the Honorable Robert R. Perry, Judge of the Circuit Court of the Seventh Judicial Circuit, in and for Putnam County, Florida. (R 795) During jury voir dire, a potential juror stated in front of the entire panel that she had heard from her husband (who was acquainted with the victim) that the victim had been "brutally murdered." (R 892-893) Defense counsel's motion for mistrial and to excuse the entire jury venire was denied. (R 895-896) The trial court granted the state's motion for excusal for cause of jury venireman Hampton over the defendant's objection. (R 972-975) Miss Hampton told the prosecutor that she could consider the death penalty and could put it out of her mind during the guilt phase of the trial. (R 940-941) Later, in response to a question whether she had feelings which would preclude her from voting for the death penalty, Miss Hampton said that voting for the death penalty would be against her will and her personal standards. (R 943) Venireman Hampton told the court that Bundy's execution made her sick and that she could not rejoice in somebody being executed. (R 957-959) However, in response to a question whether she could vote for death in an extreme situation where no other response to a defendant's activities would be appropriate, she declared "I guess so." (R 958-959)

During trial, the state elicited testimony from the defendant's girlfriend that, following the incident, the defendant did not appear remorseful. (R **1150-1151)** The court sustained the defendant's objections over the state's argument that the testimony went to establish premeditation. However, the court refused to grant a mistrial and indicated that a cautionary instruction would only serve to emphasize the testimony. (R **1151-1153)**

Defense counsel made a motion to compel the state to elect between the two felonies alleged to support the felony murder charge. (R **1391-1392)** The court denied the motion. (R **1392)** The defendant also moved to reduce the sexual battery charge from **"physical** force likely to cause serious personal injury" to sexual battery where the victim was physically helpless to resist, arguing that the evidence showed that the victim was unconscious prior to the sexual battery and that the sexual battery was a mere afterthought and not the motive for the physical attack. (R **1401-1402)** The court denied this request and indicated that it would allow the count as charged to go to the jury. (R **1402)**

During jury deliberations, the jury asked whether they were required to agree that it was a premeditated murder or that it was a felony murder, or whether it was sufficient merely to find unanimously that it was a first degree murder. (R **582, 1621-1622)** Defense counsel requested that the jury be instructed that they were required to unanimously agree to either

premeditated murder or to felony murder, and that if they could not agree then they would be unable to reach a verdict. **(R 1622-1623)** The court denied the defendant's request and, over the defendant's objection, instructed the jury to simply follow the jury verdict form (which simply stated "first degree murder as charged"). (R **1623-1624)** Following this instruction, the jury found the defendant guilty of all counts, as charged. (R **583-584, 1625-1626)**

During the penalty phase, the state introduced post-autopsy photographs of the victim. (R **585-591, 1652-1658)** Defense counsel objected to the photographs, arguing that they were irrelevant to the penalty phase, that they were misleading (since they showed post-mortem lividity), and overly prejudicial. (R **1651-1652, 1654)** The state argued that the pictures were relevant to show heinousness and to rebut the defendant's assertion that the victim was raped while unconscious, by showing that the bruises to her legs were inflicted while she was struggling. (R **1652, 1654)** The state contended that the medical examiner could circle which bruises were caused while the victim was alive.[1] The court allowed the photographs into evidence and the medical examiner exhibited the photographs and circled

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[1]The state made this contention notwithstanding the fact that the medical examiner, prior to his testimony, had had to ask the prosecutor what other doctors had testified to regarding which neck wounds were made by the assailant and which were made by the treating surgeon. (R **1666-1667)**

numerous bruises on the pictures during his testimony. **(R 1655, 1658, 1674-1680)** After the medical examiner testified that it was beyond his expertise to tell if the wounds to the victim's legs were inflicted while the victim was conscious (R **1679),** and that the bruises were unlike those seen on sexual battery victims (R **1695-1696),** the court indicated that it would not allow the photographs to go back to the jury room or to be exhibited again to the jury. The court took this action since the witness did not testify as the court had expected and since it felt the photos were overly prejudicial. (R **1687-1697)** The court, however, denied the defendant's motion to strike the photographs. (R **1696)**

The court also permitted the state to present testimony during the penalty phase as to the effect of a blood transfusion of Θ negative blood into the victim who had B positive blood. (R **1672, 1683-1684)** During the guilt phase of the trial, defense counsel had argued that a contributing cause of the victim's death may have been an improper transfusion of Θ negative blood into the victim. (R **1540-1553)** The state attorney attempted to argue during his closing argument that Θ negative blood was the universal donor blood, an argument for which there was no testimonial support in the record at the time of the argument. (R **1562-1564)** The court refused to allow the state to make the argument during the guilt phase closing argument. (R **1563-1564)** During the penalty phase, the state then presented testimony that Θ negative blood was, in fact, the universal donor and no harm

had come to the victim as a result of the transfusions. (R **1683-1685)** Defense counsel argued unsuccessfully that this testimony at the penalty phase was irrelevant to any aggravating circumstances and merely made counsel appear that he had tried to mislead the jury during the guilt phase of the trial, thus depriving the defendant of the effective assistance of counsel. (R **1672, 1683-1684)** Defense counsel's motion to exclude the testimony and for a mistrial were denied. (R **1672, 1683-1684)**

Defense counsel objected to the jury being instructed on the aggravating circumstance that the murder was committed to avoid a lawful arrest, contending that there was no evidence to establish that aggravator. (R **1766-1768)** The court overruled the defendant's objection. (R **1768)** When the state sought to change the aggravating factor concerning during the course of a felony from "during the course of a robbery and/or sexual **battery,"** as the felony murder had been charged in the indictment, to simply "during the course of a sexual battery," the defendant objected. (R **1768-1772)** Counsel argued that the state was merely manipulating the aggravating circumstances to enable them to obtain both "during the course of a felony" and "for pecuniary gain," without violating the prohibition against improper doubling of the same aspect into two aggravating factors. The court overruled the objection. (R **1772)** The defendant also renewed its objection to the aggravating factor of heinous, atrocious, and cruel, contending that the factor was

unconstitutionally vague, despite the state's request to further define the circumstance. (R **1773-1783)**

The defendant requested a special jury instruction on non-statutory mitigating circumstances which the defendant had sought to establish. (R **592, 1792-1193)** The court denied the request, indicating that it would merely give the instruction that the jury could consider any other aspect of the defendant's character. (R **1793)** Defense counsel renewed his request for a special verdict form for the jury to find the aggravating circumstances, which request was denied. (R **1797-1798)**

The jury recommended a death sentence by a vote of eight to four. (R **599, 1850)** The court adjudicated the defendant guilty of first degree murder and sentenced the defendant to death finding the following aggravating circumstances: (d) the murder was committed during the commission of a sexual battery; (e) the murder was committed for the purpose of preventing an unlawful arrest; (f) the murder was committed for pecuniary gain; and (h) the murder was especially heinous, atrocious, or cruel. (R **641-644)**

The court specifically rejected two statutory mitigating circumstances argued by the defendant, to-wit: (a) the defendant has no significant history of prior criminal activity and (b) the defendant was under the influence of extreme mental or emotional disturbance. (R **644-645)** The court stated further that the defendant had not proven or argued any other mitigating circumstances. (R **645)** As to non-statutory mitigating

circumstances, the court rejected the factors that (1) the defendant was a crack cocaine addict and (2) the defendant never had a loving relationship with his family. The court, while finding that the defendant possessed an atypical personality disorder and that he expressed shame or remorse for his actions, ruled that these mitigating factors were entitled to only little weight. (R 645-646)

The court also adjudicated the defendant guilty of armed robbery and sexual battery with great physical force, sentencing him to guidelines sentences of nine years and twenty-seven years, respectively; said sentences to run concurrently. (R 648-652)

A notice of appeal was timely filed. (R 653) This appeal follows.

STATEMENT OF THE FACTS

Shortly after 7:00 a.m. on August 15, 1988, Miss Terry Sorrell, a regular customer, and Dorothy and Deborah Patillo, custodians of the store, observed the defendant, a former employee, leaving the Handy Way Store in Palatka. (R 997-1003, 1013-1016, 1022-1023) He appeared to be locking the front door and was observed going around to the rear of the store and returning to the front of the business. (R 1000-1001, 1015-1016, 1022) He was wearing a Handy Way smock. (R 1000-1001, 1015-1016) When the Patillos questioned the defendant about the whereabouts of the manager, Minnie Ruth McCollum, and about why the store was locked, the defendant told them that Ruth's car had broken down and that she had taken his car. (R 1016, 1022-1023) He indicated that he had repaired her car and was going to pick her up. (R 1016, 1022-1023) The defendant got into McCollum's car and drove off. (R 1016, 1023)

The three ladies tried the door to the store and, finding it locked, peered in through the window. (R 1003, 1017, 1024) They noticed that things inside were amiss: the security camera in the ceiling was pulled down; wires were coming out of the trash can, which had been tipped over: the area behind the counter was in disarray; and the door to the back room, normally kept open, was almost completely closed. (R 1003-1004, 1017-1018) Thinking that something was awry, the women called the sheriff's office. (R 1018, 1024)

Deputy Sheriff William Watkins arrived at the store at 7:19 a.m., and called for the store supervisor to gain entry. (R 1047-1048) Meanwhile, he searched around the outside of the store and discovered a plastic "Uzi-type" water gun behind the store. (R 1048)

The supervisor arrived, but, since she did not have keys to the store, Deputy Watkins obtained her permission to break the front door's glass to obtain entry into the store. (R 1050) Upon entering the store, he observed that the door to the back room was open one inch and the light in the that room was on. (R 1051) The deputy pushed the door open, meeting with some resistance, and found the victim, the store manager Ruth McCollum, blocking the doorway. (R 1051-1053) McCollum was lying on her back, naked from the waste down, with blood coming out of the back of her head and her neck. (R 1052-1053) She was breathing and moaning slightly. (R 1053) Watkins also observed a paring knife beside the victim's head. (R 1052)

Deputy Watkins called for the rescue service. (R 1053) Meanwhile, he attempted to slow down the victim's bleeding. (R 1053)

The ambulance and a paramedic arrived at about 7:30 a.m. (R 1061-1065) The paramedic observed the victim lying on her back. (R 1066) The rigid position of her limbs indicated that she was suffering from brain trauma and pressure inside her skull. (R 1066) The victim was making snoring sounds in an effort to breathe and her tongue was swollen blocking her air

passageway. (R **1067-1068)** The swollen tongue indicated internal bleeding. (R **1069)** The paramedic heard breath sounds in both lungs. (R **1068)** The victim had a puncture wound on each side of her larynx and swelling of her entire scalp and eyes. (R **1069, 1074)** The paramedic noted that the victim had no response to painful stimuli, and therefore was not in pain at the time of his treatment. (R **1084-1085)** The victim was removed from the scene and taken to Putnam County Hospital. (R **1079)**

