IN THE SUPREME COURT OF FLORIDA

ROOSEVELT BOWDEN, :

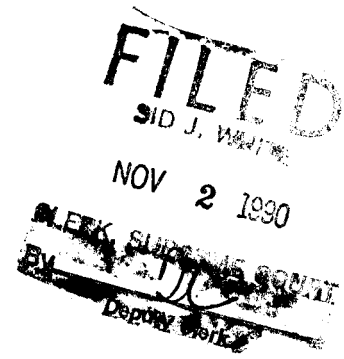
Appellant, :

vs. : Case No. 74,438

STATE OF FLORIDA, :

Appellee. :

_____:



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

INITIAL BRIEF OF APPELLANT

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

ROBERT F. MOELLER
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ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

Appellant, Roosevelt Bowden, was arrested by Detective Dennis Bender of the Tarpon Springs Police Department on April 12, 1988 on a charge of first-degree murder. (R1)

Appellant was found to be insolvent, and the public defender's office was appointed to represent him on April 13, 1988. (R2-3)

On April 22, 1988 the public defender's office was permitted to withdraw from representing Appellant due to an ethical conflict. (R4-5)

Attorney Frank Louderback was appointed to represent Appellant on April 26, 1988. (R6)

On May 19, 1988 a Pinellas County Grand Jury returned an indictment alleging that Appellant killed Charles Littlefield with premeditation on or between April 11 and 12, 1988 by beating him with a blunt object. (R13-14)

Frank Louderback was permitted to withdraw from representing Appellant on August 10, 1988 due to irreconcilable differences. (R79, 122)

Attorney James A. Martin was appointed to represent Appellant on August 16, 1988. (R81) On November 9, 1988 Martin filed a motion to withdraw as counsel of record, citing "lack of cooperation and the adversarial atmosphere asserted by the defendant" (R217), which motion was heard and denied without prejudice on November 18, 1988. (R221, 689-698)

Through counsel, Appellant filed two motions to suppress. (R281, 282) One motion sought to suppress cigarette lighters that were seized without a warrant from Appellant's personal property at the Pinellas County Jail by officers of the Tarpon Springs Police Department. (R281) The other motion sought suppression of statements Appellant made to officers of the Tarpon Springs Police Department. (R282) Both motions were heard by the Honorable Stanley R. Mills on March 2, 1989 and denied. (R290, 705-743)

This cause proceeded to a jury trial beginning on April 11, 1989, with Judge Mills presiding. (R745-1516) On April 14, 1989 the jury returned a verdict finding Appellant guilty of murder in the first degree, as charged. (R337, 1416)

Penalty phase was conducted on April 18, 1989. (R1425-1516) After receiving additional evidence from both the State and the defense, the jury was instructed on the following aggravating circumstances (R1501): (1) Appellant had previously been convicted of another capital offense or of a felony involving the use or threat of violence to some person. (2) The crime was committed while Appellant was engaged in or an accomplice in the commission, or an attempt to commit, or flight after committing or attempting to commit the crime of robbery. (3) The crime was especially wicked, evil, atrocious, or cruel. The court instructed the jury on the following mitigating circumstances (R1501-1502): (1) The crime was committed while Appellant was under the influence of extreme mental or emotional disturbance. (2) Any other aspect of Appellant's character or record, and any other circumstances of the

offense. The jury returned a recommendation by a vote of ten to two that the court impose the death penalty upon Appellant. (R342, 1509)

Through counsel, Appellant filed a motion for arrest of judgment and a motion for new trial on April 24, 1989. (R395, 396) On May 11, 1989 Appellant filed an amended motion for new trial and motion for new penalty proceeding. (R414) Judge Mills heard the motion for arrest of judgment and amended motion for new trial and motion for new penalty proceeding on June 26, 1989, and denied them. (R428, 430, 1538-1541)

Prior to sentencing Appellant asked that a different attorney be appointed to represent him, but the court did not grant his request. (R1560-1565)

On June 30, 1989 the court below sentenced Appellant to die in the electric chair. (R484-485, 486-491, 1599-1605) Judge Mills found in aggravation that Appellant had previously been convicted of a felony involving violence to another person (R486-487, 1600-1602) and that the capital felony was especially heinous, atrocious or cruel. (R487-488, 1602-1603) The court specifically considered and rejected as aggravating factors that the homicide was cold, calculated and premeditated, and was committed during the course of a robbery. (R488-489, 1603) With regard to mitigation, the court rejected all statutory circumstances, but noted as to nonstatutory mitigation that Appellant had

> clearly established that he is the product of a terrible childhood and adolescence. After suffering the loss of his mother at an extremely

> tender age, the defendant was bounced about in foster care and state institutions before, many years later, being returned to the care of his father.

(R490) The court also observed, however, that Appellant's surviving brothers and sisters had "turned out well under roughly similar conditions." (R490)

Appellant's notice of appeal was timely filed on July 12, 1989 (R564), and the Public Defender for the Tenth Judicial Circuit was appointed to represent him on appeal. (R575)

STATEMENT OF THE FACTS

I. Suppression Hearing

Dennis Bender of the Tarpon Springs Police Department was the sole witness to testify at the suppression hearing held on March 2, 1989 before Judge Stanley R. Mills. (R706-729) Bender came into contact with Appellant around 4:30 on April 12, 1988 when Appellant was arrested on the basis of probable cause at the Labor Force upon returning from work. (R707) Bender read Appellant his Miranda rights from a card issued by the state attorney's office when he was arrested and again at the police station. (R707-709) Both times Appellant said he understood his rights. (R709) He was not questioned at the arrest site, but was questioned at the Tarpon Springs Police Department regarding his activities on April 11-12. (R710) Appellant indicated that having his rights in mind, he would go ahead and speak with Bender. (R710)

Appellant told Bender that he had worked at the Labor Force on April 11. (R711) When he got off work he went to visit a friend named Joe. (R711) Joe drove him to Charlie Littlefield's residence, where Appellant was staying off and on and eating meals. (R711) There was a monetary transaction for use of facilities. (R711) Appellant took a shower, then went to ABC Pizza with Joe, his wife, and his eight or nine year old daughter. (R711) At ABC Appellant bought two hoagies, then returned to the Littlefields' apartment. (R711) There he got into an argument with Charlie over Appellant being there all the time. (R711-712) The argument began upstairs and ended downstairs. (R711-712) Appellant felt that he

needed to restrain Littlefield, and so he grabbed him by the throat and held him down on the couch until he calmed down. (R712) Appellant let go of Charlie, who went to the kitchen and started pulling things out of the refrigerator. (R712) Then Charlie left out the back door. (R712) Appellant remained in the apartment for five to fifteen minutes, then left out the back door to look for Charlie. (R712) He went to a Fifties Club and a place called Charlie's Lounge, but did not find Littlefield in either establishment. (R712) Appellant then returned to the apartment. (R712) He stated to Bender that he did not kill Littlefield. (R712)

On April 21, Appellant placed several calls to the police station and eventually spoke with a Detective Lockhart. (R713) Appellant expressed the desire to take a lie detector test. (R713) Late that afternoon Bender went with Detective Fivecoat to the Pinellas County Jail and met with Appellant. (R713-714) Bender had arranged for a polygrapher to be standing by, and when Appellant confirmed that he did wish to take a lie detector test, one was begun. (R714) It was discontinued when Appellant said he was tired, but the police returned after being contacted by Appellant on April 25 and administered the final phase. (R714, 727-729) Appellant was advised of the results of the test, which showed definite signs of deception. (R715) Appellant was again advised of his Miranda rights. (R715) He changed his statement to say that he had left the apartment immediately after Charlie Littlefield, instead of waiting five to fifteen minutes, and caught up with him in the back yard. (R716) They had a discussion

relatively close to the back door of the apartment during which Littlefield "basically said to hell with everybody" and walked away. (R716) Appellant waited awhile, then went back inside the apartment. (R716)

Appellant's statements were not tape-recorded, nor did the police make handwritten notes of the conversations. (R718-719)

Bender testified that Appellant did not ask for an attorney at the polygraph examinations or when he called the police. (R728) Bender said that he did not know Appellant was represented by the public defender's office, although Bender acknowledged that there was no doubt in his mind that in each and every first degree murder case in Pinellas County the accused was given a solvency hearing and the public defender was appointed to represent him. (R723-724) The information the police had was that Appellant was refusing to speak to any lawyers. (R723) Bender did not speak with anyone from the public defender's office about going to talk to Appellant. (R723-724)

On April 18 Bender took several butane lighters from Appellant's property at the Pinellas County Jail. (R718) These items had been inventoried when Appellant was arrested on April 12. (R718) Bender did not have a warrant when he took the lighters, although he acknowledged that he had time to obtain a warrant if he thought he needed one. (R718, 721)

With regard to Appellant's statements, defense counsel argued that his initial statement was inadmissible because the State had not covered such issues as Appellant's sobriety,

emotional state, intelligence, and lack of mental illness, and argued that the second statement was inadmissible because it was obtained after counsel had been appointed to represent Appellant through the use of a polygraph, which counsel termed an "inadmissible tricking device." (R731-738) The court denied the motion to suppress Appellant's statements, finding that they were made freely and voluntarily. (R737-738)

As for the lighters, the State argued that their seizure was incident to arrest. (R738) Defense counsel argued that the passage of six days time had dissipated this justification, and Bender had ample time to obtain a search warrant. (R738-739) The court found that Bender had adequate time to obtain a warrant, and that Appellant did not acquiesce or agree in any way to an inventory of his personal effects, but found Lightbourne v. State, 438 So.2d 380 (Fla. 1983) controlling, and refused to suppress the lighters.

