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IN THE SUPREME COURT OF FLORIDA

LARRY DEAN KRAMER, Appellant,	)	
vs.	)	CASE NO. 78,659
STATE OF FLORIDA, Appellee.	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

LARRY DEAN KRAMER,	)	
Appellant,	)	
vs.	)	CASE NO. 78,659
STATE OF FLORIDA,	)	
Appellee.	)	

INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On December 12, 1990, the Grand Jury in and for Orange County Florida returned an indictment charging Appellant, LARRY DEAN KRAMER, with one count of first degree premeditated murder, in violation of Section 782.04(1)(a)1, Florida Statutes (1989). (R 904) Appellant filed numerous pre-trial motions including a motion to declare Section 921.141(5)(h), Florida Statutes (1989) unconstitutional. (R 944-957) This motion was denied. (R 1092)

Appellant proceeded to jury trial on April 29 - May 2, 1991, with the Honorable Richard F. Conrad, Circuit Judge, presiding. (R 1-554) During jury selection, the defense objected to the state's peremptory challenge to an African American venireman. (R 294-296) The court overruled the defense objection after requiring the state to set forth its reasons for

exercising its challenge. (R 296) At the conclusion of the evidence, Appellant moved for a judgment of acquittal on the grounds that the state had not proven either felony murder or premeditation, but rather had only proved that there was drinking which led to a fight and the ultimate death of the victim. (R 463) The trial court denied the judgment of acquittal. (R 466) The trial court denied several requested jury instructions by the defense. (R 471-481) During closing argument, the defense made several objections to comments made by the prosecutor, which objections were overruled. (R 506-508, 509, 510) Following deliberations, the jury returned a verdict finding Appellant guilty as charged. (R 548, 1129)

The penalty phase portion of Appellant's trial was held on July 22 - 23, 1991. (R 555-888) Prior to the commencement of the penalty phase, defense counsel made a motion in limine to prevent the state from disclosing with regard to Appellant's prior felony conviction for attempted first degree murder, that the victim of that offense subsequently died. (R 564-572) The trial court granted this motion to the extent that it ruled the state must first proffer any testimony with regard to this matter. (R 572) When this motion in limine was violated, defense counsel moved for a mistrial. (R 596-597) The trial court ultimately denied the motion for mistrial although it did note that the prosecutor had violated the ruling on the motion in limine. (R 845-846) During closing arguments, defense counsel on three separate occasions argued in violation of the motion in

limine. (R 851, 853, 864) Defense counsel objected and moved for a mistrial which motions were denied. (R 851, 853, 864) Following deliberations, the jury returned an advisory verdict recommending by a nine-to-three vote that Appellant be sentenced to death. (R 880, 1243)

On September 6, 1991, Appellant again appeared before Judge Conrad for sentencing. (R 889-896) Judge Conrad adjudicated Appellant guilty and in accordance with the jury recommendation, sentenced Appellant to death. (R 890-891) Judge Conrad filed a written finding of facts with regard to the aggravating and mitigating circumstances. (R 1271-1286)

Appellant filed a timely notice of appeal on September 11, 1991. (R 1288) Appellant was adjudged insolvent and the Office of the Public Defender was appointed to represent him on appeal. (R 1300)

STATEMENT OF THE FACTS

On November 7, 1990, Buddy Leggett, an employee of the City of Orlando, was picking up trash on Interstate 4 when he discovered a body in the gutter on the South Street on-ramp. (R 309-310) The body was not easily visible from the road and looked like it had been there for a couple of days. (R 310) Leggett waved down a police officer coming up the ramp and alerted him to the discovery. (R 311) The body was eventually identified as that of Walter Edward Traskos. (R 444)

An autopsy was performed on the body of the victim and it was determined that the victim received numerous blows about his head and face causing fractures to the base of the skull and front of the skull, numerous abrasions and hemorrhaging into the right eye socket. (R 354-358) The fracture was caused by a severe blow with a blunt instrument. (R 359) The medical examiner estimated that the victim suffered a minimum of 9 to 10 blows. (R 359) The cause of death was determined to be skull and facial fractures due to blunt force injuries of the head due to a beating. (R 363) The doctor opined that probably only one major blow was fatal. (R 364) The injuries to the victim's body including contusions and abrasions on his chest, elbows, knees and hands were consistent with either falling or being struck by an object. (R 364-365) At the time of his death, the victim had a blood alcohol level of .23 which indicates that the person was intoxicated and his judgment, motor skills, and coordination were impaired. (R 366)

A large rock was found several hundred feet down the concrete drainage ditch which parallels the on-ramp. (R 314) The major blow to the victim was delivered while he was lying on the ground. (R 379) The other blows were probably not delivered while he was lying on the ground. (R 379)

Officer John Parks, of the Orlando Police Department was the lead investigator in this crime. (R 446) After interviewing Philip Unser, Parks attempted to locate Appellant with Unser's help. (R 446) Unser and Parks went to the Orlando Public Library where they found Appellant and Parks arrested him. (R 447) Parks spoke to Appellant and read him his Miranda rights. (R 450) At first, Appellant indicated that he wanted to see an attorney, at which point Parks told him that he would stop any interrogation. (R 451) However, Appellant then told Parks that he wanted to continue without an attorney and agreed to give a taped statement. (R 451) In his initial statement, Appellant told Parks that he had last seen the victim whom he knew as Kyle on the afternoon of Wednesday, November 7, 1990. (R 453) Appellant said that he and Kyle had purchased some beer and went up to the culvert area near the South Street entrance to I-4. (R 453) When they got there, there was another person who stayed for a couple of hours. (R 453) Approximately four hours after they had gotten there, Appellant left. (R 453) At the time he left, Kyle was asleep and uninjured. (R 453) Appellant met up with another person and then went to the coalition for the homeless. (R 453) Appellant and this friend bought some more

beer and then went to the railroad tracks near the Omni Hotel. (R 453) They stayed there four or five hours after which Appellant left to go get something to eat. (R 453) Appellant then went to the Methodist Church on Magnolia where he spent the night. (R 453) After giving this statement, Parks indicated that he did not believe that Appellant was telling the truth. (R 455) Parks showed Appellant a photo of Philip Unser and told Appellant that Unser had told the truth about the incident and that Parks believed that Appellant killed Traskos. (R 455) Appellant seemed shocked and told Parks that he was willing to tell the truth. (R 455) Parks then took a second taped statement from Appellant. (R 455-456) In the second statement, Appellant told Parks that on Wednesday afternoon, he and the victim got into a fight and that the victim had pulled a knife on him. (R 456) The knife was simple pocket knife with a single blade. (R 456) Appellant picked up a good sized rock and threw it at Kyle hitting him in the head. (R 456) The victim fell to the ground and as he started to get back up, Appellant again hit him with the rock. (R 456) Appellant said he did not hit the victim anymore and did not know if the victim was still alive. (R 456) After this, Appellant changed his pants because they had blood on them. (R 456) Appellant threw his pants in a dumpster not far from where the offense occurred. (R 456) Appellant just simply threw the rock down the culvert. (R 456) Appellant then grabbed the knife and headed towards the Library and Lake Eola where he threw the knife. (R 456) Appellant said that when they

first got into the fight, they had just been wrestling around and he had hit the victim with his fist a couple of times. (R 456) Appellant stated that he may have even grabbed the victim by the throat and stuck his thumb in his eye one time. (R 456) Eventually they separated and the victim stood up and pulled out his knife. (R 456) The victim started coming towards him with the knife so Appellant picked up the rock and threw it. (R 456) Although the victim ducked a bit, the rock hit him in the forehead and knocked him down. (R 456) As the victim started to get back up with the knife in hand, Appellant hit him again with the rock. (R 456) Appellant stated that he was sorry that the whole thing happened. (R 456)