At the hospital, McCollum was treated by emergency room physician Robert Brown. (R **1346-1350)** The victim was brought into the emergency room at **9:23** a.m. with massive swelling and contusions to her face, skull, and neck. (R **1350)** She also had stab wounds to her and was having difficulty breathing. (R **1350)** The doctor intubated her immediately and initiated three more **IV's** (in addition to what the paramedic had already established (R 1351), giving her a total of ten pints of O negative blood. (R **234, 236, 241)** The victim had a fractured mandible and three stab wounds, one in the center of the neck and two in the lower aspect of the neck. (R **1353-1354)** Dr. Brown determined that Putnam County Hospital could not adequately treat the victim, so he arranged for her to be transferred to Shands Hospital in Gainesville. (R **1352-1353)**

When Ruth McCollum arrived at Shands Hospital, she did not have breath sounds on either side of her chest. (R **1433-1434)** Part of a lung had collapsed, requiring chest tubes to be inserted to expand the lungs. (R **1434-1436)** Dr. Kirby Bland, a

surgeon at Shands, made incisions in both sides of the victim's neck to explore the knife wounds and to control bleeding. (R 1439) The doctor was able to control her bleeding, but the victim was comatose and had less than a five percent chance of recovery. (R 1443-1445) The doctor also diagnosed another knife injury causing a laceration on the lower part of her left eye. (R 1447) McCollum died at the hospital six days later, after the surgeon and the victim's son had agreed on a "do not resuscitate" course of action. (R 1459-1460) The cause of death was severe brain damage. (R 1476) The head injuries were caused by multiple blows. (R 1473) A doctor opined that the knife wounds and strangulation contributed to the death since, because of those injuries, some medical treatment was unable to be performed and oxygen was reduced to the brain. (R 1476)

After leaving the Handy Way store in the victim's car, the defendant went to the house of his girlfriend, Jane Betts, who was the mother of his daughter. (R 1131-1132, 1134) The defendant told Betts that he was in trouble. (R 1135) He admitted robbing the Handy Way store, telling Betts that when he went into the store, McCollum was there. The defendant stated that he knocked the victim down and hit, kicked, and stabbed her with a knife kept at the store. (R 1136) He said that he was going to Jacksonville to borrow some money and to cash some lottery tickets and that he would return for Betts and their daughter later that day to leave town and return to North Carolina. (R 1137)

Betts testified that Barry Randolph was very nice and worked regularly when they had previously lived in North Carolina. (R **1149)** When they moved to Palatka, the defendant got in with the wrong crowd, became addicted to crack cocaine, and changed altogether. (R **1146-1149)** On the morning of the incident, she did not believe that the defendant appeared to be on crack cocaine, but she did not know whether the defendant had ingested any cocaine between 11:00 p.m. the night before and **6:00** a.m. the morning of the incident. (R **1150-1151, 1154-1155)** In response to a question of the state attorney, Betts stated that the defendant did not act remorseful or ashamed. (R **1150-1151)** The defendant's objection to this comment was sustained but the court refused to grant a mistrial and stated that a curative instruction would only draw attention to the comment. (R **1151-1153)**

The Jacksonville police arrested the defendant without incident at the Sav-A-Lot store in Jacksonville where the defendant was waiting for the manager to advance him some money. (R **1136-1137, 1175-1183, 1216-1217, 1223)** They recovered the victim's vehicle in the parking lot of the store. (R **1216, 1219)**

Detectives Hord and Brown of the Putnam County Sheriff's interviewed the defendant at the Jacksonville Sheriff's Department. (R **1192)** He also added to and amended his statement later during the ride back to Putnam County. (R **1233)** After a waiver of his rights, the defendant indicated that he rode his bicycle to the Handy Way store with a toy gun (which he later hid

behind the store). **(R 1197, 1234)** Randolph said he knew the routine at the store, having worked there, and he knew there should be approximately **$1000** in the safe. **(R 1197-1198)** The defendant knew the combination to the safe. **(R 1198, 1234)** He planned on going into the store unseen, opening the safe, removing the money, and leaving while the manager was outside checking the gas tanks. **(R 1198, 1234)** However, when the defendant went into the store, the manager was there and saw him. (R **1198, 1234)** When she saw him, he knew he had no choice, so he rushed her. (R **1198)** The victim panicked and started to struggle with the defendant. (R **1198, 1235)** The defendant indicated that the victim was much tougher than he had expected, but that he was finally able to get her into the back room, where he hit her with his hands and fists until she quit yelling. (R **1198, 1235)**

After pulling the security camera down so that he could not be identified, the defendant tried unsuccessfully to open the store safe. **(R 1199, 1235)** When the victim started moving again, the defendant went back to the back room, where the victim pulled the draw string out of his jacket. (R **534)** The defendant grabbed the string from the victim and choked her with it until she stopped struggling. **(R 1235)**

The defendant then looked for and found a slip of paper which contained the combination to the safe. **(R 1235)** Again unsuccessful in opening the safe (even with the correct combination), the defendant opted to instead take lottery tickets, which he put into his bag. **(R 1235)**

The victim started screaming again and the defendant again hit her and kicked her. (R **1235)** Since she was still trying to fight him and was making noise, the defendant grabbed a small knife and stabbed her. (R **1235-1236)** In order to make it appear as if someone else had done this **("a** maniac"), the defendant took off the victim's pants and masturbated until he was ready to ejaculate. (R **534, 1236)** Then, he got on top of victim and ejaculated inside of her. (R **1236)**

Since people were gathering outside the store, the defendant emptied the victim's purse, and took her car keys to effectuate his escape. (R **1235-1236)** When he left, the victim was no longer moving. (R **1236)** He took a Handy Way jacket, put it on, and left the store, locking the door behind him. (R **1236)**

He drove off in the victim's car to his girlfriend's house, before leaving for Jacksonville to cash the lottery tickets and to borrow some money from the manager of the Sav-A-Lot store. (R **1236, 1238)** On the way to Jacksonville, Randolph stopped at a few convenience stores and at a McDonald's where he cashed the winning lottery tickets, and disposed of his clothing and losing tickets. (R **1237-1238)** The defendant, on the return trip to Palatka, directed the detectives to the convenience stores and to the McDonald's, where the police recovered the lottery tickets and the blood-stained clothing and tennis shoes. (R **1201-1211)** The defendant indicated to the detective that he was remorseful for what had happened. (R **1214)**

During the penalty phase of the trial, the state presented testimony, over the defendant's objection as to relevance to the penalty phase, from the medical examiner as to the cause of death of the victim (R **1674-1685)**

The defendant presented evidence of Dr. Harry Crop, a psychologist. Although the doctor would not use the judicial statutory term "extreme" to describe the defendant, he did testify that Randolph suffered from a mental disturbance which was operating at the time of the offense. (R **1726-1729)** The defendant suffered from an atypical personality which was aggravated by pretty significant factors in his history which contributed to the offense. (R **1726, 1731)** The defendant, who was adopted when he was five months old, had problems getting along with people in school and had counseling for a year in the third grade. (R **1732-1733)** His mother was emotionally unstable (and was hospitalized for psychiatric reasons on a number of occasions), while his father was physically abusive, tying the defendant up and beating him all over his body with his hands, a broomstick, and a belt. (R **1733)** Because of these things, coupled with his emotional problems, the defendant did not perceive any love from his family. (R **1742- 1743)**

Despite his emotional deficiencies, the defendant did relatively well. (R **1734)** The defendant, who was **26** years old at the time of the offense (R **1206),** had always tried to prove himself in sports and in school, where he graduated from high school with passing grades. (R **1734)** While in the Army, from

which he was honorably discharged, he started using drugs, first marijuana, then cocaine. (R **1734)**

In **1984** he started using the highly-addictive crack cocaine. (R **1735)** The psychologist testified that, unlike alcohol intoxication, it is not readily apparent from looking at a person that he is on crack cocaine. (R **1735, 1738-1739)** When a person is regularly using crack cocaine, as was the defendant, the effects of the drug stay in the blood; the person's personality is affected, not necessarily by an immediate ingestion of the drug, but rather by its overall use. (R **1736-1738)** The doctor opined that the defendant's abnormal personality was greatly influenced by his drug addiction at the time of the offense. (R **1737, 1740, 1742)**

The doctor further testified that Randolph regretted what had happened; he was ashamed and embarrassed about what had happened, that he had lost control. (R **1741)** The defendant felt remorse for what he had done. (R **1741)** The psychologist believed that the defendant did not have anything against the victim, that he fully intended to only go in and get the money while the victim was away from the store, but that things happened which caused the defendant to panic. (R **1741)** This behavior at the scene was caused by the defendant's personality disorder which was greatly aggravated by the drug abuse. (R **1742-1743)**

At the penalty phase, the state did not present any evidence of prior history of criminal activity on the part of the defendant. (R **1645-1760, 1788-1789)**

SUMMARY OF ARGUMENT

Point I. The trial court erroneously excused for cause a juror who stated unequivocally that she could put aside her feelings on the death penalty in determining guilt or innocence and could vote to impose the death penalty in some circumstances. Excusing this juror for cause violated the defendant's 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 a new trial.

Point 11. The trial court's denial of the pretrial motion for individual voir dire and the court's conduct during voir dire which consisted of questioning prospective jurors as to their pretrial exposure to the case tainted the jury and resulted in a jury which was neither fair nor impartial. A new trial is required.

Point 111. The sexual battery committed by the defendant was committed while the victim was unconscious. Hence, the proper charge was sexual battery while the victim was physically helpless to resist, rather than sexual battery and in the process thereof use of great physical force.

Point IV. A prosecutor in closing argument is not permitted to express facts to the jury which are not contained in the evidence, nor is he allowed to unfairly criticize defense

counsel's tactics. A new trial is required where the state oversteps its bounds and engages in improper argument.

Point V. The state may not elicit testimony during a capital trial which indicates that the defendant did not exhibit remorse over his actions. Such evidence is totally irrelevant to issues during the guilt or penalty phase of the trial. To elicit such testimony unduly prejudices the jury and deprives the defendant of a fair trial.

Point **VI**. The state may not introduce evidence at the penalty phase of a trial which does not go to prove an aggravating circumstance or to rebut a mitigating circumstance. Gruesome post-autopsy photographs, testimony concerning blood transfusions, and duplicitous testimony on cause of death are irrelevant to the penalty phase and are overly prejudicial. They must be excluded.