II. Guilt Phase

A. State's Case

Charles Littlefield and his wife, Rita, came to Florida from Colorado in January, 1988. (R997-998) On April 11, 1988 they were living in an apartment on East Lime Street in Tarpon Springs with Rita's sister, Teresa Greathouse. (R997, 1040)

Appellant, Roosevelt Bowden, whom everybody called "Slow," was living at the same apartment off and on. (R999, 1040) The Littlefields had known him for about two months. (R998-999) Appellant slept in the back bedroom upstairs, while Rita and

Charlie slept downstairs on what Rita described as a " sleep-away couch." (R999) Appellant did not pay any rent, nor did he pay for food or electricity. (R1000) He was working at labor pools, earning $20 or $25 a day. (R1000)

Charlie Littlefield was having some problems with Appellant. (R1000) Rita testified about an incident where Appellant came downstairs while she was sleeping. (R1002-1003) This resulted in problems between Appellant and Charlie, and Charlie said he wanted Appellant out. (R1002-1003) Appellant said, "Yeah, I'll get out of your house before I kill you." (R1003)

Charlie Littlefield drank quite frequently. (R1030) On April 11, 1988 he began drinking NA (non-alcoholic beer), but switched to Fisher Ale, and eventually became drunk. (R1010, 1030)

Rita Littlefield did not see Appellant drinking anything that night, but she did see him with a bottle of Seagram's Extra Dry Gin. (R1010-1011)

About 8:30 p.m. Appellant came to the apartment with a man, a woman and a little girl. (R1005, 1041) Appellant "wanted them to stay the night so he could sleep with ... that guy's old lady,"[1] but Charlie would not let them stay the night. (R1005-1008) The visitors and Appellant said they would go to ABC Pizza. (R1008) Appellant wanted to come back after that and take a

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[1] When Rita Littlefield gave this testimony, Appellant objected and moved for a mistrial and a curative instruction. (R1006) The trial court denied the motion for mistrial, but told the prosecutor to "[g]et back on something relevant again." (R1006)

shower. (R1008) He wanted to give Charlie five dollars for staying there. (R1008) Appellant gave Charlie a ten-dollar bill, and Charlie gave him a back a five. (R1008-1009) After the exchange of money, Charlie had fourteen dollars, and Appellant said he had five dollars. (R1009)

Appellant returned from ABC Pizza about 11:00 or 11:30. (R1011, 1041) He knocked on the door and asked Charlie if he could come in to take a shower. (R1012, 1041-1042) Charlie initially said no, but then let him in. (R1012, 1041-1042)

Appellant went upstairs and called Charlie. (R1012, 1042) When Charlie went upstairs, the two men began arguing about taking advice from Tom Campbell.[2] (R1013, 1042) Rita went up to see what was going on, and the argument got worse. (R1012, 1042) The three came downstairs, and Charlie started throwing everything all over the apartment. (R1013, 1042) He had never done that before. (R1013)

Appellant, who was much larger than Charlie, put him on the bed and was holding him there, trying to calm him. (R1013-1014, 1043) Charlie slapped Appellant, and Appellant let him go. (R1014-1015, 1044) Charlie again started slinging things around. (R1015, 1044) Appellant picked Charlie up by his chin and was holding him against the wall with his feet off the floor and telling him to calm down. (R1015, 1042-1043) Rita told Appellant not to hurt Charlie, and Appellant responded, "I wouldn't hurt this

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[2] Campbell was a friend of the Littlefields and Appellant. (R1061-1062)

boy for nothing." (R1015) He put Charlie down. (R1016)[3] Charlie grabbed a pink cigarette lighter, and a beer from the kitchen refrigerator, and went out the door. (R1016, 1018-1019, 1030, 1044) He also had a lighter in his possession. (R1018-1019, 1030) Appellant went out right behind Charlie, saying he was going to calm him down. (R1016, 1044)

Rita and Teresa both fell asleep. (R1016, 1045) Neither woman was certain how long Appellant was gone, but Teresa estimated he returned within 10 to 15 minutes, 20 at the most. (R1016, 1031-1032, 1045) According to Teresa, when Appellant came back he was acting shaky, kind of tired, and he was "sweaty like." (R1045, 1054) Rita testified, however, that Appellant was acting "[n]ormal," and was not all sweaty. (R1016) Neither woman saw any blood on Appellant. (R1032, 1059) He did not take a shower or change his clothes. (R1059)

According to Rita Littlefield, when Appellant came back to the apartment, he said that Charlie had said, "'Fuck you all,'" and left, throwing his keys behind him. (R1017) Appellant said he had looked for Charlie at ABC Pizza and the Fifties Club, but was unable to find him. (R1017) Teresa Greathouse testified that upon Appellant's return he said he had looked for Charlie at Jack Crawley's house and the Fifties Club. (R1045)

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[3] The chronology of events stated above is that given by Rita Littlefield in her trial testimony. Teresa Greathouse testified that Appellant picked Charlie up by the chin before placing him on the bed. (R1042-1043)

The sisters testified that Appellant made several statements about a dead body when he came back to the apartment, such as that it weighs a lot, and the skin feels like leather, and if the man has an erection, you have to snap it. (R1027, 1055)

Appellant offered Rita a generic cigarette, which was the kind Charlie smoked. (R1004) Appellant usually smoked Kools. (R1005, 1105)

Appellant and Teresa Greathouse went upstairs, where they split a sandwich Appellant had brought from ABC Pizza. (R1045-1046, 1054) While they were up there, Appellant displayed a ten-dollar bill and four ones to Greathouse. (R1054)

At 2:30 a.m. Rita Littlefield went out with Appellant to look for Charlie. (R1019) They went to Jack Crawley's, where Charlie sometimes went to visit, but Crawley had not seen Charlie. (R1019, 1023) Appellant would not let Rita go near a smashed up black truck in some woods by an alleyway, because he said there were "drugs over thataway." (R1020-1022) They looked for Charlie in a park area, then returned to the apartment. (R1023-1024) Rita initially testified that she and Appellant looked for Charlie for "about an hour" (R1020), then said it took about 10 or 15 minutes from the time she left with Appellant to look for her husband until they returned to the apartment (R1023), and then testified that they left the apartment at 2:30 a.m. to look for Charlie, but she had "no idea" what time it was when they returned. (R1024)

When they got back to the apartment, Appellant said that if Charlie did not come back, he would take care of Rita. (R1056)

Appellant slept in a chair that night. (R1025) He was still at the apartment when Rita awoke at 6:00 or 6:30 a.m. (R1026) He left somewhere between 6:00 and 7:30. (R1026)

Charlie Littlefield's body was found around noon on April 12, 1988. (R970-971, 1076-1077) Littlefield was lying on his back in a vacant field in which trees and brush and weeds had grown up, not far from his apartment. (R972, 1029, 1104, 1124-1125, 1192) His face was "pretty well beat up" and was covered with blood that was drying. (R972) It appeared that Littlefield had been dragged initially by his shoulders, then by his feet. (R971, 1194-1196) There were indications that pressure had been applied to Littlefield's neck, but he died from blows to the head. (R1204-1206) The injuries sustained by Littlefield were consistent with having been caused by a "rebar," or steel rod. (R1159-1160, 1210-1212)[4] He had some defensive wounds on his arms. (R1207-1208) Littlefield died some time between midnight and 2:00 a.m. on April 12, 1988. (R1209) His assailant would have been spattered with blood. (R1198)

A Seagram's Extra Dry Gin bottle was found just outside the crime scene roped off by the police, near the old black pickup truck. (R987, 1101, 1172)

After talking to certain people, including Rita Littlefield and Teresa Greathouse, Detective Dennis Bender of the

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[4] At Appellant's trial a piece of "rebar" that Detective Danny Fivecoat of the Tarpon Springs Police Department had picked up at a construction site was admitted into evidence as State's Exhibit Number 7 over defense objections. (R1171-1174) No rebar was found in the area where Littlefield's body was discovered. (R1172)

Tarpon Springs Police Department arrested Appellant at Minute Man Day Labor when Appellant returned there from working on the afternoon of April 12, 1988. (R1079-1080, 1082) Bender asked Appellant to explain his whereabouts and activities on April 11. (R1082) Appellant told Bender he worked at Minute Man that day. (R1083) From there he went to the house of a friend named Joe, whose last name he did not know, where he had something to drink and stayed for a short time. (R1083) Appellant then went to the Littlefields' residence on East Lime Street with Joe and Joe's wife and daughter, arriving there around 6:00 or 7:00 p.m. (R1083) Appellant told Bender he had been staying at several different locations, one of which was the Littlefields' residence. (R1084) He stopped there on April 11 to clean up after work because they were going out to dinner. (R1084) Appellant and Charlie Littlefield got into an argument over Appellant being there. (R1084) He offered to pay Littlefield a certain amount of money for the privilege of cleaning up and taking a bath. (R1084) Later that evening Appellant ate dinner at ABC Pizza with Joe and his family, remaining there until right around the 11:00 closing time. (R1084-1085) Appellant brought an extra sandwich back to the Littlefields' apartment, where Joe dropped him off. (R1085) Another argument ensued with Littlefield over Appellant being there. (R1086) Littlefield lost his temper, and Appellant restrained him by grabbing him by the throat and holding him down on the couch and advising him to calm down. (R1086) Littlefield finally became calm enough that Appellant let him up. (R1087)