Numerous beer cans were found in the area near the body. (R 458, 312, 320)

PENALTY PHASE:

In 1987, Appellant pled guilty to the offense of attempted first degree murder. (R 584) This offense occurred at Interstate 4 as it crosses over South Street. (R 590) Appellant had used a concrete block to beat the victim. (R 592-593) Appellant had given an oral and written confession to this offense. (R 592) The victim was blinded in one eye and had no memory of the incident. (R 595) The victim was beaten severely about the face with the concrete block. (R 593) There were numerous beer cans around the scene. (R 597) Although Investigatory Chisari thought that Appellant may have been

drinking, he did not consider him intoxicated. (R 599) However, Officer Dennis McDowell testified that Appellant appeared to him to be intoxicated. (R 625)

Appellant was born in 1962 in Illinois where his father was stationed in the Air Force. (R 632) He has an older brother and a younger sister. (R 632) In 1968, when Appellant was six years old, his family was transferred to Washington D.C. (R 632) Appellant developed some serious visual problems and was diagnosed as being highly myopic. (R 633) Eventually, Appellant was told that he would go blind. (R 633) Appellant tried to wear contacts but because of the irregular shape of his eyes, was unable. (R 632) Therefore, from the age of 6 years, Appellant was forced to wear glasses. (R 634) Also at this time, Appellant had an undeveloped kidney removed. (R 636) Although Appellant could play Little League, he was unable to play any contact sports. (R 637) In Junior High School, Appellant was required to stay in a special Physical Education class for the handicapped. (R 638) Both Appellant's older brother and his younger sister were quite active in school activities and sports. (R 638) Appellant's father retired from the Air Force in 1973 and the family moved to Orlando. (R 640)

Approximately six months before his retirement, Frederick Kramer began drinking. (R 707) After they moved to Orlando, Frederick Kramer continued to drink very heavily which created a lot of tension in the family. (R 708, 726-727) Appellant's parents fought increasingly which caused the children

to stay away from them. (R 727) Frederick Kramer verbally abused his wife and his children. (R 711, 728, 696)

Shortly after their move to Orlando, Frederick Kramer found evidence of Appellant's use of alcohol and marijuana. (R 640-642) Appellant's involvement in alcohol and drugs had escalated and Appellant ran away from home on several occasions. (R 729)

After Appellant was arrested and sentenced to prison in 1987, his family noticed a big change in him. (R 733, 653, 684-685, 692) While in prison, Appellant was a model inmate. (R 660-665, 742-744) Appellant became a very trusted inmate and was picked to join the work crew which was allowed to go outside the prison compound to do maintenance work along the highways. (R 661-663) Appellant took advantage of numerous extra-curricular activities while in prison. (R 663) Appellant attended church services faithfully and volunteered for special projects. (R 743) On the occasions when Appellant was outside the prison, he never tried to leave and never presented any trouble. (R 667, 744)

Appellant often babysat his neighbor's children and was very good with the children including one which was handicapped. (R 676) Often Appellant would fill in as a lifeguard at a pool and one time saved the life of a little girl who slipped and fell into the pool. (R 677)

Jonathan Lipman, a neuropharmacologist, testified that he ran numerous tests on Appellant, interviewed him for five and

one half hours, and had access to police reports, witness statements and Appellant's personal history. (R 766-773) Based on the findings, Dr. Lipman was of the opinion that Appellant is an alcoholic who is selectively and exclusively vulnerable to alcohol. (R 789) In Dr. Lipman's opinion, Appellant suffers from episodic discontrol syndrome, which is also called explosive disorder or intermittent explosive disorder. (R 789) Persons suffering from this illness are normally non-violent but subject to episodes of violence which occur when they are under the influence of alcohol. (R 790) When Appellant gets drunk, he emits violence and rage completely out of proportion to the stimulus which triggers it. (R 792) The rage which defendant feels is often over nothing and the onset is abrupt and without warning. (R 794) This violence can last minutes to hours and it is followed by remorse. (R 794) In numerous well-documented cases, statistics show a higher incidence of this illness where the sufferer had an alcoholic father. (R 796) Appellant fits the pattern of such a person with his self-destructive behavior. (R 799) Episodic discontrol syndrome is a mental illness and is behavioral-defined disorder. (R 807) In Dr. Lipman's opinion, Appellant was under the influence of extreme mental and emotional disturbance at the time he committed the offense. (R 808) It was also Dr. Lipman's opinion that Appellant could not appreciate the criminality of his conduct and could not conform his conduct to the requirement of law. (R 809) Appellant suffers from pathological intoxication which means that he needs only drink a

small amount to get intoxicated. (R 817)

SUMMARY OF ARGUMENTS

POINT I: The trial court erred in accepting the state's insufficient explanation of its peremptory challenge to the sole black juror from the venire. The defendant timely and properly objected to the state's backstrike of the black juror. The burden then shifted to the state to justify the peremptory challenge on race neutral grounds. The state clearly failed to carry this burden and the court's acceptance of the venire as challenged violated the defendant's federal and Florida constitutional rights to a fair and impartial jury.

POINT II: The trial court erred in restricting the cross-examination of the medical examiner regarding the presence of fresh needle marks on the body of the victim. This evidence was relevant to the defense's theory of the case and was proper inasmuch as the state opened the door to such testimony when it asked the doctor about the presence of any drugs in the system of the victim. This denial of the opportunity to fully and fairly cross-examine a key state witness violated Appellant's right to fair trial.

POINT III: The evidence produced by the state was insufficient to prove as a matter of law that Appellant was guilty of first degree premeditated murder. In the light most favorable to the state, the evidence showed that Appellant and the victim had been drinking, an argument ensued, and Appellant killed the victim. There was uncontradicted and unrefuted

evidence that the victim had pulled a knife on Appellant. While this evidence was sufficient to support a conviction for second degree murder, it was insufficient as a matter of law to permit the case to proceed to the jury on the charge of first degree murder.

POINT IV: The trial court erred in admitting into evidence both at the guilt phase and at the penalty phase various slides of the victim which graphically and gruesomely showed wounds. These photographs had no relevance to any issue of fact before the jury and even if marginally relevant was so prejudicial as to outweigh any probative value they may have. Further, in the penalty phase the slides of the previous victim were totally irrelevant to prove any aggravating circumstance. The sole purpose of such photographs was to inflame the passions of the jury.

POINT V: The trial court erred in allowing assistant state attorney Jeffery Ashton to comment on the fact that Appellant exercised his constitutional right to remain silent. Further, the trial court erred in permitting Ashton to argue in such a way that suggested to the jury that the defense had some burden of producing evidence.