Point **VII**. Due process, a fair trial, and the ban against cruel and unusual punishment dictate that the jury be instructed by the court on the specific non-statutory mitigating circumstances which the defendant had submitted in the case. Otherwise the jury recommendation on which the court places great weight is unreliable. Failure to so instruct, when requested to do so, mandates a new penalty phase trial.

Point **VIII**. A death sentence violates the prohibition against cruel and unusual punishment where the jury is not required to make written findings of aggravating circumstances. Supreme Court review of the sentence is based on pure speculation

in the absence of these findings. Where the court denied a request that aggravating circumstances be found by the jury, the death sentence must be overturned.

Point IX. The aggravating circumstance of heinous, atrocious, or cruel is unconstitutionally vague. A jury recommendation, which is given great weight by the sentencer and the reviewing court, and which may be based, in part, on this aggravating circumstance, is ureliable since a layman could honestly believe that every unjustified, intentional taking of life is especially heinous. There is nothing in the definition of this circumstance to enable it to be applied in a meaningful, non-arbitrary fashion. Where the jury was given the opportunity to consider this circumstance, the recommendation is invalid and the death sentence must be vacated.

Point X. The sentence of death was based on inappropriate aggravating circumstances. The court failed to consider and give proper weight to relevant mitigating factors. The sentence of death imposed on the defendant is disproportionate to the crime committed when compared with other capital sentencing decisions.

Point XI. Although this Court has previously rejected numerous attacks on the constitutionality of the death penalty in Florida, the appellant urges reconsideration, particularly in light of the evolving body of caselaw which, in some cases, has served to invalidate the very basic tenets on which the death penalty was upheld in this state.

ARGUMENT

POINT I

THE TRIAL COURT VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 22 OF THE FLORIDA CONSTITUTION, BY EXCUSING FOR CAUSE, OVER DEFENSE OBJECTION, A JUROR WHO INDICATED THAT SHE COULD PUT THE DEATH PENALTY OUT OF HER MIND DURING THE GUILT PHASE AND COULD VOTE TO IMPOSE THE DEATH PENALTY IN AN APPROPRIATE CASE.

The law is clear that prospective jurors may not be excluded for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Witherspoon v. Illinois, 391 U.S. 510, 522 (1968); Lockhart v. McCree, 476 U.S. 162, 176 (1986). This principle was reaffirmed by the United States Supreme Court in its most recent discussion on the matter. Grav v. Mississippi, 481 U.S. 648 (1987). There, the Court reiterated that 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; rather "the relevant inquiry is whether the juror's views would 'substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Id. at 658, quoting Adams v. Texas, 448 U.S. 38, 45 (1980). See also Wainwright v. Witt, 469 U.S. 412, 424 (1985).

The constitutional basis of that standard was emphasized in Gray:

> It is necessary, however, to keep in mind the significance of a capital defendant's right to a fair and impartial jury under the Sixth and Fourteenth Amendments. Justice Rehnquist, in writing for the Court, recently explained:
>
> > **"It** is important to remember that **not all who oppose the death penalty are subject to removal for cause in capital cases;** those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of **law."** Lockhart v. McCree, **476** U.S. **162, 176 (1986).**
>
> The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would "frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." Wainwright v. Witt, **469** U.S. at **423.** To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It **"stack[s]** the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law." Witherspoon v. Illinois, **391** U.S. at **523.**

Gray v. Mississippi, **481** U.S. at **658-659** (emphasis added).

In Adams v. Texas, **448** U.S. at **49,** the Court ruled that jurors could not be excluded if they stated that they would be **"affected"** by the possibility of the death penalty since such indication could mean **"only** that the potentially lethal

consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally."

> [N]either nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. The grounds for excluding these jurors were consequently insufficient under the Sixth and Fourteenth Amendments.

448 U.S. at 50. This standard for limiting the exclusion of jurors was specifically approved by the Court in Wainwright v. Witt, 469 U.S. at 423-424, which also reiterated that the burden of demonstrating that the challenged juror will not follow the law in accordance with his oath and the instructions of the court is on the party seeking exclusion of the juror, i.e., the state. Id.

In the present case, it is clear that the prosecution did not meet its burden to establish exclusion. Jury venireman Hampton stated clearly, in response to the state's questions, that she could put the potential death sentence out of her mind during the guilt phase and that, although it would be against her personal standards, she could consider the death penalty and could vote to impose the death penalty. In response to defense questioning, she told the court that, although she would not rejoice in the death penalty, she could vote for it under the appropriate circumstances.

MR. TANNER [prosecutor]: If you sat as a juror in this case would you be able to consider imposing the death penalty?

A VENIREMAN [Miss Hampton]: Oh, yes.

MR TANNER: Okay. With regard to -- to your feelings about the death penalty could you put that aside totally in the first part of the trial where you're deciding guilt or innocence; could you put that aside?

A VENIREMAN: (Nods head.)

MR. TANNER: Okay. I'm not asking you to tell me what you'd do in this case because, one, that would be unfair, you haven't heard the evidence; and, number two, it would be improper.

But if in an appropriate case -- and let's step away from this case for a moment -- you believe that the facts and the circumstances warranted it, consistent with the Judge's instructions, that you would be able to render a verdict calling for the death penalty?

A VENIREMAN: Yes.

(R **940-941)** Later, after another juror expressed reservations about the death penalty, the attention returned to Miss Hampton:

MR. TANNER: Let me ask you same [sic] questions to be sure I understand what you've said . . . .

Are you saying, Mrs. Hampton, that really you could never vote for the death penalty in any case; is that what you're saying?

A VENIREMAN: It would really be against my will.

MR. TANNER: It would be against you're personal -- personal standards?

A VENIREMAN: Yes.

* * *

MR. PEARL [defense counsel]: Now, Miss Trevora [another venireman], it's necessary to ask you -- and you, Miss Hampton, in turn -- whether your feelings about the death penalty, your reluctance, let us say, to vote for the death penalty is absolute in every case, or isn't it really a matter of degree rather than absolute, something that is absolute in your mind?

Let me give you an example, and let me ask you. Suppose that instead of Richard Randolph over here that you had already found a person guilty, as a member of the jury, and as you said you could do that if you had to regardless of what might follow, and it turned out that it was a Manson who had committed a -- many brutal murders in California, or a Bundy, who it is said has killed perhaps a hundred women, or a Stano -- I represented Stano -- who I'm sure killed at least forty people.

I'm talking about vicious, malicious, serial killers who can never be rehabilitated, they will be like a wolf loose amongst the sheep if they live.

Now, if you were faced with having to decide sitting on a jury that those people -- or Adolph Hitler who is responsible for twenty million deaths -- could you then under the circumstances that that was so heinous, so evil, so wicked, that the person involved was so little of a human being, that could you then vote for the death penalty in such an extreme case?

A VENIREMAN [Miss Trevora]: No.

MR. PEARL: Miss Hampton?

A VENIREMAN [Miss Hampton]: I hated mighty bad to hear of even Bundy being electrocuted. It made me sick. I didn't feel good. . . . I just couldn't rejoice in somebody being electrocuted.

MR. PEARL: Yes, ma'am. Of course, no one -- I guess you understand that no one expects you, or any person, any civilized person, any feeling person, to rejoice over the taking of a life, no mater how well-deserved. That is not --

What you saw or heard about out there in connection with this fellow Ted Bundy was certainly not something that **99** percent of us could approve of. I'm not talking about that.

I'm talking about the necessity, perhaps, in certain cases, and limited numbers of cases, where the State must judicially, even if sadly, take a man's life because it is felt that that is the only appropriate response to what that person had done.

Now, I'm not talking about enjoying it. I'm not talking about getting out and celebrating when it happens. I'm sure that you, like most people, feel life has value, that any life has value, and that none should be wasted.

But still the question we come back to, and that we must revisit, is the question whether in extreme circumstances could you then vote for the death penalty simply because no other punishment, no other response to the activities of the defendant would be appropriate?

A VENIREMAN [Miss Hampton]: I guess so.

MR. PEARL: You say -- your answer was, ma'am, you guess so?

A VENIREMAN: Right.

MR. PEARL: Did I -- did I quote you correctly?

A VENIREMAN: Yes.

(R 943, 957-959) Based on this colloquy, the state moved to excuse the juror for cause, over the defendant's objection, stating that it did not choose to try to further question the juror after the defendant had rehabilitated her in order to spare the juror further embarrassment. (R **972-974)** The state represented that it felt certain, though, that the juror would again prove herself unable to serve as an impartial juror. (R

974) The court accepted the state's supposition, and struck the juror, saying that she had vacillated in her answers. (R 974-975)

The state failed the Adams and Witt test; it did not show that the juror could not follow the law and the court's instructions and put her personal feelings aside. In fact, the juror's views came close to those expressed in Adams, 448 U.S. at 50, when she spoke of the gravity of the situation and that she could not rejoice in such a decision. She did maintain, however, that she could be fair in deciding guilt or innocence, and that she could vote in favor of death in an appropriate circumstance. (R 940-941, 959) Nothing she said concerning her personal distaste of executions ever contradicted that declaration that she could follow her oath and the court's instructions. As in Chandler v. State, 442 So.2d 171, 174 (Fla. 1983), examination of the record indicates that Venireman Hampton never came close to expressing the unyielding conviction and rigidity of opinion regarding the death penalty which would allow her excusal for cause.

As concluded in Adams v. Texas:

> to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their view about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law. . . . [T]hese individuals were [not] so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme. Accordingly, the Constitution disentitles the State to execute a sentence of death imposed by a

jury from which such prospective jurors have been excluded.

448 U.S. at 50-51. The erroneous exclusion of even one juror in violation of the Adams-Witt-Gray standard is constitutional error which goes to the very integrity of the legal system, and which can never be written off as "harmless error." Gray v. Mississippi, supra; Davis v. Georaia, 429 U.S. 122 (1976); Chandler v. State, supra at 174-175. Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution." Witherspoon, 391 U.S. at 519-23. The state is not permitted to so stack the deck against a defendant and thus deprive him of due process of law.

Accordingly, the defendant was tried by an unconstitutionally seated jury. The defendant's judgments and sentences must be reversed and the case remanded for a new trial before a fair and impartial jury.

