IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,411

HENRY GARCIA,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA

BRIEF OF APPELLANT

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INTRODUCTION

Appellant was the defendant in the trial court and Appellee was the prosecution. The parties will be referred to in this brief as "Defendant" and "the State." The symbol "R" will constitute a reference to the record on appeal. The symbol "T" will constitute a reference to the transcript of proceedings. The symbol "T" followed by a date will constitute a reference to the transcript of proceedings on that date in 1991. For instance, the symbol "T 5/20" will constitute a reference to the transcript of proceedings occurring on May 20, 1991.

STATEMENT OF THE CASE AND FACTS

Defendant was charged with the murder of Julia Ballentine, the murder of Mabel Avery, sexual battery "by forcibly inserting a penis and/or some other object into the vaging" of Julia Ballentine and burglary by "remaining" in the home of Ballentine and Avery with the intent to commit sexual battery and/or theft (R 1-3).

Defendant's initial trial ended in a mistrial (T 499). He was convicted of the four offenses in a second trial and sentenced to death as to each of the murder charges, but those convictions and sentences were reversed by this court. Garcia v. State, 564 So.2d 124 (Fla. 1990). In Defendant's third trial, which gives rise to the present appeal, Defendant was again convicted of the four charges. Despite the fact that the jury recommended a life sentence for the murder of Mabel Avery and a death sentence for the murder of Julia Ballentine (T 5/28 75), the court, finding four aggravating circumstances and no mitigating circumstances as to each murder, imposed a sentence of death for **each** killing (R 188-195). Acting on the State's request, the court enhanced the sentences for sexual battery and burglary, imposing consecutive life sentences on those charges (R 193).

The evidence at trial demonstrated that on the evening of January 16, 1983, or the morning of January 17, 1983, Ballentine, 90, and her sister, Avery, 86, were stabbed to death in the home they shared. Ballentine received 30 stab wounds (T 688), nine of them defensive (T 696), while Avery received 14 stab wounds (T 644), nine of which were defensive (T 645). In the rear of the victims' home, a screen had been slashed and glass and a door were broken (T 411). The sound of the glass breaking was heard by a neighbor (T 5/20 7-8). No eyewitnesses or physical evidence tied Defendant to the crime.

The only testimony as to the sexual battery charge was the following testimony of Dr. John Marraccini (T 699).

> Q. Would you enumerate, for the members of the jury, how many circumstances you encountered during the autopsy which suggested to you that she had been sexually assaulted?
> A. Well, she had a variety of injuries. She had a bruise on her labia, which are the folds in the outer genital area.
> She had an abrasion going around the back of the vagina, near the

entrance part of the vagina.

She had an anal laceration that was about an eighth of an inch long in the anal canal, and there was also hemorrhage in this area, indicating that her blood pressure was there.

She was alive when these injuries were inflicted.

So all these things taken together are a clear indication of a sexual battery having occurred.

The doctor then went on to testify that the injury in the anal area was more suggestive of having been inflicted with a knife than the injuries to the other areas (T 699-700). The other injuries, the doctor stated, looked as though they could have been done with a variety of objects "not particularly typical of a penis, but rather fingers or something else (T 700)."

Sgt. Anne Gribbons testified that she did not observe a purse or wallet in either of the victims' bedrooms (T 446). Crime scene investigator Dave Gilbert testified that the police did not find in the victims' home any pocketbooks, purses, change purses, wallets, powder cases, lipsticks, credit cards, social security cards, Medicare cards or prescription cards (T 542-543). He did not testify that no cash was found. Det. John LeClair, one of the co-lead detectives, stated that he had made no effort to find any personal property of the victims and that he did not know it the victims had any credit cards (T 5/21 78). There was no indication that any searching for valuables occurred in the victims' house (T 476, 557). There was no evidence that anything was taken from the house.

On the evening that the killings occurred, Defendant was supposed to go on a date with a woman named Marylou (T 739). When he arrived for the date, he found Marylou with her old boyfriend (T 740) and became mad and upset (T 740). As a result, Defendant, who had consumed at least one beer shortly before his confrontation with Marylou (T 738), spent the evening with Feliciano Aguayo. Defendant drank more beer at a Circle K store (T 740), after which he and Aguayo went to the Sky Vista Amusement Center, where alcohol was sold (T 740). Although Aguayo did not remember whether Defendant had anything to drink there, it is clear that Defendant and Aguayo spent 30 to 40 minutes there, left to take Aguayo's mother somewhere, returned and stayed at the Sky Vista until about 11:00 p.m. (T 740-741). When they left, Aguayo dropped Defendant off at another bar, the Leisure Lounge (T 779).

At about 7:00 a.m. (T 608) the following morning, Defendant, still upset (T 743), appeared at Aguayo's house (T 743), which was located a half mile from the victims' house (T 5/20 45). Defendant had blood on his shirt, pants, shoes and forehead (T 607, 744). Defendant was in possession of a knife that was also bloody (T 750).

Defendant told Aguayo that he had been walking home from a bar when two men and a woman got out of a car and started beating him with a tire jack (T 746-747). Defendant indicated that in the struggle, he struck one of the men and stabbed the woman (T 747). Defendant also described the route he took to get to Aguayo's home (T 753-754).

Aguayo gave Defendant a ride home and on the trip, Defendant kept repeating, "I told them not to get me mad. I have this animal inside of me (T 755)."

Later that day, Aguayo and his mother, Elizabeth Feliciano, went to the corn field where Defendant said the attack had occurred, but saw no signs of a struggle (T 758).

LeClair spoke with Defendant on September 25, 1985 (T 5/21 10) and Defendant related the events of the evening in question in a manner similar to how he related them to Aguayo (T 5/21 25-31).

The State introduced a series of aerial photographs that had to be assembled together, a process that took 45 minutes to an hour (T 5/20 39-40) and that resulted in an end product that was so large that the courtroom was too small for it to be set up there, causing the trial to be shifted for a period to a larger courtroom (T 5/20 31).

Using the aerial photographs, LeClair testified to the routes referred to by Defendant in an effort to show that in light of the distances involved and the alternative routes available, it was improbable that Defendant would have proceeded in the manner he said he did (T 5/20 32-53; 5/21 6-46).

The State also presented the testimony of Rufina Perez-Cruz, who had worked with Defendant as a farm worker. Perez-Cruz testified that shortly after the killings, she saw Defendant with some men and that Defendant said, "I got in trouble with these women, but I don't have to worry about it because they are already in hell (T 816)." She said that one of the men then used a slang Mexican expression that was reported as "te la chingastes (T 816)," and that, in English, means, "Did you fuck them up? (T 816)." According to Perez-Cruz, Defendant replied, "Yes, but I don't have to worry

about them, because they are already in hell (T 816)." She also testified that one of the men asked, "How did you do it? (T 817)," and that Defendant said, "I went in through the back door and I ripped out the screen door (T 817)." Perez-Cruz said that Defendant then saw her looking at him and stopped talking (T 817). On cross examination, Perez-Cruz indicated that Defendant and the other men were laughing and that "it seemed like they were joking (T 834)."

The defense introduced into evidence payroll records (R 83, 85) that indicated that Defendant was not working with Perez-Cruz at the time she claimed to have heard him make the statements to which she testified (T 5/22 13-14, 17).

The only witness during the penalty phase of the trial was Marraccini, who indicated that each of the victims experienced great pain from their injuries (T 5/28 21-35).

Additional facts pertaining to particular issues are set forth in the Argument portion of this brief and are hereby incorporated.

SUMMARY OF ARGUMENT

There was no evidence of premeditation and the evidence failed to prove the underlying felonies charged in the indictment. Thus, the first degree murder convictions, as well as the convictions for sexual battery and burglary, must be vacated with directions that Defendant be discharged as to those offenses. Moreover, since a new trial is required for each of a number of reasons, that new trial should be for second degree murder only.

Among the reasons why a new trial is warranted include the fact that the jury instructions as to the elements of the offenses were fundamentally flawed in that they allowed the jury to convict Defendant of the crimes based upon methods of commission that differed from the methods charged. The court also made numerous errors in reading testimony to the jury that resulted in portions that were read being misleading and unduly emphasized, portions being inconsistent with the reporter's notes and portions not being recorded by the reporter. Moreover, the court improperly allowed the introduction by the State of highly prejudicial hearsay and the misuse and overuse of gory, inflammatory photographs that were at best marginally necessary. The court further

allowed the prosecution to undertake an effort throughout the trial to place a burden on Defendant to prove his innocence by proving a defense based on his pretrial statements that he never raised at trial. In addition, the court gave confusing, contradictory and misleading instructions as to circumstantial evidence. The court also improperly excused a juror from the penalty phase based on inconsistent and inclusive comments regarding the death penalty.

Defendant was also deprived of a fair trial by prosecutorial misconduct, which included comments and testimony indicating the personal beliefs of the prosecutor, the police and the court in Defendant's guilt and the credibility of witnesses and suggesting that additional reasons existed for such beliefs, personal attacks on defense counsel, efforts to bolster the credibility of State's witnesses, attacks on Defendant's character and his demeanor off the stand, misstatements of fact and law, appeals to sympathy and comment on Defendant's failure to testify or offer an explanation for the motives of a State witness.

Defendant also maintains that the death sentences were improper. The court should not have found that Defendant was under sentence of imprisonment because the State failed to prove that he was the person named in the documents relied upon, because mandatory conditional release under the federal statute involved was not a sentence of imprisonment and because, even if such release is deemed to be a sentence, the sentence here had not yet begun. The court also erred in finding that Defendant was previously convicted of a felony involving the use or threat of violence because the State failed to prove that he was the person named in the documents relied upon and that the prior offenses involved the use or threat of violence. The finding that the capital felonies were committed while Defendant was engaged in the commission of a sexual battery cannot stand because the evidence of sexual battery was insufficient. In any event, it cannot apply to one of the

killings because that victim died before the acts alleged to constitute the sexual battery occurred. The court also found the capital felonies to be heinous, atrocious or cruel because of constitutional deficiencies in the statute and the jury instruction, errors in the jury instruction given and the fact that the evidence reflected that the killings occurred as the result of a rage and that it could not be determined when the victims lost consciousness.

In addition, numerous mitigating circumstances should have been found. These included the fact that Defendant was under the influence of an extreme mental or emotional disturbance, the fact that Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, Defendant's consumption of beer, Defendant's exemplary prison record, the fact that the alternative to death was imprisonment for 50 years without parole, the lack of premeditation, Defendant's employment, the life sentence imposed on a codefendant and, assuming Defendant's contention as to the impropriety of the finding that Defendant had been previously convicted of a violent offense is accepted, the lack of a significant history of prior criminal activity.

Further, the court made numerous errors in instructing the jury as to the mitigating circumstances. These errors resulted in Defendant receiving a sentencing hearing that was fundamentally unfair.

Finally, the court improperly enhanced Defendant's sentences for sexual battery and burglary in light of the fact that the jury failed to make a finding as to the presence of an enhancing factor and the fact that the prosecutor specifically waived the right to such a finding.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL.

A. FIRST DEGREE MURDER

When "the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." Jaramillo v. State, 417 So.2d 257, 257 (Fla. 1982); McArthur v. State, 351 So.2d 972, 976, n. 12 (Fla. 1977). When the State's evidence fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first degree murder cannot be sustained. Hall v. State, 403 So.2d 1319 (Fla. 1981); Smith v. State, 568 So.2d 965 (Fla. 1st DCA 1990).

Premeditation is the one essential element which distinguishes first degree murder from second degree murder. Tien Wang v. State, 426 So.2d 1004 (Fla. 3d DCA 1983), rev. denied, 434 So.2d 889 (Fla. 1983); Polk v. State, 179 So.2d 236 (Fla. 2d DCA 1965). Premeditated design to effect the death of a human being is more than simply an attempt to commit homicide, Tien Wang, supra; Littles v. State, 384 So.2d 744 (Fla. 1st DCA 1980) and more than an intention to kill must be proved to sustain a first degree murder conviction.[1] Miller v. State, 76 Fla. 136, 77 So. 669 (1918); Tien Wang, supra.

In the present case, there was no evidence of premeditation. The State was unable to present any witnesses or physical evidence that even placed Defendant at the home of the victims. Rather, the State showed that the victims were killed and tried to link Defendant to the killings by his appearance the following morning, by what the State asserted was an improbable version of events recounted by Defendant and by certain statements made by Defendant that in no way demonstrated premeditation. In fact, Defendant's statement, "I told them not to get me mad. I have this animal inside of me (T 755)," implies a lack of premeditation. Also

[1] The prosecutor apparently was unaware of this fact, as she defined premeditated murder during voir dire as "something that somebody intends to do (T 219)."

suggesting a lack of premeditation was the fact that Defendant was mad and upset both before and after the killings (T 740, 742). See the discussion of Defendant's mental and emotional condition in Section B (2) (a) of Point XI. Further, even the State's theory of the case recognized that the killer "was already pretty mad" and that he got "madder and madder (T 5/22 118-119)." It is thus clear that the State's evidence failed to exclude the reasonable hypothesis that the killings here occurred by other than premeditated design.[2]

As noted in Jenkins v. State, 120 Fla. 26, 161 So. 840, 840 (1935), "In cases where capital punishment has been exacted by a jury's verdict in a first-degree murder conviction, the evidence of the premeditated design ought to be supported by something more than guess work and suspicion ... ." The evidence here offered no more than a suspicion of premeditation. Defendant's motions for judgment of acquittal as to first degree murder were therefore improperly denied (T 5/21 99-101; 5/22 34-35) and the judgments and sentences for the murder counts must be reversed with directions to reduce the convictions to ones for second degree murder and to sentence accordingly.[3] Hall, supra; Purkhiser v. State, 210 So.2d 448 (Fla. 1968); Sheffield v. State, 73 So.2d 65 (Fla. 1954); Douglas v. State, 152 Fla. 63, 10 So.2d 731 (1942); Smith, supra; Tien Wang, supra; Florida Statutes § 924.34.

[2] The murder convictions cannot be sustained on a felony murder theory since, as will be demonstrated in Sections B and C of this point, there was insufficient evidence of the sexual battery and burglary charges. Moreover, even if it is said that there was sufficient evidence of sexual battery, the first degree murder conviction for the killing of Mabel Avery cannot be upheld. As detailed in Section A (3) (b) of Point XI, even the State's theory of the case recognized that Mabel Avery was killed before the killer encountered and committed the sexual battery upon Julia Ballentine. Since it is the commission of a homicide in conjunction with intent to commit the felony which supplants the requirement of premeditation for first degree murder, there must be some causal connection between the homicide and the felony. Bryant v. State, 412 So.2d 347, 350 (Fla. 1982). With regard to the killing of Mabel Avery, even the State's theory of the case asserts no connection.

[3] Of course, if this court agrees that a new trial is required for any of the reasons set forth in the subsequent points of this brief, the matter should be remanded with directions to grant a new trial for second degree murder and to enter a judgment of acquittal as to first degree murder.

B. SEXUAL BATTERY

1. INSUFFICIENT PROOF OF PENETRATION

Defendant was charged with violating Florida Statutes § 794.011 (3), "by forcibly inserting a penis and/or some other object into the vagina of" Julia Ballentine (R 2). The only testimony presented by the State with regard to this offense was the following testimony of Dr. John Marraccini (T 699).

> Q. Would you enumerate, for the members of the jury, how many circumstances you encountered during the autopsy which suggested to you that she had been sexually assaulted?
> A. Well, she had a variety of injuries. She had a bruise on her labia, which are the folds in the outer genital area.
> She had an abrasion going around the back of the vagina, near the entrance part of the vagina.
> She had an anal laceration that was about an eighth of an inch long in the anal canal, and there was also hemorrhage in this area, indicating that her blood pressure was there.
> She was alive when these injuries were inflicted.
> So all these things taken together are a clear indication of a sexual battery having occurred.

The doctor then went on to testify that the injury in the anal area was more suggestive of having been inflicted with a knife than the injuries in the other areas (T 699-700). The other injuries, the doctor stated, looked as though they could have been done with a variety of objects "not particularly typical of a penis, but rather fingers or something else (T 700)."

The evidence therefore in no way demonstrated that Defendant was guilty of "inserting a penis and/or some other object into the vagina" of Julia Ballentine. At most, the evidence showed union by some object other than a penis with the vagina. Union by such an object does not fall within the definition of "sexual battery," which is "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object." Florida Statutes § 794.011 (1) (h).[4]

[4] Union with the penis of the vagina does constitute sexual battery, but the charge here did not include such an allegation (R 2) and the doctor's testimony demonstrated in any event that such an allegation would not have been supported by the evidence.

2. INSUFFICIENT PROOF OF INTENT

The evidence here was also insufficient to prove the intent necessary to proof of sexual battery. It is clear that Julia Ballentine's injuries occurred during a struggle in which she received stab wounds from her face (T 698) down to the lower part of her leg (T 701). The fact that some of the wounds she received were in the area of her vagina is not enough to mandate the conclusion that a sexual battery was committed.

Although the crime of sexual battery does not require an intent to gain sexual gratification, Aiken v. State, 390 So.2d 1186, 1187 (Fla. 1980), it does require an intentional non-consential intrusion into the sexual privacy of another. State v. Rider, 449 So.2d 903, 905 (Fla. 3d DCA 1984), rev. denied, 458 So.2d 273 (Fla. 1984), app. dismissed, 470 U.S. 1075, 105 S.Ct. 1830, 85 L.Ed.2d 132 (1975); Surace v. State, 378 So.2d 895, 899 (Fla. 3d DCA 1980), Schwartz, J., specially concurring, cert. denied, 389 So.2d 1115 (Fla. 1980). There is no evidence here of the intent to intrude into Julia Ballentine's sexual privacy. To the contrary, the evidence showed that the injuries in the area of the vagina came as the result of a struggle that caused similar injuries in many locations. To say that such injuries constitute sexual battery is to say that a sexual battery occurs whenever a shooting or stabbing results in penetration, regardless of what part of the body the person doing the shooting or stabbing intends to shoot or stab and regardless of whether the victim moves, causing a shot or stab aimed elsewhere to penetrate. Such a conclusion would expand the scope of the sexual battery statute far beyond its intent, as reflected by the well reasoned interpretation of the statute set forth in Rider and in Judge Schwartz' specially concurring opinion in Surace.

3. RELIEF

For each of the foregoing reasons, the evidence of sexual battery was insufficient and Defendant's motions for judgment of acquittal were therefore improperly denied. The sexual battery conviction must be reversed.

C. BURGLARY

The burglary count in this case charged Defendant with unlawfully remaining in a structure with the intent to commit sexual battery and/or theft (R 2-3). As discussed in Section B of this point, the evidence of sexual battery was insufficient. The burglary conviction therefore cannot be sustained on the theory that Defendant had the intent to commit that crime. The evidence as to any intent to commit theft is also insufficient. Thus, the burglary conviction cannot stand.

The evidence reflected that Defendant was not found to be in possession of any property belonging to either of the victims or taken from their residence. Moreover, the State did not even show that any property was missing.

The only testimony that even touched on the possibility of a theft was that of Sgt. Anne Gribbons, who stated that she did not observe a purse or wallet in either of the vicitims' bedrooms (T 446) and that of David Gilbert, a crime scene investigator, who stated that the police did not find in the victims' house any pocketbooks, purses, change purses, wallets, powder cases, lipsticks, credit cards, social security cards, Medicare cards or prescription cards (T 542-543).

This testimony falls far short of showing the intent to commit a theft. There was no indication in the evidence that the victims even possessed any of the items noted in the testimony. In fact, Det. John LeClair, one of the co-lead detectives on the case (T 5/21 34), stated that he had made no effort to locate any personal property of the victims and that he did not know if the victims had any credit cards (T 5/21 78). Apparently, the police did not believe that there were such cards, because LeClair made no effort to locate through bank or other records any credit cards that the victims may have had or any purchases that might have been made on any such cards (T 5/21 78-79).[5] In addition, the parts of the house other than where the vicitms were killed "appeared to be neat and as though no one had had a struggle there or any type of search was done, perhaps, for valuables (T 557),"

[5] LeClair also testified that he had no reason to check any charge accounts to see if bills were being run up and that he had no idea what Defendant's counsel was talking about with regard to any such accounts (T 5/20 91-92).

and there was "no evidence of real searching" in Mabel Avery's bedroom (T 476).

The fact that no pocketbooks or purses at all were found tends to reflect that the victims did not use such items, since few people would have only one such item and it is unlikely that a person committing a theft would bother taking empty pocketbooks and purses. Likewise, persons who keep lipstick and powder in a pocketbook are likely to also keep those items in other locations in a home and they would not be likely targets for a thief. Their total absence would therefore seem to indicate that the victims did not use them.

It should also be realized that since the victims here were elderly, it would not be unusual for them not to have the items noted in the testimony. Moreover, it also not be unusual for persons of the advanced age of the victims to leave such items with friends, especially if, as here, they are dependent upon friends to transport them when they need to go somewhere (T 407) and they would not be likely to need the items unless they were going somewhere. Such a scenario is particularly possible here in light of the fact that the neighbors upon whom the victims relied for transportation did have a key to the victims' house (T 410).

A significant omission from the testimony also undermines any contention that the evidence proved a burglary. The testimony as to what was not found in the house included only the items noted previously. There was no testimony that no cash was found in the house. Certainly, cash would be the most likely thing to be taken in a burglary, yet the State's evidence, which dealt with the absence of a number of things, failed to establish the absence of cash. In this regard, there is a similarity between this case and Eutzy v. State, 458 So.2d 755 (Fla. 1984). In Eutzy, this court found that the evidence was insufficient to prove that a murder was committed during the commission of a robbery when the State "failed to present any evidence that the victim had anything of value with him before the murder or that no cash or valuables were on the victim's body when he was found." Id., at 758. Although the evidence here would have still been insufficient if the State had shown an absence of cash since the foregoing discussion would still be applicable, the lack of such a showing brings this case within the ambit of Eutzy.

Clearly, the evidence as to this offense is circumstantial in nature and, just as clearly, the evidence does not exclude the reasonable, and perhaps even likely, hypothesis that the victims did not own or keep in their house any of the items about which testimony was elicited. In short, the evidence of the intent to commit theft is nothing more than sheer speculation. Given the absence of proof as to the charged intent to commit sexual battery and/or theft,[6] it must be concluded that the evidence of burglary was insufficient, that Defendant's motions for judgment of acquittal should have been granted and that reversal is mandated.

II. THE COURT ERRED IN INSTRUCTING THE JURY AS TO THE ELEMENTS OF THE OFFENSES CHARGED.

A. SEXUAL BATTERY

Defendant was charged with committing sexual battery by "inserting a penis and/or some other object into the vagina" of Julia Ballentine (R 2). He was not charged with sexual battery by anal penetration with either his sexual organ or with any other object, nor was he charged with sexual battery by union of his sexual organ in any way. Nonetheless, the court instructed the jury that they could convict Defendant of sexual battery based upon the penetration of the victim's anus with Defendant's sexual organ, the penetration of the victim's anus with an object or union with the victim's vagina and/or anus by Defendant's sexual organ (T 5/22 128). Similar language was used with regard to the lesser included offense of sexual battery with the use of slight force (T 5/22 144).