POINT VI: The trial court erred in denying Appellant's requested jury instructions during the guilt phase which were correct statements of the law, directly applicable to his theory of defense, and were not adequately covered by the standard jury instructions. These instructions included an instruction

concerning the heat of passion killing and one which instructed the jury on how to consider the gory photographs which were admitted into evidence.

POINT VII: The trial court erred in overruling Appellant's objections and denying his motions for mistrial based on the fact that the prosecutor Jeffery Ashton had violated a court order on a motion in limine and repeatedly commented on irrelevant and highly prejudicial matters which were not in evidence. In particular, Ashton intentionally violated the court's order on the motion in limine precluding him from making any mention that the victim of a prior criminal offense by Appellant had died.

POINT VIII: Florida statutory aggravating circumstance of heinous, atrocious and cruel is unconstitutional. The Florida Statute suffers from the same infirmities condemned by the United States Supreme Court in Shell v. Mississippi, 498 U.S. ___, 111 S. Ct. ___, 112 L.Ed.2d 1 (1990).

POINT IX: The trial court committed reversible error by refusing to instruct the jury during the penalty phase on correct statements of law as requested by defense counsel. These requested instructions were accurate statements of the law and were particularly applicable to the facts of the instant case.

POINT X: The trial court erred in finding that the murder was especially heinous, atrocious and cruel. There was insufficient evidence to show that the victim was subjected to any prolonged period of torture or that he had any sense of his

impending death. Further, the unrebutted evidence was that Appellant suffered from a mental illness. This factor should be considered in lessening the impact of any finding of heinous, atrocious and cruel.

POINT XI: The trial court erred in refusing to find the mitigating factor that Appellant suffered from the mental illness known as episodic dyscontrol syndrome. The evidence presented with regard to this finding was overwhelming and uncontradicted. It was also competent and substantial. The trial court's rejection of this evidence is not supported by any competent record evidence. The failure of the trial court to find this factor in mitigation renders the sentence unlawful.

POINT XII: Under the totality of the circumstances, the imposition of the death penalty is proportionally unwarranted in this case. Despite the presence of one or possibly two aggravating circumstances, the overwhelming evidence in mitigation leads to the conclusion that the death penalty is unwarranted.

POINT I

> IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S OBJECTION TO THE STATE'S USE OF A PEREMPTORY CHALLENGE TO THE ONLY BLACK JUROR ON THE POTENTIAL PANEL WHERE THE REASON GIVEN BY THE PROSECUTOR WAS INSUFFICIENT AND PRETEXTUAL.

An individual's right to an impartial jury representing a cross-section of the community is guaranteed by Article I, Section 16, Florida Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. The purpose of peremptory challenges used during jury selection is to promote the selection of an impartial jury. "It was not intended that such challenges be used solely as a scalpel to excise a distinct racial group from a representative cross-section of society. It was not intended that such challenges be used to encroach upon the constitutional guarantee of an impartial jury." State v. Neil, 457 So.2d 481, 486 (Fla. 1984); See also Batson v. Kentucky, 476 U.S. 79 (1986).

As soon as the prosecutor, Jeffrey Ashton, announced that he intended to backstrike jury number 27, defense counsel made the following objection:

> MS. CASHMAN: Your Honor, that's the second black that the State has struck. We would ask that they give a race neutral reason for Ms. Davis. I don't recall her giving any answers why she couldn't be fair.
>
> For purposes of the record, Ms. Wright, being juror number 109, and seat nine is the other black that the State struck. I know that she had expressed concern about her fairness

earlier.

* * *

> I understand why they struck Ms. Wright. I'm objecting to them striking Ms. Davis, because I feel this is to just remove the only black left on the jury. I'm sorry if I didn't make myself clear on it. (R 294-295)

The state then willingly gave its reason for striking Ms. Davis:

> MR. ASHTON: To be honest with you, I'm not aware whether the other people on there are black or not. I don't know. I didn't put notes on my chart what their race was. I recall Ms. Davis was black. I will explain to the Court, because I never can understand from the supreme court exactly what the standard is. I'll give my explanation, anyway. Ms. Cashman already gave me the explanation on Ms. Wright. Obviously from the record, Ms. Davis, what I have down in this case, and I can put a copy of my chart into evidence to demonstrate this, I rated each juror on a numerical scale from 1 to 5 based on their opinions in the death penalty questions and answers to personal responsibility questions. Ms. Davis scored on the personal accountability 4 out of 5. And her rate on the death penalty question was a three. The next juror up, Jane Christiansen, her score on the personal responsibility question was a 5. More preferable to the State, her response to the death penalty was 3.5, which is better. I chose Ms. Christiansen over Ms. Davis because her responses were better than Ms. Davis on those two key issues. Important to the State of Florida. (R 295-296)

Following its explanation, the court initially expressed confusion over the standard to be applied in such cases but made the finding that the defense made a prima facia showing that the state was exercising their peremptories in a racially biased manner. (R 296) However, the court then accepted the state's explanation based on Mr. Ashton's "rating scale." (R 296-297)

Appellant submits that not only was the state's reason insufficient, but the trial court erred in allowing the challenge.

This Court in State v. Slappy, 522 So.2d 18, 21 (Fla. 1988), indicated that the issue is not whether several jurors have been excused because of their race, but whether **any** jury has been so excused.

> The striking of a single black juror for racial reasons violates the equal protection clause, even where other black jurors are seated, and even when there are valid reasons for the striking of some black jurors.

Id. Even the striking of one black juror is enough to make the initial showing required by the defense if that person is the only potential black juror to be seated. Martinez v. State, 16 FLW 2950 (Fla. 3d DCA 11/26/91); Reynolds v. State, 576 So.2d 1300, 1302 (Fla. 1991); Johans v. State, 16 FLW D2520 (Fla. 5th DCA 9/26/91).

Here the court found that the defense had met the initial burden and required the state to voice its reason for the challenge. See St. Louis v. State, 584 So.2d 180 (Fla. 4th DCA 1991) (wherein the appellate court reversed because of the state's lack of an adequate reason for justifying the excusal, rejecting the state's claim that the court should not have even required the state to give a reason). That reason, then, turned out to be insufficient and blatantly pretextual.

Once the trial court requires reasons from the state for the strike, the burden of proof shifts to the state to prove

race neutral and non-pretextual reasons for the strike. According to Slappy, supra at 22, this rebuttal by the state "must consist of a 'clear and reasonably specific' racially neutral explanation of 'legitimate reasons' for the state's use of its peremptory challenges. (citing Batson v. Kentucky, 476 U.S. at 96-98). The court must be able to conclude from the reasons given that they are neutral and not a pretext. Slappy, supra at 22.

Five non-exclusive factors to consider which would weigh against the legitimacy of a race-neutral explanation were listed by the court in Slappy. Of those five, there are at least two present here, as well as a third reason not listed in Slappy. The reasons listed in Slappy which are present here include: (1) the failure of the state to examine the juror or a perfunctory examination on the questioned issue: and (2) a challenge based on reasons equally applicable to jurors who were not challenged by the state. Here, the state's questioning of juror Davis regarding her feelings on the death penalty consisted of three questions. (R 23-24) At the conclusion of this questioning, Ms. Davis noted that if the law and the facts were appropriate she could agree to impose the death penalty. After which, Mr. Ashton, the prosecutor, replied, "You would vote to impose it. Okay. Very good. No further questions." (R 24) Interestingly, juror Christiansen whom the prosecutor professed to prefer over Ms. Davis questioned the "randomness" of the imposition of the death penalty. (R 151-155) During the general

voir dire, juror Davis was asked three questions only one of which had to do with her feelings as a juror. Two of the questions dealt with her prior jury experience (R 228) and her occupation (R 254). The only other personal question which Ms. Davis answered had to do with the prosecutor's question about whether a person is personally responsible for his actions. Ms. Davis stated that she felt that a person should be held responsible for his own actions. (R 247-248) In this regard, Ms. Davis' response was no different from the majority of other jurors.