POINT II.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR INDIVIDUAL VOIR DIRE BECAUSE OF THE PRETRIAL PUBLICITY AND THE MOTION FOR MISTRIAL AND FOR A NEW JURY VENIRE AFTER A JUROR INDICATED HEARING THAT THE VICTIM HAD BEEN "BRUTALLY MURDERED", THUS TAINTING THE JURY VENIRE AND DEPRIVING THE DEFENDANT OF HIS FEDERAL AND FLORIDA CONSTITUTIONAL RIGHTS TO A FAIR TRIAL BY AN IMPARTIAL JURY.

The defendant moved pretrial in the case for an individual voir dire, contending that to question potential jurors in front of the entire panel as to their knowledge of the case could potentially taint the jury panel with impermissible material. (R 129-132) After the court denied the motion, that is exactly what happened when a juror told the judge that her husband, who was acquainted with the victim, told her that the victim had been brutally murdered. (R 892-893) The defendant moved for a mistrial and to excuse the entire jury panel, which motion the court denied. (R 895-896) The denial of these two motions deprived the defendant of his right to a fair trial by an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16, of the Florida Constitution.

Clearly, the purpose of voir dire examination is to secure an impartial jury. Lewis v. State, 377 So.2d 640 (Fla. 1979). The actions of the court, in refusing to allow defense counsel individual sequestered voir dire and then in eliciting

information from a juror concerning her pretrial knowledge of the case and presenting it to the venire that defense counsel had sought to contain was improper and resulted in prejudice to the defendant sufficient to require a new trial.

The court, in effect, educated the entire venire - those who had not read any accounts, and those who were not influenced - about the contents of inadmissible opinion, rumors, and hearsay, thus tainting the entire panel. The court further failed to question any of the venire about prejudice they felt as a result of the excused juror's comments. It was well within the court's ability to conduct its questioning of Mrs. Trevora and her knowledge of the case at the bench and thus preclude any improper influence upon the remainder of the panel. The court's failure to take this simple, precautionary measure resulted in a tainting of the entire panel.

The jurors knowledge of extrajudicial material, in the form of opinions or hearsay, taints the panel and compels a new jury venire, in the absence of a showing through individual questioning that the information has not prejudiced the jury. See, e.g., Russ v. State, 95 So.2d 594 (Fla. 1957); Moncur v. State, 262 So.2d 688 (Fla. 2d DCA 1972); Marrero v. State, 343 So.2d 883 (Fla. 2d DCA 1977); and Kelly v. State, 371 So.2d 162 (Fla. 1st DCA 1979).

As argued in the pretrial motion, "whenever there is believed to be a significant possibility that an individual [juror] will be ineligible to serve because of exposure to

potentially prejudicial material, the examination of each juror with respect to his exposure shall take place outside the presence of other chosen and prospective **jurors."** American Bar Association, Standards Relating to Fair Trial and Free Press, Standard 3.4; United States ex rel. Doggett v. Yeager, 472 F.2d 229 (3d Cir. 1973).

In United States v. Dennis, 786 F.2d 1029, 1044 (11th Cir. 1986) **cert. denied,** 95 L.Ed.2d 914, the court stated that "when statements made by potential jurors at voir dire raises the specter of 'potential actual prejudice' on the part of the remaining panel members 'specific and direct questioning is necessary to ferret out those jurors who could not be **impartial.'" Citing** United States v. Corey, 625 F.2d 704, 707 (5th Cir. 1980), **cert. denied,** 450 U.S. 925 (1981). Once Juror Trevora had responded with her opinion as to the nature of the case it was incumbent upon the court to direct an inquiry as to the potential prejudice of her comments on the remainder of the panel or else to automatically dismiss the entire jury panel.

The defendant has the absolute and fundamental right to a fair and impartial jury. Exposure of the entire panel to the opinions concerning the crime and the contents of the publicity surrounding the trial by a prospective juror at the hands of court is a clear abuse of discretion resulting in the depravation of the defendant's right to trial by a fair and impartial jury. A new trial is required.

POINT III

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR REDUCTION OF THE SEXUAL BATTERY CHARGE FROM SEXUAL BATTERY WITH GREAT FORCE TO SEXUAL BATTERY WHERE THE VICTIM IS PHYSICALLY HELPLESS TO RESIST.

The defendant was charged with the offense of sexual battery with force likely to cause serious personal injury pursuant to Section 794.011 (3), Florida Statutes (1987). (R 11-12) That statute states:

> (3) A person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury is guilty of a life felony . . . . (emphasis added)

Therefore, in order to be convicted of this degree of sexual battery, the defendant must actually use the force in the process of the sexual battery in order to effectuate the sex offense. See also Monarca v. State, 412 So.2d 443, 446-447 (Fla. 5th DCA 1982).

Here, the defendant did not use any force in the process of the sexual battery. The only evidence at trial showed that after the defendant had completed the robbery and had already caused the victim to lose consciousness during the course of said robbery, the defendant decided to commit the sex act as an afterthought to make it appear that a maniac had committed the

attack. (R 534, 1236) According to the medical examiner, the physical evidence (the injuries to the victim) did not appear to be of the type caused by a forceful sexual battery. (R 1695-1696)

No other version of the sexual battery is shown by the record. Therefore, the state has failed to prove that the defendant actually used force during the course of the sexual battery. See Cannadv v. State, 427 So.2d 723, 730 (Fla. 1983) (where only direct evidence of the manner in which the murder was committed was appellant's own statements and those statements established that the murder was not cold, calculated, and premeditated, the state has not established that aggravating factor beyond a reasonable doubt); Youns v. Zant, 506 F.Supp. 274, 280-281 (M.D. Ga. 1980), rev'd. on other grounds 677 F.2d 792 (11th Cir. 1982) (taking of money was a mere afterthought to the killing, hence the aggravating factor of a murder during the course of a robbery must fail).

As argued by defense counsel below, the court should have reduced the charge to sexual battery where the victim was physically helpless to resist, pursuant to Section 794.011 (4) (a), Florida Statutes (1987). The definition of "physically helpless" includes that the victim is unconscious. Section 794.011 (1) (e), Fla. Stat. (1987). See Davis v. State, 538 So.2d 515 (Fla. 2d DCA 1989); Perez v. State, 479 So.2d 266 (Fla. 5th DCA 1985). This count should have gone to the jury only on this reduced charge, as requested by the defendant.

The conviction of sexual battery, and in the process thereof used physical force likely to cause serious personal injury, must be vacated and reduced to sexual battery where the victim was physically helpless to resist.

POINT IV

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL WHERE THE PROSECUTOR ENGAGED IN IMPROPER ARGUMENT THEREBY PREJUDICING THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

During the defendant's argument to the jury at the guilt phase of the trial, defense counsel pointed out to the jury that the treating physicians had administered ten pints of Θ negative blood to the victim without typing her blood, which was later discovered to be type B positive. (R **1540-1553)** This argument was based on evidence contained in the medical reports. (R **234, 236, 241)** Defense counsel argued that perhaps the incorrect blood type contributed to the victim's death. (R **1540-1553)** In his closing argument, the state attorney offered that the infusion of Θ negative blood would not cause any ill effects to the victim since Θ negative blood was a universal blood donor type. This argument was made by the prosecutor notwithstanding the fact that no evidence had been admitted to established that.

> MR. TANNER [prosecutor]:
>
> * * *
>
> Is there one shred of evidence that introducing Θ negative blood, which is the universal donor blood --
>
> MR. PEARL [defense counsel]: Objection, Your Honor. . . .I must approach the bench for a side-bar conference, if Counsel would join me.

THE COURT: Do you have legal bar for your objection? Is side-bar necessary?

MR. PEARL: If you wish me to make the objection publicly I'll be glad to do so.

THE COURT: Thank you.

MR. PEARL: Mr. Tanner, is talking about there is no evidence of this or that.
There is not one shred of evidence, no word of testimony that *o* negative is a universal solvent. That's something he' dreamed up from somewhere.

THE COURT: I'll sustain the objection. Counsel, to the evidence, if you please.

* * *

MR. PEARL: What I have to say on the subject is Mr. Tanner's remark in that regard was prosecutorial misconduct, because he knew it was not in the evidence to say that. And I move -- and I think that that prosecutorial misconduct may have been uttered for the purpose of inducing a mistrial, and was deliberate.
I must move for a mistrial, Your Honor. I am compelled to do so by my duty as a Defense Attorney. But I feel that I must say to you the prosecutorial misconduct is the cause of this motion.

THE COURT: Mr. Tanner.

MR. TANNER: If your Honor please, Mr. Pearl has speculated as to blood poisoning, which he very well knows is not the case, and was not possible.

MR. PEARL: I don't know anything of the sort. All I know is what Mr. Tanner said about something that is not in evidence. What I spoke about was in the evidence.

THE COURT: All right. I will sustain the objection. I will admonish Counsel to confine himself to those matters, comment on those matters in evidence.
I will deny your Motion for Mistrial.

(R 1562-1564) This argument by the prosecutor which the court recognized was not supported by the evidence and the subsequent statements by the state attorney in front of the jury regarding the defense counsel's tactics necessitated a mistrial.

It is highly improper for attorneys to express their personal opinion or to state facts of their own knowledge which are not in evidence. United States v. Rodriguez, 585 F.2d 1234 (5th Cir. 1978) It is well established that attorneys must not allow themselves to become unsworn witnesses. Smith v. State, 74 Fla. 44, 76 So. 334 (1917).

Additionally, during the argument on the objection and motion for mistrial, the state attorney further compounded the error by stating in front of the jury that the defense attorney was deliberately trying to mislead the jury. (R 1564) Comments on tactics of defense counsel have been held to be both improper and unethical. Wilson v. State, 371 So.2d 126 (Fla. 1st DCA 1978); Cochran v. State, 280 So.2d 42 (Fla. 1st DCA 1973). A prosecutor must refrain from making arguments that are inflammatory and abusive. Collins v. State, 180 So.2d 340 (Fla. 1965). The comment implying that defense counsel knew his arguments to the jury were inaccurate and hence misleading were truly offensive.

Once it is established that a prosecutor's remark is offensive, this Court in Pait v. State, 112 So.2d 380, 385 (Fla. 1959), emphasized that "The only safe rule appears to be that unless this court can determine from the record that the conduct

or improper remarks of the prosecutor did not prejudice the accused, the judgment must be reversed." Such an inflammatory comment is violative of an accused's fundamental right to a fair trial, free of argument condemned. Pait, supra.

The prosecutor in the instant case was guilty of prosecutorial misconduct. His argument to the jury and to the court in front of the jury contained comments upon facts not in evidence and comments upon defense trial tactics. The result of this improper argument denied the defendant his constitutional right to due process and a fair trial. Amend. VI, and XIV, U.S. Const.; Art I, Sec. 9 and 16, Fla. Const.