B. BURGLARY

Defendant was charged with burglary by "remaining" in the victims' house with the requisite intent (R 2-3). He was not charged with committing the offense by "entering" with such intent. Nonetheless, the court instructed the jury that they

[6] The fact that Florida Statutes § 810.07 (1) provides that proof of entering a structure stealthily and without consent of the owner is prima facie evidence of entering with the intent to commit an offense has no effect on this case. In the first place, Defendant was only charged with burglary by "remaining" in the structure with the necessary intent, not with the "entering" to which the statute pertains. Second, the entering here was in no way done "stealthily," since it involved the breaking of glass and a door, as well as the slashing of a screen (T 411) and created noise that was heard even in a neighbor's house (T 5/20 7-8).

could convict Defendant of burglary on either an entering or remaining theory (T 5/22 129-130). Moreover, the court instructed the jury that proof of entering a property stealthily and without consent may justify a finding that the entering was with the intent to commit a crime (T 5/22 130), an instruction which should not have been given in light of the fact that Defendant was only charged under a remaining theory. See n. 6, supra. The court also instructed the jury that a lack of consent to enter, not a lack of consent to remain as would have been proper under the charge here, was an element of the offense (T 5/22 129). Further, the court instructed as to the extent of entry needed to prove the offense (T 5/22 130), an an instruction that was totally inappropriate to the charge of remaining.

C. FELONY MURDER

Since sexual battery and burglary were the underlying felonies charged in the murder counts (R 1-2), the errors noted in the preceding two sections of this point also demonstrate that the felony murder instruction (T 5/22 124-125) was deficient. Moreover, should this court find in its consideration of Point I that the evidence of either sexual battery or burglary was insufficient, it would then be clear that Defendant could not have been properly convicted of felony murder with that crime constituting the underlying felony. Mahaun v. State, 377 So.2d 1158 (Fla. 1979); Pray v. State, 571 So.2d 554 (Fla. 4th DCA 1990). Under such circumstances, the felony murder instruction would have to be considered erroneous because of its reference to the crime for which the evidence was insufficient. Should this court find that the evidence was insufficient as to both sexual battery and burglary, the giving of a felony murder instruction at all would then have to be deemed error.

D. APPLICATION OF LAW TO THE ERRONEOUS INSTRUCTIONS

"The general rule is where an offense may be committed in various ways, the evidence must establish it to have been committed in the manner charged in the indictment." Long v. State, 92 So.2d 259, 260 (Fla. 1957). "No principle of criminal law is better settled than that the State must prove the allegations set up in

the information or the indictment." Lewis v. State, 53 So.2d 707, 708 (Fla. 1951). Although a charging document may charge in the alternative or disjunctive when an offense may be committed in more than one way, Florida Rule of Criminal Procedure 3.140 (k) (5), if the charging document alleges only one state of facts, a conviction may not rest on proof of another. Long, supra; O'Neal v. State, 308 So.2d 569 (Fla. 2d DCA 1975).

Clearly, the court here misinstructed the jury as to the essential elements of each of the offenses charged. The instructions allowed the jury to convict Defendant of the offenses based upon proof of methods of commission that differed from the methods charged and, with regard to the murder charges, of the offenses based upon offenses for which judgments of acquittal should have been granted. Such error is fundamental and need not be preserved by objection. Causey v. State, 307 197 (Fla. 2d DCA 1975); Johnson v. State, 226 So.2d 884 (Fla. 2d DCA 1969). Moreover, a misleading instruction, such as those in the present case, constitutes both fundamental and reversible error. Doyle v. State, 483 So.2d 89 (Fla. 4th DCA 1986); Carter v. State, 469 So.2d 194 (Fla. 2d DCA 1985); Christian v. State, 272 So.2d 852 (Fla. 4th DCA 1973); Ellis v. State, 202 So.2d 576 (Fla. 1st DCA 1967). This principle has been specifically applied to error in instructing a jury as to an alternative to premeditation in a sexual battery case, Gill v. State, 586 So.2d 471 (Fla. 4th DCA 1991), as well as to many other situations. See, e. g., Cole v. State, 573 So.2d 175 (Fla. 2d DCA 1991); Carter, supra; Christian, supra. As noted in Hayes v. State, 564 So.2d 161, 163 (Fla. 2d DCA 1990), " ... [A] proper jury instruction in a criminal case is a fundamental right, the denial of which can be appealed without objection." The instructions here fundamentally tainted Defendant's trial. His convictions must therefore be reversed.

III. THE COURT ERRED IN READING PORTIONS OF THE TESTIMONY TO THE JURY.

A. TESTIMONY OF ELIZABETH FELICIANO

After deliberations began, the jury asked to hear the testimony of Elizabeth Feliciano "AS TO HER DESCRIPTION OF MR GARCIA HOW HE WAS DRESSED; AND THE

BLOOD ON HIS FOREHEAD AND THE TIME SHE FIRST SAW MR GARCIA (R 89)." The parties agreed to have certain portions of Feliciano's testimony read, but disagreed over a portion in which she testified that Defendant was not carrying a woman's purse or a woman's wallet (T 614; 5/23 8). Defendant's counsel requested that this portion of the testimony be read (T 5/23 8-9). The prosecutor opposed the request, stating that "the jury wants to know what he was wearing rather if he was carrying a woman's purse which she answere inthe negative, it has nothing to do whith what she [sic] was wearing, so I object (T 5/23 8). The court agreed with the prosecutor and ordered that the testimony not be read (T 5/23 9).

The prosecutor's position and the court's ruling construed the jury's request much too narrowly. It focused on the words of the request that related to how Defendant was dressed and ignored the fact that the jury requested Feliciano's testimony as to her description of Defendant and as to the time she first saw Defendant. In this regard, it should be noted that in reading the jury's request, the court referred to each segment of what the jury asked for, but did not refer to the part of the request that asked for Feliciano's description of Defendant (T 5/23 7). This was perhaps due to the fact that the jury had scratched out some words and written that portion of their request above the area that was scratched out (R 89).

Regardless of the reason for the court not referring to part of the jury's request, it seems clear that the jury was asking for more than just the testimony as to what Defendant was wearing. Such a conclusion is compelled not just by the language used in the request, but also by the fact that the jury subsequently asked, "Please re-read Mrs Feliciano's testimony as to Mr Garcia's activities when she first saw him (R 90)."[7]

It is also clear that the excluded testimony was of great significance. The fact that Defendant did not have a woman's purse or wallet was certainly a factor

[7] The testimony regarding a woman's purse or wallet was not read in response to this second request either (T 5/23 89-91).

for the jury to consider in determining whether a burglary occurred. An acquittal on the burglary charge could have led to an acquittal on the murder charges if the jury's verdicts on those charges were based on a felony murder theory with burglary as the underlying felony. The testimony that was read to the jury was misleading on this important point in that the jury likely believed that it included everything Feliciano said about her observation of Defendant. Conversely, it placed undue emphasis on the portion of testimony that was read by failing to balance that portion with the rest of Feliciano's testimony on the subject.

It should also be noted that the same narrow construction of the jury's request was not employed with regard to testimony that favored the prosecution. Included in the portion of testimony read to the jury was the fact that Defendant had blood on his shirt and pants (T 5/23 52-53), despite the fact that the jury only asked about the blood on his forehead (R 89).

A request by a jury to have testimony read is a matter addressed to the discretion of the court. DeCastro v. State, 360 So.2d 474 (Fla. 3d DCA 1978), cert. denied, 368 So.2d 1365 (Fla. 1979); Simmons v. State, 334 So.2d 265 (Fla. 3d DCA 1976). When a court decides to grant such a request, however, it must do so in a manner that "is not misleading." Haliburton v. State, 561 So.2d 248, 250 (Fla. 1990). Each determination must be based on the particular facts and circumstances of the case, United States v. Binder, 769 F.2d 595 (9th Cir. 1985), and undue emphasis of particular testimony should not be permitted. Binder, supra; Mullins v. State, 344 So.2d 539 (Ala. Cr. App. 1977), cert. denied, 344 So.2d 543 (Ala. 1977). Courts must give a "realistic interpretation" to the scope of a jury's request, Jones v. State, 706 S.W.2d 664, 668 (Tex. Cr. App. 1986), and should read all testimony that is "inextricably intertwined with the testimony ... directly related and responsive to the interrogatory of the jury." State v. Cari, 163 Conn. 174, 72 ALR3d 608, 303 A.2d 7, 12 (1972). When it is not clear which portions of testimony a jury wishes to hear, it is the duty of the court to make inquiry of the jury. Furr v. State, 152 Fla. 233, 9 So.2d 801 (1942); Rodriguez v. State, 559 So.2d 678 (Fla. 3d DCA 1990).

Applying these principles, appellate courts have not hesitated to reverse convictions when trial courts have responded to juries' requests by reading portions of testimony, but omitting other testimony that was favorable to defendants and that fell within a reasonable interpretation of the requests. See Jones, supra (failure to read cross examination regarding a particular gesture when direct examination on the subject was read); People v. Flores, 115 A.D.2d 754, 496 N.Y.S.2d 781 (1985) (deletion of testimony in which witness was impeached through the use of his grand jury testimony); People v. Henderson, 4 Cal.2d 188, 48 P.2d 17 (1935) (omission of portion of testimony relating to the time a witness left a store when the jury requested testimony on the subject and when other testimony relating to the issue was read). The court here did not give a reasonable interpretation to the jury's request, nor did it make inquiry of the jury to settle any question as to the scope of the request. The court's action thus had the effect of placing undue emphasis on the testimony that was read, of misleading the jury on a critical point and of omitting testimony that was inextricably linked with the testimony that was read. Defendant's convictions cannot stand.

B. CHANGING THE TESTIMONY OF RUFINA PEREZ-CRUZ

The jury also asked to hear the testimony of Rufina Perez-Cruz "AS TO WHAT SHE HEARD MR GARCIA SAY (R 89)." In determining which portions of Perez-Cruz' testimony to read, the prosecutor asked that the court order that one aspect of the testimony be read in a manner different than the manner in which it was taken down by the reporter. Perez-Cruz testified that a man with whom Defendant was speaking had used a slang Mexican expression that was reported as "te la chingastes (T 816)." The prosecutor wanted the word "la" changed to "las" when the testimony was read to the jury (T 5/23 13-14). Over objection of Defendant's counsel, the court ordered that the change be made (T 5/23 16) and the testimony was read accordingly (T 5/23 58).

The change was a significant one. Perez-Cruz had been asked what the expression meant and had replied, "Well, in English, sometimes we say 'Did you fuck them up (T 816)?" She further testified that Defendant had responded, "Yes, but I don't

have to worry about them, because they are already in hell (T 816)." The change of "la" to "las" changed the term from singular to plural (T 5/23 15). Since Defendant had indicated to two of the State's other witnesses that he had been in a fight in which he had used his knife on one woman, the use of the word "la" would have been consistent with Defendant's statements. By changing the word to "las," the statement Perez-Cruz testified about became inconsistent with what Defendant had said and consistent with the facts regarding the crimes charged.

The prosecutor argued that the change was appropriate because she had asked Perez-Cruz whether the term was singular or plural and Perez-Cruz had replied that it was plural (T 5/23 16-17). The fact that the prosecutor may have, as she contended, used the word "las" in asking whether the term was singular or plural does not, however, have anything to do with what word Perez-Cruz used when she testified as to what she heard. Perez-Cruz' testimony about Defendant's statement (T 816) was elicited quite some time before the question about whether the term was singular or plural was asked (T 827). Moreover, Perez-Cruz had previously testified that Defendant's conversation was "about a woman," singular (T 815). Thus, there is no reason to believe that a mistake was made in recording the testimony with the word "la." This conclusion is also supported by the fact that the reporter at no time indicated that she believed that her notes were in error. In fact, the trial transcript, obviously prepared after this issue was raised, still uses the word "la (T 816)," so it can be presumed that the reporter heard that word. Moreover, although the prosecutor indicated that she called in an official translator to discuss the issue with him and that it was "a real big issue exactly what the phrase was (T 5/23 15)," she failed to indicate what opinion the translator offered.

Thus, the only basis asserted by the prosecutor to change the testimony was her own belief as to what was said.[8] Neither the transcript nor the reporter

[8] It is interesting to note that when Defendant's counsel subsequently realized that the transcript reflected that he had referred to a "Swiss knife," rather than a "Swiss army knife (T 5/23 33)," the prosecutor refused to agree to his request that the term be changed, stating, "No, some other case (T 5/23 33)."

supported the prosecutor's contention. Presumably, the translator's opinion did not do so either because if it had, the prosecutor would have surely presented it. Perez-Cruz was not recalled to clarify the matter. Nonetheless, the court, on an issue of vital importance, ordered that the testimony be changed. This was error.

Issues of this nature generally arise in the context of reviewing an appellate record. In that context, it is clear that a mere statement of counsel is not a sufficient basis for a court to disregard or deviate from that which is reflected by the record. Star Fruit Co. v. Eagle Lake Growers, 160 Fla. 130, 33 So.2d 858 (1948); Stanton v. Morgan, 127 Fla. 34, 172 So. 485 (1937); Abell v. Town of Boynton, 95 Fla. 984, 117 So. 507 (1928); Gracy v. Gracy, 74 Fla. 63, 76 So. 530 (1917); Putnam v. Morgan, 57 Fla. 503, 48 So. 629 (1909). The same rationale applies here. In light of the prosecutor's failure to support her position with anything more than her own opinion, the testimony should have been read to the jury as it was reported by the reporter. Under these circumstances, the most the prosecutor might have been entitled to was an instruction that the reporter's notes were not evidence and that the jury should rely on their own recollection if it differed from what the court reporter read. Barton v. State, 72 Fla. 408, 73 So. 230 (1916). The prosecutor requested no such instruction, however. The court therefore erred in ordering the testimony changed and that error compels reversal.

C. READING THE TESTIMONY OF RUFINA PEREZ-CRUZ

In determining which portions of Rufina Perez-Cruz' testimony to read to the jury, the court refused (T 5/23 18-20) the request of Defendant's counsel to include a portion in which Perez-Cruz indicated that Defendant and the individuals he was speaking with during the conversation detailed in the preceding section of this point were laughing and that it could have been a joke (T 5/23 18-20). The prosecutor opposed this request on the ground that the jury only asked what Defendant said (T 5/23 18). The prosecutor stated that she strenuously objected to testimony that went to Perez-Cruz' "opinion or conclusion or anything else (T 5/23 19)."

Subsequently, defense counsel objected to reading that portion of Perez-Cruz' testimony in which she replied, "Plural," when asked whether the term "te la shingastes," discussed in the preceding section of this point, was plural or singular, and in which she replied, "Feminine," when asked whether "las" was feminine or masculine (T 5/23 41). The objection was based on the fact that the jury had only asked for what was said (T 5/23 41-42), the exact same objection the prosecutor had successfully made with regard to the testimony that Defendant was laughing and that his statement may have been a joke. Despite its earlier ruling, the court rejected Defendant's counsel's position (T 5/23 42) and the testimony in question was read to the jury (T 5/23 59-60).

Defendant submits that under the principles set forth in the authorities discussed in Section A of this point, the court erred in not reading Perez-Cruz' testimony about laughter and joking. Additionally, Defendant maintains that a court's discretion in determining what portions of testimony will be read to a jury must be deemed abused when the court applies an inconsistent standard to testimony that favors the prosecution and that which favors the defense. If the request was to be interpreted narrowly, and limited to the words spoken by Defendant, Perez-Cruz' conclusions about the meaning of the slang term should not have been read. If the jury's request was to be read broadly enough to include that testimony, however, it would have to also be deemed to encompass Perez-Cruz' testimony about laughter and joking. In other words, either both contested portions of the testimony should have been read or neither should have been read. Reading the portion that favored the State and not the portion that favored Defendant, however, is entirely unreasonable and prejudicial to Defendant. This is particularly true in light of the fact that, as detailed in the preceding section of this point, the court ordered Perez-Cruz' testimony changed in a manner prejudicial to Defendant. Reversal is compelled.

D. FAILURE TO RECORD THE READING OF THE TESTIMONY OF DAVID RHODES

Pursuant to the jury's request, the court ordered that all of the testimony of David Rhodes that occurred after the parties stipulated to his qualifications be

read to the jury (T 5/23 77). Despite the fact that the reporter recorded the reading of the testimony of Feliciano Aguayo, Elizabeth Feliciano, Rufina Perez-Cruz and Dr. John Marraccini to the jury, the portion of Rhodes' testimony that was read was not recorded. Rather, the transcript simply states, "Thereupon, the court reporter read back Mr. Rhodes' testimony after which the jury left the courtroom to continue its deliberations (T 5/23 94).

Florida's capital felony sentencing law requires tha "certification by the sentencing court of the entire record" to this court for purposes of appellate review. Florida Statutes § 921.141 (4). Every defendant who receives a death sentence has the right to a complete review of the record. Delap v. State, 350 So.2d 462 (Fla. 1977). In the present case, this court cannot fulfill its obligation to to provide that complete review because the trial court failed to ensure that a record was made of the reading of Rhodes' testimony to the jury. An error in how that testimony was read could have had a devastating effect on Defendant's chances of being acquitted since Rhodes testified that hair samples taken from Defendant did not match hair samples taken from the scene of the crimes (T 5/21 144) and that the samples taken from the scene were consistent with hair from someone who does not bathe, such as a drifter (T 5/21 143). Obviously, this testimony was important to the jury because they asked to have it read to them. There is of course no way to determine how significant the jury considered the testimony to be, but in light of the fact that it was clearly a factor in the jury's deliberations, it must be concluded that the failure to record what was read to the jury deprived Defendant of review of an important of the record. Compare Morgan v. State, 415 So.2d 6, 9 (Fla. 1982) (no basis for relief when omitted portions of record did "not prejudice the appeal"). Moreover, the omission here cannot be corrected, since this is not a case in which a transcript is missing, but one in which the portion of the trial in which the testimony was read was never recorded. The convictions should therefore be vacated and the cause remanded for a new trial. Delap, supra.

IV. THE COURT ERRED IN ALLOWING THE PROSECUTOR TO INTRODUCE INADMISSIBLE HEARSAY THAT WAS PREJUDICIAL TO DEFENDANT.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Florida Statutes § 90.801. Such evidence is inadmissible because the party against whom it is offered has no opportunity to cross examine the out of court declarant and is thereby deprived of the chance to expose deceit and errors in the statement. Brinson v. State, 382 So.2d 322 (Fla. 2d DCA 1979). In the present case, the prosecutor repeatedly elicited prejudicial hearsay evidence.

The prosecutor brought out from Det. John LeClair the fact that Defendant had told him that on the night of the killings, Defendant had been in a fight with two men and a woman, that Defendant had stabbed the woman and that Defendant believed that he had also stabbed one of the men (T 5/21 26).[9] Subsequently, the prosecutor asked LeClair whether, once he was given this information by Defendant, he "had occasion to check all of the area hospitals to find out if there were any reports of any patients, anybody who presented themselves ... anywhere in the location of Dade County ... with a stab injury (T 5/21 32)." After a defense objection was overruled (T 5/21 32), the prosecutor established through LeClair that the only hospital report of a stabbing was one of a self-inflicted wound from Baptist Hospital, which is not even remotely in the area where Defendant said the fight occurred (T 5/21 33) and that James Archer Smith Hospital, which is in Homestead (T 5/21 33) and thus near the area spoken of by Defendant (T 5/20 35), had no reported stab wounds (T 5/21 33). The prosecutor then brought out that a check had been made of homicides reported through the end of January, 1983, about two weeks after the night in question, and that there were no reported stabbing deaths other than the ones that gave rise to the charges against Defendant (T 5/21 33). The prosecutor went on to have LeClair testify that a check had been made with the police

[9] The question of whether the prosecutor should have been allowed to use this statement is dealt with in Point VI, in which Defendant contends that its use improperly placed a burden on Defendant to prove his innocence by proving a defense he never raised at trial.

department in Florida City, which is located on the route Defendant told LeClair he took after the fight (T 5/20 41), and that no stabbings were reported (T 5/21 33).

Plainly, this testimony was inadmissible hearsay. In fact, since LeClair referred to checks having been made and did not say that he made the checks himself, it is likely that the testimony was hearsay upon hearsay. In any event, while it is true that hospital or police records of the sort that LeClair said were checked can in some instances be admissible under the business record exception to the hearsay rule, Florida Statutes § 90.803 (6), there can be no question that it is inappropriate for a police officer totestify as to what a check of such records revealed. See Picknell v. State, 301 So.2d 473 (Fla. 2d DCA 1974), cert. denied, 314 So.2d 585 (Fla. 1975) (improper for police officer to testify that his check with authorities in Tallahassee revealed that license tag belonged to defendant).

This inadmissible hearsay was certainly damaging to Defendant because, as detailed in Point VI, one of the prosecutor's primary themes was her effort to prove that Defendant did not tell the truth when he told LeClair and when he told Feliciano Aguayo about the fight. The hearsay evidence tended to support the prosecutor's theory in that respect and therefore related to a critical aspect of the case.

The prosecutor also established through LeClair that Aguayo, who had testified that Defendant had made a similar statement to him about the fight, had been arrested for a traffic related offense (T 5/21 82), clearly hearsay since LeClair was aware of the fact because Aguayo had directed his attention to it (T 5/21 82). In response to a defense hearsay objection, the court stated, "It is in redirect to cross. You may answer (T 5/21 82)."[10]

[10] Defendant's counsel had established on cross examination that charges had been pending against Aguayo but did not bring out the nature of the charges. The cross examination was proper because the jury is entitled to consider the fact that an individual might attempt to gain favor with the police or the prosecutor with regard to such charges by providing testimony favorable to the government that is partially or completely untrue. It is not proper, however, to name the offense with which such a person is charged. Rolle v. State, 386 So.2d 3 (Fla. 3d DCA 1980). Thus, the prosecutor's question not only called for hearsay, but it called for hearsay as to an inadmissible matter. Moreover, the court improperly found the question to be acceptable in light of the cross examination, which was proper and which in no way opened the door for the prosecutor to go further.

In light of the prosecutor's previously noted effort to prove that Defendant did not tell the truth to Aguayo, it is apparent that this hearsay evidence of the nature of the charges against Aguayo, which surely had the effect of diminishing the weight the jury gave to the charges and which therefore bolstered Aguayo's credibility, was improperly prejudicial to Defendant.