Additionally, the state's professed reason for striking Ms. Davis had to do with his own personal rating scale. The court accepted this as a valid explanation. Unfortunately, there is nothing in the record to indicate the basis upon which Mr. Ashton applies these arbitrary ratings. It is certainly possible that all black persons automatically score lower on Mr. Ashton's personal scale. To accept this reason as race neutral simply invites the most invidious form of discrimination. This court cannot tolerate such actions. Appellant recognizes that this Court has held that eliminating one juror in order to reach another is a legitimate basis for exercising a peremptory challenge. Kibler v. State, 546 So.2d 710 (Fla. 1989). However, as this Court noted in the context of Neil, "it would be incumbent on the prosecutor to give non-racial reasons for having challenged the black jurors rather than the white jurors in his effort to make room for the new persons he sought to have join

the panel." Id. at 714. As in Kibler, the prosecutor in the instant case did not carry the burden of showing that his challenge to Ms. Davis was not exercised solely because of her race.

In summary, Appellant asserts that the state exercised its peremptory challenge to effectively eliminate all blacks from the jury panel. The reason given by the state for doing so was not race neutral and therefore it was error for the trial court to accept such reasons. Appellant is entitled to a new trial.

POINT II

IN VIOLATION OF APPELLANT'S CONSTITUTION RIGHT GUARANTEED UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN LIMITING THE CROSS-EXAMINATION OF A STATE'S WITNESS.

At trial, the state called Dr. Gilles, the medical examiner, as a witness. (R 338) Without objection, the state elicited testimony concerning the victim's blood alcohol level. (R 366) The state also asked whether any other drugs were found in the victim's system to which the doctor replied that only nicotine was found. (R 368) On cross-examination, defense counsel attempted to question Dr. Gilles about the presence of fresh needle marks on the victim's body. The state objected on the grounds that such evidence was irrelevant. The defense countered that the state had opened the door to this line of questioning on its direct. (R 370-371) The trial court sustained the state's objection. (R 370-371)

The right of cross-examination of witnesses is a fundamental right encompassed within the confrontation clause of the Sixth Amendment to the United States Constitution made applicable to the states through the Fourteenth Amendment to the United States Constitution. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 29 L.Ed.2d 347 (1974); Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1085, 13 L.Ed.2d 923 (1965); Coxwell v. State, 361 So.2d 148 (Fla. 1978); and Coco v. State, 62 So.2d 892 (Fla. 1952). It is well settled that a criminal defendant should be

afforded wide latitude on cross-examination of the prosecution witnesses. Coxwell, supra, wherein this Court set the standard by which appellate courts must review a trial court ruling restricting cross-examination:

> [W]here a criminal defendant in a capital case, while exercising his sixth amendment right to confront and cross-examine the witnesses against him, inquires of a key prosecution witness regarding matters that are both germane to that witness'testimony on direct examination and plausibly relevant to the defense, an abuse of discretion by the trial judge in curtailing that inquiry may easily constitute reversible error.

Id. at 152

In Morrell v. State, 335 So.2d 836, 838 (Fla. 1st DCA 1976), the Court stated:

> Two main functions of cross-examination are: 1) to shed light on the credibility of the direct testimony and 2) to bring out additional facts related to those elicited on direct examination. As to the first function, the test of relevance is whether it will, to a useful extent, aid the court or the jury in appraising the credibility of the witness and assessing the probative value of the direct testimony.

In the instant case, the defense attempted to question Dr. Gilles about the presence of fresh needle marks on the body of the victim. This testimony was relevant in that it could have shown that the victim was a drug addict who in the latter stages of withdrawal became so crazed that he was prone to violence which manifested itself in the form of pulling a knife on the defendant. This would certainly be consistent with the defendant's statement to the police. That Dr. Gilles had not

found any trace of drugs in the victim's system during the autopsy is irrelevant. It was the prosecutor himself who elicited the testimony from Dr. Gilles that no drugs were present in the system. The state should not have been permitted to open this door without expecting the defense to walk in. The presence of fresh needle marks on the victim's arm as noted previously was relevant to the defense theory. The refusal of the trial court to permit this inquiry denied Appellant a valuable tool and served to violate his constitutional rights to a fair trial. A new trial is mandated.

POINT III

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE GROUNDS THAT THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT A CONVICTION FOR FIRST DEGREE PREMEDITATED MURDER.

At the close of the state's case-in-chief, defense counsel moved for a judgment of acquittal on the grounds that the state had failed to prove a prima facie case for murder in the first degree in that no felony murder was proven nor was premeditation proven. Defense counsel noted that the evidence showed only that the parties were drinking which led to a fight and eventual death of the victim. (R 463) The trial court denied the motion for judgment of acquittal. (R 466)

In deciding whether a motion for judgment of acquittal should be granted depends upon whether the state has met its burden of proof by making out a _prima facie_ case of guilt against the defendant, that is, whether the state established the guilt of the accused beyond and to the exclusion of every reasonable doubt. _Weinshenker v. State_, 223 So.2d 561 (Fla. 3d DCA 1969); _Adams v. State_, 102 So.2d 47 (Fla. 1st DCA 1958). A defendant's version of what occurred _must_ be accepted as true unless contradicted by other proof showing the defendant's version to be false. _Jaramillo v. State_, 417 So.2d 257 (Fla. 1982); _Sorey v. State_, 419 So.2d 810 (Fla. 3d DCA 1982); _McArthur v. State_, 351

So.2d 972 (Fla. 1977) (fn. 12).

Applying the foregoing principles to the instant case, it is clear that the appellant was entitled to a judgment of acquittal as to the offense of first degree murder. The state's evidence consisted solely of medical testimony with regard to the injuries suffered by the victim. It is without question that the victim died as a result of being beaten with a blunt object which probably was a large rock. The state during its case-in-chief, chose to admit the statements of Appellant. From these statements, the evidence shows that Appellant and the victim had been drinking and the victim pulled a knife at which point Appellant grabbed a rock and threw it at the victim. When the victim attempted to get up, still with knife in hand, Appellant took the rock and beat him again. The victim died of these injuries. While unquestionably the evidence was sufficient to support a conviction for some degree of murder, it was woefully insufficient to prove a prima facie case of premeditated first degree murder. There is no evidence upon which the jury could properly conclude that the defendant performed the requisite premeditation. In this regard, it is instructive to consider a factually indistinguishable case. In McCall v. State, 524 So.2d 663 (Fla. 1988) this Court considered the propriety of certain reasons for departure from the recommended guideline sanction. What is instructive are the facts of the McCall case. Travis McCall was charged by indictment with the first degree murder of Winston Bain. The evidence showed that the victim died as a

result of an excessively brutal attack wherein McCall crushed the victim's head three or four times with a concrete block and hit the victim in the face with a large board. The accused then sodomized the victim with a medal pipe. On these facts, McCall was convicted of second degree murder. The instant case is far less egregious than the McCall case. In the instant case, there is evidence that this offense was a culmination of a mutual fight which escalated. The physical evidence certainly supports Appellant's version of what occurred. The state produced nothing to rebut this and thus the court and the jury was bound to accept that version since it was not materially disputed. Therefore, it was error for the trial court to allow the case to proceed to the jury on the charge of first degree murder. This Court must reverse Appellant's conviction and remand with instructions to enter a judgment and sentence for second degree murder.