POINT V

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL AFTER THE STATE SPECIFICALLY ELICITED TESTIMONY DURING THE GUILT PHASE OF THE TRIAL INDICATING THAT THE DEFENDANT DID NOT EXHIBIT REMORSE OVER HIS ACTIONS.

The state specifically elicited testimony during the guilt phase of the trial from Janene Betts, the defendant's girlfriend, that the defendant did not exhibit any signs of remorse over his actions:

> Q [by the prosecutor, Mr. Tanner]: Did he act remorseful or ashamed, or anything, sad for what he had done?
>
> A: No.

(R **1151)** Defense counsel immediately objected to the question and answer, arguing that the testimony was totally irrelevant to any issue in the guilt or penalty phase of the trial, and had been held by this Court numerous times to be inadmissible. (R **1151-1153)** Although the state argued that it was relevant to show premeditation, the court sustained the objection, finding the testimony to be irrelevant. (R **1153)** However, the court refused to grant a mistrial and stated that it would not give a curative instruction since such an instruction would merely serve to emphasize the matter to the jury. (R **1153)** A mistrial should have been granted.

As argued by defense counsel below, any consideration of lack of remorse is extraneous to the issues in a capital

trial. Robinson v. State, 520 So.2d 1, 6 (Fla. 1988); Pope v. State, 441 So.2d 1073, 1077-1078 (Fla. 1983). Lack of remorse is not an aggravating factor in and of itself, nor does it have any place in the consideration of any aggravating factors. Robinson, Pope, McCampbell v. State, 421 So.2d 1072 (Fla. 1982). While "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, supra at 1078.

The introduction of evidence of lack of remorse was hence irrelevant and inadmissible at the guilt or penalty phase of the defendant's trial. Its introduction during the guilt phase could only serve to prejudice the jury against the defendant. Sections 90.401, 90.403, Fla. Stat. (1987). A new trial is required.

POINT VI

IN VIOLATION OF THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS **9, 16,** AND **17,** OF THE FLORIDA CONSTITUTION, THE COURT ALLOWED THE ADMISSION OF IRRELEVANT AND PREJUDICIAL EVIDENCE DURING THE PENALTY PHASE OF THE TRIAL.

During the penalty phase of the trial and over the defendant's objections, that state was permitted to introduce into evidence gory, post-autopsy photographs, testimony concerning the results of a blood transfusion of O negative blood into a person with B positive blood, and further evidence concerning the cause of death. (R **585-591, 1635-1643, 1652-1658, 1672, 1681-1683)** This error deprives the defendant of his constitutional rights to due process and to be free from cruel and unusual punishment, and thus entitles him to a new penalty proceeding.

A. Admission of Post-Autopsy Photographs

Although the state had introduced numerous photographs of the victim at the penalty phase of the trial without objection of the defendant to show the cause of death and the circumstances surrounding the crime, the state sought to introduce seven additional post-autopsy photographs depicting the victim naked and showing signs of post-lividity. (R **585-591)** The state indicated that these photographs were relevant to the penalty to

show (in conjunction with the medical examiner's testimony) which bruises to the victim's legs, back, and chest, were caused by the assailant and to show that the sexual battery was inflicted while the victim was conscious. (R 1652-1658) During the medical examiner's testimony, these photographs were displayed to the jury. (R 1674-1679, 1696-1697)

After hearing the doctor's testimony, during which he testified that he could not tell whether the victim was conscious during the sexual battery and (during a proffer) that the bruises did not appear to be of the type caused by a sexual battery (R 1679, 1695-1696), the court indicated that the photographs were indeed overly prejudicial. Since the doctor did not testify as the court had expected, it would not allow the jury to see the photographs any more than they already had. (R 1687, 1696-1697) However, the court refused to strike the photographs from evidence. (R 1696-1697)

Photographs should be received in evidence with great caution. Thomas v. State, 59 So.2d 517 (Fla. 1952). The test for admissibility is relevancy. Zamora v. State, 361 So.2d 776 (Fla. 3d DCA 1978). A photograph is admissible if it properly depicts factual conditions relating to the crime and if it is relevant in aiding the court and jury in determining issues at trial. Booker v. State, 397 So.2d 910 (Fla. 1981). Even if photographs are relevant, courts must still be cautious in admitting them if the prejudicial effect is so great that the jury becomes inflamed.

Alford v. State, 307 So.2d 433 (Fla. 1975); Section 90.403, Fla. Stat. (1987).

In Adams v. State, 412 So.2d 850 (Fla. 1982), and in Thompson v. State, 389 So.2d 197, 200 (Fla. 1980), this Court commended the trial judges' reasoned judgment in prohibiting the introduction of duplicitous photographs or ones taken away from the scene of the crime.

These photographs, as admitted by the witness and as agreed to by the court, did not aid the jury in determining the issues that the state attorney had indicated would be apparent from the photographs and the witness's testimony. (R 1679, 1687, 1695-1697) As such, their admission was irrelevant and erroneous. Reddish v. State, 167 So.2d 858, 863 (Fla. 1964). See also Rosa v. State, 412 So.2d 891 (Fla. 3d DCA 1982). The photographs were overly prejudicial so as to preclude their admissibility. Reddish, supra. The defendant's objection to the photographs should have been sustained; his motion for mistrial should have been granted.

B. Admission of Irrelevant and Highly Prejudicial Testimony

This Court has previously held that in the penalty phase of a capital trial, the state is limited to presenting evidence which proves only the enumerated aggravating factors or rebuts mitigating factors argued by the defense. Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 1986); Trawick V. State, 473 So.2d 1235 (Fla. 1985); Dougan v. State, 470 So.2d 697 (Fla.

1985). The testimony concerning the blood transfusions and the additional testimony concerning cause of death were irrelevant to any aggravating factors and, it appears, were introduced solely to prejudice the jury.

As the defense attorney argued, the state attorney may be attempting to tell the jury that defense counsel's argument during the guilt phase of the trial was an attempt by the defendant to mislead the jury. The jury could therefore be prejudiced in such a way as to affect the defendant's rights to a fair trial. (R 1683-1684) The evidence regarding the lack of ill effects of an O negative blood transfusion referred only to the guilt phase of the trial which had already been concluded. The evidence was totally irrelevant to any issue regarding the penalty to be imposed and would have the sole effect of leading the jury to believe that the defendant's counsel had misrepresented matters to the jury during his closing argument of the guilt phase. (See Point IV, supra) Whether true or not, such an accusation through the solicitation of this evidence had no place in the penalty portion of the trial. The evidence was highly inflammatory and its prejudicial effect outweighed any probative value it could conceivably have. Section 90.403, Fla. Stat. (1987)

The admission into evidence of the irrelevant and prejudicial photographs and testimony, over the defendant's

objections and motion for mistrial, necessitates a reversal for a new penalty phase trial.

POINT VII

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY SEPARATELY ON THE NON-STATUTORY CIRCUMSTANCES REQUESTED BY THE DEFENDANT WHICH WERE SUPPORTED BY THE EVIDENCE AND THE LAW.

Prior to the penalty phase, defense counsel sought to amend the standard jury instructions whereby the jury would receive separate instructions on non-statutory mitigating circumstances which have been previously recognized as valid mitigating circumstances and for which evidence had been presented. (R 592, 1792) It is beyond dispute that the United States Supreme Court decision in Eddings v. Oklahoma, 455 U.S. 104 (1982), requires that in capital cases the sentencer not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any other circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Eddinas, 452 U.S. at 110. A defendant's performance in prison and his potential for rehabilitation have been recognized a such bona fide mitigating factors.

> Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: "Any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." Jurek v. Texas, 428 U.S. 262, 275, 49 L.Ed.2d 929, 96 S.Ct. 2950 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) The court has therefore held the evidence that

> a defendant would in the future pose a danger to the community if he were not executed may be treated as establishing an "aggravating factor" for purposes of capital sentencing, Jurek v. Texas, supra; see also Barefoot v. Estelle, 463 U.S. 880, 77 L.Ed.2d 1090, 103 S.Ct. 3383 (1983). Likewise, evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under Eddings, such evidence may not be excluded from the sentencer's consideration.

Skipper v. South Carolina, 476 U.S. 1, 5 (1986).

Previously, the standard jury instructions were deemed faulty because they were reasonably understood to limit mitigating circumstances to those expressly contained in Section 921.141(6), Fla.Stat. See Hitchcock v. Dugger, 481 U.S. 393 (1987). In an effort to clarify that a jury or trial judge is not limited in the things that may be considered in mitigation, the list of mitigating factors contained in the standard jury instructions now conclude with, "among the mitigating circumstances you may consider, if established by the evidence, are: ". . . (8) Any other aspect of the defendant's character or record, and any other circumstance of the offense." Fla.Std.Jury Instructions in Criminal Cases, 2d.Ed., p. 80-81.

As these instructions are set forth, the jury may reasonably conclude that all mitigating factors other than those expressly provided for by statute may only be considered as a single factor, as opposed to considering each segment individually and attaching individual weight to each non-statutory factor. This distorts the weighing process in

favor of imposition of the death penalty in violation of the Fifth, Eighth and Fourteenth Amendments.

The precise question presented is whether the foregoing **"catch-all"** instruction is sufficient to inform the jury that a particular circumstance can properly be considered when defense counsel requests the jury to be specifically instructed that a particular factor adequately supported by the evidence, **is** valid mitigation under the law. The **"catch-all"** instructs the jury generally that it may consider any factor of the defendant's character or the crime which mitigates imposition of the offense. See Delap v. Dusaer, 513 So.2d 659 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla. 1986). **See** Lara v. State, 464 So.2d 1173, 1179 (Fla. 1985) (proper to instruct all circumstances for which evidence had been presented). It is nonetheless appropriate, indeed, it is essential that the jury be informed by the trial judge that a particular consideration as a matter of law, whether recognized expressly by statute, constitutes valid mitigation.

Judge Perry, in denying the defendant's request that separate instructions be given for these mitigating circumstances, stated:

> THE COURT: No, sir. I will tell you now I will not give this as drafted or amended. I will, however, give number 8, any other aspect of the Defendant's character or record, or any circumstances of events.
> And obviously you can argue these matters to the jury, but I am not going to give them.