Subsequently, after Det. Dave Gilbert testified on direct examination by Defendant's counsel that in the course of his investigation, he had obtained hair samples from John Conners (T 5/21 114), who had been a suspect in this case, the prosecutor's cross examination included the following (T 5/21 129-130):

> Q. Now, after the time that you obtained the hair from tall, young John Conners, from the residence of his parents where you met him, were you ever asked by any detective, either Detective Gordel or Detective Yeager or Detective LeClair or Detective Smith or anybody from that day in January a few days after the homicides until to this day as you sit in court to obtain anything from John Conners?
> A. No.
> Q. That was it, wasn't it?
> A. That was it.
> Q. After you took hair samples from John Conners and placed them into evidence against John Conners, you never heard anything abourt him again, did you?
> Q. In fact, Detective LeClair and Detective Smith when they took over this case in September 1985 never asked you to do a single thing with --
> MR. DIAZ: Objection.
> THE COURT: Sustained.
> MS. DANNELLY: Excuse me?
> THE COURT: Sustained.
> MS. DANNELLY: I don't understand the basis of the objection.
> THE COURT: Hearsay.
> MS. DANNELLY: I am asking what he was told to do by the detectives.
> THE COURT: That is hearsay.

In order to constitute inadmissible hearsay, testimony does not have to disclose actual statements. Rather, when the inescapable inference from the testimony is that a non-testifying witness has provided certain information, the testimony is hearsay in the same manner as it would be if the actual statements of the non-testifying witness were repeated. Z. P. v. State, 571 So.2d 550 (Fla. 3d DCA 1990); Molina v. State, 447 So.2d 253 (Fla. 3d DCA 1983); Dedge v. State, 442 So.2d 429 (Fla. 5th DCA 1983); Postell v. State, 398 So.2d 851 (Fla. 3d DCA 1981), rev. denied, 411 So.2d 384 (Fla. 1981).

The "inescapable inference" of the testimony here was clearly that Conners' hair did not match the hair found at the crime scene and that the police had eliminated him as a suspect. Despite the fact that a defense objection to the line of testimony had been sustained, the prosecutor, in her closing argument made certain that the inference did not escape the jury's attention. She pointed out over defense objection that Conners' hair samples were taken and then stated, "And who was never investigated or heard from again? John Conners (T 5/22 67)." After Defendant's counsel gave his closing argument, the prosecutor again turned her attention to John Conners, stating flatly that he was "eliminated (T 5/22 114)."

Similarly, the prosecutor established the even broader "inescapable inference" that there was evidence that cleared all suspects other than Defendant when she brought out over defense objection through LeClair that there were no other suspects in the case (T 5/21 87) and, over another objection, through Gilbert that he had no knowledge of any other suspects that remained (T 5/21 133).[11] This testimony was also commented on in the prosecutor's closing argument (T 5/22 65, 68). Clearly, the hearsay by inference brought out by the prosecutor was harmful to Defendant. Moreover, it was the sort of evidence that was likely to make the jury more receptive to many improper aspects of the prosecutor's closing argument which, as detailed in Point IX, emphasized the prosecutor's contention that police officers and prosecutors make certain they have the right person before they file charges.

Thus, it is clear that the prosecutor introduced a significant amount of damaging hearsay evidence against Defendant and that the impact of that evidence was magnified by the prosecutor's reliance upon it in her closing argument and the manner in which it augmented other inappropriate comments made during closing argument. These factors require reversal of the judgments and sentences.

[11] The prosecutor elicited this testimony despite having made a successful hearsay objection during the defense's cross examination of LeClair to questions as to other detective's "suppositions, speculations, hypothesis, possibilities as to who may or may not have been suspects in 1983 (T 5/21 68)."

V. THE COURT ERRED IN ADMITTING AND ALLOWING THE IMPROPER USE OF INFLAMMATORY PHOTOGRAPHS, THE UNFAIR PREJUDICE OF WHICH OUTWEIGHED THEIR RELEVANCE.

As a rule, "photographs are admissible if they are relevant and not so shocking in nature as to defeat the value of their relevance." Czubak v. State, 570 So.2d 925, 928 (Fla. 1990). This standard is a reflection of the general principle that "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." Florida Statutes § 90.403. These principles dictate that inflammatory photographs should be admitted into evidence "with great caution." Brooks v. State, 117 So.2d 482, 485 (Fla. 1960); Thomas v. State, 59 So.2d 517, 517 (Fla. 1952). Courts should exclude relevant photographs when "the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and detract them from a fair and unimpassioned consideration of the evidence." Leach v. State, 132 So.2d 329, 332 (Fla. 1961), cert. denied, 368 U.S. 1005, 82 S.Ct. 636, 7 L.Ed.2d 543 (1962).

In the present case, the State introduced a substantial number of gory and inflammatory photographs. Falling into this catagory were State's Exhibits 19, 20, 21, 22, 27, 33, 34, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 and 52.[12] These photographs were accepted into evidence over repeated defense objections as to both their admissibility and their size. It is Defendant's position that the photographs were improperly admitted and used at trial.

Consideration of this issue should begin with examination of the photographs themselves. There can be no question that they are particularly gruesome and gory in nature. Moreover, some of the photographs show the gruesome expressions on the

[12] A motion to transport the original photographs to this court for review in consideration of this point is being filed by Defendant. Defendant further notes that the photographs have been introduced in each of Defendant's three trials and, as a result, some of the photographs have more than one evidence tag, creating a situation in which it is not always clear which exhibit number applied to which trial. Defendant believes that the exhibit numbers referred to above are the correct numbers for the trial under review, but asks that this court review all the photographic evidence in case there is an error in the above references due to the series of trials.

victims' faces in death, a factor which had no relevance to the trial itself. Funchess v. State, 341 So.2d 762 (Fla. 1976), England, J., concurring, cert. denied, 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed.2d 158 (1977). Likewise, numerous photographs depicted only defensive wounds, which were unrelated to the cause of death and which were therefore also irrelevant. Id.

It is also significant to realize the size of the photographs. Almost all were 20" x 24" or 16" x 20" and were printed on sturdy posterboard. Further, the photographs were in color, making the gore that much more vivid. Also to be considered is the large number of gory photographs. Whatever points the State wanted to make could have certainly been made with far fewer photographs. The "very number" of photographs here "cannot but have had an inflammatory influence on the normal fact-finding process of the jury." Young v. State, 234 So.2d 341, 348 (Fla. 1970). It is clear that the number of photographs should be limited to those reasonably necessary to establish the facts sought to be proved thereby. Gould v. State, 312 So.2d 225 (Fla. 1st DCA 1975). It is also clear that although the State generally need only show relevance, not necessity, to have gruesome photographs admitted, necessity becomes a consideration when large numbers of cumulative photographs are offered into evidence. Henninger v. State, 251 So.2d 862 (Fla. 1971).

There was no necessity for the photographs here and their relevance was marginal. The identity of the victims was established by stipulation (T 415). The fact that their deaths were caused by stab wounds was at no time in dispute during the trial and the medical examiner could have easily testified to that fact without the use of photographs and certainly without the use of so many photographs. Indeed, in the penalty phase of the trial, in arguing that the crimes were heinous, atrocious or cruel, the prosecutor recounted for the jury what had happened to the victims and then said, "The State does not need photographs to convince you of that evidence (T 5/28 52). Similarly, the prosecutor told the jury that they did not need photographs to remember what happened to the victims (T 5/28 51). These

comments came after the prosecutor had also told the jury that the State did not need photographs of blood to convince them of the appropriate penalty because Defendant had convinced them of that himself (T 5/28 50-51) and that they did not need photographs to convince themselves that Defendant's actions were heinous, atrocious and cruel (T 5/28 51).

Moreover, the prosecutor used the photographs not only in presenting evidence regarding the injuries to the victims, but also to make numerous points that had nothing to do with the gory aspects of the photographs and which could have easily been established by other means. These included numerous points about how the beds in the victims' house looked (T 445, 476, 477, 478), the fact that one bed appeared to have been moved (T 446), the fact that there was a bedspread on one bed (T 477), the fact that a closet door was open (T 476), the fact that a lamp had been knocked over (T 446, 477, 482), the fact that the base of the lamp was broken (T 482), the fact that a clock was on the floor (T 477), the fact that the face was off the clock (T 477), the fact that certain furniture was askew from the wall (T 477), the fact that a particular rug was green (T 579), the fact that hair was found on the rug (T 580), and the location of a nightstand (T 478), certain clothing (T 477) and a shoe or slipper (T 482). After establishing from the detective that dusted for fingerprints at the crime scene that a wooden dresser was one of the few objects in one of the bedrooms that was capable of being evaluated for fingerprints (T 527), the prosecutor even used State's Exhibit 20 to ask whether the dresser in the picture was the one to which the detective had referred (T 530). Clearly, the gory aspects of the photographs had nothing to do with the foregoing testimony, which could have just as easily been elicited without photographs or with photographs taken after the victims' bodies had been removed or taken at an angle that did not include the bodies. The only point of using the photographs in conjunction with this testimony was, as defense counsel noted in making one of his numerous objections, "to display this crime scene to the jury time and time and time and time again, for no other reason than to jeopardize Mr. Garcia's rights to a fair trial (T 597)."

Further, despite the previously noted fact that the cause of death was undisputed, the prosecutor had the medical examiner approach an easel (T 647, 655, 690) and take the jury in detail through State's Exhibits 37 through 52 (T 647-660, 690-698). She also had each of these photographs published to the jury (T 647, 655, 690).[13] This was done despite the fact that the medical examiner specifically testified that State's Exhibits 41 (T 655-656), 42 (T 656), 45 (T 657), 46 (T 658), 47 (T 659), 48 (T 696), 49 (T 697) and 50 (T 697) depicted defensive injuries, which, as previously noted, were irrelevant. Moreover, it seems apparent from the context of the testimony and from a look to the photographs themselves that State's Exhibits 43 and 44 also depict defensive injuries (T 655-659). In addition, the medical examiner testified that State's Exhibit 38 showed the same wounds that were shown in State's Exhibit 37 along with an additional wound (T 648), so it is clear that State's Exhibit 37 was cumulative and thus unnecessary.

It should also be realized that the prosecutor did not merely use the photographs to establish the points she wanted to make. Rather, despite a number of defense objections to the practice, she repeatedly left gory photographs in full view of the jury both before and after the testimony with which they were concerned (T 441-442, 479-481, 530, 579, 582, 596-597). Additionally, despite the fact that the prosecutor introduced the photographs over defense objections that she vigorously opposed (T 438-439, 479-480, 597-599, 632-635), the prosecutor in closing argument tried to blame the use of the photographs on the fact that the defense questioned whether the State's evidence was sufficient. "These pictures, I went to some pains to keep from showing you those dreadful photographs because I don't like looking at them either ... (T 5/22 101)," said the prosecutor, whose comment ignored the fact that the defense never challenged whether the victims were stabbed, only by whom.

It also appears that the photographs may have been admitted into evidence as the result of a misperception by the court. In admitting them, the court was

[13] Most of the other photographs were also published to the jury (T 440, 481, 516, 517)

"somewhat greatly influenced, actually, by the fact that I'm sure these objections were made previously and the Supreme Court of Florida has had an opportunity to view them (T 634)." The court was incorrect in its assumption. On Defendant's previous appeal, this court did not deal with any issue relating to the photographs. Garcia v. State, 564 So.2d 124 (1990).

The inflammatory nature of photographs coupled with the fact that the point the prosecutor seeks to make can be shown without them can under appropriate circumstances be a sufficient basis to conclude that the unfair prejudice is so great as to preclude the admission of the photographs. Pottgen v. State, 589 So.2d 390 (Fla. 1st DCA 1991); Hoffert v. State, 559 So.2d 1246 (Fla. 4th DCA 1990). Such a conclusion is even more strongly compelled when the photographs though technically relevant throw "no light in resolving a material issue of fact." Albritton v. State, 221 So.2d 192, 197 (Fla. 2d DCA 1969). See also Beagles v. State, 273 So.2d 796 (Fla. 1st DCA 1973) (admission of numerous gruesome photographs was error when there was no fact or circumstance in issue which necessitated or justified their admission). In the present case, the factors discussed in the above cases are accompanied by the number, size, overuse and improper use of the photographs. Under these circumstances, "the probative value of the photographs was at best extremely limited" and their relevance was "outweighed by their shocking and inflammatory nature." Czubak, supra, 570 So.2d at 929. Reversal is therefore mandated.

VI. THE COURT ERRED IN DENYING DEFENDANT'S MOTION IN LIMINE AND IN OVERRULING DEFENDANT'S OBJECTIONS TO THE STATE'S EFFORTS TO PLACE A BURDEN ON DEFENDANT TO PROVE HIS INNOCENCE BY PROVING A DEFENSE HE NEVER RAISED AT TRIAL.

Prior to his arrest, Defendant made statements to Feliciano Aguayo and to Det. John LeClair with regard to his whereabouts on the night that the crimes with which this case is concerned were committed. Defendant indicated that he had been attacked in a cornfield by two men and a woman, that he had used his knife on the assailants to protect himself and that after the attack, he found his way to Aguayo's house, where he asked Aguayo for a ride home. At trial, the State brought out these statements and attacked them as being untrue. The State's efforts in this regard improp-

erly placed a burden on Defendant to prove his innocence by proving a defense he never raised at trial.

In Bayshore v. State, 437 So.2d 198 (Fla. 3d DCA 1983), the defendant made statements upon his arrest to the effect that he was not in the neighborhood where the crime had occurred and that he had been at his father's house on the night of the crime. The introduction of those statements was referred to by the appellate court as the creation of a "straw man." 437 So.2d at 199. The prosecutor then proceeded to "knock down" that straw man by asking the jury if the defendant had in fact been home with his father, where the person was who could corroborate that.

In the present case, the prosecutor went far beyond what the prosecutor did in Bayshore. She not only created a straw man, but she made the straw man an ongoing feature of the trial, from opening statement through multiple witnesses and photographs so large that they wouldn't fit in the courtroom to her final knockout punch in closing argument.

Defendant filed a motion in limine to prohibit the State from proceeding in this manner (R 34-38). After it was denied (T 3-11), the prosecutor wasted little time in beginning her construction and demolition project, noting over objection in opening statement that Defendant told Aguayo "the most amazing story you are ever going to hear (T 387)." The prosecutor then discussed the statement to Aguayo (T 387-391), talked about the fact that Aguayo's examination of the corn field failed to corroborate Defendant's statement (T 391-392) and indicated that LeClair would testify about Defendant's statement to him and that the jury would see "a rather large and significant exhibit" of the distances involved (T 394-395).

This matter was also a feature during the presentation of the State's case. A large portion of Aguayo's testimony dealt with it (T 745-763). The testimony of Elizabeth Feliciano mirrored that of Aguayo (T 603-610).

Subsequently, over a renewed defense objection (T 5/20 30-31), the State called Beverly Hall for the sole purpose of introducing a series of aerial

photographs to be used by LeClair to point out to the jury the locations and routes referred to by Defendant in his statement. In order to be used, the photographs had to be assembled together, a process that took 45 minutes to an hour (T 5/20 39-40) and that resulted in an end product that was so large that the courtroom was too small for it to be set up there, causing the trial to be shifted for a period of time to a larger courtroom (T 5/20 31).

LeClair then testified. The primary purpose of his testimony was to bring out Defendant's statement and to demonstrate the distances involved and alternative routes available in an effort to show that it was improbable that Defendant would use the routes referred to in the statement (T 5/20 32-53; 5/21 6-46). The defense unsuccessfully renewed its pretrial motion during LeClair's testimony (T 5/21 16).

After the defense again unsuccessfully renewed its motion on this issue and unsuccessfully asked for a mistrial (T 5/22 40-41), the prosecutor's closing argument repeatedly attacked Defendant's statement, pointed out things that it did not explain and questioned why Defendant did not go into a police station located on the route Defendant spoke of and relate what had happened to him.

> And the defendant was faced with an explanation. ...
> So he tells him this remarkable story that after he left him that night, the previous night at the Leisure Lounge, he managed to get himself down 15 miles into South Dade, to the El Cuevo Bar, but he can't tell him how he got there. It is that morning, he doesn't have an answer. ...
> * * *
> The man has just been attacked in the middle of the night in the middle of nowhere by four strangers for no reason, he is in front of the police department and he doesn't stop, excuse me, could you help me? Somebody has tried to kill me. Can you get me home? Can I get some help?
> No. No. The defendant continues to run. ...
>
> (T 5/22 58, 59)

After twice indicating that what Defendant told Aguayo did not make sense (T 5/22 60, 61), the prosecutor indicated that Aguayo's testimony "was absolutely, utterly, one hundred percent unimpeached on that witness stand. There isn't a single question that Mr. Diaz asked him that would cause you to doubt any of that testimony (T 5/22 62)."

After closing argument by Defendant's counsel, the prosecutor returned to the same theme, stating:

> The defendant's explanation. The defendant did not offer a bad explanation, the defendant offered a false explanation. ...
> ... Feliciano Aguayo is no fool, and he is going to put two and two together. So the defendant is going to take a shot coming up with the story and hope he can pass it off but the problem is it is just a ridiculous story that even his friend can't believe it and even you can't believe it.

(T 5/22 114-115)

She then told the jury that the aerial photographs gave the jury "a real feel for how stupidly, ridiculous that story was (T 5/22 116).

In essence, the prosecutor's approach throughout the trial was to put Defendant on trial not just for the charges in the indictment, but for making false statements to Aguayo and LeClair. The opening statement and closing argument were challenges to Defendant to prove his innocence by proving that the statements were true despite the fact that the defense never relied on the alibi defense suggested by the statements. Moreover, by asserting that Aguayo's testimony was "absolutely, utterly, one hundred percent unimpeached," the prosecutor was telling the jury that Defendant meet the burden of answering the State's challenges.

This case thus presents an even stronger basis for reversal than did the facts in Bayshore. There, the defendant's statement was not a primary aspect of the State's case, which included an identification by the victim, and the prosecutor apparently made only the one reference to the matter in argument. Here, by contrast, the issue became a feature of the State's case, cf. Williams v. State, 117 So.2d 473 (Fla. 1960) (error when otherwise admissible similar crime evidence becomes a feature of the trial), and the prosecutor made one of her primary themes in argument. Moreover, the effect of the State's approach was accentuated by the prosecutor's repeated references to Defendant's "story" and Defendant's "explanation," even though the defense offered no story or explanation, but simply argued that the State failed to prove that Defendant committed the crimes charged. See Lane v. State, 459 So.2d 1145 (Fla. 3d DCA 1984) (prosecutor's "straw man

argument and use of the word "alibi" when no alibi was offered may have led jury to believe that defendant had burden of proving his innocence and required reversal).

It should therefore be concluded that the rationale of Bayshore and Lane and other cases expressing similar reasoning, see, e. g., Brown v. State, 524 So.2d 730 (Fla. 4th DCA 1988); Kindell v. State, 413 So.2d 1283 (Fla. 3d DCA 1982), Pearson, J., concurring; Gilbert v. State, 362 So.2d 405 (Fla. 1st DCA 1978), is directly applicable here. Cf. Rodriguez v. State, 493 So.2d 1067 (Fla. 3d DCA 1986) (improper for prosecutor to tell jury that if they believed the defendant's story was not credible and that he took the stand and did not tell the truth, the defendant was guilty). Reversal is thus compelled.

VII. THE COURT ERRED IN INSTRUCTING THE JURY ON CIRCUMSTANTIAL EVIDENCE

Recognizing the circumstantial nature of the evidence in this case and pursuant to a request by the prosecutor (T 134), the court read a circumstantial evidence instruction to the jury panel during voir dire (T 138). At the same time, the court read the reasonable doubt instruction (T 137-138). In instructing the jury after closing arguments, however, the court failed to give a circumstantial evidence instruction. This failure was apparently of some concern to the jury, since they sent a communication to the court asking whether there was a definition of circumstantial evidence that they should know and indicating that it was not in their written instructions (R 89). In response, the court read a circumstantial evidence instruction (T 5/23 65-66), but did not couple that instruction with a reasonable doubt instruction as had been done during voir dire. In the instruction, the court told the jury that a crime may be proved by circumstantial evidence and that "[a] well connected chain of circumstances is as conclusive in proving a crime as is possible evidence (T 5/23 65 [emphasis added])." During voir dire, by contrast, the court had used the term "positive" evidence (T 138)."

The inconsistent and contradictory nature of the instructions on this subject could have only served to confuse the jury. The jury may have felt that since the

circumstantial evidence instruction was not repeated at the close of the case, the court had concluded that the instruction did not apply in light of the evidence at trial. By not instructing on reasonable doubt at the time the second circumstantial evidence instruction was given after the two had been given together initially, the court may have given the jury the impression that the nature of the evidence at trial was such that the circumstantial evidence instruction no longer had to be considered in light of the reasonable doubt instruction. The fact that the second circumstantial evidence instruction told the jury that a case may be proved by circumstantial evidence which is as conclusive as "possible" evidence most certainly had the potential to mislead the jury into believing that the burden of proving a case beyond a reasonable doubt is a significantly lesser burden than it actually is. The potential for confusion in this respect was increased by the failure to give the reasonable doubt instruction, since the standard instruction on that subject would have told the jury that a reasonable doubt is not a "possible" doubt. Florida Standard Jury Instruction (Criminal) 2.03.

The court should not give instructions which are confusing, contradictory or misleading. Butler v. State, 493 So.2d 451 (Fla. 1986); Finch v. State, 116 Fla. 437, 156 So. 489 (1934). "The giving of a misleading instruction constitutes both fundamental and reversible error." Doyle v. State, 483 So.2d 89 (Fla. 4th DCA 1986), citing Carter v. State, 469 So.2d 194 (Fla. 2d DCA 1985) and Christian v. State, 272 So.2d 852 (Fla. 4th DCA 1973). The instructions here, as in Ellis v. State, 202 So.2d 576, 578 (Fla. 1st DCA 1967), "could have had no effect other than to confuse the jury and to that extent constituted such fundamental error as to amount to a departure from the essential requirements of law, and resulted in a miscarriage of justice." Since a conviction must be reversed whenever there exists a "reasonable possibility" that a confusing instruction contributed to the conviction, Butler, supra, 493 So.2d at 453, reversal is mandated in the present case.

VIII. THE COURT ERRED IN EXCUSING A JUROR BASED ON THE JUROR'S INCONSISTENT AND INCONCLUSIVE COMMENTS REGARDING THE DEATH PENALTY

On the morning of the fifth day of trial, after the bulk of the State's case had been presented, the court informed the parties that he had received a call from one of the jurors, Ruben Cruz-Pino, who had indicated to the court "that he had misjudged and could not assess the death penalty (T 668)." Cruz-Pino was brought into the courtroom and questioned. He stated that he had told the judge "that I couldn't impose the death penalty in any case (T 671)." He did not make clear, nor was he asked, whether the words "in any case" meant "in any event," meaning regardless of what other evidence might be presented, or "in any prosecution," meaning not only under the facts of the present case but under any set of facts involving any defendant. The prosecutor was apparently unclear as to the meaning of the term, as reflected in her ensuing question to Perez-Cruz (T 673):

> MS. DANNELLY: So do you feel that, knowing full well that the State intends to seek the death penalty in this case, that if you convict the defendant on the evidence, that he would be facing the death penalty, which you are opposed to, at least in this case, and quite likely in other cases, that that would have an effect on your ability to sit on the jury and deliberate?
>
> MR. CRUZ-PINO: I could make a decision on whether to find him guilty or not guilty, but when this time came for the sentencing aspect, that's the problem I have. (emphasis added)

The emphasized portion of the prosecutor's question certainly indicated that she did not interpret the juror's initial statement as meaning that he could never vote to impose the death penalty on any defendant under any circumstances. The juror's reference in response to "the problem" he had shed no light on the matter.