Littlefield then began ranting and raving throughout the house, picking up different items and throwing them down, because he lost his temper and wanted Appellant to leave. (R1087) Littlefield went into the kitchen and was pulling items out of the refrigerator. (R1087) He grabbed a beer and went out the back door, still angry. (R1087) Appellant remained in the apartment five or ten minutes and then left by the back door to look for Charlie. (R1087-1088) Appellant went into the Fifties Club, where Charlie occasionally went, and looked around for him in there. (R1088) Appellant then stuck his head in Charlie's Lounge to see if Littlefield was there, but did not go inside. (R1088) After searching for Charlie for about one-half hour, Appellant returned to the Lime Street apartment and told Rita he could not find him. (R1088-1089, 1091) He stayed there the rest of the evening, then accompanied Rita when she looked for Charlie. (R1089) When they were unsuccessful in finding Charlie after looking for about one-half hour, Appellant and Rita returned to the apartment. (R1089, 1091) Appellant stayed there until morning, then went to work. (R1089)

In subsequent statements to the police, Appellant said he had not waited in the apartment, but had gone out the back door immediately after Charlie. (R1102-1103) He caught up with him and words were exchanged. (R1103) The argument ended when Littlefield said, "You can fuck off, I am leaving," and walked away. (R1103) Appellant said he never saw Charlie again. (R1103) Appellant denied any direct involvement in Littlefield's killing. (R1100)

Betty Joyce was working the evening shift as bartender at the Tarpon Springs Fifties Club on April 11, 1988. (R1072) She came on duty at 5:00. (R1073) The club closed at 11:00. (R1072-1073) Joyce did not see any black males come into the club that night. (R1073)[5]

Detective Bender removed three butane lighters from Appellant's property at Pinellas County Jail. (R1104) These lighters were identified by Rita Littlefield and Tom Campbell as belonging to Charles Littlefield. (R1018, 1063-1064) Littlefield had two of them in his pockets when he left the apartment on the evening of April 11. (R1018-1019)

Wadie Moore, Jr., who had been convicted of four felonies, was in the same cell with Appellant at the Pinellas County Jail. (R1129-1130) Appellant told Moore he was charged with murder. (R1130) The police thought the weapon was a knife. (R1130) Appellant said he had been in a fight with a "guy" at a house. (R1131) There was mention of a girl. (R1131) The "white dude" ran out of the house, and Appellant ran out behind him. (R1131) Appellant caught up with the man at a parking lot and they argued. (R1131-1132) The white dude said to Appellant, "Fuck you," or something like that. (R1131) Appellant told Moore the police were a "dumb set of cops" who would never find out who did it or what the weapon was. (R1132)

Willie Lampkin, who had been convicted of five felonies, slept in the same cell with Appellant at the Pinellas County Jail

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[5] Appellant is a black man. (R1, 835, 848, 1057)

for about a week in December, 1988. (R1156, 1158) Appellant told him he was living with "this guy." (R1158) Appellant lived upstairs and was having an affair with the man's wife. (R1158-1159) On the night of the crime Appellant and the man had a fight. (R1158) Shortly thereafter the man left, and Appellant saw him leave from upstairs. (R1158, 1161) Appellant told Lampkin he followed the man, and beat him using a rebar and took $1,100. (R1158) He went to work the following day. (R1159) When he returned to the office, the police were waiting on him. (R1159) He did not have a chance to flee because they were all over the place. (R1159)

B. Motion for Directed Verdict of Acquittal

When the State concluded its case, Appellant moved for a judgment of acquittal. (R1215) His attorney emphasized the circumstantial nature of the evidence, and the fact that no blood appeared on Appellant. (R1215) The court denied the motion. (R1216-1217)

C. Defense Case

Michael Malone was an FBI special agent assigned to the laboratory in Washington, D.C. (R1217-1218) He was an expert in hair and fiber analysis. (R1220) Malone received three sets of evidence pertaining to this case from the Tarpon Springs Police Department: one from the victim, one from Appellant, and one from the general area where the body was found. (R1227) He examined a shirt identified as being from Charles Littlefield and found no

Negroid hairs on it. (R1232) He checked all items from Littlefield and found no Negroid hairs on any of them. (R1232) Malone also looked for Caucasian hairs on a shirt and all other items that came from Appellant and did not find any. (R1234)

Special Agent John Brown of the FBI was also assigned to the lab in Washington. (R1240) He was an expert in forensic serology. (R1242) In April and May of 1988 he received a number of items from the Tarpon Springs Police Department that were described as having come from Appellant or Charles Littlefield or the crime scene. (R1244-1245) Brown examined items from Appellant including boots, blue jeans, a T-shirt, another shirt, and the flannel shirt Appellant was wearing on the night in question for the presence of blood and did not find any. (R1245-1252, 1285-1286) He also examined fingernail scrapings taken from Appellant for the presence of blood and did not find any. (R1254-1256)

Appellant testified that he was 40 years old. (R1261) He was born and raised in New Haven, Connecticut, and had been in Florida about two years. (R1261)

Upon breaking up with his fiancee, Appellant moved in with the Littlefields at the request of Tom Campbell. (R1262) Appellant was working in construction, and he paid Charles Littlefield rent of $25.00 and more each week. (R1262, 1287-1288, 1300) Appellant had another residence four blocks away from the Littlefields' where he stayed off and on with a man who had broken up with his "old lady." (R1267, 1288-1289) He stayed at this other apartment three different nights. (R1311) There was no

shower there, and Appellant did not have any clothes there. (R1311)

Even though Charlie Littlefield was a white boy, he was a brother to Appellant. (R1263) Appellant acknowledged that the two had a lot of arguments, mostly because Littlefield was "an aggressive young man." (R1263) About two weeks after Appellant moved in with Charlie he did say, "I will kill you," but he said it "not meanly" and "with no intention whatsoever." (R1301)

On April 11, 1988 Appellant went to Joe and Stormy Delietite's house after work. (R1264) The three of them went to Charlie Littlefield's home in the early evening so that Appellant could shower before they went out to dinner. (R1264) Littlefield indicated Appellant could take a shower, and Appellant went upstairs and took off his shirt, but did not have the opportunity to shower because Littlefield, who was drinking "extensively" that night, came up arguing. (R1265-1266)

Appellant had $30-40 that night, and he gave Littlefield $5.00 because he asked for it in the kitchen, but it was not for taking a shower. (R1265)

Appellant ate dinner at ABC Pizza with the Delietites and ordered a sandwich to go. (R1266) Appellant paid his own bill. (R1266) He left ABC between 10:30 and 11:00 and the Delietites dropped him off at the Littlefields'. (R1266-1267) Appellant knocked on the door and asked Charlie if he could come in and freshen up, and Charlie said, "Sure." (R1267) Charlie asked Appellant if he had a place to stay, and Appellant replied that he

was staying down the street. (R1267) Appellant went upstairs and Charlie came up. (R1267-1268) Charlie was "hyped up." (R1268) He was mad at Teresa for being up in Appellant's room. (R1268-1269) Rita came to the top of the stairs and asked what was going on. (R1269) Charlie told her to go downstairs and mind her own business. (R1269) Appellant told Charlie to "cool it," but he went downstairs, "raving mad, hollering and screaming." (R1269-1270) He was calling Teresa all kinds of names and telling her to get out. (R1270) Appellant ran downstairs and told Charlie to "cool out." (R1270) Charlie opened the door and told Teresa to get out. (R1270) Appellant slammed the door shut. (R1270) When he did so, Charlie "broke like he was going to jump on Teresa." (R1270-1271) That is why Appellant grabbed him by his chin and the back of his head and picked him up off the floor and put him against the wall. (R1270-1271) Appellant said, "Cool out, Man, just chill out," and put Charlie down on the bed. (R1271) Charlie was wrestling and fighting with Appellant. (R1271) Rita said, "Don't hurt him." (R1271) Appellant said, "There is no way in the world I am going to hurt him." (R1271) Rita sat down, but she was crying and hysterical. (R1271) Charlie stopped wrestling, and Appellant let him go. (R1271) That is when Charlie slapped him. (R1271) Charlie did not hurt Appellant. (R1271)

When Appellant got off Charlie, Charlie went into a rampage, throwing things. (R1271-1272) He went into the kitchen, grabbed a beer from the refrigerator, popped the top, and was flinging things out of the refrigerator. (R1272) He came in the

doorway and stood for a moment, then left out the back door. (R1272) Rita was crying hysterically. (R1272) Appellant asked her if she was all right, and she said she was. (R1272) Appellant asked Rita if she wanted Appellant to get him, and Rita said, "Yeah, bring him home." (R1272) Appellant ran out of the house. (R1272) Roughly two to five minutes had elapsed since Charlie's departure. (R1272) Appellant went directly to the Fifties Club, which was open, and spoke with the proprietor, Harold Junior. (R1274, 1297) Junior said he had not seen Charlie. (R1274, 1297) Appellant then went to Charlie's Lounge. (R1274) There were hardly any people there. (R1274) Appellant then went directly back to the apartment. (R1274) He had been gone less than six minutes. (R1274) As soon as Appellant returned to the Littlefield residence, he asked Rita if Charlie had returned yet. (R1275) She said no. (R1275) Appellant asked if Charlie had ever done this before. (R1275) Rita answered that he had, he would sometimes stay away for three or four days after he got in "a little mad fit." (R1275)

Appellant waited for Charlie to cool off and come back. (R1275) He did not want to leave the girls there by themselves because the area in which they were living was a heavy drug area, in which there had been a multitude of homicides. (R1275)

Rita became very edgy and wanted to go out. (R1276) It was late, and Appellant would not let Rita go out by herself, and so he went with her. (R1276) They took the same route as Appellant had taken when he went out by himself earlier. (R1276)