(R 1792-1793)

It is respectfully submitted that the failure to give independent instructions to the jury identifying each valid mitigating circumstance that has been recognized by law and which is supported by the evidence, after timely request by the defendant, results in vague and confusing jury instructions which are biased in favor of imposition of the death penalty. As such, the recommendation has been made in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The defendant is absolutely entitled to have the jury accurately and fairly instructed on all factors that properly mitigate against imposition of the death penalty. The trial court is the only entity to give the jury instructions on its lawful function. Unless the court instructs the jury that these considerations may properly be used by them in determining whether the death penalty is warranted, the jury may conclude that these factors previously recognized by the courts as constituting valid mitigation are baseless. Worse, the jury may suspect that a defense attorney is attempting to mislead them about the propriety of a factor and thereby lose faith in his credibility. It is imperative that the trial judge adequately and completely define such considerations under the law when timely requested. Because the trial court erred in refusing the timely request to instruct the jury that a defendant's performance while incarcerated and his potential for rehabilitation are lawful factors to consider in mitigation, the

death penalty must be reversed and the matter remanded for a new penalty proceeding before a new jury.

POINT VIII

THE APPELLATE REVIEW PROVIDED BY THE SUPREME COURT OF FLORIDA RESULTS IN ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9 AND 16, AND 22 OF THE FLORIDA CONSTITUTION, ESPECIALLY WHERE THE COURT DOES NOT REQUIRE THE JURY TO MAKE FINDINGS OF AGGRAVATING CIRCUMSTANCES.

Three members of this Court have now recognized that the death penalty in Florida is being unconstitutionally applied. 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 recommends (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, supra at **815** (Shaw, Ehrlich, and Grimes, JJ., dissenting) (emphasis added).

Defense counsel specifically requested that the trial court require the jury to make written findings of the aggravating factors which it found. The court denied this request. This failure as recognized by three Justices of this Court, renders the capital sentencing process cruel and unusual as applied.

The United States Supreme Court has determined that the Sixth Amendment does not require that the jury find the presence of statutory aggravating circumstances. Hildwin v. Florida, **490** U.S. ___, **104** L.Ed.2d **728 (1989).** In Spaziano v. Florida, **468** U.S. **447 (1984),** the United States Supreme Court held that a trial judge's override of a jury recommendation of life does not in and of itself violate the Eighth Amendment. "The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws. 'Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment is violated by a challenged practice.' [citation **omitted]"** Spaziano, **468** U.S. at **464.** Significantly, Spaziano challenged the authority of the trial judge to override the jury recommendation of life, contending specifically that because the majority of other states require that the jury be the sentencer, the Eighth Amendment required that the jury also be the ultimate

sentencer in Florida. However, the Eighth Amendment challenge made in this issue on appeal is significantly different, in that this issue challenges the consistency of imposition of the death penalty following appellate review by this Court. In State v Dixon, 283 So.2d 1 (Fla. 1973), this Court suaranteed that the same results in one case would occur based on the same facts. The guarantee has proved to have been hollow, in that this Court indulges in speculation and conjecture when faced with a jury recommendation of life in order to glean anything in the record which may have supported the recommendation. However, when the jury recommends death, this Court simply presumes that death is the appropriate penalty. It is expressly submitted that the use of that presumption and this practice violates the Eighth and Fourteenth Amendments by skewing the appellate review process in favor of imposition of the death penalty. This procedure further injects arbitrariness and capriciousness into imposition of the death penalty, in that the reasons that constitute mitigation in cases where the jury recommends life are summarily rejected without consideration by this Court when the jury recommends death; the presumption that death is the appropriate penalty in the presence of one statutory aggravating factor and "nothing in mitigation" is the typical reference made by this Court in that situation. This practice violates the requirement that every death sentenced defendant be focused upon as a **"uniquely** individual human being." Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

At issue here is not the severity of punishment contrasted against the moral culpability of the defendant, as was the case in Tyson v. Arizona, 481 U.S. 137, 157-158 (1987), but rather the indiscriminate fashion in which the presence of aggravation and mitigation is recognized or disregarded by this Court. The review by this Court does not provide a "principled way to distinguish [cases] in which the death penalty was imposed, from the many cases in which it is not." Godfrey v. Georgia, 446 U.S. 420 (1980) (opinion of Stewart, J.); see also Skipper v. South Carolina, 476 U.S. 1, 14-15 (1986) (Powell, J., concurring). In reviewing a death sentence, this Court has only the written findings by the trial court. The review provided by this Court is arbitrary and capricious, based on the absence of any structured means by which to review in every case in which the death penalty is imposed the factual findings made by the jury to support its recommendation. Accordingly, the capital sentencing process as it is being applied, which does not include written findings by the trial jury, now violates the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9, 16, and 22, of the Florida Constitution. Therefore, this Court is asked to reverse the death penalty and remand for imposition of a life sentence.

POINT IX

SECTION 921.141(5)(h), FLORIDA STATUTES (1987) IS UNCONSTITUTIONALLY VAGUE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 22 OF THE FLORIDA CONSTITUTION AND THE COURT ERRED IN INSTRUCTING THE JURY THAT IN DETERMINING WHAT SANCTION TO RECOMMEND, IT COULD CONSIDER WHETHER THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL AND FURTHER ERRED IN FINDING THE UNCONSTITUTIONAL FACTOR THEREBY RENDERING THE DEATH SENTENCE UNRELIABLE.

In imposing Randolph's sentence, the trial court found that the murder was especially heinous, atrocious, and cruel as provided by Section 921.141(5)(h), Florida Statutes (1987). Additionally, defense counsel objected to the jury being instructed on the aggravating factor, contending that it is unconstitutionally vague on the basis of Mavnard v. Cartwright, 486 U.S. ___, 100 L.Ed.2d 372 (1988). Although the trial court modified the instruction to include the definition of the factor as provided by State v. Dixon, 283 So.2d 1 (Fla. 1973), the defendant contended below and maintains on appeal that the factor is still unconstitutionally vague.

Section 921.141(5)(h), Florida Statutes (1987), authorizes the jury and the trial court in a capital case to consider as an aggravating circumstance whether the killing was especially heinous, atrocious, or cruel. The difficulty with this circumstance is that "an ordinary person could honestly

believe that every unjustified, intentional taking of human life is 'especially heinous.'" Maynard v. Cartwrisht, 100 L.Ed.2d at 382. See also State v. Dixon, supra at 8 ("To a layman, no capital crime might appear to be less than heinous....") Because this aggravating circumstance can characterize every first degree murder, especially to a jury, section (5)(h) is unconstitutionally vague. It "fails adequately to inform juries what they must find to impose the death penalty and, as a result, leaves them and appellate courts with the kind of open-end discretion which was held invalid in Furman v. Georsia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972)." Maynard v. Cartwright, 100 L.Ed.2d at 380.

Since Furman, the Court has "insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Id; Spaziano v. Florida, 468 U.S. 447 (1984). For example, in Godfrey v. Georgia, 446 U.S. 420 (1980), the jury sentenced the defendant to die, and the Georgia Supreme Court affirmed, based solely on a finding that the murder was "outrageously or wantonly vile, horrible and inhuman." The United States Supreme Court, however, reversed finding that:

> There is nothing in these few words, standing alone, . . . implie[d] any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile,

> horrible and inhuman." Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of [this aggravating circumstance]. In fact, the jury's interpretation of [this circumstance] can only be the subject of sheer speculation.

446 U.S. at 428-429.

Similarly in Maynard v. Cartwriaht, the Court applied Godfrev to Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance. This language was identical to that used in Florida's section (5)(h). A unanimous Supreme Court found that this language was unconstitutionally vague:

> [T]he language of the Oklahoma aggravating circumstance at issue -- "especially heinous, atrocious, or cruel" -- gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman language that the jury returned in its verdict in Godfrev ... To say that something is "especially heinous" merely suggests that the individual jurors should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is "especially heinous."

Maynard v. Cartwriaht, 100 L.Ed.2d at 382.

In Smalley v. State, 14 FLW 342 (Fla. July 6, 1989), this Court, discussed the problem presented by Maynard v. Cartwriaht:

> It is true that both the Florida and Oklahoma capital sentencing laws use the phrase "especially heinous, atrocious, or cruel." However, there are substantial differences between Florida's capital

> sentencing scheme and Oklahoma's. In Oklahoma the jury is the sentencer, while in Florida the jury gives an advisory opinion to the trial judge, who then passes sentence. The trial judge must make findings that support the determination of all aggravating and mitigating circumstances. Thus, it is possible to discern upon what facts the **sentencer** relied in deciding that a certain killing was heinous, atrocious or cruel.

Smalley, 14 FLW at 342 (emphasis added). This Court's analysis in Smalley fails to address what affect the vague instruction may have had on the jury recommendation, which is also relied on (and supposedly relied on heavily) by the sentencer. **See**, Riley v. Wainwright, 517 So.2d 656, 657 (Fla. 1987) (jury recommendation is "integral part"); Fead v. State, 512 So.2d 176, 178 (Fla. 1987); LeDuc v. State, 365 So.2d 149 (Fla. 1978); Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) (great weight); Lamadline v. State, 303 So.2d 17, 20 (Fla. 1974) (jury recommendation is "critical factor"). **See** also Point VIII, supra.

The defendant contends that the heinous, atrocious, or cruel instruction, even as modified, was unconstitutionally vague under the Eighth and Fourteenth Amendments because that instruction was inadequate to channel the broad discretion of the jury in making its recommendation and the sentencer who relies heavily on that recommendation, and to genuinely narrow the class of persons eligible for the death penalty. Godfrev v. Georgia, supra; Zant v. Stephens, 462 U.S. 862 (1983). As in Maynard v. Cartwright, the instruction did not limit the jury's or the trial court's discretion in any significant way. Accordingly, allowing

Richard Randolph to **be sentenced to die under this unconstitutionally vague law is error. Amend. V, VIII, and XIV, U.S. Const.;** Art. **I, Sec. 2, 9, 16, and 22, Fla. Const.**

POINT X

THE APPELLANT'S DEATH SENTENCE IS IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES, EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, AND FAILED TO PROPERLY FIND THAT THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The sentence of death imposed upon Richard Randolph must be vacated. The trial court found improper aggravating circumstances, failed to consider (or gave only little weight to) highly relevant and appropriate mitigating circumstances, and improperly found that the aggravating circumstances outweighed the mitigating factors. These error render Randolph's death sentence unconstitutional in violation of the Eight and Fourteenth Amendments.

A. The Trial Judge Considered Inappropriate Aggravating Circumstances.

It is well established that aggravating circumstances must be proven beyond a reasonable doubt by competent, substantial evidence. Martin v. State, 420 So.2d 583 (Fla. 1982); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). The trial judge found four aggravating circumstances: (d) during the course of a sexual battery, (e) for the purpose of preventing a lawful arrest, (f) for pecuniary gain, and (h) especially heinous,

atrocious, or cruel. (R **641-644)** The state has failed in this burden with regard to at least three of these aggravating circumstances found by the trial court. The court's findings of fact, based in part on facts not proven by substantial, competent evidence beyond a reasonable doubt do not support these circumstances and cannot provide the basis for the sentence of death.