Subsequently, the juror stated, "I could not do that, no matter what, no matter what verdict we came up with, I couldn't impose the death penalty or recommend it (T 674)." Again, it was not made clear whether the juror's feelings related to all prosecutions or just to the present one, as implied by the term "what verdict we come up with."

Upon further questioning, the juror's beliefs became even less clear, as he stated on two occasions that he did not have a problem with a person being sentenced to death, but that he didn't want to be the person to do it (T 675, 676). He was not

asked whether, despite his reluctance, he could recommend a death sentence under appropriate circumstances.

On examination by defense counsel, the juror moved even further away from taking such an absolute position. He agreed that he was "just very hesitant to be involved in a death penalty situation (T 677; emphasis added)." Asked it he could make a recommendation to the court, he replied (T 678):

> I guess I just don't know enough about the system.
> I can understand finding someone guilty or not guilty, but it's the second phase that bothers me. I guess I just don't know enough about it.

He was then asked if he felt he would have difficulty sitting in the death penalty phase of the trial and replied (T 679):

> I don't think I would have difficulty sitting in it. I would just have to vote my conscience.

At that point, the court asked, "And your conscience is that you will not vote in any case to impose the death penalty? (T679)." The juror replied, "That's right (T 679)." The court's question thus used the same ambiguous phrase, "in any case," as did the juror's initial comment. While it can be assumed that the court meant for the phrase to mean "in any prosecution," it cannot be assumed that someone not familiar with the law on the subject, such as the juror, would interpret it in that manner. Thus, despite the court's effort, it remained unclear exactly what the juror meant.

Without waiting to hear argument, the court stated that there existed cause to remove the juror for the penalty phase (T 680). Upon defense request, however, the court withheld making a formal ruling at the time (T 680-681).

The matter was revisited prior to the penalty phase of the trial. The court again used the same ambiguous phrase in questioning the juror (T 5/28 10):

> THE COURT: * * *
> My first question to you is, do you still feel that you could not in any case impose the death penalty?
> MR. CRUZ-PINO: Yes, I do.

On examination by defense counsel, the juror was asked whether he could participate and be fair to both sides. He replied, "I don't know how to answer that. I

don't know if--when you say fair or fairly, I don't think I am being fair. Just doing what my conscious says (T 5/28 11)." He then agreed with defense counsel that there was no possible way to have him recommend a sentence of death (T 5/28 11). The juror was not asked whether his feelings were limited to the present case or whether they applied to all defendants under all circumstances.

After the court indicated that it would again reserve ruling, the prosecutor asked whether the argument as to whether the juror was fit and appropriate would be reopened (T 5/28 12). The court responded in the negative (T 5/28 12). Defense counsel then said, "Maybe he changed his mind afterwards (T 5/28 12," an apparent reference to the juror's opinion being changed by the facts of the case he heard prior to contacting the court. The court responded by stating that the juror could not have been any clearer than he had been and ended the discussion (T 5/28 12). At the conclusion of its instructions to the jury, the court, without pausing for argument, replaced the juror with an alternate (T 5/28 73-74).

In urging the court to excuse the juror, the State relied on Jennings v. State,512 So.2d 169 (Fla. 1987). In that case, this court approved the removal from the penalty phase of a juror who told the court during trial that she had not been completely candid about her feelings regarding the death penalty and that she could not recommend a death sentence. The decision in Jennings relied on Tresvant v. State, 359 So.2d 524 (Fla. 3d DCA 1978), cert. denied, 368 So.2d 1375 (Fla. 1979), anther case which dealt with concealment of information by a juror during voir dire.

In the present case, there was no concealment of information. As the trial progressed, and as he heard the evidence, certain feelings began to take shape in Cruz-Pino's mind. At no time did he indicate that those feelings had existed

during voir dire or that they had been concealed. Thus, the broad discretion recognized in Jennings and Tresvant, discretion that exists to correct juror misconduct, does not exist here.

That is not to say that a trial court cannot ever excuse a juror based on concepts that crystalize in a juror's mind during a trial. If those concepts demonstrate a basis for exclusion that exists independent of the evidence in the case, such an action may be appropriate. When the concepts are based upon evaluation of the evidence presented up to that point in the trial, however, excusing the juror would not be proper. See Grooms v. Wainwright, 610 F.2d 344 (5th Cir. 1980), cert. denied, 445 U.S. 953, 100 S.Ct. 1605, 63 L.Ed.2d 789 (1980) (not error when trial court failed to conduct inquiry of juror after being informed that during trial juror had stated that from what juror had heard so far in trial, defendant was guilty). Indeed, to excuse a juror under such circumstances would be to interfere in the jury's decision making process.

In the present case, because of the inconsistent and inconclusive comments by the juror and the repeated use of the ambiguous phrase "in any case," it is not clear whether Cruz-Pino's feelings were based on the evidence he had heard relating to the present proceeding or whether they applied to all defendants under all circumstances in a manner that would allow for him to be properly excused pursuant to the dictates of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Under these circumstances, there was an insufficient basis to support the court's decision to excuse the juror and to replace him with an alternate juror. Reversal of the sentences as to the murder charges is therefore required.

IX. PROSECUTORIAL MISCONDUCT THROUGHOUT THE TRIAL DEPRIVED DEFENDANT OF A FAIR TRIAL

> It is ... the duty of a prosecuting attorney in a trial to refrain from making improper remarks or committing acts which would or might tend to affect the fairness and impartiality to which the accused is entitled. Tribue v. State, Fla.App.1958, 106 So.2d 630. The prosecuting attorney in a criminal case has an even greater responsibility than counsel for an individual client. For the purpose of the individual case, he represents the great authority of the State of Florida. His duty is not to obtain convictions but to seek justice, and he must exercise that responsibility with the circumspection and dignity the occasion calls for. His case must rest on evidence, not innuendo. If his case is a sound one, his evidence is enough. If it is not sound, he should not resort to innuendo to give it a false appearance of strength. Cases brought on behalf of the State of Florida should be conducted with a dignity worthy of the client.
>
> Kirk v. State, 227 So.2d 40, 43 (Fla. 4th DCA 1969) (footnote omitted)

" ... [I]t is imperative that prosecuting attorneys be ever mindful of their awesome power and concomitant responsibility. The tactics and trial strategy of the prosecutor must reflect a scrupulous adherence to the highest standards of professional conduct." Martin v. State, 411 So.2d 987, 990 (Fla. 4th DCA 1982). "At all times a prosecutor cannot overstep the bounds of propriety and fairness and he must not resort to improper methods to produce a wrongful conviction." Rolle v. State, 268 So.2d 541, 542 (Fla. 3d DCA 1972). "The duty to prosecute does not transcend the duty to be fair." Hargrove v. State, 431 So.2d 732, 733 (Fla. 4th DCA 1983). Thus, "the prosecutor has a duty to be fair, honorable and just." Boatwright v. State, 452 So.2d 666, 667 (Fla. 4th DCA 1984). The prosecutor "may prosecute with earnestness and vigor--indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314, 1321 (1935). A prosecutor who "evidences an excessive preoccupation with obtaining a conviction at any cost ... disregards the prosecutor's duty in representing the people of the state of Florida to see that justice is done because obtaining a conviction at the expense of a fair trial is not justice." Briggs v. State, 455 So.2d 519, 521 (Fla. 1st DCA 1984). "Such violations

of the prosecutor's duty to seek justice ... cannot be condoned." Garron v. State, 528 So.2d 353, 359 (Fla. 1988). In the present case, the effect of numerous inappropriate remarks and acts by the prosecutor compels reversal of the convictions.

A. COMMENTS AND TESTIMONY INDICATING THAT THE POLICE, PROSECUTOR AND COURT BELIEVED IN DEFENDANT'S GUILT AND IN THE CREDIBILITY OF WITNESSES, SUGGESTING THAT THE PROSECUTOR HAD ADDITIONAL REASONS FOR SUCH BELIEFS AND ATTRIBUTING MOTIVES TO WITNESSES

During closing argument, the prosecutor, over objection, addressed defense counsel's contention that the evidence was insufficient by stating (T 5/22 104):

> I am appalled to think --
> MR. DIAZ: Objection.
> THE COURT: Overruled.
> MS. DANNELLY: -- that Mr. Diaz would suggest to this jury that these detectives and this Court and all of those good people who came and testified in this case and myself would be satisfied of these murders to convict the wrong man. Do you think Rose Flight would sleep lightly at night? How about Feliciano Aguayo or Elizabeth Feliciano or Rufino Perez or Detective LeClair or Dave Gilbert or David Rhodes or myself? Do you think we could settle for that and yet this is what he tells you this is about, that we don't have any evidence ... .

Shortly thereafter, the prosecutor discussed the reason why she had spoken with police criminalist David Rhodes prior to the trial. She said (T 5/22 105):

> The purpose is so that when you as a prosecutor go into court and you file two counts of first degree murder and sexual battery and armed burglary against a man and you take him to court and you stand before a jury and ask for the death penalty that you make damn sure that he is the person who did it. You make damn sure that you go over every little piece of evidence and you make god damn sure that none of that evidence exonerates him. You better believe you spend a lot of time with those experts and there is no doubt that that was done in this case.

The prosecutor quickly returned to the same theme (T 5/22 106):

> And that is why I talked to him and that is why I got the evidence and that is why he analyzed it, so there was absolutely no doubt when we came into a court of law seeking justice that that man was guilty.

Near the end of her argument, the prosecutor revisited the subject (T 5/22 119):

> You consider the evidence in this case, you decide if the police officers and this Court and State would be satisfied to convict the wrong man of these murders and if you think so you find him not guilty.

These comments plainly expressed to the jury the prosecutor's personal belief in Defendant's guilt and in the credibility of the witnesses. They also indicated that the police shared her beliefs. In addition, they suggested that the prosecutor

had additional reasons for her beliefs and improperly attributed motives to the witnesses. Further, they portrayed the court as having the same beliefs and motives as the prosecutor and the police. Moreover, the impact of these comments was magnified by the fact that during the trial, the prosecutor had elicited testimony that had the same effects.

Over defense objection, the prosecutor established from Det. John LeClair that from 1985 through and to the conclusion of his investigation there were no other suspects in the case (T 5/21 87).[14] This occurred despite the fact that a defense objection had thwarted a previous attempt by the prosecutor to establish through the medical examiner that there had come a time when he learned that other suspects had been ruled out (T 728). Apparently not satisfied with having made her point once after the initial rebuff, the prosecutor also brought out over defense objection from Det. Dave Gilbert that he had no knowledge of any other suspects that remained.[15]

The comments regarding her pretrial conversations with Rhodes grew from testimony the prosecutor elicited as to the fact that she and Rhodes had discussed the case on many occasions in great lengths and were uttered despite the fact that a defense objection to the line of testimony was sustained (T 5/21 145).

Also accentuating the prosecutor's comments was the fact that the prosecutor improperly bolstered the credibility of three of her witnesses by establishing that they had given prior statements consistent with their testimony (T 761, 807, 818, 820, 821, 5/21 10-11). This testimony is discussed in Section C of this point as an independent area of misconduct, but it should also be considered here.

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[14] This testimony was elicited despite the fact that the prosecutor had previously made a successful objection "to other detectives suppositions, speculations, hypothesis, possibilities as to who may or may not have been suspects in 1983 (T 5/21 68)."

[15] Similarly, the prosecutor elicited testimony reflecting that John Conners had been eliminated as a suspect and commented on that fact in closing argument. See the discussion with regard to that testimony and argument in Point IV.

There can be no question that a prosecutor may not express a personal opinion as to a defendant's guilt. Singletary v. State, 483 So.2d 8 (Fla. 2d DCA 1985); Jones v. State, 449 So.2d 313 (Fla. 5th DCA 1984); Wilson v. State, 371 So.2d 126 (Fla. 1st DCA 1978); Reed v. State, 333 So.2d 524 (Fla. 1st DCA 1976); Arline v. State, 303 So.2d 37 (Fla. 1st DCA 1974). It is equally improper to express law enforcement officers' beliefs in a defendant's guilt. Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984), rev. denied, 462 So.2d 1108 (Fla. 1985). It is also inappropriate for a prosecutor to express a personal opinion as to a witness' credibility. George v. State, 539 So.2d 21 (Fla. 5th DCA 1989); Blackburn v. State, 447 So.2d 424 (Fla. 5th DCA 1984); Cummings v. State, 412 So.2d 436 (Fla. 4th DCA 1982); Francis v. State, 384 So.2d 967 (Fla. 3d DCA 1980). Likewise, a prosecutor may not comment on a witness' motives when those motives are not brought out in testimony. Duque v. State, 498 So.2d 1334 (Fla. 2d DCA 1986). Further, it is improper to suggest that counsel has additional reasons for believing witnesses. Walker v. State, 473 So.2d 694 (Fla. 1st DCA 1985), rev. denied, 491 So.2d 281 (Fla. 1986). Plainly, these authorities demonstrate that the testimony and comments here were improper.

B. COMMENTS ATTACKING DEFENSE COUNSEL

Throughout the trial, the prosecutor launched repeated personal attacks against Defendant's attorney. The prosecutor's salvos began during voir dire, continued during the questioning of witnesses and culminated in a full scale barrage during closing argument.

In voir dire, after the prosecutor told the jury that she was "the only person with a real responsibility in this case (T 162)," Defendant's counsel stated, "I'm going to object to that statement (T 162)." Despite the fact that the objection was sustained, the prosecutor responded, "I'm sure you would object, but nevertheless (T162)"

On redirect examination of Det. John LeClair, the prosecutor asked whether, "other than Mr. Diaz' [defense counsel] speculative question," any bloody footprints were found on the sidewalk or the grass at the crime scene (T 5/21 85). After

LeClair responded in the negative, the prosecutor gratuitously added, "Except in Mr. Diaz' mind, correct? (T 5/21 85)." After a defense objection was sustained and a motion to strike made, the prosecutor withdrew the comment (T 5/21 85).

Shortly thereafter, however, the prosecutor received a negative response when she asked LeClair whether he had any indication from any source that a particular wooded area that Defendant's counsel had asked questions about was of evidentiary value. She then added, "Other than Mr. Diaz? (T 5/21 89).

Moments later, in response to the fact that Defendant's counsel had brought out that LeClair had not visited a home located at 14700 Biscayne Drive (T 5/21 77), the prosecutor asked whether LeClair knew who lived at that address (T 5/21 90). After he replied in the negative, she asked if he knew if it was "the defense attorney's house, perhaps? (T 5/21 90)."

Questioning in an area that Defendant's counsel had gone into in cross examination, the prosecutor then established that there were no charge accounts that needed to be checked for illegal use (T 5/21 92) and followed up by asking LeClair, "Do you have any idea what Mr. Diaz is talking about? (T 5/21 92)."

In her initial closing argument, the prosecutor stated (T 5/22 54-55):

> Mr. Diaz spent quite a bit of time trying to convince you that the time of death could have been Saturday night, 11:00 p.m., midnight, 10:00 p.m., 9:00 p.m., but you know very much of the cross-examination in this case would remind one of a show that used to be on, it was called the Rest of the Story. The questions get posed. And it seems like that's the answer. And then you hear the rest of the story.
> ... You cannot divorce yourself from the facts of that crime scene as Dr. Marraccino told you and as Mr. Diaz would suggest that you should do ... .

The prosecutor then argued that Elizabeth Feliciano knew the time that Defendant came to her house and asked, "Where is the great mystery for Mr. Diaz? (T 5/22 56)."

The prosecutor then noted that there had not been any evidence presented in the trial against John Conners, an individual who had been questioned in the course of the investigation. She then stated (T 5/22 68):

> But you are supposed to consider him a suspect because you know you know why, Mr. Diaz doesn't want you to consider the evidence against his client. Mr. Diaz wants you to forget Rufino Perez, Elizabeth Feliciano and Feliciano Aguayo and think about speculative people, names he can throw out and try to catch you on, as if you were fools, as if you would not question him.

Next, the prosecutor argued to the jury that several of the State's witnesses did not know each other and that they should be believed. She then created an argument about the witnesses somehow conspiring and attributed that argument to Defendant's counsel despite that the defense had never even hinted at such a theory. In this regard, the prosecutor said (T 5/22 71-72):

> Helen McMakin doesn't even know Ximena Evans. Ximena Evans doesn't even know Feliciano Aguayo. They don't know Rufino Perez, so I guess all these people, independent of each other, maybe they were all looking for a reward that didn't exist, got together and conjured up this grand scheme to convict that man of these murders which he obviously couldn't have committed. That is what defense counsel would have you believe.

After Defendant's counsel gave his closing argument, the prosecutor resumed her attacks, beginning by stating (T 5/22 100-101):

> Now, I would like to address in a rapid fashion the issues Mr. Diaz raises. There is an old adage in the courtroom, it goes something like this: When you can't attack the law, attack the facts. When you can't attack the facts attack the prosecutor.
>
> Well, I am the prosecutor in this case and he is welcome to attack me as much as he wants to. That goes with the territory but that is not what you are to consider. I am happy taking it on. I have been doing it a long time because believe me it's not the first time.
>
> It tells you something. It tells you Mr. Diaz wants you to think of an ulterior motive that all these people have to convict his client rather than address the evidence because you can't attack the facts and the evidence because they stand unrefuted in this case.

The prosecutor then stated that Defendant's counsel told the jury that he had made no attempts to fool them or to color the evidence. She then said (T 5/22 102-103):

> Yet Feliciano Aguayo sat on that witness stand for some time. He testified on direct, cross-examination. He testified on redirect, he recrossed him and never did he ever say to Mr. Aguayo to his face, look him in the eyes, weren't you arrested on January 18th and didn't it have something to do with this case?
>
> Do you know why he never did that? You ask yourselves why Mr. Diaz never had the courtesy to look the man in the face and let him explain it. You know why? Because he knew the answer. He knew that Feliciano Aguayo was arrested for a drivers license infraction that had absolutely nothing to do with this case, and he wanted to color it in such a fashion that this big bad man was looking for favors on his drivers license ticket and so he invented a story that miraculously is parroted by his own client two-and-a-half years later to Detective LeClair.

Despite the fact that when a witness is or has been under charges, it is appropriate only to bring out the existence of the charges, not the specific crimes involved, Rolle v. State, 386 So.2d 3 (Fla. 3d DCA 1980), the prosecutor added (T 5/22 103):

> Now, what do you call that technique? What do you call that technique when you don't even approach the man and look him in the eyes and give him a chance?

Pointing out that Defendant's counsel used the word "justice" in his closing argument, the prosecutor went on to say (T 5/22 104):

> You know why he talks justice, because he wasn't talking about the evidence in this case. He can throw oot this word and incite emotion and try to march his client out the back door and make you feel good about yourselves.

As set forth fully in Section A of this point, the prosecutor discussed her pretrial meetings with police criminalist David Rhodes (T 5/22 105, 106, 119). She also criticized Defendant's counsel for not bringing out the fact that these meetings occurred and for objecting when she did so (T 5/22 104-105):

> Let's talk about David Rhodes, an interesting witness. You found out in cross-examination, you didn't find it on direct, cross-examination that I had spoken to him many, many times. I wanted you to know that. He objected but you found out about it anyway.

The prosecutor then returned to her accusation that Defendant's counsel was trying to fool the jury (T 5/22 113):

> All of a sudden and while we are on the subject of a knife, Mr. Diaz brings up a knife and leaves it hanging there, didn't you get a knife, you got a knife and checked it, it had a broken tip, didn't it? It is significant here that it is hanging, he knows it is not going to be tied up today or to anybody else. Now you know why, he knows he found out later the rest of the story that the knife was obtained at the Homestead Air Force base in December of 1982, a whole month before the homicide even takes place. He doesn't want to fool anybody oh, no.
> MR. DIAZ: Judge, I never brought up anything about the knife, she did.
> THE COURT: Never mind the comment. This is final argument. Objection overruled.
> MS. DANNELLY: Just dangling it there, doesn't explain and hopes the jury bites.

It is therefore clear that a substantial portion of the prosecutor's strategy was to attack Defendant's attorney rather than to deal with the evidence. The various comments and questions that made up this attack were either wholly

unnecessary or touched on matters that could have been dealt with by phraseology directed to the underlying issue instead of to counsel personally. This approach effectively placed Defendant on trial not just for what he was charged with doing, but also for the allegations made by the prosecutor against defense counsel.

The prosecutor's attacks were unwarranted and inappropriate. In Briggs v. State, 455 So.2d 519, 521 (Fla. 1st DCA 1984), the court discussed the inappropriateness of a prosecutor suggesting that defense counsel was not being truthful and was deliberately misleading the jury. Noting that such conduct evidences an excessive preoccupation with obtaining a conviction at any cost, the court said:

> Such preoccupation usually leads to personal involvement by counsel to such an extent that he or she often becomes unable to try the case with the degree of objectivity and personal detachment required of counsel in the adversarial environment. Verbal attacks on the integrity of opposing counsel, rather than appropriate comments on the credibility of witnesses and inferences to be drawn from the evidence before the jury, are wholly inconsistent with the prosecutor's role.

Likewise, the court in Tarrant v. State, 537 So.2d 150, 152 (Fla. 2d DCA 1989), rev. denied, 544 So.2d 201 (Fla. 1989), citing to Briggs, stated, "It is improper and unethical for counsel to attack the personal integrity and credibility of opposing counsel instead of trying the legal and factual issues."

Other cases have found fault with specific comments that are quite like those in the present case. For instance, comment on defense techniques has been held improper. Cochran v. State, 280 So.2d 42 (Fla. 1st DCA 1983). One of the numerous comments found improper in Alvarez v. State, 574 So.2d 1119, 1120 (Fla. 3d DCA 1991), was, "So, if you are nitpicking and trying to insult someone's intelligence, as the defense is really doing today ... ." Similarly, in Melton v. State, 402 So.2d 30 (Fla. 1st DCA 1981), it was inappropriate for the prosecutor to argue that it was amusing how defense attorneys come up with arguments to thwart the common sense of jurors. References to defense counsel's "cheap tricks," Redish v. State, 525 So.2d 928, 931 (Fla. 1st DCA 1988), and to a defense argument as a "smoke screen," McGee v. State, 435 So.2d 854 (Fla. 1st DCA 1983), have also been found inappropriate. Numerous other cases have used similar reasoning. See Johnson v. State, 351 So.2d

10 (Fla. 1977) (argument that defense attorney sought to make a mockery of Hamilton county); Jenkins v. State, 563 So.2d 791 (Fla. 1st DCA 1990) (accusing defense counsel of further victimizing the victim and of seeking an acquittal at all costs rather than searching for the truth); Jackson v. State, 421 So.2d 15 (Fla. 3d DCA 1982) (question to jury as to whether they would buy a used car from defense attorney and reference to defense attorney as cheap shot artist); Harris v. State, 414 So.2d 557 (Fla. 3d DCA 1982) (implication that witness' tearful breakdown on stand was due to tactics of defense counsel); Simpson v. State, 352 So.2d 125 (Fla. 1st DCA 1977) (reference to one of the favorite tricks of a defense lawyer).