Appellant did not want Rita to go into one area because he had heard that junkies hung out back there shooting up. (R1276-1277)

Appellant and Rita went to Jack Crawley's house and engaged in a conversation with him about Charlie for five or ten minutes. (R1277) Appellant then asked Rita if she wanted to walk up by the Fifties Club, the lights of which were still on, but she said no, and they returned to the apartment. (R1278)

Appellant drank his third beer while sitting in a chair waiting for Charlie. (R1278) He never did take his shower. (R1278) He went to sleep almost right away. (R1278)

Appellant left for work about 6:00 the next morning, heading for the labor department in Tarpon where they hired daily workers. (R1278-1279) When he got off work around 4:30 or 5:00 and went to the office to pick up his check, the police were waiting for him. (R1279) They placed him under arrest immediately. (R1279) Appellant was startled, but he had no intention to flee at all. (R1279)

Appellant acknowledged speaking with the police the day he was arrested. (R1280) He instituted another meeting with them while he was incarcerated and asked what he could do to speed up the investigative process. (R1281) Detective Bender asked Appellant if he left the house right behind Charlie, and Appellant asked, "Is that want you want me to say? Okay, I left the house behind Charlie." (R1282) Bender was playing games with Appellant, and Appellant was confirming what Bender wanted to hear. (R1283, 1294)

Appellant denied making the statements about a dead body that were attributed to him. (R1313-1314) He acknowledged making the statement that he would take care of Rita if anything happened to Charlie. (R1313-1314)

Appellant did not tell Willie Lampkin and Wadie Moore the things about which they testified at his trial. (R1283, 1283-1284, 1305-1306)

With regard to the cigarette lighters that were in his personal property at the jail, Appellant bought the pink one at a Pick Kwik Store, Thomas Campbell gave him the blue one the same day he gave Charlie Littlefield nine lighters, and Appellant took the yellow Joy Food lighter off the front seat of Tom Campbell's car the day Campbell drove him to work. (R1284-1285)

Appellant testified that he was convicted of one very serious felony in Connecticut. (R1286) He denied killing Charlie Littlefield. (R1286)

When the State completed its cross-examination of Appellant, defense counsel announced that he had no redirect. (R1314) Appellant asked to "say something to the courtroom," but the court denied the request because Appellant's attorney had elected not to ask him any more questions. (R1315)

IV. Penalty Phase

A. State's Case

Detective Sergeant Michael Sweeney of the New Haven Police Department was the first witness to testify for the prosecution at the penalty phase of Appellant's trial. (R1439-1448) He identified three documents as being certified copies of docket sheets showing that a Roosevelt Bowden had been convicted in Connecticut of a robbery in 1968, an aggravated assault in 1971, and a manslaughter (which had originally been charged as a murder) in 1978. (R1440-1442)

Sweeney was not the case detective on the manslaughter, but he was familiar with the investigation. (R1442-1443) The victim was Appellant's 19 month old daughter. (R1443-1444) During April, 1978 Appellant was having a domestic problem with the child's mother, to whom he was not legally married. (R1444) One evening in early April, Appellant walked the child into the middle of Congress Avenue, and stabbed her in the chest with knives approximately ten times. (R1444) He picked the baby up and ran with her for awhile, then dropped her on the sidewalk and fled the scene. (R1444) The police arrived and had the baby transported to the hospital, where she died in the emergency room that same evening. (R1444) Sweeney saw Appellant sitting with a detective that night; Appellant was crying. (R1447-1448)

Approximately five years after Appellant's arrest for murder, Sweeney saw Appellant walking in a crowd at the New Haven Coliseum and detained him to ascertain what Appellant was doing out

of prison. (R1445-1446) Sweeney asked why Appellant had received such a light sentence, and Appellant explained that the mother of the child had pled on his behalf. (R1447) Appellant also told Sweeney that the reason he killed the child was that her mother was not taking caring of her properly. (R1447)

Dr. Joan Wood, who had already testified at guilt phase, was the only other State witness at penalty phase. (R1449-1458) She gave some further detail concerning the injuries Littlefield received. (R1450-1458) All the wounds to his head were to the front one-half of the head. (R1456-1457) This indicated essentially a face-to-face position between Littlefield and the person who assaulted him. (R1456-1457) Dr. Wood opined that it would have taken at least a few minutes to inflict all the head injuries to Littlefield. (R1450) He was alive, although not necessarily conscious, through all the blows. (R1452-1453, 1455, 1457) Dr. Wood did not know the chronological order of the blows, except that the defensive wounds clearly had to be created before Littlefield received the first blow which fractured his skull and rendered him unconscious. (R1457-1458)

Appellant was the sole defense witness at penalty phase. (R1459-1475) He was born in New Haven, Connecticut in 1948, and had 13 brothers and sisters. (R1459-1460) His mother died when Appellant was five, and he and his siblings were taken away from their father by the State. (R1460) Appellant and his sister went to the Connecticut State Receiver Home, while his other brothers and sisters were placed in separate homes. (R1460) Appellant

stayed there for about five years, and endured horrifying experiences. (R1461) He did not know why he was being detained, and was trying to get back home to his father. (R1461) He and his sister were rejected, and subjected to all kinds of abuse that one can think of. (R1461)

Appellant was eventually transferred because of his age to the Children's Center of Connecticut in Hamlin. (R1461-1462) His sister did not go with him. (R1462) Appellant had not seen his father or his brothers and other sisters during all the years he was at the State Receiver Home. (R1462) At the Children's Center, one had to fight, and only the strong survived. (R1462) Appellant spent about two years there. (R1462)

When he was still under 16, Appellant went to the boy's school in Maryton, Connecticut. (R1462) He was sent there because the State could not place him anywhere else. (R1463) There Appellant really found out that he could fight and defend himself. (R1463) The boys would take the new people coming in and assault and rape them, and that happened to Appellant. (R1463) He was in the boy's home for approximately five years. (R1463) He finally went home with his father, whom he had not seen during all those years of being institutionalized. (R1463)

Appellant did not learn any skills whatsoever when he was in the institutions. (R1464) When he came of age Appellant worked as a laborer in the construction field. (R1464) He was in the army for three and one-half to four years, receiving an undesirable

discharge because he had a problem following the rules and was unable to adapt to military service. (R1464, 1469)

Appellant testified that he did not commit the robbery or the aggravated assault about which Detective Sergeant Sweeney testified. (R1464-1465)

Appellant acknowledged the manslaughter conviction and described some of the circumstances surrounding the killing of his 22 month old daughter. (R1465-1467, 1469-1473) Appellant met Deborah Barr, the child's mother, when Appellant got out of the army. (R1465) They lived together for five years. (R1465) Appellant was working at Sergeant Locksmith Company with his father, learning to be a tool and die maker. (R1465) There came a time when Appellant and Deborah parted company, but Appellant did not know exactly what year that was. (R1465-1466) She attained the baby from Appellant's custody at gunpoint and began abusing her, putting cigarettes out on her body, etc. (R1466, 1472) Appellant called the child abuse service, but they would never allow him to have his daughter. (R1466) Appellant suffered a "mental lapse," and stabbed and killed his daughter, although he did not remember the killing. (R1466, 1469-1470) During his trial for that offense, Appellant entered a plea of manslaughter pursuant to a plea bargain (which the State violated). (R1466-1467) Appellant was sorry for what happened in New Haven. (R1467) He was aware of the burden of taking a human life every day of his life. (R1467)

After the State cross-examined Appellant, he sought and received permission to address the jury. (R1473-1474) He said that he did not kill Charles Littlefield, but was prejudiced by his past manslaughter conviction, and was pleading for his life because he wanted to live. (R1474-1475)

Following Appellant's testimony, the court ruled that the State had not proven Appellant's alleged robbery and aggravated assault convictions beyond a reasonable doubt, and instructed the jury that he was removing those offenses from their consideration. (R1487)

V. Presentence Hearing and Sentencing

A hearing was held before Judge Mills on June 26, 1989 at which the court and counsel took up Appellant's motion for arrest of judgment and amended motion for new trial, and considered certain matters pertaining to sentencing. (R1532-1572) The court expressed reservations about one aspect of the evidence in this case, namely, that no blood was found on Appellant's clothing, and Dr. Wood had testified that Charles Littlefield's assailant would have been spattered with blood. (R1541-1547) He indicated that he believed the evidence was sufficient for the jury to find Appellant guilty (R1545), but proposed bringing Charles Littlefield's wife and sister-in-law in for them to view Appellant's clothing that was introduced into evidence during the defense case and state with certainty whether this was indeed the clothing Appellant was wearing on the night in question. (R1545-1547) The State objected to this as not being an appropriate matter for the court to

consider in his sentencing determination. (R1547-1550, 1555-1556, 1558-1559)

At the sentencing hearing of June 30, 1989 Judge Mills announced that, although he remained troubled by the lack of blood on Appellant's clothing, he was persuaded by the Amos Lee King case that he was not permitted to be influenced by residual doubt in his sentencing decision, and he would not pursue the matter further. (R1580-1584, 1605)

In his oral recitation of the aggravating circumstances he found applicable to Appellant's case, the court discussed several offenses and the circumstances surrounding them as they appeared from the presentence investigation report prior to announcing his decision to sentence Appellant to death. (R1600-1602)

SUMMARY OF THE ARGUMENT

I. Appellant's constitutional rights were violated by the State's peremptory excusal of the sole black prospective juror on the panel without legitimate, race-neutral, record-supported reasons being given for the juror's exclusion. The trial court's incorrect belief that Appellant needed to show a pattern of exclusion of black jurors by the State led the court to abdicate his duty to critically examine the reasons asserted by the prosecutor for his apparently racially-motivated use of a peremptory challenge.