1. While Enaaaed in the Commission of a Sexual Battery

The court based this finding on its own version of the facts, without regard to the evidence presented by the state's own witnesses. The facts presented by the state show clearly that the sexual battery of the victim was merely an afterthought by the defendant in order to cover up the real motive for the crime, that of pecuniary gain. As the defendant told police (which version is unrefuted), he committed the sexual battery to make it appear that some maniac had done this. (R **534, 1236)** See Cannady v. State, **427 So.2d 723, 730** (Fla. **1983)** (where only direct evidence of the manner in which the murder was committed was appellant's own statements and those statements established that the murder was not cold, calculated, and premeditated, the state has not established that aggravating factor beyond a reasonable doubt)

This aggravating factor can be found only if the dominant motive for the killing was the sexual battery. In Parker v. State, **458** So.2d **750** (Fla. **1984),** this Court rejected the

finding that the murder was committed during the course of a robbery where the taking of the victim's necklace and ring was an mere afterthought and not the motive for the killing. See also Moody v. State, 418 So.2d 989 (Fla. 1982). As shown in Point 111, supra, the assault which led to the victim's death (in order to steal money from the store) had already been completed when the defendant engaged in the sexual activity. Any idea of committing this sex act did not occur until after the incident was over. No sexual battery motive was present before or during the physical assault of the victim.

In Youns v. Zant, 506 F.Supp. 274 (M.D. Ga. 1980) rev'd on other grounds 677 F.2d 792 (11th Cir. 1982), the court rejected a finding that the murder was committed during the course of a robbery. There, the court held:

> The only relevant evidence presented at trial indicated that petitioner did not contemplate the taking of any money until after the shots had been fired and the blows had been struck, i.e., after the murder had been committed . . . . Based on the evidence presented at trial, that petitioner prior to the commission of the murder had any intent to rob the victim is only speculation. Certainly the evidence does not prove these aggravating factors beyond a reasonable doubt.

Youns v. Zant, 506 F.Supp. at 280-281. See also Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979), and Spivey v. State, 529 So.2d 1088 (Fla. 1988), for analogous situations concerning the lack of proof to establish that the motive for the murder was to prevent a lawful arrest, or for pecuniary gain, respectively.

Therefore, in order for this aggravating factor to be present in the instant case, it must be proven beyond a reasonable doubt that the sole or dominant motive for the killing was the sexual battery. Evidence establishing this aggravating factor was totally lacking in the instant case, and was, at most, speculative. The court appoints itself an expert medical examiner and finds that the injuries to the victim, "in this Court's mind, are consistent with that of a brutal and violent rape." (R 642) However, this finding flies in the face of the testimony of the real medical examiner, who testified that the injuries to the victim did not appear to be of the type caused by a forceful sexual battery. (R 1695-1696) Therefore, this aggravating factor must be stricken.

2. For the Purpose of Avoiding or Preventing a Lawful Arrest

The trial court found this factor because the victim knew the defendant and the defendant told police that when the victim saw him, he "had no choice." (R 642) This factor has not been shown beyond a reasonable doubt.

It is well settled that in order to apply this aggravating factor where the victim is not a law enforcement officer, there must be "strong proof of the defendant's motive," and it must be "clearly shown that the dominant or only motive for the murder was the elimination of the witnesses." Perry v. State, 522 So.2d 817, 820 (Fla. 1988) (emphasis added). See also

Rembert v. State, 445 So.2d 337, 340 (Fla. 1984); Riley v. State, 366 So.2d 19, 22 (Fla. 1978). The mere fact that the victim knew and could have identified his assailant is insufficient to prove this aggravating factor. Perry, Rembert, supra.

The defendant's statement to the police that after the victim saw him come into the store "he had no choice" is ambiguous at best and thus cannot support this aggravator. Taken in context, it appears to mean that the defendant had no choice but to fight with the victim and take her into the back room while he completed his robbery. (R 1198, 1234-1235) Furthermore, had the defendant's motive been to kill the victim to avoid detection, he certainly would not have left the store while she was still alive. As this Court held in Rembert v. State, supra at 340:

> The [trial] court reasoned that, because Rembert an the victim had known one another for a number of years, Rembert eliminated the only witness who could testify against him, thereby establishing the avoidance or prevention of arrest. In Riley v. State, 366 So.2d 19, 22 (Fla. 1978), this Court considered murder to eliminate a witness and stated that "the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases."
>
> The victim was alive when Rembert left the premises and could conceivably have survived to accuse his attacker. If Rembert had been concerned with this possibility, his more reasonable course of action would have been to make sure that the victim was dead before fleeing. We do not find that the state demonstrated beyond a reasonable doubt the requisite intent

needed to establish this aggravating factor.

Here, too, as in Rembert, the state has not demonstrated this factor beyond a reasonable doubt. The aggravating circumstance must be stricken.

3. Especially Heinous, Atrocious, or Cruel

The court also erred in finding that the murder was especially heinous, atrocious, or cruel. Contrary to, and notwithstanding, the trial court's findings, the facts sub judice fail to support this finding. This Court defined this aggravating circumstance in State v. Dixon, supra at 9:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

Recognizing that all murders are heinous, Tedder v. State, 322 So.2d 980, 910 (Fla. 1975), this Court further refined its interpretation of the legislature's intent that the aggravating circumstance only apply to crimes **especially** heinous, atrocious, or cruel.

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily tortuous to the victim.

State v. Dixon, supra at 9.

First of all, the trial court's findings are inaccurate, incomplete, and do not support the finding of this aggravating factor. The court maintains that the defendant "went back to the victim on four or five separate occasions while attempting to murder her." (R 643) The record, however, shows that the defendant returned to the back room on only two occasions, when he heard the victim coming around. (R 1235-1236) Additionally, as argued above, there is no showing that the defendant intended to murder the victim. Had the defendant intended all along to murder the victim, he would have completed the crime prior to his leaving the store. Instead, the evidence shows that the defendant was merely trying to quiet the victim and keep her from interfering with his taking of money until he could accomplish the taking and get away. The evidence shows that the defendant tempered his assault, using only such force as h thought necessary to quiet the victim so that he could finish his theft.

From the above-quoted language of Dixon it is clear that the factor does not apply here since there is absolutely no showing of an intentional torture of the victim. As stated in Brown v. State, 526 So.2d 903, 907 (Fla. 1988), wherein the factor was rejected, the crime was not committed "so as to cause" the victim unnecessary and prolonged suffering.

Additionally, as argued in Point IX, supra, this factor is unconstitutionally vague and cannot be use to support a death sentence.

Moreover, as further developed below in Point B, the defendant suffered from a mental or emotional disturbance which has been held to negate this aggravating factor. See, e.g., Holsworth v. State, 522 So.2d 347 (Fla. 1988); Amazon v. State, 487 So.2d 8 (Fla. 1986).

This case, despite its unpleasantness, is not heinous, atrocious, or cruel. Compare to Rembert v. State, 445 So.2d 337 (Fla. 1984) (defendant bludgeoned store owner during robbery); Herzoa v. State, 439 So.2d 1372 (Fla. 1983) (a strangulation death was found not to be heinous, atrocious, or cruel); Simmons v. State, 419 So.2d 316 (Fla. 1982); Halliwell v. State, 323 So.2d 557 (Fla. 1975). This finding must also be rejected.

B. Mitigating Factors, Both Statutory and Non-Statutory, Are Present Which Outweigh The Aggravating Factors, If Any

1. No Significant History of Prior Criminal Activity

The state presented no evidence at the penalty phase of any prior criminal activity on the defendant's part. However, the trial court utilizes the pre-sentence investigation to support the rejection of this mitigating factor. (R 644) A proper reading of this factor and the case law shows that the trial court incorrectly rejected it in mitigation.

This Court has construed this circumstance as follows:

> As to what is significant criminal activity, an average man can easily look at a defendant's record, weigh traffic offenses on the one hand and armed

> robberies on the other, and determine which represents significant prior criminal activity. Also, the less criminal activity on the defendant's record, the more consideration should be afforded this mitigating circumstance.

State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). The crux of this mitigating factor, then, is the word **"significant."** State v. Dixon, supra at 10; Salvatore v. State, 366 So.2d 745 (Fla. 1978). In the present case, the trial court has ignored the above-quoted language of Dixon.

A reading of the pre-sentence investigation reveals that the defendant has only misdemeanor convictions, several of which were for fighting with his emotionally unstable mother. **(R** 621-622) The defendant had absolutely no prior convictions of felonies. Since the only criminal history of the defendant consists of misdemeanors, he does not have a significant history of criminal activity (weighing misdemeanors and "traffic offenses on the one hand and armed robberies on the **other,"** Dixon, supra at 9). See also Caruthers v. State, 465 So.2d 496 (Fla. 1985) (mitigating factor found despite recent misdemeanor conviction); Combs v. State, 403 So.2d 418 (Fla. 1981) (found even though prior felony conviction for burglary): Salvatore, supra.

This factor should have been found.

2. Defendant Was Under the Influence of Mental or Emotional Disturbance, Especially When Coupled With the Defendant's Crack Cocaine Addiction. and Other Contributing Non-Statutory Factors

Section 921.141 (6)(b), Florida Statutes (1987), provides for the statutory mitigating circumstance of the defendant being under the influence of extreme mental or emotional disturbance. Although Dr. Krop would not use the judicial statutory term "extreme" to describe the defendant, he did testify that Randolph suffered from a mental disturbance which was operating at the time of the offense. (R 1726-1729) The defendant suffered from an atypical personality which was aggravated by pretty significant factors in his history which contributed to the offense. (R 1726, 1731) Whether or not this evidence comes up to the level of a statutory mitigating factor, it does at least establish a very substantial mitigating factor, especially when coupled with other factors, which the court erroneously rejected.

It is clear that the defendant was suffering from an impaired mental state at the time of the incident; there was no evidence to the contrary. In State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), this Court interpreted this statutory mitigating circumstance, stating:

> Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance . . . . Like subsection (b), this circumstance is provided to protect that person, who while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.