In Briggs, supra, 455 So.2d at 520, n. 1, the court quoted an admonition from the trial judge to the prosecutor to the effect that the case was not being tried on the evidence, but that it was being tried on persons. The trial judge in Briggs then said, "It's happening, the circumstances--I read about it in Miami all the time." That trial judge was correct. It does happen in Miami and it did happen in Miami in the present case.

C. IMPROPER EFFORTS TO BOLSTER THE CREDIBILITY OF THE STATE'S WITNESSES

The prosecutor established that three of the State's witnesses, Feliciano Aguayo (T 761, 807), Rufina Perez-Cruz (T 818, 820) and Ximena Evans (T 5/20 10-11), told the police the same version of events that they testified to at trial. Over defense objection, she also established that Perez-Cruz told the same version of events to an attorney (T 821), presumably during a deposition.

Prior consistent statements of a witness are hearsay and are generally not admissible to corroborate or augment the witness' trial testimony. Jackson v. State, 498 So.2d 906 (Fla. 1986); Van Gallon v. State, 50 So.2d 882 (Fla. 1951); Jenkins v. State, 547 So.2d 1017 (Fla. 1st DCA 1989); Roti v. State, 334 So.2d 146 (Fla. 2d DCA 1976). An exception to the general rule exists when the prior statement comes in to rebut an express or implied charge against the witness of improper influence, motive or recent fabrication. Jackson, supra; Gardner v. State, 480 So.2d 91 (Fla. 1985). This exception clearly does not apply here.

In the first place, the prosecutor established the prior consistent statements on direct examination of each witness. "There must be an initial attempt on cross-examination to demonstrate the improper influence, motive or recent fabrication" before the exception can apply. Jenkins, supra, 547 So.2d at 1020. Moreover, Defendant's counsel made no such charges in the ensuing cross examination of the witnesses. Rather, "he was merely testing the credibility of the witness[es] as he is allowed to do." Keller v. State, 586 So.2d 1258, 1260 (Fla. 5th DCA 1991). Further, even after the defense made no charges on cross examination of Feliciano Aguayo, the prosecutor established Aguayo's prior statements a second time on redirect examination (T 807).

It should also be realized the improper testimony appears to have played a significant role in the jury's decision making process. The jury deliberated over a period of two days and made numerous requests to have testimony read to them. As a result, portions of the testimony of several witnesses was read to them. After their request to hear the entire testimony of Perez-Cruz was denied by the court (T 5/23 93), the jury asked to rehear that portion of Perez-Cruz' testimony "re: when she first spoke to the police (T 5/23 94; R 91)." Pursuant to that request, the jury again heard testimony that in 1983, shortly after the killings, Perez-Cruz had told the police what she told the jury during the trial (T 5/23 96). Thereafter, the jury made no further requests for testimony and convicted Defendant. Given these facts, the critical nature of Perez-Cruz' testimony and the fact that Perez-Cruz' credibility was subject to question in light of the payroll records that indicated that Defendant was not working when Perez-Cruz claimed to have heard him make the statements about which she testified, the introduction of the prior statements was unquestionably improperly prejudicial to Defendant.

It also appears that the prosecutor was aware of the general rule of law and tried to circumvent it by creating her own charge of an improper motive in order to bring out the prior statements to rebut it. Immediately after bringing out the prior statements of Aguayo, the prosecutor asked whether Aguayo was aware of a reward in

the case and received a negative reply (T 761). The same was true with regard to Perez-Cruz (T 820). Yet, Defendant's attorney never asked these witnesses anything about a reward.[16] Thus, the prosecutor set up a straw man by bringing up the reward and knocked it down with the prior inadmissible prior consistent statements.[17] In that manner, the prosecutor improperly bolstered the testimony of the three witnesses, two of which, Aguayo and Perez-Cruz, were of great importance to the State's case, "and cloaked it with a vicarious integrity which undoubtedly enhanced its probative value." Roti, supra, 334 So.2d at 148.

[16] Defendant's attorney had cross examined Elizabeth Feliciano about a reward, but she admitted that she was aware of a reward when she spoke to the police (T 629-630). Clearly, Defendant's counsel was aware from pretrial discovery as to which witnesses were aware of the reward when they talked to the police and which witnesses had not. He appropriately limited his cross examination on the subject to the one witness who did know of the reward. Certainly, the defense cross examination of Feliciano in this regard did not give the prosecutor carte blanche to bring out prior consistent statements made by the other witnesses. The prosecutor's apparent knowledge in this area of the law is demonstrated not just by the fact that she asked Aguayo and Perez-Cruz about a reward, but also by the fact that she did not ask Feliciano whether she had given consistent statements to the police. This approach was an apparent recognition of the fact that the exception to the general rule of inadmissibility of prior consistent statements does not apply when the statements were made after the event giving rise to the purported motive. Jackson, supra; Kellam v. Thomas, 287 So.2d 733 (Fla. 4th DCA 1974).

[17] The prosecutor compounded the effect of her efforts by arguing in closing argument that Perez-Cruz knew nothing of a reward and that she had no motive to testify as she did (T 5/22 64).

The prosecutor's closing argument on this matter also demonstrated the impropriety of the testimony she elicited as to the prior consistent statements. As detailed in Section H of this point, immediately after arguing that Perez-Cruz had no motive, the prosecutor went on to improperly comment on Defendant's failure to supply such a motive (T 5/22 64). This comment implicitly conceded that the defense had not made a charge of improper motive that might have given rise to the exception that under appropriate circumstances can allow for the introduction of prior consistent statements.

Moreover, before concluding her closing argument, the prosecutor amplified the impact of the improper testimony one more time by asking the jury if they saw the expressions on the witnesses' faces and whether they looked like they knew anything about a reward (T 5/22 112).

D. IMPROPER ATTACKS ON DEFENDANT'S CHARACTER AND HIS DEMEANOR OFF THE STAND

In her examination of Rufina Perez-Cruz, the prosecutor brought out the fact that in January of 1983, when the killings in this case took place, Defendant looked different than he did at trial (T 822). She then had Perez-Cruz discuss the differences in appearance, establishing that in 1983, Defendant had long hair down to his shoulders and a moustache, that Defendant frequently wore a bandana around his forehead and that Defendant did not appear or dress like he did in court (T 822).

The only possible reason for this testimony was to attack Defendant's character by showing that his appearance when he was not before a jury was consistent with the stereotypical image the jury might have had of a criminal and by insinuating that Defendant's appearance in the courtroom was an act designed to make the jury think more highly of him than they would otherwise.

It is well settled that the State may not attack the character of an accused until and unless the accused has placed his character in issue. Young v. State, 141 Fla. 529, 195 So. 569 (1940); Ivey v. State, 586 So.2d 1230 (Fla. 1st DCA 1991). This principle has been specifically held applicable to efforts to contrast a defendant's courtroom appearance to the way the defendant looked at the time of arrest and of the commission of the crime. Kingery v. State, 523 So.2d 1199 (Fla. 1st DCA 1988); Proctor v. State, 447 So.2d 449 (Fla. 3d DCA 1984). In addition, "comments on a defendant's demeanor off the stand are clearly improper." Pope v. Wainwright, 496 So.2d 798, 802 (Fla. 1986), cert. denied sub nom, Pope v. Dugger, 480 U.S. 951, 107 S.Ct. 1617, 94 L.Ed.2d 801 (1987). These principles demonstrate that the testimony here was improperly elicited.

E. MISSTATEMENTS OF FACT

In an effort to demonstrate that Rufina Perez-Cruz was either mistaken or lying when she claimed that, while at work, she overheard Defendant make the statements about which she testified, the defense introduced payroll records (R 83-86) that

reflected that Defendant was not working at the time in question.[18]

With regard to this subject, the State presented the testimony of Sgt. Jim Radcliff, who, in investigating the case, had attempted to obtain payroll records of individuals who worked for Defendant's employer, Jose Trevino, "in an effort to gain more witnesses in a certain event (T 5/20 19)." Specifically, Radcliff's "purpose was to find a list of individuals that Henry Garcia had been talking to (T 5/20 21)." When asked whether he was trying to find out whether Defendant was one of the individuals working there, Radcliff replied, "No. We knew Henry Garcia was working there. We were trying to find out the names of other people (T 5/20 21)." Radcliff also testified that he was unable to find anything that was useful to him (T 5/20 19) and that the payroll records the defense introduced were not produced for him (T 5/20 19).

In closing argument, the prosecutor contended that the jury should give little or no weight to the documents presented by the defense. In arguing this point, she stated, "In 1985 September Mr. Trevino and his daughter told police that the records didn't exist and they don't get produced. All of a sudden in 1988 there are these pieces of paper. Where did they come from? What backs them up? (T 5/22 110-111; emphasis added).

It is clear from Radcliff's testimony that the police did not even seek Defendant's payroll records. They were not trying to determine when Defendant was working, but were trying to find the individuals to whom Perez-Cruz claimed Defendant made the statements about which she testified. There was no reason for Defendant's payroll records to have been produced in response to such an inquiry.

Thus, the prosecutor's statement that Trevino and his daughter told the police that the records did not exist is totally unsupported by the evidence. Moreover, the statement is strikingly similar to a statement relied upon by this court as a

[18] The refusal to admit these records into evidence was the basis upon which this court reversed Defendant's initial conviction in this case. Garcia v. State, 564 So.2d 124 (Fla. 1990).

factor in overturning Defendant's initial conviction in this case. As this court noted, Garcia v. State, 564 So.2d 124, 128-129 (Fla. 1990), in the prior trial, the prosecutor stated:

> [Y]ou can't get the records. I wouldn't say we didn't look for them. You better believe we looked for them. The police looked for them but they simply didn't exist and that's why you didn't hear any records in this courtroom, even though you heard testimony from a woman who alleged to have some. (emphasis added)

From the last trial to this one, therefore, the prosecutor went from telling the jury that the records "simply didn't exist" to telling another jury that Trevino and his daughter "told police that the records didn't exist."

The impact of this misstatement was magnified by the fact that in her efforts to convince the jury that someone had fabricated the payroll records, the prosecutor told the jury that Defendant dated Irma Paz, Trevino's daughter, in January of 1983 (T 5/22 109). After an objection by defense counsel that there was no evidence to support this assertion, the prosecutor told the jury that both Perez-Cruz and Ida Paz, Irma's sister, had testified to the fact (T 5/22 109-110). She then repeated that Ida Paz had told the jury that Defendant used to date Irma (T 5/22 110).

These statements were also unsupported by the record. Perez-Cruz, after first stating that she did not know if Defendant and Irma "were friends or if they had a relationship (T 826)," stated only that she would say that the two were friends (T 827). Ida Paz not only did not testify as the prosecutor claimed, but she said that she didn't know Defendant (T 5/22 23, 29).

"A prosecuting attorney['s]" argument should always be confined "to facts which are established by the record or which may be reasonably inferred from the facts established," and when a prosecutor "goes beyond that range," the prosecutor "takes the chance" of causing "the necessity of the reversal of a favorable judgment." Frenette v. State, 158 Fla. 675, 29 So.2d 869 (1947). When, as here, the prosecutor injects an important element not supported by the record into closing argument, the prosecutor "violates the rule that argument of counsel be channeled by the evidence produced at trial." Huff v. State, 437 So.2d 1087, 1091 (Fla. 1983).

The prosecutor here violated these principles and did so with regard to evidence that was of critical importance to the defense.

F. MISSTATEMENTS OF LAW

The prosecutor made repeated misstatements of law to the jury. Initially, she told the jury panel during voir dire that Defendant was "cloaked in an imaginary cloak of innocence (T 84-85; emphasis added), an obvious dimunition of the very real presumption of innocence that forms the backbone of our system.

She went on to define premeditated murder as "something that somebody intends to do (T 219)," ignoring the fact that there exists a distinct legal difference between intent and premeditation. Miller v. State, 76 Fla. 136, 77 So. 669 (1918); Tien Wang v. State, 426 So.2d 1004 (Fla. 3d DCA 1983), rev. denied, 434 So.2d 889 (Fla. 1983); Littles v. State, 384 So.2d 744 (Fla. 1st DCA 1980).

The prosecutor also told the prospective jurors that they "will all be, basically, the finders, as the instructions will tell you, of what is true here, what really happened (T 192)." That comment was quite similar to improper comments made by the trial court in Gibbs v. State, 193 So.2d 460 (Fla. 2d DCA 1967). There, the court told the jury that they were "going to seek the truth" and that they had "only one desire, and that is to seek the truth based on the evidence." Id. at 462. On appeal, the comments were found improper because the role of a jury is to reach a verdict, not necessarily to seek the truth. The appellate court noted that such a comment could lead a juror to vote to convict because of a belief that the defendant committed the offense, even when the offense is not proven beyond a reasonable doubt.

On several occasions, the prosecutor told the jury panel that reasonable doubt is a doubt for which you have a reason (T 85, 86, 188, 205). Such comments distorted the definition of reasonable doubt. Even when a juror does not have a specific reason for a doubt, the juror's abiding conviction of guilt need only be one "which wavers and vacillates" to establish a reasonable doubt. Florida Standard Jury Instruction (Criminal) 2.03.

The prosecutor thus made numerous misstatements of law to the jury. "Counsel may not contravene the law and the jury instructions in arguing to the jury." Cave v. State, 476 So.2d 180, 186 (Fla. 1985), cert. denied, 476 U.S. 1178, 106 S.Ct. 2907, 90 L.Ed.2d 993 (1986). Yet, that is exactly what happened here with regard to extremely important legal concepts. The prosecutor's comments were plainly improper.

G. APPEALS TO SYMPATHY

Although it was totally irrelevant to any aspect of the case, the prosecutor informed the jury during opening statement that the victims had a niece who was a nun in New York and that Rose Flight, a neighbor, had the task of letting "the Mother Superior" know of the crimes so that the family could travel to Miami to make the appropriate arrangements (T 377). She subsequently elicited these facts from Flight (T 412-413), an elderly woman whom the prosecutor physically assisted when she took the stand (T 414). The defense objected to the irrelevant hearsay testimony and to the prosecutor assisting the witness (T 414).

"It is the responsibility of the prosecutor to seek a verdict based on the evidence without indulging in appeals to sympathy, bias, passion or prejudice." Edwards v. State, 428 So.2d 357, 359 (Fla. 3d DCA 1983). Prosecutors also have a responsibility to "seek justice," a responsibility that is inconsistent with such appeals. Harper v. State, 411 So.2d 235, 237 (Fla. 3d DCA 1982). Irrelevant references to a victim's family are improper appeals to sympathy. Johnson v. State, 442 So.2d 185 (Fla. 1983), cert. denied, 466 U.S. 963, 104 S.Ct. 2182, 80 L.Ed.2d 563 (1984). Making the point that such a family member was a nun and doing so through a witness for whom the prosecutor also sought sympathy magnified the impropriety. The prosecutor's actions here ignored her responsibilities and were clearly inappropriate.

H. COMMENT ON FAILURE OF DEFENDANT TO TESTIFY OR PRODUCE AN EXPLANATION

In closing argument, the prosecutor stated (T 5/22 64):

> What motive does Rufino Perez have to come into this court and testify if it isn't the truth? What reason could this woman possibly have to come into court and tell you what she heard if she hadn't heard it and if she wanted to come into court had a motive to convict him of murder? Don't you think he would have known about it? Don't you think Mr. Diaz would have brought something to your attention? And yet her testimony is totally unimpeached.

Clearly, this comment told the jury that Defendant would have known of any motive that Rufina Perez-Cruz might have had to testify as she did and that he would have told any such information to his attorney, who would have brought it out. This case is therefore similar to Wright v. State, 363 So.2d 617 (Fla. 1st DCA 1978), cert. denied, 372 So.2d 471 (Fla. 1979), in which the prosecutor, in his argument, asked the defense attorney the location of a gun that was supposedly used in the offense charged but that was not found by the police. Reversing the conviction, the court stated, 363 So.2d at 620:

> In these circumstances, the prosecutor's comment could have only carried the impression to the jury that defense counsel knew what happened to the missing gun because his client knew, and that neither had revealed that information to the jury. The comment was in purport a challenge to the defendant to come forth with the missing gun or with an explanation for its absence from the trial. As a demand for self-incriminating evidence or for a testimonial explanation, the comment violated a right secured to appellant by the Fifth and Fourteenth Amendments.

Similarly, the comment here was a challenge to Defendant to come forth with an explanation for Perez-Cruz' motives. The same rationale thus compels the conclusion that the comment here was improper.

I. CUMULATIVE EFFECT OF THE PROSECUTORIAL MISCONDUCT

Although some of the prosecutorial remarks and acts in this case were not objected to, reversal is nonetheless mandated. Defendant maintains that each of the remarks and acts that were objected to is sufficient in and of itself to require reversal and that certainly their cumulative impact warrants such action. Further, Defendant contends that the scope of the improprieties here was so extensive that it is clear that Defendant did not receive a fair trial and that fundamental error therefore occurred. Such error, which can be considered on appeal without objection in the trial court, is error which goes to the foundation of the case or goes to the merits of the cause of action. Clark v. State, 363 So.2d 331 (Fla. 1976); Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979), cert. denied, 386 So.2d 642 (Fla. 1980). When prosecutorial misconduct is of such a character that neither rebuke nor retribution may entirely destroy its sinister influence, a new trial should be ordered

regardless of the lack of objection or exception. Rosso v. State, 505 So.2d 611 (Fla. 3d DCA 1987); Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984), rev. denied, 462 So.2d 1108 (Fla. 1985); Peterson, supra; Ailer v. State, 114 So.2d 348 (Fla 1st DCA 1959). In this regard, the prosecutorial acts and remarks complained of in this point should be considered as a whole and in light of the other acts and remarks complained of in the preceding points, including, but not necessarily limited to, the prosecutor's successful effort to change the testimony that was read to the jury, her use of damaging inadmissible hearsay evidence, her overuse and misuse of gory photographs and her efforts to place a burden on Defendant to prove his innocence by proving a defense he never raised at trial.

Not only is the misconduct here widespread, but it occurred in a case in which there was no physical evidence tying Defendant to the crimes. It was a close case that probably turned on the believability of one witness, Rufina Perez-Cruz, whose testimony about Defendant making certain statements had to be balanced against the payroll records that demonstrated that Defendant was not working on the day Perez-Cruz claimed to have been working with him and to have heard the statements. The closeness of the case is reflected not just by the evidence, but also by the numerous questions and requests made by the jury, as well as the jury's two days of deliberations. In a close case such as this one, a prosecutor cannot be allowed to push the jury to the side of guilt with improprieties such as those which occurred here, Tuff v. State, 509 So.2d 953 (Fla. 4th DCA 1987); Ryan, supra, nor can such improprieties be considered harmless, since it clearly cannot be said beyond a reasonable doubt that the improprieties did not contribute to the verdict. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

X. THE CUMULATIVE EFFECT OF THE ERRORS MANDATES REVERSAL.

Defendant contends that each of the foregoing points presents a sufficient basis in and of itself for reversal of his convictions and sentences. Defendant further submits that should this court find that error is presented by more than one of the

foregoing points, but that no point compels reversal on its own, the cumulative effect of the errors should be deemed to mandate such a result.[19]

Reversal on this basis is appropriate when a reviewing court finds that errors occurred "which, while possibly in isolated particularity were not of reversible quality," but which "in their attribute of totality ... could well have been the influencing factor in the jury's verdict." Rockett v. State, 262 So.2d 242 (Fla. 2d DCA 1971). Among the errors that can be considered in reaching such a conclusion are errors to which no objection were made because, even if not fundamental error, such errors "may be considered with other assignments of error in determining whether the substantial rights of the defendant have been injuriously affected." Gibbs v. State, 193 So.2d 460, 463 (Fla. 2d DCA 1967). See also Pollard v. State, 444 So.2d 561 (Fla. 2d DCA 1984) ("issues ... though waived, do have a cumulative effect and the combined weight of these errors should be considered with others to determine whether substantial rights of the appellant have been affected"). In light of the closeness of this case, as detailed in Section I of the preceding point, it is clear that the errors complained of in this brief injuriously affected Defendant's substantial rights and it cannot be said beyond a reasonable doubt that the errors did not contribute to the verdict. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Simply put, Defendant did not receive a fair trial. Justice demands reversal.

XI. THE COURT ERRED IN SENTENCING DEFENDANT TO DEATH.

The jury returned an advisory sentence of life imprisonment for the killing of Mabel Avery and an advisory sentence of death for the killing of Julia Ballentine. The court overrode the jury's recommendation with regard to the killing of Mabel Avery and imposed a sentence of death as to each of the two murder counts.

A. AGGRAVATING CIRCUMSTANCES

In support of its conclusion that Defendant should be sentenced to death, the court applied four aggravating circumstances to each of the murder convictions.

[19] The cumulative effect of the prosecutorial misconduct in this case is discussed in Section I of the preceding point. The present point is directed to the cumulative effect of both the prosecutorial misconduct in its entirety and the other errors that occurred in the case.

The existence of an aggravating circumstance must be proven beyond a reasonable doubt before it can be properly considered. Johnson v. State, 438 So.2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984); Williams v. State, 386 So.2d 538 (Fla. 1980); Alford v. State, 307 So.2d 433 (Fla. 1975), cert. denied, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). When the evidence of an aggravating circumstance is circumstantial in nature, it must be "inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance." Simmons v. State, 419 So.2d 316, 318 (Fla. 1982). A finding of an aggravating circumstance cannot be supported by speculation, Dougan v. State, 470 So.2d 697, 702 (Fla. 1985), cert. denied, 475 U.S. 1098, 106 S.Ct. 1499, 89 L.Ed.2d 900 (1986), or even by logical inferences. Clark v. State, 443 So.2d 973, 976 (Fla. 1983), cert. denied, 467 U.S. 1210, 104 S.Ct. 2400, 81 L.Ed.2d 356 (1984).

1. THE COURT ERRED IN FINDING THAT THE CAPITAL FELONIES WERE COMMITTED BY A PERSON UNDER SENTENCE OF IMPRISONMENT

The court found to exist the aggravating circumstance set forth in Florida Statute § 921.141 (5) (a), that the capital felony was committed by a person under sentence of imprisonment. This finding was based on the court's conclusion that at the time of the killings, Defendant "was on parole from the federal penitentiary in Lampoc, California (R 188)."

a. INSUFFICIENT PROOF THAT DEFENDANT WAS THE PERSON CONVICTED AND RELEASED

In its effort to prove the existence of this aggravating circumstance, the State relied exclusively on the introduction of a Judgment and Commitment from the United States District Court for the Western District of Texas (R 140, 145) and a Certificate of Mandatory Release (R 144-144A). These documents reflect that an individual named Henry Juarez was convicted on May 25, 1972, of bank robbery and use of a dangerous weapon, and that on June 23, 1982, Henry Juarez was released from the United States penitentiary in Lompoc, California, pursuant to 18 U.S.C. § 4163. The State

presented no testimony to show that Defendant was the Henry Juarez referred to in the documents. The documents themselves do not refer to Henry Garcia, which is Defendant's name (T 5/21 14), in any manner, nor do they refer to David Garcia or Enrique Juarez, the other names under which Defendant was charged (R 1).[20] Plainly, this evidence was insufficient to prove that Defendant was the person convicted in the case or released as reflected by the Certificate of Mandatory Release.