POINT IV

IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION APPELLANT WAS DENIED DUE PROCESS WHEN THE TRIAL COURT ADMITTED PHOTOGRAPHS OF THE VICTIM INTO EVIDENCE OVER OBJECTION WHERE SUCH PHOTOGRAPHS HAD NO RELEVANCE TO ANY ISSUE.

During the guilt phase of Appellant's trial, the state successfully sought introduction of numerous color slides showing the area where the crime occurred as well as the victim. Defense counsel objected to a majority of these photographs as either being cumulative or as being unnecessarily prejudicial and irrelevant. Some of the slides were autopsy photographs. The trial court overruled all of Appellant's objections to the slides, even to slide eleven which the state was admitting for identification purposes only and to which the state agreed to the defense's stipulation of identity (R 331) and to slide 16 which the doctor testified that he could do without. (R 333) The slides were admitted into evidence over defense objection. (R 343) In the penalty phase, the state was permitted to enter into evidence three slides showing the victim of appellant's previous crime of attempted first degree murder. (R 612-614) The trial court overruled the defense objection to two of these photographs as being irrelevant and unnecessarily gory. (R 614) These slides were admitted over objection. (R 618)

Photographs should be received in evidence with great caution. Thomas v. State, 59 So.2d 517 (Fla. 1952). The test for admissibility of photographs is relevancy. Zamora v. State,

361 So.2d 776 (Fla. 3d DCA 1978). A photograph is admissible if it properly depicts factual conditions relating to the crime and if it is relevant in that it aids the court and jury in finding the truth. Booker v. State, 397 So.2d 910 (Fla. 1981). Even if photographs are relevant, courts should still be cautious in admitting them if the prejudicial effect is so great that the jury becomes inflamed. Alford v. State, 307 So.2d 433 (Fla. 1975) cert. denied 427 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). In Adams v. State, 412 So.2d 850 (Fla. 1982), this Court noted with approval the trial judge's reasoned judgment in prohibiting the introduction of "duplicitous photographs." Photographs taken of the victim after the body is removed from the scene should be received with added caution since their relevance is generally lessened. Reddish v. State, 167 So.2d 858 (Fla. 1964). In Hoffert v. State, 559 So.2d 1246 (Fla. 4th DCA 1990) review denied 570 So.2d 1306 (Fla. 1990) the Court ruled that the danger of unfair prejudice to the defendant due to the introduction of autopsy photographs of the victim's head which depicted the internal portion of the head after an incision had been made with the scalp pulled away revealing flesh under the hair and overlying skull far outweighed probative value of the photographs and that the state failed to show any necessity for its admission. Thus the Court ruled the admission was erroneous.

Applying the foregoing principles to the instant case, it is clear that the trial court erred in admitting the slides in question into evidence. The slides depicted numerous pictures of

the victim both at the scene and at the autopsy. These photographs were in large part, duplicitous of the photographs to which the defense counsel had no objection. Even when the state agreed to a stipulation of identity thus rendering unnecessary the admission of the photographs, the trial court still admitted it. (R 331) Even when the testifying witness stated that the photograph would add nothing to his testimony, the trial court still admitted the photograph. (R 333) That the photographs were gruesome cannot be denied. The admission of the these irrelevant and highly prejudicial photographs was error which requires a reversal for a new trial.

With regard to the slides which were admitted over objection at the penalty phase, the state showed absolutely no relevance to their admission. The slides had nothing to do with the instant offense but rather were slides taken of a prior criminal offense for which Appellant was convicted. The two offending slides showed photographs of the previous victim. These photographs had nothing whatsoever to do with any aggravating circumstance. They certainly added nothing to the proof of the aggravating circumstance regarding the prior conviction for a violent felony. This was proven through the admission without objection of the judgment and sentence. The only possible reason for the admission of these slides was to inflame the passion of the jury. In essence, then, they constituted an improper non-statutory aggravating circumstance. Appellant is entitled at the very least to a new sentencing

proceeding.

POINT V

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS TO VARIOUS COMMENTS BY THE PROSECUTOR DURING CLOSING ARGUMENTS IN THE GUILT PHASE WHICH IMPLIED THAT APPELLANT HAD SOME DUTY TO PRESENT EVIDENCE IN HIS BEHALF.

During closing arguments, the prosecutor, Jeffrey L. Ashton, made several comments concerning the fact that the defense had failed to present evidence. In pertinent part, Ashton made the following comments:

> BY MR. ASHTON: ... The testimony is absolutely uncontradicted that this man was lying right there where he was killed, on his back, on the cement. <u>And I defy the defense counsel to show any piece of evidence that refutes that</u>. (R 506)
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> *　　*　　*
>
> BY MR. ASHTON: ... Why would someone, having been through what Larry Kramer said he went through, first of all, why would he throw away the knife to begin with? The knife obviously is a part of any defense he might want to raise if he got caught. It is not his knife. He didn't use it. It was in Walter's hand, presumably.
>
> *　　*　　*
>
> BY MR. ASHTON: Presumably in Walter's hand, at least from what Larry Kramer said. Getting up with the knife when the second blow was struck. Why would he get rid of it? Even if he decided to get rid of it, why wouldn't he get rid of it in the culvert where he dumped the rock, or in the dumpster where he dumped his pants? Two places which

> the police could search. But no. He says he took it all the way down to Lake Eola, the opposite side of the lake from where the swans are, and just threw it in the lake, I don't know why. A place where it could never be found. ... (R 509)
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> * * *
>
> BY MR. ASHTON: ... In the second statement where he admits to the killing, there is not one single reference in that entire statement to him drinking. Nothing. Now there is a defense called voluntary intoxication --
>
> * * *
>
> BY MR. ASHTON: As I said, there is a defense called voluntary intoxication in the law. The judge is not going to instruct you that that has any application to this case. So Ms. Cashman's statement that --
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> * * *
>
> BY MR. ASHTON: That the defendant was drinking or may have been intoxicated, and imagine what his blood alcohol level was, should be disregarded by you because it is not relevant to any legal defense in this case. Because the fact --
>
> * * *
>
> BY MR. ASHTON: Thank you. Ms. Cashman's argument of the defendant was or may have been intoxicated at the time of the crime are, 1) not supported in any respect by any evidence in this case, and 2) and not relevant to any legal defense. (R 500-502)

To each of these comments, defense counsel interposed an objection arguing that such statements were irrelevant in the case of suggesting a possible defense of voluntary intoxication, or that they were improper since they suggested that the defendant had the burden of presenting some evidence. The trial court overruled the defense objections in each case. Appellant

argues to this Court that these rulings by the trial court were clear error and that the comments by Jeffrey Ashton were highly improper, prejudicial, and served to destroy Appellant's right to a fair trial.