II. When Appellant sought to discharge his court-appointed counsel, the court below conducted inadequate inquiries into the reasons behind Appellant's dissatisfaction with his lawyers. Furthermore, the court failed to conduct a Faretta hearing when Appellant invoked his right to represent himself.

III. The trial court improperly limited Appellant's right to testify in his own defense when he denied Appellant's request to "say something to the courtroom" after Appellant was cross-examined. Although defense counsel chose not to pursue any redirect examination, the right to testify was personal to Appellant, and should not have been cut off in this manner.

IV. The court below failed to grant Appellant adequate relief when Rita Littlefield, wife of the victim herein, testified that Appellant wanted to sleep with another man's wife. Although the court sustained a defense objection, this testimony was so

highly inflammatory that only a mistrial or, at the very least, a curative instruction could have remedied its sinister influence.

V. The evidence did not support the giving of an instruction on robbery as an aggravating circumstance. As the trial court even acknowledged, the evidence was at least as consistent with the hypothesis that the small amount of money and two cheap lighters removed from Charles Littlefield's body were taken merely as an afterthought as it was with the hypothesis that robbery was a motive for the homicide.

VI. The sentencing court improperly considered convictions and circumstances of offenses set forth in the presentence investigation report in finding that Appellant had previously been convicted of a felony involving violence to the person. The court also may have been influenced in his decision to sentence Appellant to death by unsubstantiated allegations appearing in the PSI that Appellant had killed other people, but not been convicted.

VII. The especially heinous, atrocious or cruel aggravating circumstance, as applied, does not genuinely limit the class of persons eligible for the death penalty. This aggravator has not been applied in a rational and consistent manner by the Court. Juries are provided with inadequate guidance to enable them to separate the murders which qualify as especially heinous, atrocious or cruel from those which do not.

ARGUMENT

ISSUE I

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

During selection of the jury that was to try Appellant,[6] the prosecutor exercised two of his peremptory challenges to excuse prospective jurors Karen Currens and Almeith Brazell, whereupon the following discussion took place among the court and counsel for the State and counsel for the defense (R884-885):

> MR. MARTIN [defense counsel]: Judge, I feel I need to perfect the record with regard -- I believe it's Neal, that's the case with regard to the challenge because of the race factor, so I would ask you to inquire of the State their reasons for challenging this lady. She is the only black that's up there.
>
> THE COURT: At this point, since you are correct in saying she is the only lady of that race to be up there, it's obvious that no kind of pattern has been established at this point. I think it would be safer, for the purposes of the record, if the State would make an announcement as to what the basis would be.
>
> MR. HEYMAN [prosecutor]: I know there is not a pattern shown. First of all, her age. I am not quite sure -- I didn't make a notation. She said -- has indicated that a relative or a family member was accused of a crime. That's all I have at this stage. I am not picking on her because she is black. Actually, for the record, there are too many women up there. I am going to pick -- take a younger woman off the jury.

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[6] Appellant is a black man. (R1, 835, 848)

MR. MARTIN: We have twelve challenges?

THE COURT: Ten.

MR. MARTIN: I am asking for twelve, but we will cross that bridge when we come to it. And I hope that we don't.

THE COURT: I don't think there is any basis for me to make a finding right now. I don't think there is a basis for me to find it's a racially motivated challenge. There may become such a basis and I will hold the door open. Right now, I don't think I can make that.

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

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

Before Batson, however, this Court recognized that racially discriminatory use of the peremptory challenge is inimical to the Florida Constitution. State v. Neil, 457 So.2d 481 (Fla. 1984). The Court set forth in Neil the procedure to be followed when one a party believes the other party is exercising his peremptory challenges to exclude members of a particular race:

> A party concerned about the other side's use of peremptory challenges must make a timely objection [footnote omitted] and demonstrate on the record that the challenged persons are members of a distinct racial

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

457 So.2d at 486-487.

Any doubt about whether the complaining party has met his initial burden under Neil must be resolved in that party's favor. State v. Slappy, 522 So.2d 18 (Fla. 1988); Tillman v. State, 522 So.2d 14 (Fla. 1988). Here, the striking of the sole black member of the jury panel, who had not demonstrated that she would be partial or unfair, raised the strong likelihood that the juror was rejected on racial grounds and shifted the burden to the State to

show otherwise. Parrish v. State, 540 So.2d 870 (Fla. 3d DCA 1989); Timmons v. State, 548 So.2d 255 (Fla. 2d DCA 1989). See also Blackshear v. State, 521 So.2d 1083 (Fla. 1988).

Appellant was not required to demonstrate, as the trial court and prosecutor seemed to think, that the State was engaged in a pattern of systematic exclusion from the panel of all members of a distinct racial group. The issue where a Neil challenge is raised is whether any prospective juror has been excused because of his or her race, and the striking of a single black juror because of race is unconstitutional. Slappy; Tillman; Thompson v. State, 548 So.2d 198 (Fla. 1989); Mitchell v. State, 548 So.2d 823 (Fla. 1st DCA 1989); Mayes v. State, 550 So.2d 496 (Fla. 4th DCA 1989).

The court's refusal to find that the prosecutor's challenge was racially motivated, while holding the door open to possibly make such a finding as voir dire progressed, was similar to the error the court committed in Smith v. State, 15 F.L.W. D1821 (Fla. 2d DCA July 11, 1990). In Smith the trial court refused to inquire into the State's reasons for peremptorily excusing three of the four black prospective jurors from the panel because no "systematic exclusion" had been shown, but indicated that he would inquire if the remaining black juror should be challenged by the State. The Second District Court of Appeal reversed due to this "inquiry deficiency." 15 F.L.W. at D1821. Here the court was waiting for a pattern of excluding black people from the jury to emerge, but the need for a full Neil inquiry arose even without such a pattern.

The court's misunderstanding of the ramifications of the prosecutor's removal of the sole remaining black prospective juror accounts for the court's failure to critically evaluate the reasons the prosecutor gave for his action to ascertain whether these reasons were racially-neutral, reasonable, and supported by the record, as the court's duty required. Tillman; Mitchell; Timmons. See also Knowles v. State, 543 So.2d 1258 (Fla. 4th DCA 1989); Parrish (failure to conduct full Neil inquiry after defendant demonstrates likelihood of racial bias reversible error). The court merely called upon the prosecutor to state his reasons because it was "safer, for purposes of the record," without any follow-up questioning of either the prosecutor or the prospective juror whom he removed. It thus appears that the court below, as did the trial judge in Slappy and Roundtree v. State, 546 So.2d 1042 (Fla. 1989), mistakenly believed he was bound to accept the State's explanation at face value.

Although it is not crystal clear from the record, it appears that Almeith Brazell was the black juror whom the prosecutor excused peremptorily. Appellant raised the Neil issue immediately after the State exercised its challenge of her. (R884) The prosecutor floundered around a bit, but more or less articulated three reasons for excusing Brazell, apart from her race: her age, the fact that she said a relative or family member was accused of a crime, and the fact that there were too many women on the jury. (R885) Brazell's age is not reflected in the record, but it is unclear how her age was relevant to the decisions Brazell would

have to make as a juror in Appellant's case. In Slappy this Court referred to several factors to consider in evaluating the legitimacy of the State's assertedly race-neutral reasons for removing black prospective jurors. The presence of one or more of these factors will tend to show that the State's reasons are not actually supported by the record or are an impermissible pretext. One factor cited in Slappy was that "the prosecutor's reason is unrelated to the facts of the case." 522 So.2d at 22. Here, Brazell's age was unrelated to the facts of the case. The prosecutor's statement that Brazell said that a relative or family member was accused of a crime is not supported by the record; she gave no such response during voir dire questioning. (R820-821, 840-842) Even if she had given such a response, again, the State did not show how this would relate to the facts of Appellant's case. The prosecutor seemed to settle on the fact that there were too many women on the jury as his primary reason for removing Brazell. However, at the time the prosecutor exercised his peremptory on Brazell, there remained nine white women on the jury panel who could have been excused, five of whom actually served on Appellant's jury. (R400, 781-884, 1416-1417, 1510-1511) (Another of this nine, Deborah Wood, was selected as the alternate juror. (R400, 935)) See Roundtree, 546 So.2d at 1045 (State's explanation that it struck black woman peremptorily because it preferred predominantly male jury inadequate where State accepted a number of white female jurors). In Slappy the Court noted that a peremptory challenge based on reasons equally applicable to jurors who were

not challenged renders the peremptory suspect. Here there were many white jurors who were female but were not challenged. And, once again, the State did not demonstrate how the jurors' gender was related to the facts of the case. Finally, to use a prospective juror's sex as a basis for removing her from the jury raises equal protection and fair-cross-section objections similar to those that arise when race is the criteria used for exclusion. See Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979); Amends. VI and XIV, U.S. Const.; Art. I, § 16, Fla. Const. In sum, then, the reasons the prosecutor gave for challenging the sole black person on the panel were not legitimate, race-neutral, record - supported reasons.

Because the reasons given by the prosecutor below for excusing the juror in question were inadequate, and the trial court demonstrated, at best, an incomplete understanding of the law in his failure properly to scrutinize those reasons, the manner in which Appellant's trial was conducted deprived him of the equal protection of the laws to which he was entitled, and did not afford him the trial by an impartial jury made up of a fair cross-section of the community which was guaranteed to him by the state and federal constitutions. Amends. VI and XIV, U.S. Const.; Art. I, § 16, Fla. Const. Appellant must be granted a new trial.