In Gorham v. State, 454 So.2d 556 (Fla. 1984), cert. denied, 469 U.S. 1181, 105 S.Ct 941, 83 L.Ed.2d 953 (1985), this court dealt with a situation in which the State attempted to prove that the defendant was under a sentence of imprisonment by simply introducing certified copies of North Carolina records. This court noted that the introduction of photographs or fingerprints would have foreclosed any doubt on the issue, but held the evidence sufficient because the North Carolina records contained the identical name, sex, race and date of birth of the defendant. Here, as in Gorham, the State failed to introduce photographs or fingerprints. Unlike Gorham, however, the name on the documents here does not match that of Defendant. In addition, there is no information on the documents regarding sex, race or date of birth.

Since even the fact that the name on a prior conviction matches that of a defendant is not sufficient to prove that the defendant is the person previously convicted, Sinkfield v. State, 592 So.2d 322 (Fla. 1st DCA 1992); Killingsworth v. State, 584 So.2d 647 (Fla. 1st DCA 1991), there can be no question that in the present case, in which even that factor is absent, the State failed to meet its burden of proving this aggravating circumstance beyond a reasonable doubt.[21]

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[20] The record does contain a certificate in which a prison official certifies the two documents as being exact copies of the originals (R 143) and in which he refers to the person to whom the documents pertain as "Henry JUAREZ (aka: David GARCIA)." This reference is plainly hearsay, is unsubstantiated by the documents themselves and does not in any event tie the documents to Defendant's real name of Henry Garcia. It is thus not relevant to consideration of this point in any way.

[21] Even if it is said that the evidence presented by the State was a sufficient basis upon which this aggravating circumstance could be based, it should nonetheless be held that the circumstance was improperly found to exist because of the manner in which the evidence was presented. The prosecutor did not simply rely upon the documents. Rather, when they were introduced, she proceeded to tell the jury that the documents related to Defendant and that Defendant was released on parole (T 5/28 17-18). Thus, the prosecutor essentially offered her own testimony as to (continued next page)

b. THE PERSON NAMED IN THE DOCUMENTS WAS NOT UNDER SENTENCE OF IMPRISONMENT

The court's finding that Defendant was under sentence of imprisonment was based on the assumption that Defendant was "on parole (R 188)." It is clear, however, that the person named in the documents relied upon by the State was not released on parole. Rather, Henry Juarez was "released ... according to Section 4163 Title 18, U.S.C. (R 144)." The cited provision, since repealed, stated, "Except as hereafter provided, a prisoner shall be released at the expiration of his term of sentence less the time deducted for good conduct." As is reflected by the language of this provision and by the fact that the document introduced by the State is entitled, "Certificate of Mandatory Release (R 144)," release pursuant to the provision was not, as with parole, discretionary, but was mandatory. Weber v. Willingham, 356 F.2d 933 (10th Cir. 1966), cert. denied, 384 U.S. 991, 86 S.Ct. 1897, 16 L.Ed.2d 1008 (1966). That there is a difference between parole and mandatory release is also demonstrated by the fact

(footnote 21, continued from last page) the identity of the person on the documents and as to a purported fact that would bring that person within the ambit of this aggravating circumstance. Clearly, such testimony is improper. See Pope v. Wainwright, 496 So.2d 798 (Fla. 1986) (improper for prosecutor in penalty phase to vouch for the State's case and the credibility of State's witness). Moreover, for no apparent reason, the prosecutor also stated that the terms of the parole required Defendant to live in western Texas (T 5/28 18), thus testifying that Defendant had violated his parole by even being in Florida. By that comment, the prosecutor invited the jury to rely on a nonstatutory aggravating factor, a clearly inappropriate invitation. Elledge v. State, 346 So.2d 998 (Fla. 1970). Further, on two occasions (T 5/28 42, 57), the prosecutor referred to Defendant's use of other names in a manner that had nothing to do with arguing that Defendant was the person named in the documents, but that was clearly for the improper purpose of implying that Defendant belonged to a criminal class. Lee v. State, 410 So.2d 182 (Fla. 2d DCA 1982). Another reason why this factor was improperly found to exist here was the fact that although the court instructed the jury that aggravating circumstances had to established beyond a reasonable doubt (T 5/28 71), it failed to tell the jury that when the proof is circumstantial, the evidence must be inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance. Simmons v. State, 419 So.2d 316, 318 (Fla. 1982). While such an instruction may not be required whenever the evidence is circumstantial, in the present case, in which the jury was twice instructed on circumstantial evidence during the guilt phase of the trial (see Point VII), the failure to also give one in the penalty phase may well have given the jury the impression that a different standard for reasonable doubt applied in the penalty phase than had applied previously. Had the various actions discussed in this footnote not accompanied the introduction of the documents relied upon by the State, the jury may have concluded that the documents were insufficient to prove the aggravating circumstance beyond a reasonable doubt and such a conclusion may have affected their advisory verdict.

that the Certificate of Mandatory Release itself indicates that the person being released is to remain under the jurisdiction of the United States Parole Commission "as if on parole (R 144)." Thus, there can be no question that when he was released from federal custody, Henry Juarez was not on parole, as found by the court.

The question thus becomes whether an individual released pursuant to 18 U.S.C. § 4163 is under sentence of imprisonment. Because of the mandatory nature of the release, this question must be answered in the negative.

In White v. State, 403 So.2d 331, 337 (Fla. 1981), cert. denied, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983), this court noted that the reason why a person on parole is deemed to be under sentence of imprisonment is that "[p]arole does not terminate a sentence of imprisonment but rather is a continuation of the sentence." In support of its conclusion, this court cited to the case that established the principle, Sellers v. Bridges, 153 Fla. 586, 148 A.L.R. 1240, 15 So.2d 293 (1943). In that case, this court discussed why parole is a continuation of a sentence and relied on the fact that "[n]o prisoner is placed on parole merely as a reward for good conduct or efficient performance of duties assigned in prison," id. at 294, and the fact that before parole is granted an investigation must disclose that there is a reasonable probability that applicants for parole will conduct themselves as respectable and law abiding persons. Id. at 294. It was therefore because of the discretionary nature of parole and the nature of the process of determining who will receive parole that this court found it to be a continuation of the sentence.

As noted previously, release pursuant to 18 U.S.C. § 4163 is not discretionary. It is specifically for the purpose of rewarding good conduct, the very factor that this court in Sellers v. Bridges noted was not a basis for granting parole.

Thus, the mandatory release granted to Henry Juarez was not similar to parole. Instead, Henry Juarez was in a situation similar to that of an individual who is serving a period of probation which follows a period of incarceration. In each instance, the release is mandatory, either because the prisoner earned it through his good conduct that made the statute apply or because of the trial court's order

granting probation. It is settled that a person who is on probation after a period of incarceration is not under a sentence of imprisonment. Ferguson v. State, 417 So.2d 631, 636 (Fla. 1982). The same rationale therefore compels the conclusion that Henry Juarez was not under a sentence of imprisonment when the crimes occurred here

The decision of this court in Haliburton v. State,561 So.2d 248 (Fla. 1990) does not alter this conclusion. There, this court held that an individual who had been placed on mandatory conditional release from a Florida sentence pursuant to Florida Statutes (1979) § 944.291 was considered to be under sentence of imprisonment. There is a significant distinction between the nature of the release under the statute dealt with in Haliburton and the statute dealt with in the present case. The federal statute here dealt only with release that occurred after time was deducted for good conduct. Thus, each prisoner totally controlled his or her right to release under the statute and no discretion was left to the releasing authority. If the prisoner behaved, the prisoner had to be released. Under the statute dealt with in Haliburton, the release was in part discretionary, since it applied to release that occurred after time was deducted not just for good conduct, Florida Statutes (1979) § 944.275 (1), a matter within the prisoner's control, but also for all other "extra-good time allowances" that were granted as a matter of discretion, such as those that were set forth in Florida Statutes (1979) §§ 944.275 (2) (b); (2) (c); (2) (e); (3) (a); and (3) (b). Thus, the Florida statute retained a significant discretionary element and was thus more akin to parole than the federal statute, which, by contrast, was mandatory innature and thus more similar to the probation following imprisonment situation dealt with in Ferguson. The opinion in Haliburton therefore does not apply here.

In the event that this court disagrees with the distinction Defendant has drawn between the two statutes, Defendant would suggest that Haliburton was incorrectly decided as to this issue. There is no indication in the opinion that this court considered the reason why parole is considered to be a continuation of a sentence, as set forth in Sellers v. Bridges. Rather, this court relied on Williams v. State, 370 So.2d 1164 (Fla. 4th DCA 1979), a case in which a pro se litigant claimed that

keeping him under supervision after mandatory conditional release was granted was a double jeopardy violation. It was in that context that the court in Williams found that the litigant was serving a sentence. That issue has little relevance to the issue in the present case its determination in Williams is entirely consistent with the rationale expressed in Sellers v. Bridges. The decision in Haliburton is not consistent with that rationale, however, for the reasons discussed previously in this argument. Defendant respectfully suggests that this court in Haliburton may have applied the holding of Williams without fully considering whether the basis for the rule of law, as set forth in Sellers v. Bridges, also applied to the facts of Haliburton. Therefore, if this court finds no difference between the statute in the present case and the statute in Haliburton, Defendant would contend that this court should recede from Haliburton and find that the aggravating circumstance of being under sentence of imprisonment was not established here.

c. INSUFFICIENT PROOF THAT THE SENTENCE WAS IN EFFECT AT THE TIME OF THE CRIMES

The Certificate of Mandatory Release introduced by the State reflects that Henry Juarez was released from the federal penitentiary on June 23, 1982 (R 144) and that the certificate would become effective on the date of release shown on the reverse side (T 144). The reverse side reflects a release date of June 23, 1983 (R 144A), some five months after the offenses in this case. Thus, the State's proof was that Henry Juarez was released prior to the date of the crimes, but that he was not subject to the restrictions of his mandatory release until after the crimes occurred. In short, the State proved that Henry Juarez was in the midst of a year during which he was under no legal constraints. Since the State chose to try to prove this aggravating circumstance solely from the face of the documents it relied on, rather than by calling witnesses who could have explained the documents, the State must be bound by the information contained on the face of those documents alone. That information, as noted, fails to show any legal constraint, much less a sentence of imprisonment. The State therefore failed to prove the existence of this aggravating circumstance.

2. THE COURT ERRED IN FINDING THAT DEFENDANT WAS PREVIOUSLY CONVICTED OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON

As to each of the murder convictions, the court found to exist the aggravating circumstance set forth in Florida Statutes § 921.141 (5) (b), that Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. This finding was based on the court's conclusion that Defendant was convicted of four previous offenses (R 188-189, 190).

a. INSUFFICIENT PROOF THAT DEFENDANT WAS THE PERSON CONVICTED OF THE PRIOR OFFENSES

In its effort to prove this aggravating circumstance, the State relied exclusively on the introduction of the judgments and sentences and commitments in the four cases upon which the court relied. These documents are in the names Enrique Juarez (R 135, 136), Henry Juarez (R 140, 145, 147) and David Garcia (R 149, 150). None are in the name Henry Garcia, which is Defendant's name (T 5/21 14). Even though some of the documents contained fingerprints (R 137, 151), the State made no effort to show that the fingerprints were those of Defendant. The State therefore failed to prove beyond a reasonable doubt that Defendant was the person convicted of the previous offenses. In support of this position, Defendant relies upon and incorporates the arguments and authorities set forth in Section (A) (1) (a) of this point, dealing with the insufficient proof that Defendant was the person convicted and released from federal custody. Those arguments and authorities are equally applicable here [22] and demonstrate that the court erred in finding this circumstance to exist.[23]

[22] The State has a slightly stronger argument that this circumstance was shown than it does as to the circumstance regarding being under sentence of imprisonment. This is because the documents relating to being under sentence of imprisonment referred only to Henry Juarez and there is no indication in the record that Defendant ever used that name. The documents relating to prior violent felonies also referred to Enrique Juarez and David Garcia, names which the record demonstrates Defendant did use. As noted in Section (A) (1) (a) of this point, however, the mere fact that a name on a document matches that of a defendant is not sufficient to prove that the defendant is the person named on the document. Thus, the State's evidence to this circumstance, although stronger than the evidence as to being under sentence of imprisonment, is still insufficient.

[23] For the reasons set forth in footnote 21, even if it is concluded that the evidence was a sufficient basis upon which this aggravating circumstance could be based, it should be held that the circumstance was improperly found to exist here.

b. INSUFFICIENT PROOF THAT THE PRIOR OFFENSES INVOLVED THE USE OR THREAT OF VIOLENCE

No contention was made by the State that any of the prior offenses were capital felonies. Thus, in order to be considered in support of this aggravating circumstance, they must be felonies involving the use or threat of violence to the person. The State offered no evidence or testimony of violence with regard to any of the offenses. Rather, the State simply introduced copies of documents that demonstrated convictions for certain crimes. The documents did not reflect any of the facts underlying the convictions.

A prior conviction of a felony may only be considered in support of this aggravating circumstance when the judgment of conviction discloses that it involved violence, Mann v. State, 420 So.2d 578, 581 (Fla. 1982), or when the State introduces evidence of the details of the offense and those details show violence. Freeman v. 563 So.2d 73, 76 (Fla. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991); Rhodes v. State, 547 So.2d 1201, 1204-1205 (Fla. 1989); Tompkins v. State, 502 So.2d 415, 419 (Fla. 1986); Perri v. State, 441 So.2d 606, 608 (Fla. 1983). Prior offenses fall within this aggravating circumstance only when they are "life-threatening crimes in which the perpetrator comes into direct contact with a human being." Lewis v. State, 398 So.2d 432, 436 (Fla. 1981). The documents introduced by the State were insufficient to establish on their faces that the offenses involved violence and they were unsupported by any testimony. Thus, the evidence was not sufficient to prove this circumstance.

One of the documents reflects that Henry Juarez was convicted of "willfully instigating and attempting to cause a mutiny," in violation of 18 U.S.C. § 1792 (R 147). Under this provision, a "mutiny" can be no more than "resisting the warden or his subordinate officers in the free and lawful exercise of their legal authority." United States v. Bryson, 423 F.2d 724, 724-725 (4th Cir. 1970). Obviously, a person can resist a warden or a subordinate officer either with or without the use or threat of violence. Compare Florida Statutes § 843.01 (resisting officer with violence to his person) and Florida Statutes § 843.02 (resisting officer without violence to his

person). Thus, the mutiny conviction could have been for nothing more than refusing to go to dinner when told to or complaining about a work assignment.

Another document demonstrates that Henry Juarez was convicted of "bank robbery and use of a dangerous weapon" in violation of 18 U.S.C. § 2113 (d) (R 140). This provision makes it unlawful to assault any person or put in jeopardy the life of any person by use of a dangerous weapon or device, while committing the offenses defined by subsections (a) and (b) of the statute. Subsection (b) states that the offense is committed by "[w]hoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value ... belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association." Subsection (a) can be violated by either a taking or an attempt to take property or money from one of the above named institutions "by force and violence, or by intimidation. It can also be violated, however, by "[w]hoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such" institution.[24]

Thus, a violation of subsection (d) based upon the offense defined by subsection (b) can be committed without ever coming into direct contact with a human being, as required by the standard set in Lewis before this aggravating circumstance can apply. For instance, an individual could violate this law by breaking into a bank when it is closed, stealing property of the bank, using a dangerous weapon to sever a power line to keep the alarm from sounding and leaving the exposed line where the first person to arrive at the bank the next morning might step on it.

Moreover, a violation of subsection (d) based upon the offense defined by subsection (a) can be committed in many ways that do not involve the use or threat of

[24] There have been amendments to subsections (a) and (b) of the statute since Henry Juarez' conviction, but the above language has remained unchanged.

violence. For instance, a person could violate this law by attempting to steal a computer from a desk in a bank, using a knife to cut the cable to free the computer and having the knife slip out of his or her hands and flip in the air toward another person. Likewise, the person could attempt to steal a security guard's gun that was left unattended on a table and have the security guard slip and hit his or her head while trying to retrieve the gun.

The State also introduced a document showing that Enrique Juarez was convicted in Texas of "Assault with intent to Rob (R 135-137)." There is presently no such crime in Texas, as it was abolished by the adoption of a new penal code on January 1, 1974. Laws of Texas (1973) ch.399 § 1, p. 883. It is clear, however, that the former Texas crime of assault with intent to rob did not necessarity require the use or threat of violence. As the name of the offense implied, an assault with intent to commit any other offense required merely the existence of facts which brought the offense within the definition of an assault and an intention to commit the other offense. Walters v. State, 56 Tex.Cr.R. 10, 118 S.W. 543 (Tex.Crim.App. 1909). Thus, a simple assault that was interrupted before any of the elements of robbery occurred could have formed the basis for a conviction of the crime of assault with intent to rob. Under such circumstances, it is quite possible, perhaps even likely, that there would have been no violence used or threatened. Moreover, even a completed robbery under the Texas penal code that included the offense of assault with intent to rob would not have necessarily required the use or threat of violence, since one of the ways by which that crime could have occurred was for a person "by assault" to "fraudulently take" property. Former Texas Penal Code, Art. 1408. Certainly, a taking that arose from simple assault and fraud would not have necessarily had violent aspects.

The final document relied upon by the State in its effort to prove the existence of this aggravating circumstance reflected that David Garcia was convicted in Texas of aggravated robbery and that the court in the case found that David Garcia used and exhibited a firearm (R 149-151).

Although this court has held that a conviction for robbery under Florida's robbery statute constitutes a felony involving the use or threat of violence, Simmons v. State, 419 So.2d 316, 319 (Fla. 1982), that conclusion was based on the "confrontational element" resulting from the specific wording of the Florida provision, which requires "force, violence, assault or putting in fear." Florida Statutes § 812.13 (1). Robbery in Texas does not contain a similar requirement. In Texas, a person commits robbery "if, in the course of committing theft ... and with intent to obtain or maintain control of the property," the person: (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death." Texas Penal Code § 29.02 (a). A robbery in Texas becomes an aggravated robbery if the person "causes serious bodily injury to another" or "uses or exhibits a deadly weapon." Texas Penal Code § 29.03 (a).

Thus, robbery in Texas, unlike its Florida counterpart, can be committed in many ways that do not involve a confrontation. If there is no confrontation, the mere use of a firearm, while sufficient under Texas law to turn the offense into aggravated robbery, would not necessarily turn the crime into one involving the use or threat of violence. For instance, a person could be convicted of aggravated robbery with the use and display of a firearm, as David Garcia was, by using the firearm to shatter the glass of the door to a closed business, committing a theft of the business' property and having the police officer who comes to investigate cut himself on the shards remaining in the door frame.

It should therefore be concluded that each of the documents relied upon by the State dealt with offenses that could have been devoid of the use or threat of violence. Thus, the documents on their faces cannot support this aggravating circumstance. Since the State presented no evidence as to the actual facts underlying the convictions it relied upon, the only manner by which this circumstance can be shown when the judgment fails to disclose that the crime involved the use or threat of violence, it cannot be said that the State met its burden of proof with regard to this circumstance.

3. THE COURT ERRED IN FINDING THAT THE CAPITAL FELONIES WERE COMMITTED WHILE DEFENDANT WAS ENGAGED IN THE COMMISSION OF A SEXUAL BATTERY

The court found to exist the aggravating circumstance set forth in Florida Statutes § 921.141 (5) (d), that the capital felonies were committed while the defendant was engaged in the commission of certain enumerated felonies. The court's finding was based upon its conclusion that the killings occurred while Defendant was committing a sexual battery upon Julia Ballentine (R 189, 190).[25]

a. INSUFFICIENT EVIDENCE OF SEXUAL BATTERY

For the reasons set forth in Point I, the evidence was insufficient to prove sexual battery. Since a judgment of acquittal should have been granted on the sexual battery count, that offense cannot form a basis for the application of this aggravating circumstance. Atkins v. State, 452 So.2d 529 (Fla. 1984).[26]

b. INAPPLICABILITY TO THE KILLING OF MABEL AVERY

Even it it was concluded that there was sufficient evidence to support the sexual battery conviction, the conclusion would nonetheless be compelled that this aggravating circumstance was inappropriately applied to the killing of Mabel Avery. The State's theory of the case was "that Julia Ballentine was still in her bed and Mabel Avery was up (T 5/22 52)" when the killer broke in. According to the State's theory, the killer confronted Mabel Avery in the hallway and then killed her in her bedroom (T 5/22 119). "Then, he went into the bedroom of Julia Ballentine," where he committed the sexual battery, the prosecutor argued to the jury (T 5/22 119). Thus, even accepting the facts precisely as urged by the State, Mabel Avery was dead before the sexual battery occurred. When a felony occurs after a killing, that felony cannot form a basis for the application of this aggravating circumstance. Moody v. State, 418 So.2d 989 (Fla.

[25] Although Defendant was also convicted of burglary, the court did not rely on that offense in its finding, so it is of no significance to this issue.

[26] The factors noted in footnote 21 may have also influenced the jury in its consideration of this aggravating circumstance. Thus, even if it is held that the evidence was a sufficient basis upon which this circumstance could be based, it should be held that that the circumstance was improperly found to exist here.

1982), cert. denied, 459 U.S. 1214, 103 S.Ct. 1213, 75 L.Ed.2d 451 (1983). Cf. Rhodes v. State, 547 So.2d 1201 (Fla. 1989) (defendant's actions after the death of the victim cannot be used to support finding that killing was heinous, atrocious or cruel); Eutzy v. State, 458 So.2d 755 (Fla. 1984) (killing of cab driver did not occur during commission of robbery when the taking necessary for the robbery asserted by the State was the taking of a cab ride without payment that occurred before the killing).

4. THE COURT ERRED IN FINDING THAT THE CAPITAL FELONIES WERE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL

The court found to exist the aggravating circumstance set forth in Florida Statute § 921.141 (5) (h), that the capital felonies were especially heinous, atrocious or cruel. Defendant submits that this statutory provision is unconstitutional and that the court therefore erred in denying Defendant's motions to declare it unconstitutional. Defendant further maintains that the standard jury instruction on this aggravating factor suffers from the same constitutional infirmities and that instruction actually given is improper for this and for additional reasons. Moreover, Defendant maintains that this circumstance does not apply under the facts of this case.

a. ERROR IN INSTRUCTING JURY, IN CONSIDERATION OF THIS FACTOR BY THE COURT AND IN DENYING DEFENDANT'S MOTIONS TO DECLARE THIS AGGRAVATING CIRCUMSTANCE UNCONSTITUTIONAL

In instructing the jury on this circumstance, the court said (T 5/28 69-70):

> The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.
> Heinous means extremely wicked or shockingly evil.
> Atrocious means outrageously wicked and evil.
> Cruel means inflicting a high degree of pain with utter indifference to or enjoyment of the suffering of others
> The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional actions that shows the crime was unconscionable or pitiless and was unnecessarily torturous to the victim.

i. THE ERRONEOUS NATURE OF THE INSTRUCTION

The above instruction departed from the standard instruction in a number of respects. In setting forth the aggravating circumstance itself, the court referred to the crime as being "wicked, evil, atrocious or cruel," rather than "heinous, atrocious or cruel." In defining "cruel," the court referred to "utter indifference to or en-

joyment of the suffering of others," omitting the word "even" before the word "enjoyment." In setting forth the kind of crimes intended to be included as heinous, atrocious or cruel, the court referred to actions that showed that the crime was "unconscionable," rather than "conscienceless."