It is so clearly established that an accused has a fundamental right to a fair trial, free from improper prosecutorial comments and interrogation that the Supreme Court of Florida, in Stewart v. State, 51 So.2d 494 (Fla. 1951), noted:

> This court has so many times condemned pronouncements of this character that the law against it would seem to be so commonplace that any layman would be familiar with and observe it.
>
> * * *
>
> It would seem trite to state that the reason the courts throughout the country have condemned this type of abuse is that was are committed to the principle of fair and impartial trial, regardless of the offense one is charged with .... He is entitled to a fair and orderly trial in an environment reflecting the constitutional guarantees which constitute fair trial. Under our system of jurisprudence, prosecuting officers are clothed with quasi judicial powers and it is consonant with the oath they take to conduct a fair and impartial trial. The trial of one charged with crime is the last place to parade prejudicial emotion or exhibit punitive or vindictive exhibitions of temperament. Stewart v. State, supra at 494-495.

In Washington v. State, 86 Fla. 533, 98 So. 605 (1923), the Court spoke of the high standards which are expected of a prosecutor. The prosecutor is a sworn officer of the government with the great duty imposed on him of preserving intact all the great sanctions and traditions of law:

> It matters not how guilty a Defendant in his opinion may be, it is his duty under oath to see that no conviction takes place except in strict conformity to law. His primary considerations should be to develop the evidence for the guidance of the court and jury, and not to consider himself merely as attorney of record for the state struggling for a verdict. 98 So. at 609.

Similarly, the Fourth District Court of Appeal in Kirk v. State, 227 So.2d 40, 42-43 (Fla. 4th DCA 1969), stated:

> It is the duty of the trial judge to carefully control the trial and zealously protect the rights of the accused so that he shall receive a fair and impartial trial. The trial judge must protect the accused from improper or harmful statements or conduct by a witness or by a prosecuting attorney during the course of a trial. It is also 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. [citation omitted]. 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.

The Supreme Court of the United States has observed that the average jury has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, the Court noted, improper

suggestions and insinuations are apt to carry much weight against the accused when they should properly carry none. <u>Berger v. United States</u>, 295 U.S. 78, 88 (1935).

In <u>Kirk</u>, <u>supra</u>, during closing argument, the prosecutor speculated on the whereabouts of certain possible defense witnesses who would corroborate the defendant's story. There, the appellate court, in reversing the defendant's conviction chastised both the prosecutor for making the prejudicial comments and the trial judge for not controlling the prosecutor's conduct:

> While we quite realize that some latitude must be given to a lawyer's language in a hard-fought case, we think the prosecutor's remarks fell short of the degree of propriety required in these matters. It is our judgment that the trial judge failed to uphold his duty to maintain order and decorum, and to exercise that general control over the trial needed to protect the accused from abuse or intimidation. <u>Kirk v. State</u>, <u>supra</u> at 43.

The court reversed the conviction on the basis of the comment which had given the impression to the jury that the defense had some burden of proof.

The trial court in the instant case should have, at least, rebuked the prosecutor for his improper remark:

> When it is made to appear that a prosecuting officer has overstepped the bounds of that propriety and fairness which should characterize the conduct of a state's counsel in the prosecution of a criminal case, or where a prosecuting attorney's argument to the jury is undignified and intemperate, and contains aspersions, improper insinuations, and assertions of matters not in evidence, or consists of an appeal to prejudice or sympathy calculated to unduly influence a trial jury, the trial

> judge should not only sustain an objection at the time to such improper conduct when objections is offered, but should so affirmatively rebuke the offending prosecuting officer as to impress upon the jury the gross impropriety of being influenced by improper arguments. Deas v. State, 119 Fla. 839, 161 So. 729, 731 (1935).

See also Oglesby v. State, 156 Fla. 481, 23 So.2d 558, 559 (1945); Ailer v. State, 114 So.2d 348, 351 (Fla. 2d DCA 1959).

It is further submitted that the remarks by the prosecutor during closing argument so fundamentally prejudiced the defendant's right to a fair trial that the defendant was entitled to a mistrial. The effect of the remarks was to shift the burden of proof onto the defendant. It is well established that the state has the burden of proof in a criminal trial and that the burden cannot constitutionally be shifted to the defendant. Mullaney v. Wilbur, 421 U. S. 684 (1975); In re Winship, 397 U.S. 358 (1975). As a result, the insinuations were of such magnitude and so prejudicial to the defendant that "neither rebuke nor retraction may entirely destroy their sinister influence." Carlile v. State, 129 Fla. 860, 176 So.2d 862, 864 (1937). A new trial should be awarded.

Additionally, the prosecutor's argument was an improper comment on the defendant's silence at trial. A criminal defendant is afforded the constitutional right to refrain from testifying at his trial:

> No person shall ... be compelled in any criminal case to be a witness against himself.... Amend. V, U.S. Const.

Cf. Art. I, Section 9, Fla.Const. The failure to testify should

not, therefore, create any presumption against him. Wilson v. United States, 149 U.S. 60, 66 (1893)

Comment on the defendant's exercise of his Fifth Amendment privilege at trial would punish a defendant for exercising that right, and is, therefore, not permitted in this country or this state. Griffin v. California, 380 U.S. 609 (1965); Fla.R.Crim.P. 3.250.

Appellant is aware of the propriety of a prosecutor commenting that certain evidence was uncontradicted or unrefuted. Dufour v. State, 495 So.2d 154 (Fla. 1986). However, in the instant case, Jeffrey Ashton, the prosecutor, went far beyond merely commenting that evidence was unrefuted. Instead, Ashton went far beyond such comment by "defying" defense counsel to show evidence to refute his argument. Ashton further implied that the defendant had the duty to present the knife he claimed the victim had.

There is no way to determine what effect remarks such as the ones in the instant case may have had upon the jury. the remarks so fundamentally tainted the defendant's right to a fair trial that reversal is warranted. See Davis v. State, 214 So.2d 41 (Fla. 3d DCA 1968). There is nothing in the record from which an appellate court can tell whether the offensive remarks, objected to by counsel, contributed to the conviction. They cannot be deemed harmless.

In conclusion, the words of Mr. Justice Drew in Grant v. State, 194 So.2d 612, 615-616 (Fla. 1967), are quite

appropriate:

> The State has undoubtedly spent thousands of dollars and hundreds of hours have been devoted by state officials and others in the investigation and prosecution of this appellant. Now, as in an increasing number of cases reaching us in recent years, we must undo all of that which has been done and send this case back for a new trial. To some it might appear to be straining at technicalities to reverse this case in which literally thousands of words were spoken for the mere utterance of 30 words, but this result is required not by the whims or individual feelings of the Justices of this Court but because the law which we, and those others who exercised the State's sovereign power in the trial and prosecution, are sworn to uphold has been patently disregarded. The rules which govern the trial of persons accused of crimes in our courts are the result of hundreds of years of experience. With their manifold faults, they have proven to be man's best protection against injustice by man. Many a winning touchdown has been called back and nullified because someone on the offensive team violated a rule by which the game was to be played. The test in such case is not whether the infraction actually contributed to the success of the play but rather whether it might have. Surely where [the future of one's] life is at stake, the penalty cannot be less severe.