ISSUE II

THE COURT BELOW ERRED IN FAILING TO CONDUCT ADEQUATE INQUIRY INTO APPELLANT'S DISSATISFACTION WITH HIS COURT-APPOINTED COUNSEL AND IMPROPERLY DENIED APPELLANT'S RIGHT TO REPRESENT HIMSELF.

After the public defender's office and Attorney Frank Louderback withdrew from representing Appellant on the instant charge, Attorney James A. Martin was appointed by the court below on August 16, 1988 to undertake the representation. (R81) At least three times thereafter Appellant's dissatisfaction with the conduct of his defense manifested itself. In a letter to the clerk of the court dated September 26, 1988, which accompanied a pro se demand for speedy trial, Appellant complained about his lack of success in persuading his attorneys[7] to request a fast and speedy trial. (R164-166) Appellant's letter concluded with this request: "If my lawyer doesn't wish to go forward I would like to represent myself if at all possible and this is what I wish to know is it all possible." (R165)

On November 9, 1988 Appellant's court-appointed lawyers filed a motion to withdraw (R217), which was heard by the Honorable Mark R. McGarry on November 18, 1988. (R689-698) At the hearing James Martin told the court there had been no communication with Appellant. (R691) Appellant felt his counsel was in league with the State against him, and had no faith in their representation, and did not want them to represent him. (R691-692) Appellant

[7] Apparently, James Martin and another lawyer in his office, Thomas Tripp, were both working on Appellant's case.

acknowledged that Martin's comments were correct. (R692) He added that his lawyers only wanted to talk about a penalty phase of a trial. (R692) Appellant indicated that he wanted his former lawyer, Frank Louderback, to resume his representation. (R693) When the court asked Appellant if he felt he could handle his trial by himself, Appellant mentioned the possibility of retaining a "paid lawyer from the street" to represent him if he could obtain money from some people in Connecticut. (R693-695) The court told Appellant the lawyers he had "were as good as any two lawyers anywhere," and he was not going to let them withdraw. (R695-696) He gave Appellant 10 days to retain a lawyer, adding that if he was unable to do so, Appellant had "sure better start cooperating" with his court-appointed attorneys. (R696)

Finally, after penalty phase, but before he was sentenced, Appellant asked for "another counselor to be appointed" to represent him. (R1562-1563)[8] He asserted that he had not been given the opportunity to prove his innocence, and that not one of his witnesses had been called to the stand. (R1561-1562) He further claimed that the State's witnesses had committed perjury. (R1561) The court did not grant Appellant's request for a different attorney, noting that Martin's representation of Appellant was "pretty much at an end," and that Martin would not be handling Appellant's appeal. (R1563-1564)

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[8] Appellant apparently executed a written waiver of counsel form during a June 26, 1989 hearing dealing with presentence arguments and Appellant's motion for new trial (R1560), but this document does not appear in the record.

When a criminal defendant requests that his court-appointed counsel be discharged, the trial court must make a sufficient inquiry into the reasons for the request. Black v. State, 545 So.2d 498 (Fla. 4th DCA 1989); see also Scull v. State, 533 So.2d 1137 (Fla. 1988). In Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973) the court set forth the procedure the trial court must follow when an indigent accused seeks to dismiss his court-appointed counsel. The court first noted that "the right of an indigent to appointed counsel includes the right to effective representation by such counsel." 274 So.2d at 258. Accord: Chiles v. State, 454 So.2d 726 (Fla. 5th DCA 1984) ("It is well established that the right of an indigent to appointed counsel includes the right to effective representation by such counsel. [Citation and footnote omitted.]" 454 So.2d at 726.) The Nelson court then stated that where, as here, the defendant

> makes it appear to the trial judge that he desires to discharge his court appointed counsel, the trial judge, in order to protect the indigent's right to effective counsel, should make an inquiry of the defendant as to the reason for the request to discharge. If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed ade-

> quate time to prepare the defense. If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute. See Wilder v. State, Fla.App. 1963, 156 So.2d 395, 397. If the defendant continues to demand a dismissal of his court appointed counsel, the trial judge may in his discretion discharge counsel and require the defendant to proceed to trial without representation by court appointed counsel. See Cappetta v. State, Fla.App. 1967, 204 So.2d 913 for principles that should guide the court in the exercise of such discretion.

274 So.2d at 258-259. In Hardwick v. State, 521 So.2d 1071 (Fla. 1988) this Court specifically approved the procedure adopted by the Fourth District in Nelson.

The rather brief hearings of November 9, 1988 and June 26, 1989 failed to fulfill the requirements of Nelson. At the November 9 hearing judge McGarry made virtually no effort to ferret out the root causes of Appellant's dissatisfaction with the way in which he was being represented by questioning his attorneys or Appellant. Appellant obviously felt strongly that his lawyers were not doing an adequate job, as he was not communicating with them. Appellant's complaint that his counsel seemed to be preparing exclusively for a penalty phase went unexamined. The court made no specific ruling on whether Appellant's lawyers were rendering effective assistance to him, and indeed the court was in no position to make such a ruling because of the incomplete hearing

that was conducted, which was somewhat similar to the inquiry this Court found inadequate in Scull.

At the June 26 hearing Judge Stanley Mills essentially took the position that Appellant's complaints about his representation were irrelevant because that representation was almost over. The court ignored the fact that the crucial matter of whether Appellant would be sentenced to death or to life imprisonment had not yet been determined. Clearly, Appellant was entitled to competent representation in which he had confidence at the sentencing hearing as much as at the other parts of his trial.

Furthermore, even if the court below had made sufficient inquiries before refusing to grant Appellant's requests to dismiss his counsel, and had specifically found that counsel was rendering effective assistance to Appellant, this would not have ended the court's obligation. In Taylor v. State, 557 So.2d 138, 143 (Fla. 1st DCA 1990) the court reversed Taylor's first-degree murder conviction even though "the trial court made a sufficient inquiry into the reason Taylor desired to discharge his counsel and found that the attorney was rendering effective assistance in the case [footnote omitted]," because

> a determination of competency of counsel does not fully satisfy the duties imposed on the trial court. The trial judge erred in failing to advise Taylor that his attorney could be discharged but the state would not be required to appoint substitute counsel and that Taylor had the right to represent himself. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

557 So.2d at 143. See also Jones v. State, 449 So.2d 253 (Fla. 1984); Chiles; Hardwick (when defendant "attempts to dismiss his court-appointed counsel, it is presumed that he is exercising his right to self-representation. [Citation omitted.]" 521 So.2d at 1074).

Moreover, Appellant specifically invoked his right to represent himself months before his trial, in his letter of September 26, 1988 to the clerk of the circuit court. A criminal defendant has the right to dispense with the assistance of counsel and represent himself pursuant to Article I, Section 16 of the Florida Constitution (accused has right "to be heard in person, by counsel or both") and the Sixth Amendment to the United States Constitution. Smith v. State, 407 So.2d 894 (Fla. 1981); Jones; Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). A violation of the right to proceed pro se is inherently prejudicial. McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). "The right is either respected or denied; its deprivation cannot be harmless." 465 U.S. at 177 n.8, 79 L.Ed.2d at 133, n.8. Once Appellant expressed a desire to proceed on his own, it was incumbent upon the court to hold a hearing to determine whether Appellant was competent to represent himself, and to advise Appellant of the hazards of self-representation. Faretta; Hardwick; Johnston v. State, 497 So.2d 863 (Fla. 1986); Fla.R.Crim.P. 3.111(d)(3). Instead, Appellant's invocation of his right to act as his own attorney was ignored. The court's failure

to conduct a Faretta inquiry was reversible error. McKaskle; Hardwick; Smith v. State, 512 So.2d 291 (Fla. 1st DCA 1987).

Because the lower court did not adequately explore Appellant's requests that his court-appointed counsel be discharged, and that Appellant be permitted to represent himself, the proceedings below denied Appellant his right to the assistance of counsel and to due process of law consistent with Article I, Sections 9 and 16 of the Constitution of the State of Florida and the Sixth and Fourteenth Amendments to the Constitution of the United States. As a result, Appellant must be granted a new trial.

ISSUE III

THE TRIAL COURT ERRED BY CURTAILING APPELLANT'S RIGHT TO TESTIFY IN HIS OWN DEFENSE.

Appellant took the stand as the third and final defense witness. (R1261-1314) When the State completed its cross-examination, Appellant's counsel announced that he had no redirect. (R1314) Appellant then asked if he could "say something to the courtroom." (R1314) The court refused to allow this, noting that Appellant's attorney had elected not to ask any questions at that point. (R1315)

Appellant should have been permitted to complete his testimony, whether or not his lawyer chose to ask him any further questions.[9]

The right of every person accused of a crime to be heard in person, by counsel, or both, as guaranteed in Article I, Section 16 of the Constitution of the State of Florida, "is a mandatory organic rule of procedure in all criminal prosecutions in all courts of this State." Deeb v. State, 131 Fla. 362, 179 So. 894 (Fla. 1937). See also Johnson v. State, 380 So.2d 1024 (Fla. 1979). The right to testify in one's own defense is also secured by the Constitution of the United States, pursuant to the Due Process Clause of the Fourteenth Amendment, the Compulsory Process Clause of the Sixth Amendment, and the Fifth Amendment privilege against self-incrimination. Rock v. Arkansas, 483 U.S. 44, 107

[9] At penalty phase Appellant made a similar request to address the jury after the State completed its cross-examination, and the court allowed him to do so. (R1473-1475)

S.Ct. 2704, 97 L.Ed.2d 37 (1987). In Rock the Court emphasized the fundamental nature of the "accused's right to present his own version of events in his own words," 97 L.Ed.2d at 47, and noted that "the most important witness for the defense in many criminal cases is the defendant himself." 97 L.Ed.2d at 46. For these reasons the State may not enforce a rule which permits a witness to take the stand, but excludes material portions of his testimony. Rock, 97 L.Ed.2d at 48. The action of the court below deprived Appellant of his full right to testify, consistent with these constitutional principles.