The jury was therefore told that it could find the existence of this circumstance upon a finding that the murder was simply "evil" or "wicked." Moreover, since the language of the last sentence of the instruction, which tells the jury the kind of crime to be included in the circumstance refers only to offenses that are "heinous, atrocious or cruel," the jury was left with no guidance whatsoever as to the meaning of the terms "evil" and "wicked." They were left to their own devices to define these nonexistent manners of proving this circumstance.[27]

It is well established that it is inappropriate to rely upon nonstatutory aggravating circumstances in imposing or recommending a sentence of death. Drake v. State, 441 So.2d 1079 (Fla. 1983), cert. denied, 466 U.S. 978, 104 S.Ct. 2361, 80 L.Ed.2d 832 (1984); Perry v. State, 395 So.2d 170 (Fla. 1981); Miller v. State, 373 So.2d 882 (Fla. 1979); Elledge v. State, 346 So.2d 998 (Fla. 1977). Yet, the instruction here allows precisely that and it does so in an extraordinarily broad sense, for the words "evil" and "wicked" are so subjective in nature.[28]

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[27] This factor distinguishes the present case from Melendez v. State, 498 So.2d 1258 (Fla. 1986), in which this court found that it was not error when the trial court substituted "wicked, evil" for "heinous." Since the trial in Melendez occurred before the adoption of the present standard jury instruction, In re Standard Jury Instructions Criminal Cases--No. 90-1, 579 So.2d 75 (Fla. 1990), the language as to what types of crimes are included would not have been a part of the instruction in that case. There can be no question that if the language as to the types of crimes to be included is not given, the instruction would be constitutionally deficient. Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). Although, as will be discussed subsequently in this point, there is a question as to whether the inclusion of the last sentence of the standard instruction resolves the constitutional concerns, it is clear that the instruction given here, which does not tie the last sentence to the terms "evil" and "wicked," gave the jury no guidance and was therefore deficient.

[28] The fact that the court defined "heinous" as "extremely wicked or shockingly evil" did not provide the jury with any guidance, since the circumstance was defined using the simple terms "wicked" and "evil" and not the modified terms used in defining "heinous." Moreover, since the language as to what types of crimes are included applied to "heinous" crimes, which were required to be "extremely wicked or shockingly evil," the jury was in essence told that the language in that regard did not apply to crimes that were simply "wicked" or "evil."

Similar problems are also raised by the other deviations from the standard instruction. "Conscionable" is defined as "conscientous." Webster's Ninth New Collegiate Dictionary (1990); Webster's Third New International Dictionary of the English Language, Unabridged (1966). "Conscientous" is generally thought of as meaning "meticulous" or "careful," not as referring to a matter of conscience, as "conscienceless" clearly does. The use of the word "unconscionable," rather than "conscienceless" therefore changed the entire focus of the instruction.

Further, by eliminating the word "even," the instruction here equated the indifference to the suffering of others with the enjoyment of the suffering of others. Obviously, that was not intended to be the case. The word "even" was intended to demonstrate the more severe nature of the enjoyment of suffering. The instruction here therefore made it easier to find the existence of this factor than is contemplated by the statute.

Thus, for the foregoing reasons, the instruction was vague and overbroad and allowed the jury to find a nonstatutory aggravating factor. It was thus improper and violated Defendant's right to due process under the federal and state constitutions.

ii. CONSTITUTIONAL CONCERNS

AA. JURY INSTRUCTIONS

Even if it is said that the instruction here was the equivalent of the standard instructions despite the deviations, the finding would nonetheless be compelled that the instruction was improper. The inclusion of the final sentence of the standard instruction is the only difference between it and a prior version of the instruction that was found to be unconstitutional in that it was "so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa v. Florida, ___ U.S. ___, ___, 112 S.Ct. 2926, 2928, 120 L.Ed.2d 854, 858 (1992). Thus, the present standard instruction can be upheld only if the addition of the final sentence is deemed to cure the constitutional infirmity found in Espinosa. Defendant submits that it does not.

Analysis of this question should begin with a look at Espinosa v. State, 589 So.2d 887 (Fla. 1991), the decision reversed by the United States Supreme Court. In that case, this court at page 894 rejected the defendant's claim on this subject "upon the rationale" of Smalley v. State, 546 So.2d 720 (Fla. 1989).

In Smalley, the defendant, asserting that the aggravating circumstance and the standard jury instruction in this regard were unconstitutionally vague, relied upon two of the cases subsequently cited in Espinosa v. Florida, Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) and Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). Despite the lack of objection at trial, this court reviewed the claim and rejected it. Noting the similar language between the Florida statute and the Oklahoma statute dealt with in Maynard v. Cartwright, this court distinguished Florida's law in light of two factors: (1) the fact that in Oklahoma, "the jury is the sentencer, while in Florida the jury gives an advisory opinion to the trial judge, who then passes sentence," 546 So.2d at 722; and (2) the fact that this court "has narrowly construed the phrase 'especially heinous, atrocious, or cruel' so that it has a more precise meaning than the same phrase has in Oklahoma," 546 So.2d at 722, a reference to the language in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), from which the language of the standard jury instruction is taken.

Review of the most recent pronouncements of the United States Supreme Court reveals that the distinguishing factors set forth by this court in Smalley cannot be considered a valid constitutional basis for upholding the standard instruction.

In Espinosa v. Florida, the Court rejected the State's effort to save the prior instruction on the ground that Florida juries are not the sentencers. The Court discussed the great weight that Florida courts are required to give to jury recommendations and found that such indirect weighing of an invalid aggravating factor "creates the same potential for arbitrariness as the direct weighing" of such a factor. ___ U.S. at ___, 112 S.Ct. at 2928, 120 L.Ed.2d at 859. When a state places capital sentencing authority in two actors, rather than one, the Court concluded, "neither

actor must be permitted to weigh invalid aggravating circumstances." ___ U.S. at ___, 112 S.Ct. at 2929, 120 L.Ed.2d at 859. This reasoning plainly applies equally to both the former and the present standard jury instruction.

The second distinguishing factor relied on in Smalley cannot validate the present standard instruction either. The language of Dixon was considered to be a limitation on the Florida statute when the statute was approved in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). The Court in Proffitt read the language of Dixon to mean that the statute is directed "only at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim,'" going on to state that the Court could not say that the provision "as so construed provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." 428 U.S. at 255-256, 96 S.Ct. at 2968, 49 L.Ed.2d at 924-925 (emphasis added).

Thus, Proffitt made it quite clear that the Dixon language imposes a limit on the scope of the statute. Only crimes which were conscienceless or pitiless and which were unnecessarily torturous to the victim are included. Nonetheless, the standard instruction does not make it clear that these requirements are to be construed as limits. Rather, the standard instruction uses crimes that meet the requirements as mere examples of the "kind of crime intended to be included." Inherent in that language is the fact that other crimes are also to be included and the instruction is therefore far broader than is the limitation that was adopted in Dixon and that was a key factor in the approval of the statute in Proffitt.

The standard instruction therefore inappropriately assumes that the Court in Proffitt approved the entire Dixon statement that has become the present instruction rather than just the limiting language of the final sentence. In Sochor v. Florida, ___ U.S. ___, ___, 112 S.Ct. 2114, 2121, 119 L.Ed.2d 326, 339 (1992), the Court noted that this court has on occasion continued to invoke the entire Dixon statement, "perhaps thinking that Proffitt approved it all." Plainly, the standard instruction is predicated upon such an assumption and therefore it cannot withstand constitutional

scrutiny.[29, 30]

Moreover, the terms used in the final sentence of the present standard instruction violate due process and are themselves too vague and overbroad to pass constitutional muster. Almost any capital felony would likely seem "conscienceless" to most jurors. That term thus provides no basis for distinguishing one case from another. Further, the use of the term could well invite the jury to consider the inappropriate factor of lack of remorse. Pope v. State, 441 So.2d 1073 (Fla. 1983). "Pitiless" is by its very nature so highly subjective as to offer almost no guidance at all. The term "unnecessarily torturous" gives the jury no guidance, just as the word "especially" was held to give no guidance in construing "heinous, atrocious, or cruel" in Maynard v. Cartwright, supra, 486 U.S. at 363-364, 108 S.Ct. at 1859, 100 L.Ed.2d at 382. Indeed, the term "unnecessarily torturous" invites the jury to speculate as to how much torture is "necessary" in any given case. The vagueness and overbreadth of the terms used in the effort to instruct on the limitations of Dixon therefore also demonstrate the constitutional infirmity of the instruction.

It should also be realized that the final sentence of the standard instruction fails to even make clear which terms must be shown for the aggravating circumstance to apply. The actual language of Dixon refers to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." 283 So.2d at 9. Thus Dixon requires that the crime must be unnecessarily torturous to the victim and that the

[29] The constitutional problems are even more acute with regard to the instruction actually given in the present case than they are with regard to the standard instruction in light of the deviations from the standard instruction that are detailed in Section (A) (4) (a) (i) of this point.

[30] This court's Committee on Standard Jury Instructions in Criminal Cases has recognized the inadequacy of the present standard instruction in light of the recent United States Supreme Court cases. On January 13, 1993, the committee voted to publish for comment as a substitute for the present instruction, the following: "The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. To be heinous, atrocious or cruel, the defendant must have deliberately inflicted or consciously chosen a method of death with the intent to cause extraordinary mental anguish or physical pain to the victim, and the victim must have consciously suffered such mental anguish or physical pain for a substantial period of time before death."

crime must be either conscienceless or pitiless. The standard instruction, however, refers to the fact that the crime "was conscienceless or pitiless and was unnecessarily torturous to the victim." This instruction can be interpreted consistently with the dictates of Dixon or it can be interpreted to mean that the crime had to be either conscienceless or that it had to be both pitiless and unnecessarily torturous to the victim. It thus allows for this aggravating circumstance to be made upon the simple conclusion that the crime was "conscienceless." It therefore fails to properly inform the jury of the limitation stated in Dixon.

BB. INAPPROPRIATENESS OF CONSIDERATION OF THIS FACTOR DUE TO CONSTITUTIONAL CONSIDERATIONS AND ERROR IN DENIAL OF DEFENDANT'S MOTION TO DECLARE THIS FACTOR UNCONSTITUTIONAL

The constitutional problems with the statutory provision and jury instruction relating to this aggravating factor, as detailed in the preceding segment of this point, demonstrate not just error in instructing the jury, but also in the court's consideration of this factor in sentencing and in the court's denial of Defendant's motions to declare the statute unconstitutional.[31]

This conclusion is mandated due to the improper definition set forth in the standard instruction and the fact that, as noted in Sochor v. Florida, ___ U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992), this court has on occasion continued to invoke the full Dixon statement encompassed in the standard instruction. See, e. g., Porter v. State, 564 So.2d 1060 (Fla. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991); Smalley, supra; Cherry v. State, 544 So.2d 184 (Fla. 1989), cert. denied, 494 U.S. 1090, 110 S.Ct. 1835, 108 L.Ed.2d 963 (1990); Lucas v. State, 376 So.2d 1149 (Fla. 1979). Thus, the aggravating circumstance has not been properly limited and the guidance provided to the trial court was insufficient to allow for proper consideration of this factor.

In Sochor, the Court noted the "troubling" nature of this issue in the abstract, ___ U.S. at ___, 112 S.Ct. at 2121, 119 L.Ed.2d at 326, but found that because this

[31] A motion is being filed with this court to supplement the record with the motions that raised this issue in and that were denied by the trial court.

court has consistently found the existence of this aggravating circumstance when a defendant strangled a conscious victim, the trial court in that case did have sufficient guidance. As will be discussed subsequently in this point, the present case deals with a situation in which the State's efforts to link Defendant to the killings necessarily linked him to a rage and in which it cannot be determined what acts occurred before and what acts occurred after the victims lost consciousness. Thus, unlike Sochor, this case deals with the sort of facts that must be resolved on a case by case basis and not the sort that have consistently called for the application of this aggravating circumstance. The concerns expressed in Sochor must therefore be faced here.

The conclusion urged by Defendant is consistent with the decisionreached when similar terms were found deficient in People v. Superior Court of Santa Clara County, 31 Cal.3d 797, 183 Cal.Rptr. 800, 647 P.2d 76 (1982). There, the court dealt with a California statute which stated that "the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim." The court stated, 647 P.2d at 78:

> ... [A]ny attempt to determine what constitutes "necessary" torture--to clarify the meaning of "unnecessary"--appears to be futile. Furthermore, even assuming that hurdle were overcome, to find the special circumstance to be proved, the jury must agree that the crime was "conscienceless or pitiless"--terms that only add to the vagueness problem. As "unnecessarily" torturous assumes the existence of conduct that is necessarily torturous, so a conscienceless or pitiless first degree murder assumes the existence of such murder performed with conscience or pity. We cannot fathom what it could be. As we stated in Pryor v. Municipal Court (1979) 25 Cal.3d 238, 158 Cal.Rptr. 330, 599 P.2d 636, "vague statutory language is not rendered more precise by defining it in terms or synonyms of equal or greater uncertainty.

The court then went on to reject the claim that the approval in Proffitt of the Florida statute based on the Dixon limitation should lead to a different conclusion. The court found that Proffitt "left open the question whether the statutory language is too vague to comport with due process in defining an offense or special circumstance." 647 So.2d at 80 (emphasis in opinion). For the reasons set forth in this brief, Defendant submits that Florida's statute does not comport with due process under either the federal or state constitutions and the post-Proffitt treatment of this aggravating factor has

failed to meet the expectations of Proffitt. It was therefore improper for the court to consider this aggravating circumstance and to deny Defendant's motions to declare the statute unconstitutional.

b. ERROR TO FIND THAT THIS AGGRAVATING FACTOR APPLIED TO THE FACTS OF THIS CASE

i. EMOTIONAL RAGE

In Halliwell v. State, 323 So.2d 557 (Fla. 1975), this court found that a killing occurring in an emotional rage was not especially heinous, atrocious or cruel, despite the fact that the defendant beat the victim's skull repeatedly with a 19-inch breaker bar to cause his death and subsequently dismembered the body with a saw, machete and fishing knife. Noting that the dismemberment was not relevant to consideration of this aggravating factor since the victim died before it occurred, this court, in Buford v. State, 403 So.2d 943, 952 (Fla. 1981), cert. denied, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982), cert. denied, 454 U.S. 1164, 102 S.Ct. 1039, 71 L.Ed.2d 320 (1982), characterized its Halliwell decision by noting that "a killing in an emotional rage was not heinous, atrocious, or cruel."

In the present case, the State introduced Defendant's statement, "I told them not to get me mad. I have this animal inside me (T 755)." This statement reflects that Defendant's actions werethe product of an emotional rage. There is no other evidence in the record to place these actions in any other context. Moreover, the facts surrounding the deaths here are fully consistent with acts occurring during an emotional rage. Even the prosecutor recognized this fact in her closing argument, as she argued to the jury that the killer "was already pretty mad (T 5/22 119)" and that he "got madder and madder (T 5/22 118)." The rationale of Halliwell and Buford is thus applicable to the present case.

ii. LACK OF CONSCIOUSNESS

The medical examiner presented by the State testified that he could not say when in the course of the attacks, the victims lost consciousness. It is clear that acts occurring after the victims were unconscious can play no role in determining whether the offenses here were heinous, atrocious or cruel. Jackson v. State, 451 So.2d 458

(Fla. 1984). Further, in Herzog v. State, 439 So.2d 1372 (Fla. 1973), this court dealt with a situation in which the actual period of unconsciousness was unclear and concluded that this aggravating circumstance could not be applied. Compare Nibert v. State, 574 So.2d 1059 (Fla. 1990) (finding of heinous, atrocious or cruel upheld when victim was stabbed 17 times, there was testimony that some wounds were defensive and victim remained conscious throughout the stabbing). The reasoning of Jackson and Herzog apply here and the fact that it cannot be said which injuries occurred before the victims lost consciousness demonstrates that this circumstance was not shown.

iii. CONSIDERATION OF SEXUAL BATTERY WITH REGARD TO THE KILLING OF JULIA BALLENTINE

As part of its conclusion that this aggravating circumstance applied to the murder of Julia Ballentine, the court specifically relied upon its conclusion that Defendant had committed a sexual battery upon Julia Ballentine (R 189).

As discussed in Point I, the evidence was insufficient as to sexual battery. Thus, its consideration by the court as to this circumstance was inappropriate. Atkins v. State, 452 So.2d 529 (Fla. 1984). Moreover, there was no showing that Julia Ballentine was conscious at the time any sexual battery occurred. Thus, even assuming the offense was proved, it was not appropriate to consider it with regard to this circumstance. Herzog v. State, 439 So.2d 1372 (Fla. 1973).

iv. ERROR REGARDLESS OF SUFFICIENCY OF EVIDENCE TO SUPPORT FINDING

If it is concluded that the evidence here was a sufficient basis upon which this aggravating circumstance could be based, it should nonetheless be held that it was improperly found since the factors noted in footnote 21, particularly in conjunction with the errors in instructing on this factor discussed in Section (A) (4) (a) (i), could have influenced the jury to find this circumstance to exist.

5. THE COURT ERRED BY THE DOUBLING OF AGGRAVATING CIRCUMSTANCES IN SENTENCING FOR THE KILLING OF JULIA BALLENTINE

The court relied upon its conclusion that Defendant committed a sexual battery upon Julia Ballentine with regard to both its finding that her killing occurred during the commission of an enumerated felony and its finding that the killing was heinous,

atrocious or cruel (R 189). Although Defendant has challenged the court's consideration of this matter as to each of those factors (see Sections (A) (3) (a) and (A) (4) (B) (iii) of this point), Defendant also maintains that its consideration as to both circumstances constitutes an improper doubling. It is well settled that the "doubling of aggravating circumstances is improper where they refer to the 'same aspect' of the crime." Provence v. State, 337 So.2d 783, 786 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). Here, the court clearly considered the same aspect of the crime, the sexual battery, with regard to two aggravating factors. Doing so was error.

B. MITIGATING CIRCUMSTANCES

The court found that there existed no mitigating circumstances (R 191-192). This finding was plainly erroneous. Moreover, the court erred by failing to even evaluate some of the mitigating factors.

1. GENERAL CONSIDERATIONS

It is well established that a sentencing court must find as a mitigating circumstance each factor that is mitigating in nature and that has been reasonably established by the evidence. Campbell v. State, 571 So.2d 415 (Fla. 1990). "If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors." Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988); Chesire v. State, 568 So.2d 908, 911 (Fla. 1990).

"Mitigating evidence must at least be weighed in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence." Santos v. State, 591 So.2d 160, 164 (Fla. 1991), citing Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988), cert. denied, 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988). Although the relative weight given each mitigating factor is within the provence of the sentencing court, all mitigating circumstances must be considered, Lemon v. State, 456 So.2d 885 (Fla. 1984), cert. denied, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985), and a mitigating factor, once

found, cannot be dismissed as having no weight. Campbell, supra.

2. MITIGATING CIRCUMSTANCES REJECTED BY THE COURT

a. DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE

i. STATUTORY MITIGATION

In its sentencing order, the court noted that "[t]he defense urged that the capital felonies were committed while Defendant was under the influence of extreme mental or emotional influence pursuant to" Florida Statutes § 921.141 (6) (b), but stated, "The evidence supports no such position and the Court will not consider it (R 191)." Contrary to the court's conclusion, such evidence did exist. Moreover, it was undisputed. The court's explicitly stated failure to consider it was therefore error.

On the evening that the killings occurred, Defendant was supposed to go on a date with a woman named Marylou (T 739). When he arrived for the date, he found Marylou with her old boyfriend (T 740) and became mad and upset (T 740). As a result, Defendant, who had consumed at least one beer shortly before his confrontation with Marylou (T 738), spent the evening with Feliciano Aguayo. Defendant drank more beer at a Circle K store (T 740), after which he and Aguayo went to the Sky Vista Amusement Center, where alcohol was sold (T 740). Although Aguayo did not remember whether Defendant had anything to drink there, it is clear that Defendant and Aguayo spent 30 to 40 minutes there, left to take Aguayo's mother somewhere, returned and then stayed at the Sky Vista until about 11:00 p.m. (T 740-741). When they left, Aguayo dropped Defendant off at another bar, the Leisure Lounge (T 779). The evidence also showed that that the next morning, when Defendant arrived at Aguayo's house, he was still upset (T 743) and that when Aguayo was driving him home, Defendant kept repeating, "I told them not to get me mad. I have this animal inside of me (T 755)."

Thus, it was undisputed that Defendant was upset as the result of his domestic situation with regard to Marylou and that some sort of dispute occurred that caused him to get so mad that the "animal" inside him was unleashed. It is also clear that Defendant was drinking, a factor that was likely to accentuate the mental and emotional disturbance. Further, these factors were of sufficient severity that Defendant was still upset when he arrived at Aguayo's house.

In Fead v. State, 512 So.2d 176, 179 (Fla. 1987), this court concluded that the jury reasonably could have found that the defendant acted under extreme mental and emotional disturbance and duress "partly as a result of his alcohol consumption and partly because of his jealousy." Similar factors are present here and are coupled with whatever disturbance uncaged the "animal" inside Defendant. See also Santos v. State, 591 So.2d 160, 163-164 (Fla. 1991) (fact that defendant was involved in an on-going, highly emotional domestic dispute with a woman with whom he used to live and her family considered as factor with regard to this mitigating circumstance): Amazon v. State, 487 So.2d 8, 13 (Fla. 1986) ("inconclusive evidence" that defendant, who had history of drug abuse, had taken drugs on the night of the murders and testimony indicating that defendant was "emotional cripple" proper considerations with regard to this factor); Mann v. State, 453 So.2d 784, 785 (Fla. 1984), cert. denied, 469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed.2d 953 (1985) (fact that defendant suffered from feelings of rage considered in mitigation). The rationale of these cases demonstrates that the court erred in failing to consider this mitigating factor.

ii. NONSTATUTORY MITIGATION

Even if it is said that the facts of this case are insufficient to show the statutory mitigating circumstance of extreme mental or emotional disturbance, there can be no dispute that they should have been considered as a nonstatutory mitigating factor. "[A]ny emotional disturbance relevant to the crime must be considered and weighed by the sentencer," regardless of whether it is sufficient to establish a statutory mitigating circumstance. Chesire v. State, 568 So.2d 908, 912 (Fla. 1990) (emphasis in opinion). Nonetheless, the court here flatly refused to consider this matter. That refusal was plainly improper.

b. CAPACITY OF DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW

i. STATUTORY MITIGATION

The sentencing order noted that "[t]he defense opined that the capacity of the defendant to appreciate the criminality of his conduct to the requirements of the law was substantially impaired," but concluded that "this is not a mitigating factor in this case (R 191)."