Reversal is mandated.

POINT VI

IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED JURY INSTRUCTIONS IN THE GUILT PHASE.

During the charge conference in the guilt phase of the trial, defense counsel requested a special instruction with regard to photographs and an instruction on the heat of passion killing. (R 476-479, 1108-1109) The trial court denied these motions on the grounds that they were covered in part by the standard instructions and apparently because the heat of passion instruction applied only where legal provocation was present. (R 476,481)

In most cases, the standard jury instruction approved by this Court would be sufficient to adequately instruct a jury on the applicable law. However, this Court has recognized that they may not be applicable in every case and that the trial court would have to tailor the instructions to fit some cases. _In The Matter of the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases_, 327 So.2d 5 (Fla. 1976). In general, the instructions given by the court in the guilt phase were correct. However, they were not complete. The failure to give the requested jury instructions deprived the jury of the applicable law which it had been sworn to apply. While appellate courts have been reluctant to reverse convictions on grounds that certain instructions had not been given a general exception is

often made. In Hutchinson v. State, 309 So.2d 184 (Fla. 1st DCA 1975) the court reversed the conviction for second degree murder. Although three defendant were tried for the murder of the victim, it was clear that as to two of them, the state was proceeding upon an aider and abettor theory. An instruction on the necessity of participation in the felonious design was requested and denied. The trial court gave other instructions. In reversing the conviction, the court stated that although the standard jury instructions need not be followed word for word, the gist of the instructions should contain a complete statement of the applicable law.

In the instant case, by refusing to give the requested jury instructions, the trial court deprived the jury of the complete statement of the law applicable to homicides. The Appellant was entitled to have the jury instructed on the law applicable to his theory of defense if there is any evidence introduced to support the instruction, however the trial judge may feel about the merits of such a defense from a factual standpoint. Williams v. State, 395 So.2d 1236 (Fla. 4th DCA 1981). In the instant case the theory of the defense was that Appellant's actions were merely reactions to the fact that the victim had pulled a knife on him. It was this legal provocation that supported the requested instruction. With regard to the instruction on the use of the photographs, this was particularly applicable in the instant case. Numerous colored slides were admitted into evidence, many over defense objections. These

photographs were quite graphic and gruesome. While the standard jury instruction did caution the jury not to let sympathy play any part in its verdict, the instructions were silent with regard to the actual consideration of the photographs. Under the peculiar facts of this case, the instruction was quite applicable. Because the trial court denied these instructions, the jury was not given a complete statement of the law applicable and thus the reliability of the jury verdict is brought into question. Appellant is entitled to a new trial.

POINT VII

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL DUE TO THE REPEATED IMPROPER COMMENTS BY ASSISTANT STATE ATTORNEY JEFFERY L. ASHTON DURING THE PENALTY PHASE OF HIS TRIAL.

Prior to commencement of the penalty phase of the trial, defense counsel made a motion in limine to prohibit any disclosure from the state that with regard to the prior attempted first degree murder conviction of Appellant that the victim subsequently died. (R 564-572) After hearing arguments, the trial court granted the motion in limine to the extent that before the state could present such evidence they would first have to proffer it to the court. (R 572) The state attorney, Jeffery L. Ashton told the court that he intended to seek admission of this evidence through the testimony of the medical examiner, Dr. Ruiz, who performed the autopsy on the previous victim. During the testimony of the first state witness, Investigator John Chisari, the prosecutor questioned him about his contact with the victim of the previous felony. Chisari then stated that he knew that the victim, Milhauser, passed away later on down the line. Defense counsel made an objection and a motion for mistrial on the grounds that it violated the court's order on the motion in limine. Jeffery Ashton replied that this statement was not prejudicial in that it only stated that the victim passed

away and did not relate to the crime. The court deferred ruling on the matter. (R 597) Subsequently, Jeffery Ashton told the court that the state would not be calling Dr. Ruiz since the doctor was not under subpoena. (R 615-617) Defense counsel renewed its motion for mistrial and argued that at the time the court made its ruling and Ashton told the court of his intention to proffer the testimony through Dr. Ruiz, he knew he had no intention of calling Dr. Ruiz. Therefore, the evidence that came in through Investigator Chisari was quite prejudicial. (R 617) At the close of all the evidence, the trial court denied the motion for mistrial although it made a finding that Jeffery Ashton did violate the court's previous order. (R 845-846) During closing arguments, the following comments were made by Jeffery Ashton:

> BY MR. ASHTON: The other thing you need to look at is the similarity of the two. These aren't just two unrelated acts. These are two crimes which, in all respects, are identical. You have heard about where they happened. Within fifty yards of each other. You heard about how the victims were killed. Both had their heads bashed in with large rocks. (R 851)
>
> * * *
>
> BY MR. ASHTON: ... This is May, 1987. The area you hears described is a place where Robert Milhausen was killed. (R 853)
>
> * * *
>
> BY MR. ASHTON: ... That if Larry Kramer is lying, if the reason for the [previous] murder was something entirely different, which we do not know -- (R 864)

On each of these occasions, defense counsel immediately objected

and renewed the motion for mistrial. The trial court in each case reserved ruling and in each case Jeffery Ashton's only reply was "I'm sorry." (R 851, 853, 864) Additionally, during the closing argument Jeffery Ashton held up a piece of paper and told the jury that it was document which showed that Appellant was on probation for the attempted murder of Robert Milhauser at the time he committed the murder of Walter Traskos. Defense counsel objected on the grounds that this constituted a non-statutory aggrivator. The trial court overruled the objection. (R 855) At the conclusion of the proceedings, defense counsel renewed its motion for mistrial which the court denied. (R 886) Appellant contends that these deliberate and highly prejudicial comments by Jeffery Ashton served to completely taint the penalty proceedings and denied Appellant his right to a fair trial.

Assistant State Attorney Jeffery L. Ashton's closing remarks were highly inflammatory and thwarted the pursuit of justice.[1] In Boatwright v. State, 452 So.2d 666 (Fla. 4th DCA 1984), the Fourth District Court of Appeal addressed the problem of prosecutors making inflammatory remarks at closing argument. The Fourth District Court of Appeal stated:

> It diverts the jury's attention from the task at hand and worse, prompts the jury to consider matters extraneous to the evidence. This type of argument is calculated to inflame the passions or prejudices of the jury and, thus, is prohibited by ABA Standards for Criminal Justice, 3-5.8(c)

[1] This appears to be not the first time that Mr. Ashton committed prosecutorial misconduct. See Bovette v. State, 585 So.2d 1115 (Fla. 5th DCA 1991)

> Under our law, the prosecutor has a duty to be fair, honorable and just. As put by Justice Sutherland, the prosecuting attorney "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, 55 S.Ct. 629, 79 L.E. 1314 (1935). We discussed the prosecutor's role in Martin v. State, 411 So.2d 987, 990 (Fla. 4th DCA 1982), and said that it is the duty of a prosecutor to seek justice, not merely to convict. We recognize that the tensions of the adversary process and the heat of trial can test an attorney to the limit. Nonetheless, it 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.
>
> See also Harris v. State, 414 So.2d 557 (Fla. 3d DCA 1982)
>
> The prosecutor's argument in the case at bar constitutes a departure from acceptable practice.