The fact that Appellant's counsel, with whom Appellant was at odds throughout the proceedings below (please see Issue II herein), declined to question Appellant further on redirect is of no moment. The right to testify fully was a right personal to Appellant; only he, not his lawyer, could waive that right. In Rock the Court stated that it had recognized in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) that the Sixth Amendment grants to the accused personally the right to make his defense, and went on to say that the right of the accused to testify is even more fundamental to a personal defense than the right of self-representation discussed in Faretta. 97 L.Ed.2d at 46-47. And in Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), the Court wrote:

> the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.

463 U.S. at 751 (emphasis supplied). See also People v. Curtis, 681 P.2d 504 (Colo. 1984); State v. Neuman, 371 S.E.2d 77 (W.Va. 1988).

The trial court should have allowed Appellant to speak his piece. Because he did not, Appellant was deprived of a fair trial. He must receive a new one.

ISSUE IV

THE COURT BELOW ERRED IN REFUSING TO GRANT A MISTRIAL OR GIVE A CURATIVE INSTRUCTION TO THE JURY WHEN STATE WITNESS RITA LITTLEFIELD GAVE IRRELEVANT, HIGHLY PREJUDICIAL TESTIMONY.

During her testimony on direct examination, Rita Littlefield, wife of the victim herein, said that Appellant came to the apartment he shared with the Littlefields about 8:30 p.m. on April 11, 1988. (R1005) He had a man and a woman and a child with him. (R1005) Appellant "wanted them to stay the night so he could sleep with ... that guy's old lady." (R1005-1006) When Littlefield gave this testimony, defense counsel immediately objected, and moved for a mistrial and a curative instruction. (R1006) The court sustained the objection, admonishing the prosecutor to "[g]et back on something relevant again,"[10] but did grant any further relief. (R1006-1007)

Relevance is the basic test for evidentiary admissibility. § 90.402, Fla. Stat. (1989); Craig v. State, 510 So.2d 857 (Fla. 1987). To be relevant, evidence must prove or tend to prove a fact in issue. Stano v. State, 473 So.2d 1282 (Fla. 1985). The testimony offered by Littlefield clearly failed this most basic test for admissibility, and the trial court correctly sustained Appellant's objection. However, Littlefield's allegation that Appellant desired to commit formication with another's man's wife

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[10] This was not the first time during Appellant's trial that the court had to admonish the prosecutor not to dwell on irrelevant matters. Earlier he had elicited the fact that Rita Littlefield was pregnant at the time of her husband's death. (R998) The court directed the prosecutor not "to go into it any more." (R1003-1004)

was the type of highly inflammatory testimony that required more than the sustaining of an objection. This testimony cast Appellant in a bad light before the jury by portraying him as a person of low moral character. It was particularly critical here that the jury not be permitted to consider such an irrelevant matter, as Appellant would be taking the stand in his own defense at both the guilt and penalty phases, and the jury would thus be called upon to assess his credibility. Any suggestion of a character defect could have caused the jury to give Appellant's testimony less credence than they otherwise would have given it. At the very least, therefore, the jury should have been instructed to disregard Rita Littlefield's improper testimony. The court's failure to grant Appellant's request to so charge the jury deprived him of a fair trial, and he must be granted a new one.

ISSUE V

THE COURT BELOW ERRED IN INSTRUCTING APPELLANT'S JURY AT PENALTY PHASE THAT THEY COULD CONSIDER IN AGGRAVATION THAT THE HOMICIDE WAS COMMITTED DURING A ROBBERY.

At the guilt phase of Appellant's trial, the court instructed the jury on first degree felony murder, with robbery as the underlying felony, over Appellant's objection that the evidence did not support the giving of this instruction. (R1332-1333, 1392-1393)

At penalty phase the court instructed the jury that they could consider as an aggravating circumstance that the homicide for which Appellant was to be sentenced

> was committed while he was engaged in or an accomplice in the commission, or an attempt to commit, or flight after committing or attempting to commit the crime of robbery.

(R1501)

The evidence adduced at Appellant's trial did not support the submission of this aggravating circumstance to the jury. The evidence suggested that the motive for the killing of Charles Littlefield was not robbery, but a rage that grew out of the argument between Littlefield and Appellant. As Appellant lived with Littlefield, he must have known he was not a man of means,[11] and robbing him would yield little of value. Apparently, the only things taken from Littlefield were two cheap disposable butane lighters and fourteen dollars in cash; his watched remained on his

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[11] Littlefield worked at K-Mart. (R998)

wrist and his keys were still on him. (R973, 1192) Here, as in Rhodes v. State, 547 So.2d 1201 (Fla. 1989) there was no evidence presented to show that the reason Appellant killed Littlefield was to obtain his property or that he possessed the requisite intent to deprive Littlefield of his property at the time of the murder. 547 So.2d at 1207. From all that appears from the evidence, the items taken were removed as a mere afterthought following the homicide. See Hill v. State, 549 So.2d 179 (Fla. 1989) and Scull v. State, 533 So.2d 1137 (Fla. 1988) (pecuniary gain aggravator not established where other motive for murder may have existed and victim's property possibly taken only as afterthought). Indeed, the court below specifically ruled out robbery or any type of pecuniary motive for the homicide in his oral remarks at Appellant's sentencing hearing (R1603), as well as in his written sentencing order, in which he wrote (R489):

> (d) Although the State asserts that the crime in question was committed while the defendant was engaged in the commission of or an attempt to commit the crime of robbery, and although there is evidence that a small amount of money and some inexpensive lighters were removed from the victim's body, the Court does not find that this aggravating factor has been established to the extent of the high burden required of the State. The facts are equally consistent with the items being removed from the deceased as an afterthought following the murder.

Elimination of the robbery aggravator leaves two aggravating circumstances remaining (previous conviction of a violent felony and especially heinous, atrocious or cruel), offset

by one mitigating circumstance (Appellant's terrible childhood and adolescence). One cannot tell with certainty whether Appellant's jury would have returned a death recommendation if they had not been permitted to consider this unsupported aggravating factor during their deliberations. The jury's sentencing recommendation, and the sentence of death based partly thereupon, are therefore not sufficiently reliable to pass constitutional muster under the Eighth and Fourteenth Amendments. Appellant must receive a new sentencing proceeding before a new jury which is permitted to consider only proper aggravating circumstances.

ISSUE VI

> IN FINDING THAT APPELLANT HAD PREVIOUSLY BEEN CONVICTED OF A FELONY INVOLVING VIOLENCE AND SENTENCING APPELLANT TO DEATH, THE COURT BELOW IMPROPERLY CONSIDERED CONVICTIONS AND CIRCUMSTANCES NOT PROVEN BEYOND A REASONABLE DOUBT, AND MAY HAVE CONSIDERED OTHER OFFENSES FOR WHICH APPELLANT WAS NOT CONVICTED.

In his written finding that Appellant had previously been convicted of a violent felony, the court below stated (R486-487):

> It is uncontradicted that the defendant has previously been convicted of a previous felony involving the use of extreme violence to another human being. In particular, the State has established beyond any reasonable doubt and the defendant has admitted that he brutally stabbed his own baby daughter to death in the State of Connecticut in 1978. Although pale by comparison to the offense previously mentioned, the Pre-sentence Investigation prepared by the Department of Corrections also reveals that the defendant has previously been convicted of two robberies with violence in the State of Connecticut, an assault with intent to kill, another assault wit intent to kill, a B & E with violence, and two counts of aggravated assault. Although these charges are all serious charges involving violence against persons, the Court finds that the defendant's brutal slaying of his own infant daughter is sufficient, in and of itself, to support finding that the defendant has been previously convicted of another felony involving the use of violence to the person.

At the sentencing hearing of June 30, 1989, the court orally elaborated further upon Appellant's past record and the

supposed circumstances of previous offenses Appellant committed (R1600-1601):

> First of all, it has rather clearly been established you have been convicted of a previous crime involving the use of violence against a person. That, as I think you even said in your testimony, was a particularly heinous offense involving the use of extreme violence.
>
> There are a good many others. Frankly, I don't think it is necessary for me to rely upon them. In looking for a record in the presentence investigation, it starts in 1964. I have not bothered to recite the smaller items.
>
> However, the high or low points, depending on your point of view, included situations of robbery with violence, two of those.
>
> Resisting a police officer. Assault with intent to kill. Assault with intent to kill, again. Risk of injury to a minor. Beating with violence.
>
> Two counts of aggravated assault. Finally, the murder charge, which was ultimately reduced in the State of Connecticut to manslaughter.
>
> Perhaps an even greater detail is the presentence investigation that was prepared in the State of Connecticut, which sets forth some of these offenses in greater detail.
>
> The August 8, 1968 incident involving aggravated robbery was one which was described as you having kicked the victim in the groin and mouth, breaking dentures, before taking out a sharp instrument and cutting the left side of his face severely, requiring forty to forty-five stitches.

> Another incident involving burglary and assault, involved you -- according to the presentence investigation -- forcibly entering the home of one Clementina Hobby (phonetic), and taking a fifteen year old boy, Conrad Hobby (phonetic), and punching him about the face. You attempted to throw him out of the window.
>
> When the police arrived, according to this, they found you choking Clementina with a knife in your hand.
>
> There is another incident here involving the threatening of one Jenny Nesbitt (phonetic) with a gun, and actually firing a shot at her from a gun you carried on your person.
>
> So, I think it is simply without question that particularly aggravated circumstances have been found to exist. Much of it from your testimony, frankly.