The wording of the order demonstrates that the court misunderstood the mitigating circumstance defined by Florida Statutes § 921.141 (6) (f), which the court cited in regard to the above finding. That provision establishes as a mitigator the fact that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."

It is therefore apparent that the court failed to consider whether Defendant's capacity to conform his conduct to the requirements of law was substantially impaired. Moreover, the considered not whether Defendant's capacity to appreciate the criminality of his conduct was impaired, but whether his capacity to appreciate "the criminality of his conduct to the requirements of the law" was impaired. Whatever that phrase refers to is clearly something other than what the statute encompasses. Thus, in rejecting this mitigating circumstance, the court failed to consider the factors included within the scope of the statute, substituting instead the court's own version of the circumstance.[32] This was clearly error.

It should also be realized that had the court rejected this factor under the proper statutory definition, the court would have still erred. The reason for the court's conclusion was that Defendant's actions in walking to Feliciano Aguayo's house and asking for a ride home "were the actions of a person acting in logical sequence," not those of a person who is "psychotic or delusional (R 191)." Defendant submits that the exact opposite is true. It is certainly not "logical" for an individual who has just killed two people to appear on the doorstep of people who know him while wearing blood stained clothes and carrying a knife that also has blood on it. The facts relied upon by the court support, rather than refute, the applicability of this mitigating factor. When they are considered together with the facts detailed in the preceding segment of this point relating to Defendant's domestic situation with Marylou, his drinking and the dispute that got him so mad that the "animal" inside him was released, the conclusion that Defendant's capacity to appreciate the criminality of his

[32] The court's apparent confusion as to this circumstance is also demonstrated by the erroneous instruction given to the jury regarding this factor. See Section C of this point.

conduct or to conform his conduct to the requirements of law was substantially impaired is called for.

ii. NONSTATUTORY MITIGATION

Even if it is said that the facts of this case are insufficient to show the statutory mitigating circumstance regarding Defendant's capacity, those facts should have been considered as nonstatutory mitigation. Cf. Chesire v. State, 568 So.2d 908, 912 (Fla. 1990) (emotional disturbance not sufficiently extreme to constitute statutory mitigating circumstance should be considered as nonstatutory mitigation). The court's failure to do so was error.

c. DEFENDANT'S CONSUMPTION OF BEER

The court specifically rejected as a mitigating circumstance the fact that Defendant had been drinking beer prior to the offenses, stating that such consumption "without evidence of intoxication is simply not enough (R 191-192)." The court's legal conclusion that intoxication must be shown before consumption of alcohol can be considered in mitigation is incorrect.

In Chesire v. State, 568 So.2d 908, 911 (Fla. 1990), this court recognized the propriety of the consideration of the fact that the defendant "had been drinking" at the time of the murders, even though the trial court had found that the defendant was not sufficiently intoxicated. Noting that there was no evidence that the defendant had started drinking as a way of developing the courage to commit the murders, this court stated, "Thus, this is valid mitigation." Id. at 911. Likewise, in the present case, there is no indication that Defendant started drinking to develop courage. Rather, as discussed previously in this point, it is clear that he began to drink socially and continued to do so after becoming upset that Marylou was with her old boyfriend. Other cases also demonstrate that drinking need not reach the level of intoxication to constitute valid mitigation. In fact, in Holsworth v. State, 522 So.2d 348 (Fla. 1988), a mitigating factor in this regard was found to exist despite the fact that the jury had rejected a voluntary intoxication defense during the guilt phase

of the trial. See also Amazon v. State, 487 So.2d 8, 13 (Fla. 1986) ("inconclusive evidence that defendant had taken drugs); Buckrem v. State, 355 So.2d 111, 113 (Fla. 1978) (evidence that defendant "was drinking during the night the homicide was committed"). The court therefore reached an incorrect legal conclusion with regard to the extent of drinking needed to constitute mitigation and erred in refusing to take this factor into account.

3. MITIGATING CIRCUMSTANCES NOT CONSIDERED BY THE COURT

The record demonstrates the existence of several mitigating circumstances that were not considered by the court.

a. DEFENDANT'S EXEMPLARY PRISON RECORD

Defendant's counsel argued that Defendant's "exemplary prison record" should be taken into account by the court in imposing sentence (R 185; T 7/12 5). It is apparent that the State agreed that Defendant's record was in fact exemplary, because the prosecutor, who stated that she had contacted an individual at the prison, did not dispute the fact, but merely argued that it should not be given significant weight in light of the fact that Defendant had little opportunity to misbehave and that his record was not different from that of other inmates (T 7/12 6-7).

A defendant's record while incarcerated has been recognized to be a proper mitigating circumstance. Campbell v. State, 571 So.2d 415 (Fla. 1990); Fead v. State, 512 176 (Fla. 1987); Francis v. State, 473 So.2d 672 (Fla. 1985), cert. denied, 474 U.S. 1094, 106 S.Ct. 870, 88 L.Ed.2d 908 (1986); Delap v. State, 440 So.2d 1242 (Fla. 1983), cert. denied, 467 U.S. 1264, 104 S.Ct. 3559, 82 L.Ed.2d 860 (1984); McCampbell v. State, 421 So.2d 1072 (Fla. 1982). Yet, despite the fact that this factor was advanced by the defense and the fact that the State argued only as to the weight that should be given to the factor and not that it was improper mitigation, the court failed to consider the factor at all. Such a failure to even consider a mitigating factor is unquestionably error.

b. IMPRISONMENT FOR 50 YEARS WITHOUT PAROLE

Defendant's counsel argued as mitigation that the alternative to death was that Defendant would be imprisoned for life with no possibility of parole for 50 years (T 5/28 62; 7/12 5-6). Although this court has stated that this factor is "a relevant consideration of 'the circumstances of the offense,'" Jones v. State, 569 So.2d 1234, 1240 (Fla. 1990), the court did not find it to exist and gave no indication in its order or in its oral pronouncement of sentence that it had even been taken into account (R 188-195, T 7/12 7-9). Again, the failure to even consider this circumstance was error.

c. LACK OF PREMEDITATION

In Point I, Defendant has argued that there was insufficient proof of premeditation to support the murder convictions. In the event that this court agrees with that position, but nevertheless upholds the convictions on a felony murder theory, Defendant would contend that the lack of premeditation should be considered to constitute a mitigating circumstance.

In Van Poyck v. State, 564 So.2d 1066 (Fla. 1990), cert. denied, ___ So.2d ___, 111 S.Ct. 1339, 113 L.Ed.2d 270 (1991), this court found the evidence insufficient to establish premeditated murder, but sufficient to prove felony murder. This court noted that while its finding in this respect did not affect the defendant's guilt, "it is a factor that should be considered in determining the appropriate sentence." Id. at 1069. See also Menendez v. State, 419 So.2d 312 (Fla. 1982) (fact that there was no direct evidence of premeditation considered by this court in overturning death sentence). Moreover, since Florida Statutes § 921.141 (5) (i) allows "heightened premeditation to constitute an aggravating circumstance, Gore v. State, 599 So.2d 978, 986 (Fla. 1992); Jackson v. State, 599 So.2d 103, 109 (Fla. 1992), it is logical that that a lack of premeditation should constitute a mitigating circumstance. This was another factor that was not considered by the court here.

d. DEFENDANT'S EMPLOYMENT

Feliciano Aguayo testified that Defendant worked in the fields as a farm worker (T 736). Rufina Perez-Cruz, who worked with Defendant, testified that Defendant worked "every day (T 840)." In Buckrem v. State, 355 So.2d 111, 113 (Fla. 1978), the fact that the defendant was "gainfully employed" was considered in mitigation. This is in keeping with cases that recognize a good work record, such as that which would be reflected in the steady attendance testified to by Perez-Cruz, is a proper mitigating circumstance. Campbell v. State, 571 So.2d 415 (Fla. 1990); Fead v. State, 512 So.2d 176 (Fla. 1987); Wasko v. State, 505 So.2d 1314 (Fla. 1987); McCampbell v. State, 421 So.2d 1072 (Fla. 1982). This circumstance has been specifically applied to a defendant who "could be a productive farm worker within the state prison system," Fead, supra, 512 So.2d at 179, a factor that would directly apply to Defendant in light of his occupation. This circumstance was not considered by the court either.

e. DEFENDANT'S PEACEFUL NATURE

Elizabeth Feliciano testified that Defendant was "a peaceful man (T 607)." This is an aspect of Defendant's character that constitutes a proper factor to be considered as a mitigating circumstance. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Indeed, in a noncapital case, Gilbert v. State, 487 So.2d 1185 (Fla. 4th DCA 1986), rev. denied, 494 So.2d 1150 (Fla. 1986), the court recognized the defendant's peaceful nature as one of several factors that might ordinarily constitute proper "mitigating circumstances" for sentencing purposes. Id. at 1192. Although the court in Gilbert could not consider such circumstances because it was dealing with a mandatory sentence, the decision demonstrates that this factor is a proper one to be considered here. The court failed to do so, however.

f. THE LIFE SENTENCE IMPOSED ON A CODEFENDANT

The record reflects that Defendant's codefendant, Enrique Fernandez (R 1-3), was tried and convicted and that he received two consecutive life sentences (T 5/28 7). It also demonstrates that Fernandez "was convicted as a principal (T 5/28 7)."

"What happens to a codefendant is relevant and may be considered by a judge and jury in determining the appropriate sentence." Bassett v. State, 449 So.2d 803, 808 (Fla. 1984) (citations omitted). Although this factor is certainly strongest when the codefendant played a greater role in the crime, such as being the triggerman, Barfield v. State, 402 So.2d 377 (Fla. 1981), or the controlling force instigating the murder, Stokes v. State, 403 So.2d 377 (Fla. 1981), it is applicable whenever "the accomplice was a principal in the first degree." Eutzey v. State, 458 So.2d 755, 759 (Fla. 1984), citing Herzog v. State, 439 So.2d 1372 (Fla. 1983) and McCampbell v. State, 421 So.2d 1072 (Fla. 1982). It was considered in McCampbell despite the fact that evidence showed the defendant to be the triggerman and his accomplices to have played lesser roles in a robbery, one getting money from a safe, another robbing the registers, a third, along with the defendant, guarding people in the back, and a fifth remaining in a getaway car. Likewise, in Herzog, the defendant strangled the victim and was assisted by a codefendant. In Eutzy, this mitigating factor was not applied because there was no indication that the codefendant "aided, abetted, counseled, hired or otherwise procured the offense," 458 So.2d at 760, a conclusion that carried the clear implication that such involvement was all that was necessary for this circumstance to exist. See also Florida Statutes § 777.011 (defining principal in the first degree by using the same terms quoted above from Eutzy).

In the present case, the record does not clearly reflect the extent of Fernandez' involvement, but it does reflect the prosecutor's statement that he was prosecuted as a principal and that Fernandez was "the driver" that transported Defendant, knowing that Defendant "wanted to pull off a burglary (T 5/28 7)." Even assuming Fernandez' involvement was no more than what the above comments by the prosecutor reflected, the above cases demonstrate that this mitigating factor was applicable and that the court erred in not considering it.[33]

[33] Although Defendant waived the right to present this factor to the jury (T 5/28 8), there was no waiver of the right to have it considered by the court. Nonetheless, the court failed to recognize it.

g. NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY

The court, as detailed in Section (B) (2) of this point, specifically rejected some of the mitigating circumstances set forth in Florida Statutes § 921.141 (6). The court went on in its sentencing order to list several of the other statutory factors and to determine that they were inapplicable to the case (R 192). Although the court referred to the factors it listed as "the remaining mitigating circumstances" under the statute (R 192), the court did not discuss and did not include in its list of remaining statutory factors the mitigating circumstance set forth by Florida Statutes § 921.141 (6) (a), that the defendant had no significant history of prior criminal activity. Moreover, the court denied Defendant's motion to have the jury instructed on this factor (T 5/28 37). It is therefore apparent that the court failed to consider the applicability of this statutory factor and that the court precluded the jury from doing so.

The only evidence of prior criminal activity was the documents that demonstrated that Enrique Juarez, Henry Juarez and David Garcia had been convicted of various offenses (R 135-150). Defendant has asserted in Section (A) (2) (a) of this point that the State's evidence was insufficient to prove that he was the person to whom these documents pertained. Thus, if this court accepts Defendant's position in this respect, there would be no evidence of prior criminal activity and this mitigator would apply.

In light of the fact that none of the prior convictions were in Defendant's name, it should also be concluded that the court erred in denying the requested instruction on this factor. It is possible that the jury could have concluded that the State did not meet its burden of proving the prior convictions due to the different names. Thus, had the jury been instructed on this factor, it may well have found it to exist and such a finding may have influenced the jury's advisory sentence.[34] When the evidence can support a mitigating circumstance, courts are required to grant requests to instruct the jury on that factor. Bowden v. State, 588 So.2d 225 (Fla. 1991); Stewart v. 558 So.2d 416 (Fla. 1990). The failure to do so here was error.

[34] This possibility was enhanced by the improprieties noted in footnote 21, which may well have impacted on the jury's consideration of this matter.

4. ERRORS IN INSTRUCTING THE JURY ON MITIGATING CIRCUMSTANCES

The court committed several significant errors in instructing the jury as to mitigating circumstances.

The court properly told the jury that "each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision (T 5/28 71)." The court omitted, however, that portion of the standard instruction that reads, "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant," a statement that is intended to be included shortly after the statement regarding the standard of proof for aggravating circumstances. Florida Standard Jury Instructions in Criminal Cases, p. 79.

This omission likely left the jury with the erroneous impression that both aggravating and mitigating circumstances had to be established beyond a reasonable doubt before they could be considered. Thus, the jury may have rejected mitigating circumstances that they otherwise might have accepted because they felt that the circumstances were not proved beyond a reasonable doubt.

The court also erred by telling the jury that one mitigating circumstance was the facts that the crimes were committed while Defendant "was under the influence of extreme or mental emotional disturbance (T 5/28 70)." This instruction was intended to relate to the circumstance set forth in Florida Statutes § 921.141 (6) (b), which refers to "extreme mental or emotional disturbance."

By reversing the order of the words "mental" and "or," the court told the jury that in order to find this circumstance to exist, they had to find that an emotional disturbance existed, either an extreme emotional disturbance or a mental emotional disturbance. It therefore excluded from this circumstance an extreme mental disturbance that is not emotional in nature, a condition that clearly falls within the circumstance as defined by statute. As a result, the jury could have felt that the evidence supported the conclusion that an extreme mental disturbance existed, but that the condition did not support this mitigating factor in light of the instruction.

The court also told the jury that a mitigating circumstance was the "capacity of the defendant to appreciate the criminality of his conduct or to conform his

conduct to requirements of law with substantial impairment (T 5/28 70)." This instruction was intended to relate to the circumstance set forth in Florida Statute § 921.141 (6) (f), which establishes as a mitigator the fact that the "capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."

The instruction given by the court drastically changed the nature of this mitigating circumstance.[35] It told the jury that they could consider Defendant's capacity to appreciate the criminality of his conduct, but it did not tell them that such capacity need only be substantially impaired in order for this factor to apply. The jury was therefore left to their own devices to determine to what extent Defendant's capacity had to be affected in order for this circumstance to be applicable. They may have, for example, concluded that Defendant's capacity had to be totally impaired, almost totally impaired, extremely impaired, severely impaired or impaired to some other degree in excess of that required by the statute.

The instruction also told the jury that they could consider Defendant's capacity "to conform his conduct to requirements of law with substantial impairment." It is hard to imagine how the jury might have interpreted this part of the instruction. Did they try to decide what a "law with substantial impairment" is? Did they feel that this instruction required a showing that Defendant was capable of conforming his conduct despite having a substantial impairment? The instruction as given makes such little sense that the jury could have interpreted it in any number of ways, none of which would have been likely to match the statutory definition.

"[A] Florida capital sentencing jury's recommendation is an integral part of the death sentencing process." Riley v. Wainwright, 517 So.2d 656, 657 (Fla. 1987). " ... [I]mproper, incomplete or confusing instructions relative to the consideration of both statutory and nonstatutory mitigating evidence does violence to the sentencing scheme and the jury's fundamental role in that scheme." Id. at 658. "It is quite

[35] The court's apparent confusion as to this circumstance is also demonstrated by the court's misstatement of the circumstance in its sentencing order. See Section (B) (2) (b) (i) of this point.

simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." Gregg v. Georgia, 428 U.S. 153, 193, 96 S.Ct. 2909, 2934, 49 L.Ed.2d 859, 886 (1976). "In determining an advisory sentence, the jury must consider and weigh all aggravating and mitigating circumstances." Floyd v. State, 497 So.2d 1211, 1215 (Fla. 1986) (emphasis in opinion). In doing so, a sentencer must not be precluded from considering any aspect of a defendant's character or any of the circumstances of the offense. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Floyd, supra, As noted in Peek v. State, 395 So.2d 492, 497 (Fla. 1988), 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981), if this court were "to sanction an instruction which established no effective guidance for the jury in considering circumstances which may mitigate against death," it "would surely breathe life into Mr. Justice Rehnquist's admonition that such a procedure would 'not guide sentencing discretion but totally unleash it.' Lockett v. Ohio, 438 U.S. at 631, 98 S.Ct. at 2975, 57 L.Ed.2d 973 (Rehnquist, J., concurring in part and dissenting in part)."

Moreover, a misleading jury instruction constitutes both fundamental and reversible error. Doyle v. State, 483 So.2d 89 (Fla. 4th DCA 1986); Carter v. State, 469 So.2d 194 (Fla. 2d DCA 1985); Christian v. State, 272 So.2d 852 (Fla. 4th DCA 1973); Ellis v. State, 202 So.2d 576 (Fla. 1st DCA 1967). As noted in Hayes v. State, 564 So.2d 161, 163 (Fla. 2d DCA 1990), " ... [A] proper jury instruction in a criminal case is a fundamental right, the denial of which can be appealed without objection." This principle would seem particularly with regard to instructions that may affect whether a defendant will live or die.

There can be no question that the instructions in the present case were improper, incomplete, confusing and misleading. It is equally clear that the court failed to give the jury the necessary guidance to allow them to properly carry out their role in Florida's capital sentencing scheme. Further, the instructions were subject to being interpreted in a manner that excluded from the jury's consideration certain mitigating circumstances, such as any circumstance not proved beyond a reasonable doubt, the statutory circumstance relating to Defendant's impaired capacity and the statutory circumstance of an extreme mental disturbance. Clearly, the sentencing process was severely flawed.

5. REMEDY

With regard to the conviction for the killing of Mabel Avery, since the jury recommended a sentence of life imprisonment, the court's imposition of a death sentence can only be sustained if "the facts suggesting a sentence of death" are "so clear and convincing that no reasonable person could differ." Tedder v. State, 322 So.2d 910 (Fla. 1975). If there is "any reasonable explanation for the jury's recommendation," a death sentence cannot stand. Hallman v. State, 560 So.2d 223, 226 (Fla. 1990). In light of the foregoing argument relating to the aggravating and mitigating circumstances, there were numerous factors upon which the jury could have reasonably based its recommendation. This death sentence therefore cannot be sustained.

With regard to the conviction for the killing of Julia Ballentine, several factors should be considered. As the court noted in its Amended Findings of Fact and Sentence, "the only factual difference" between the two murders was "that Mabel Avery was NOT raped (R 195) (emphasis in original)." Since, as discussed in Point I, there was insufficient evidence of the charged sexual battery of Julia Ballentine, the distinction relied on by the court is nonexistent. Thus, if the sentence for the killing of Mabel Avery is reversed, the death sentence for the killing of Julia Ballenting would be disproportionate to the life sentence for the killing of Mabel Avery. Further, in light of the foregoing discussion as to why the various aggravating factors were improperly found and why the various mitigating factors should have been found, a death sentence for the killing of Julia Ballentine is disproportionate to the crime and to the sentences in the cases discussed in the foregoing argument. This death sentence therefore cannot stand either.

Should this court disagree with the conclusion that the death sentences must be reduced to sentences of life imprisonment, Defendant would contend that in light of the foregoing argument as to the aggravating and mitigating circumstances and as to the conduct and errors during the sentencing phase of Defendant's trial, the sentences should should be reversed and the cause remanded for a new sentencing hearing.

XII. THE COURT ERRED IN ENHANCING THE SENTENCES FOR SEXUAL BATTERY AND BURGLARY.

It is well settled that before a felony can be reclassified for sentencing purposes, there must be a sufficient jury finding of the existence of the factor relied upon for enhancement. Smith v. State, 462 So.2d 1102 (Fla. 1985); State v. Overfelt, 457 So.2d 1385 (Fla. 1984). In the present case, pursuant to the State's request (R 181-183), the court enhanced the sentences for sexual battery and burglary (R 193), despite the fact that the jury was given verdict forms with boxes to check to indicate a finding of the existence of an enhancing factor and the fact that the jury did not check any of these boxes.[36] The State contended that enhancement was proper because the jury found Defendant guilty of the two offenses "as charged." While such a finding may be a sufficient basis to enhance in some cases, it is not here.

In the first place, the presence of the boxes on the verdict forms (at the State's insistence [T 662-665]) means that finding a defendant guilty "as charged" does not carry the implication that that the enhancing factor was found. Second, the verdict forms here only gave the jury the options of convicting Defendant "as charged," convicting him of a lesser offense or acquitting him. Thus, the jury's verdict here certainly cannot be said to constitute a finding of an enhancing factor. Third, the jury in this case was not given the indictment (T 5/22 39), so the jury cannot be charged with the knowledge that the enhancing factors were included in the charge.

Additionally, the fact that when it became known that the jury had not checked any boxes, the prosecutor specifically waived the right to have the jury make a finding (T 5/28 97-98) should be held to have waived the right to the finding necessary for enhancement. The State cannot be allowed to accept the benefit of not running the risk of having the jury change its verdicts without being held to its waiver of the right to enhancement. The doctrines of waiver and estoppel thus preclude enhancement. See generally McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971); Enfinger v. Order of United Commercial Travelers, 156 So.2d 38 (Fla. 1st DCA 1963).

For the foregoing reasons, resentencing on these two counts is mandated.

[36] A motion is being filed with this court to supplement the record with the verdict forms.

CONCLUSION

Based upon the foregoing argument and authorities, Defendant respectfully submits that the judgments and sentences in this cause should be reversed.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded to Fariba Komeily, Assistant Attorney General, Office of the Attorney General, 401 N.W. 2d Ave., Ste. 912N, Miami, Fl. 33128, this 26 day of January, 1993.

Anthony C. Musto