Dr. Krop's diagnosis of the defendant meets this standard (although the doctor, apparently not understanding the legal

definition of the circumstance, did not believe so). He testified that the defendant suffered from an atypical personality disorder, which, even though not categorized in the revised edition of the Diagnostic and Statistical Manual of Mental Disorders as a separate category, had very distinctive and qualitative criteria. (R **1726, 1747, 1760)** Randolph's personality trait contributed to the defendant's disfunction, which was definitely operating at the time of the offense to help bring about the consequences. (R **1727-1728, 1742)**

This mental disturbance was aggravated by pretty significant factors in his history which contributed to the offense. (R **1726, 1731)** The defendant, who was adopted when he was five months old, had problems getting along with people in school and had counseling for a year in the third grade. (R **1732-1733)** His mother was emotionally unstable (and was hospitalized for psychiatric reasons on a number of occasions), while his father was physically abusive, tying the defendant up and beating him all over his body with his hands, a broomstick, and a belt. (R **1733)** Because of these things, coupled with his emotional problems, the defendant did not perceive any love from his family. (R **1742- 1743)**

The defendant became addicted to crack cocaine. (R **1735)** The psychologist testified that, unlike alcohol intoxication, it is not readily apparent from looking at a person that he is on crack cocaine. (R **1735, 1738-1739)** When a person is regularly using crack cocaine, as was the defendant, the

effects of the drug stay in the blood; the person's personality is affected, not necessarily by an immediate ingestion of the drug, but rather by its overall use. (R 1736-1738) The doctor opined that the defendant's abnormal personality was greatly influenced by his drug addiction at the time of the offense. (R 1737, 1740, 1742) The trial court's findings that the defendant had not immediately prior to the incident ingested crack cocaine and was not intoxicated by it (as evidenced by testimony of his girlfriend who saw him after the incident), completely ignores this testimony of Dr. Krop. It is not the immediate ingestion and **"alcohol-like"** high which produces the mental impairment here; rather it is the long-time build up of this narcotic in the blood which significantly contributed to the defendant's erratic behavior. (R 1736-1739)

Because of his personality disorder, coupled with the defendant's crack cocaine addiction, the defendant reacted to the situation as he did. (R 1741-1742) The defendant panicked during the situation and, though he did not intend to cause injury to the victim, he lost control. (R 1741) The defendant was truly sorry for the victim. (R 1214, 1741)

This Court has recognized the mitigating quality of crimes committed impulsively while the perpetrator suffers from a mental disorder rendering him temporarily out of control. Holsworth v. State, 522 So.2d 347 (Fla. 1988); Amazon v. State, 487 So.2d 8 (Fla. 1986); Miller v. State, 373 So.2d 882 (Fla. 1979); Burch v. State, 343 So.2d 831 (Fla. 1977); Jones v. State,

332 So.2d 615 (Fla. 1976). In Holsworth, the defendant, like Randolph here, had a personality disorder. His mental disorder, like the defendant's here, was attributable to physical abuse at the hands of his father. While committing a residential burglary, Holsworth attacked a mother and her daughter with a knife. The mother broke Holsworth's knife, but he obtained another from the kitchen and continued his attack. Both victims received multiple stab wounds. The daughter died. The trial judge found no mitigating circumstances and imposed death. However, this Court reduced the sentence to life citing Holsworth's drug usage, his mental impairment, and his abuse as a child.

In Amazon, supra, the defendant's mental condition and crime were also similar to the defendant's here. Amazon was emotionally impaired, he was raised in a negative family setting, and had a history of drug abuse. There was inconclusive evidence that Amazon had ingested drugs on the night of the murders. During a burglary, robbery, and sexual battery, Amazon lost control and, in a frenzied attack, administered multiple stab wounds to his robbery and sexual battery victim and her eleven-year-old daughter, who was telephoning for help for her mother. The trial court found no mitigating circumstances. Reversing the death sentence, this Court said, "In light of these mitigating circumstances, one may see how the aggravating circumstances carry less weight and could be outweighed by the mitigating factors." Amazon v. State, 487 So.2d at 13. Richard

Randolph is likewise deserving of a life sentence. His crime was a product of his mental impairment which was caused by his emotional and physical abuse as a child, and was compounded by his drug addiction. See also Sonser v. State, 544 So.2d 1010 (Fla. 1989).

Impulsive killings during the course of other felonies, even where the defendant was not suffering from an impaired mental capacity, have also been found unworthy of a death sentence. See, Proffitt v. State, 510 So.2d 896 (Fla. 1987) (defendant stabbed victim as he awoke during a burglary of his residence); Caruthers v. State, 465 So.496 (Fla. 1985) (defendant shot a convenience store clerk three times during an armed robbery): Rembert v. State, 445 So.2d 337 (Fla. 1984) (defendant bludgeoned store owner during a robbery): Richardson v. State, 437 So.2d 1091 (Fla. 1983) (defendant beat victim to death during a residential burglary in order to avoid arrest). Certainly, with the added mitigation of mental impairment contributing to the crime, the defendant's life must be spared.

Factors in addition to those addressed above which should have been considered in mitigation are the fact that the defendant cooperated with the police, Caruthers v. State, supra: Washinston v. State, 362 So.2d 658 (Fla. 1976); that he expressed remorse for his actions, Sonser v. State, 544 So.2d 1010 (Fla. 1989); that he was not originally armed before the altercation, Thompson v. State, 328 So.2d 1 (Fla. 1976): and that the defendant was a good person prior to his crack cocaine addiction

(R 1149), that despite his emotional deficiencies, the defendant did relatively well in school and in the Army (R 1734), all indicating that the defendant has good prospects for rehabilitation. Holsworth v. State, supra: McCampbell v. State, 421 So.2d 1072 (Fla. 1982).

C. Summary

Richard Randolph's death sentence is disproportionate to his crime and his character. The evidence is strong: the trial court impermissibly found three aggravating circumstances, which are not supported by the law or the facts. The trial court rejected and/or ignored a plethora of mitigating factors. This Court must reverse his death sentence with directions to the trial court to impose life.

POINT XI

IN CONTRAVENTION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. The issues are presented in a summary form in recognition that this Court has specifically or implicitly rejected each of these challenges to the constitutionality of the Florida statute and that detailed briefing would be futile. However, Appellant does urge reconsideration of each of the identified constitutional infirmities.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances @@outweigh@@ mitigating factors, Mullaney v. Wilbur, 421 U. S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). This leads to arbitrary and capricious imposition of the death penalty.

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent

manner. See Godfrey v. Georgia, supra; Witt v. State, 387 So.2d 922, 931-932 (Fla. 1980) (England, J. concurring.). Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J. concurring in part and dissenting in part).

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and factors. See Lockett v. Ohio, 438 U.S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1975) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

The failure to provide the defendant with notice of the aggravating circumstances which make the offense a capital crime and on which the state will seek the death penalty deprives the defendant of due process of law. See Gardner v. Florida, 430 U.S. 349 (1977); Argersinger v. Hamlin, 407 U.S. 25 (1972); Amend. VI and XIV, U.S. Const.; Art. I, Sections 9 and 15(a), Fla. Const.

Execution by electrocution imposes physical and psychological torture without commensurate justification and is therefore cruel and unusual punishment. Amend. VIII, U.S. Const.

The Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law.

The Florida capital sentencing system allows exclusion of jurors for their views on capital punishment which unfairly results in a jury which is prosecution prone and denies the right to a fair cross-section of the community. **See** Witherspoon v. Illinois, 391 U.S. 510 (1968).

The Elledae Rule [Elledae v. State, 346 So.2d 998 (Fla. 1977)], if interpreted to automatically hold as harmless error any improperly found aggravating factor in the absence of a finding by the trial court of a mitigating factor, violates the Eighth and Fourteenth Amendments to the United States Constitution.

Section 921.141(5)(d), Florida Statutes (1987) (the capital murder was committed during the commission of a felony), renders the statute unconstitutional in violation of the Eighth an Fourteenth Amendments to the United States Constitution, because it results in arbitrary application of this circumstance and in death being automatic in felony murders unless the jury or trial court in their discretion find some mitigating circumstance out of an infinite array of possibilities as to what may be mitigating.

Additionally, a disturbing trend has become apparent in this Court's decisions and its review of capital cases. This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction. Quince v. Florida, 459 U.S. 895 (1982) (Brennan and Marshall, J.J.,

dissenting from denial of cert.); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Appellant submits that such an application renders Florida's death penalty unconstitutional.

In rejecting a constitutional challenge to the statute, the United States Supreme Court assumed in Proffitt v. Florida, 428 U.S. 242 (1976), that this Court's obligation to review death sentences encompasses two functions. First, death sentences must be reviewed "to insure that similar results are reached in similar cases." Proffitt, supra at 258. Secondly, this Court must review and reweigh the evidence of aggravating and mitigating circumstances to determine independently whether the death penalty is warranted. Id. at 253. The United States Supreme Court's understanding of the standard of review was subsequently confirmed by this Court when it stated that its "responsibility [is] to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." Harvard v. State, 375 So.2d 833, 934 (Fla. 1978) cert. denied, 414 U.S. 956 (1979) (emphasis added).

In two decisions, this Court has recognized previous decisions were improperly decided. In Proffitt v. State, 510 So.2d 896 (Fla. 1987), this Court reduced a death sentence to life despite having previously affirmed it on three prior occasions in Proffitt v. State, 315 So.2d 461 (Fla. 1975) affirmed 428 U.S. 242 (1976); Proffitt v. State, 360 So.2d 771 (Fla. 1978); and Proffitt v. State, 372 So.2d 1111 (Fla. 1979). The basis of the holding was this Court's duty to conduct

proportionality review. Similarly in King V. State, 514 So.2d 354 (Fla. 1987) this Court invalidated a finding of the aggravating factor that the defendant caused a great risk of death to many persons despite having approved it in King's direct appeal, Kina v. State, 390 So.2d 315 (Fla. 1980). In so doing, this Court acknowledged that the factor had not been proven beyond a reasonable doubt. What these two cases clearly demonstrate is that the death penalty as applied in Florida leads to inconsistent and capricious results.

In view of the arbitrary and capricious application of the death penalty at every level of the criminal justice system, the constitutionality of the Florida death penalty statute is in doubt. For this and the previously stated argument, Appellant contends that the Florida death penalty statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the appellant requests that this Honorable Court reverse the judgments and sentences and grant the following relief:

1. As to Points I, 11, and IV, remand for a new trial;

2. As to Point 111, remand for imposition of the lesser charge of sexual battery on one physically helpless to resist;

3. As to Points V - XI, remand for imposition of a life sentence or, in the alternative, a new penalty phase trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Fourth Floor, Daytona Beach, FL 32114 and mailed to: Mr. Richard Paul Speaker, Inmate Number 115769, P.O. Box 747, Starke, FL 32091 this 27th day of September, 1989.

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