In Barclay v. State, 470 So.2d 691 (Fla. 1985) and Williams v. State, 386 So.2d 538 (Fla. 1980) this Court held that information contained in a presentence investigation report cannot supply the proof beyond a reasonable doubt needed for the sentencing court to find that the defendant has a previous conviction for a violent felony. Here the State established only the manslaughter conviction at the penalty phase of Appellant's trial.[12] All the other offenses and circumstances the court discussed were gleaned

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[12] The State attempted to prove that Appellant had been convicted of a robbery and an aggravated assault in Connecticut, but the trial court ruled that proof on these offenses insufficient for them to be considered by the jury. (R1440-1442, 1464-1465, 1476-1487)

from the PSI, and it was improper for the court to consider them. Although the court sought somewhat to downplay his reliance upon the matters he culled from the PSI, his rather extensive discussion of them clearly shows that they did play a role in the sentencing process.

Furthermore, the PSI contained even more damaging information that may have improperly been considered by the sentencing court. There are at least three references to Appellant allegedly having admitted that he killed other people without being convicted. (R454, 480, 482) Although the court did not specifically indicate that he considered these admissions, he did read the PSI (R1584), and two of the references in the PSI were highlighted (R454, 480), thus suggesting that the court was aware of them. It is proper for the court to consider only convictions, not mere accusations, in aggravation. Provence v. State, 337 So.2d 783 (Fla. 1976). Clearly, this type of unsubstantiated allegation, that Appellant had killed others, could be highly prejudicial and cause the trial court to opt for a death sentence if he gave the allegation any credence whatsoever. See Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988) (life override affirmed where appellant had previous conviction for homicide in California).

Both the improper matters that we know the court considered, as well as what the court may have considered, undermine confidence in the reliability of the court's determination to sentence Appellant to death. Appellant's sentence must therefore be vacated and this cause remanded for a new sentencing

proceeding. Art. I, §§ 9 and 17, Fla. Const.; Amends. VIII and XIV, U.S. Const.

ISSUE VII

APPELLANT'S DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE IS APPLIED ARBITRARILY AND CAPRICIOUSLY AND DOES NOT GENUINELY LIMIT THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.

The court below instructed Appellant's jury on the aggravating circumstance set forth in section 921.141(5)(h) of the Florida Statutes as follows (R1501):

> Third, the crime for which the defendant is to be sentenced was especially, [sic] wicked, evil, atrocious, or cruel.

This instruction tracked the language found at page 79 of the Florida Standard Jury Instructions in Criminal Cases.

The court found the especially heinous, atrocious or cruel aggravating circumstance applicable to the crime for which Appellant was convicted, and used it to support imposing a sentence of death upon Appellant. (R487-488, 1602-1603)

In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the United States Supreme Court upheld Florida's death penalty statute against an Eighth Amendment challenge, indicating that the required consideration of specific aggravating and mitigating circumstances prior to authorization of imposition of the death penalty affords sufficient protection against arbitrariness and capriciousness:

> This conclusion rested, of course, on the fundamental requirement that each statutory aggravating circumstance must satisfy a constitutional

> standard derived from the principles of Furman itself. For a system "could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur." 428 U.S. at 195 n. 46, 49 L.Ed.2d 859, 96 S.Ct. 2909. To avoid this constitutional flaw, an aggravating circumstance must genuinely limit the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235, 249-250 (1983) (footnote omitted). As it has been applied, however, Florida's especially heinous, atrocious or cruel aggravating factor has not passed constitutional muster under the above-stated principles, as it has not genuinely limited the class of persons eligible for the ultimate penalty. This fact is evidenced by the inconsistent manner in which this Court has applied the aggravator in question, and by the lack of guidance provided to juries who are called upon to consider its application in a specific factual setting.

Deaths by stabbing provide but one of many examples which could be cited of the Court's failure to apply the section 921.141(5)(h) aggravating circumstance in a rational and consistent manner. In cases such as Nibert v. State, 15 F.L.W. S415 (Fla. July 26, 1990), Mason v. State, 438 So.2d 374 (Fla. 1983), and Morgan v. State, 415 So.2d 6 (Fla. 1982), the Court has approved

findings of especially heinous, atrocious or cruel where the deaths resulted from stabbings. In Wilson v. State, 436 So.2d 908 (Fla. 1983), however, a killing that resulted from a single stab wound to the chest was held not to be especially heinous, atrocious or cruel. In Demps v. State, 395 So.2d 501 (Fla. 1981) the victim was held down on his prison bed and knifed. Even though he was apparently stabbed more than once (the opinion refers to "stab wounds" (plural) 395 So.2d at 503), and lingered long enough to be taken to three hospitals before he expired, this Court nevertheless found the killing not to be "so 'conscienceless or pitiless' and thus not 'apart from the norm of capital felonies' as to render it 'especially heinous, atrocious, or cruel' [citations omitted]." 395 So.2d at 506. See also opinion of Justice McDonald concurring in part and concurring in the result in Peavy v. State, 442 So.2d 200 (Fla. 1983) (simple stabbing death without more not especially cruel, atrocious, and heinous). (For other examples of how various aggravating circumstances have been applied inconsistently, please see MELLO, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death - Eligible Cases Without Making It Smaller, XIII Stetson L. Rev. 523 (1983-84). The result of the illogical manner in which the section 921.141(5)(h) aggravator has been applied is that sentencing courts have no legitimate guidelines for ascertaining whether it applies. Any killing may qualify, and so the class of death-eligible cases has not been truly limited.

The problem is even more acute when one examines the way juries are instructed. In State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) this Court at least attempted to provide a narrowing construction of section 921.141(5)(h) by defining the terms contained therein as follows:

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

Presumably, sentencing courts are aware of Dixon. Juries are rarely informed of the definitions contained therein. Most juries, like that which recommended death for Appellant, are given only a vague instruction (the standard) which could be thought applicable to any murder, and does not adequately define the section 921.141(5)(h) aggravating circumstance.

In Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), the United States Supreme Court held that the Oklahoma aggravating circumstance "especially heinous, atrocious, or cruel" was unconstitutionally vague under the Eighth Amendment, United States Constitution because this language gave the sentencing jury no guidance as to which first degree murders

met these criteria. Consequently, the sentencer's discretion was not channeled to avoid the risk of arbitrary imposition of the death penalty. See also Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (aggravating circumstance of "outrageously or wantonly vile, horrible, and inhuman" too subjective). The jury instruction given by the court below provided no more guidance to Appellant's jury than the Oklahoma statute in Cartwright. A reasonable juror might well have concluded from the instruction that the heinous, atrocious, or cruel aggravator applied to all murders.

In Oklahoma, unlike Florida, capital juries are the sentencers and they must make written findings of which aggravating factors they found. In Florida, on the other hand, the jury's recommendation is advisory and no findings with regard to the aggravating factors weighed by the jury are made. We simply do not know in the case at bar whether all of the jurors found Appellant's crime especially heinous, atrocious, or cruel, whether none of them did, or whether the jury split on the applicability of this aggravator. What can be said is that there is a reasonable probability that some of the jurors found this circumstance proved and joined in the recommendation of death. Had the jury been properly instructed concerning the limiting construction given to this aggravating factor, there is a reasonable possibility that fewer jurors would have found it applicable, and a life recommendation might have been the result.

For this reason, Appellant's death sentence is unreliable under the Eighth and Fourteenth Amendments, United States Constitution. Although a Florida jury's sentence recommendation is advisory rather than mandatory, it can be a "critical factor" in whether a death sentence is imposed. LaMadline v. State, 303 So.2d 17 at 20 (Fla. 1974). In Valle v. State, 502 So.2d 1225 (Fla. 1987), this Court held that a defendant must be allowed to present all relevant mitigating evidence to the jury in his effort to secure a life recommendation because of the great weight the sentence recommendation would be given. The corollary to this proposition is that the jury must not be misled into thinking that an aggravating circumstance applies because that circumstance was not properly defined to them. In either case, there is a likelihood of an erroneous death recommendation.

In Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), the Supreme Court of the United States noted:

> If a state has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not. [Citations omitted.]

82 L.Ed.2d at 352. In the Florida scheme of attaching great importance to the jury's penalty recommendation, it is critical that the jury be given adequate guidance so that its recommendation is rational and can appropriately be given the great weight to which it is entitled. If, as here, the jury is not given adequate

instructions to define and narrow the aggravating circumstances, its penalty verdict may be based on caprice or emotion at worst, or an incomplete understanding of applicable law at best. The resulting sentence which leans heavily upon the jury's recommendation for support will then lack the rational basis mandated by the United States Constitution. See Amends. VIII and XIV.

Appellant is aware that this Court rejected arguments similar to those set forth herein in Smalley v. State, 546 So.2d 720 (Fla. 1989) and Occhicone v. State, 15 F.L.W. S531 (Fla. Oct. 11, 1990), but asks the Court to reconsider these important constitutional issues.

CONCLUSION

Roosevelt Bowden's rights under the Florida and United States Constitutions were violated by the manner in which the proceedings below were conducted. He prays this Honorable Court to reverse his conviction and sentence for first-degree murder and remand this cause with directions that Appellant be afforded a new trial. In the alternative, Appellant asks the Court to reverse his death sentence and remand for a new penalty proceeding before a jury, or resentencing by the court, as appropriate.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 31st day of October, 1990.

Respectfully submitted,

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