In the instant case, Mr. Ashton's closing remarks went far beyond "acceptable practice."

Appellant relies upon the legal analysis set forth in Point V, supra with regard to this issue. However, Appellant further urges this Court to take the opportunity to severely chastise Jeffrey Ashton for his actions in the instant case. The defense counsel in the instant case properly sought by way of a pretrial motion in limine to prevent certain highly inflammatory evidence from being presented to the jury. The trial court made a specific finding that such evidence could not be admitted unless and until Mr. Ashton presented the proffered testimony of

Dr. Ruiz. Despite this clear ruling, Mr. Ashton elicited this testimony from his witness and then commented three separate time during his closing argument. The three separate comments were highly inappropriate since no evidence concerning the death of the prior victim had ever been presented. On each occasion following the defense objection, Mr. Ashton's only reply was to say "I'm sorry." His sentiments ring hollow. Mr. Ashton is not a young inexperienced prosecutor. Rather, he is a veteran of numerous death penalty cases.[2] There simply is no excuse for his blatant violation of the court order. This Court should not let this go unpunished, especially which to do so would result in a serious miscarriage of justice. Appellant is entitled to a new penalty phase.

[2] Ashton was the prosecutor in Cox v. State 555 So.2d 352 (Fla. 1989) and DeAngelo v. State, Case No. 78,499 (currently pending).

POINT VIII

THE STATUTORY AGGRAVATING FACTOR OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER IS UNCONSTITUTIONALLY VAGUE UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9,16 AND 17 OF THE FLORIDA CONSTITUTION.

In Smallev v. State, 546 So.2d 720 (Fla.1989), this Court rejected a claim that Florida's especially heinous, atrocious or cruel statutory aggravating factor ("HAC" factor) is unconstitutionally vague under the Eighth and Fourteenth Amendments because application of that factor by the juries and trial courts is subsequently reviewed and limited on appeal:

> It was because of [the State v. Dixon] narrowing construction that the Supreme Court of the United states upheld the aggravating circumstance of heinous, atrocious or cruel against a specific Eighth Amendment vagueness challenge in Proffitt v. Florida, 428 U.S. 242 (1976). Indeed, this Court has continued to limit the finding of heinous, atrocious or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim. (citations omitted). That Proffitt continues to be good law today is evident from Mavnard v. Cartwriqht, wherein the majority distinquished Florida's sentencing scheme-from those of Georgia and Oklahoma. See Mavnard v. Cartwriqht. 108 S.Ct. at 1859.

Smallev v. State, 546 So.2d 720, 722 (Fla.1989).[3]

Even more recently, however, the United States Supreme

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while this Court rejected this challenge in numerous cases, the United States Supreme Court has granted certiorari in Sochor v. Florida, 380 So.2d 595 (Fla. 1991) cert qranted 50 Cr.L 3088 (November 18, 1991) and will be addressing the issue.

Court decided Shell v. Mississippi, 498 U.S. __, 111 S.Ct. __, 112 L.Ed. 2d 1 (1990) and re-affirmed the holding in Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct 1853, 100 L.Ed.2d 372 (1988). The concurring opinion explained why the limiting constructions being utilized by the various states are not up to constitutional standards:

> The basis for this conclusion [that the limiting construction was deficient] is not difficult to discern. Obviously, a limiting instruction can be used to give content to a statutory factor that "is itself too vague to provide any guidance to the sentencer" only if the limiting instruction itself "provide[s] some guidance to the sentencer." Walton v. Arizona, 497 U.S. __, __, 111 L.Ed.2d 511, 110 S.Ct. 3047 (1990). The trial court's definitions of "heinous" and "atrocious" in this case (and in Maynard) clearly fail this test; like "heinous" and atrocious" themselves, the phrases "extremely wicked or shockingly evil" and "outrageously wicked and vile" could be used by "'[a] person of ordinary sensibility [to] fairly characterize almost every murder.'" Mavnard v. Cartwrisht, supra, at 363, 100 L.Ed.2d 372, 1108 S.Ct. 1853 (quoting Godfrey v. Georgia, 446 U.S. 420, 428-429, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980)(plurality opinion))(emphasis added).

Shell v. Mississippi, 112 L.Ed.2d at 5. Significantly, the terms of the "limiting construction" condemned by the United states Supreme Court in Shell as being too vague are the precise ones used by this Court to review the HAC statutory aggravating factor.

It is respectfully submitted that the limiting construction used by this Court as to this statutory aggravating

factor is too indefinite to comport with constitutional requirements. The definitions of the terms of the HAC aggravating factor do not provide any guidance to the jury when the factor is first weighed in issuing a sentencing recommendation, by the sentencer when the factor is next weighed in conjunction with the recommendation when the sentence is imposed, and finally by this Court when the factor is reviewed and the limiting construction is applied. The inconsistent approval of that factor by this Court under the same or substantially similar factual scenarios shows that the factor remains prone to arbitrary and capricious application.

For instance, recently in Hitchcock v. State, 578 So.2d 685 (Fla. 1990), this Court stated that application of the HAC statutory aggravating factor "pertains more to the victim's perception of the circumstances than to the perpetrator's." Hitchcock, at 692. Compare this statement to the analysis contained in Mills v. State, 476 So.2d 172, 178 (Fla. 1985):

> In making an analysis of whether the homicide was especially heinous, atrocious and cruel, we must of necessity look to the act itself that brought about the death. It is part of the analysis mandated by section 921.141(1), Florida Statutes which provides for a separate proceeding on the issue of the penalty to be enforced and "evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant." In this case the death instrumentality was a .410 shotgun fired at close range. Whether death is immediate or whether the victim lingers and suffers is pure fortuity. The intent and method employed

by the wronsdoers is what needs to be examined. The same factual situation was presented in Teffeteller v. State, 439 So.2d 840 where this Court set aside the trial court's finding that the murder was heinous, atrocious and cruel.

Mills, 476 So.2d at 178 (emphasis added).

"It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.** Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393, 402 (1977). "What is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879, 103 S.Ct. 2733, 77 L.Ed.2d 235, 251 (1983). It is an arbitrary distinction to say that one murder is especially heinous because, for a matter of minutes while being driven approximately two to three miles, a victim perceived that death may be imminent, yet say that another murder was not heinous because, for hours after the fatal wound was inflicted, a victim suffered and waited impending death.

Because the HAC statutory aggravating factor is itself vague, and because the limiting construction used by this Court both facially and as applied is too vague and indefinite to comport with the Eighth and Fourteenth Amendments as set forth in Maynard v. Cartwrisht, supra, Godfrey v. Georqia, 446 U.S. 420, 100 S.Ct 1759, 64 L.Ed.2d 398 (1980), and Shell v. Mississippi, supra, the instant death sentence imposed in reliance on the HAC

statutory factor must be vacated and the matter remanded for a new penalty phase before a new jury.

POINT IX

IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 17 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S SPECIAL REQUESTED JURY INSTRUCTION IN THE PENALTY PHASE.

Appellant filed written requests for numerous special jury instructions at the penalty phase. (R 1210-1242) After reviewing all the requested instructions, the trial court denied all of them except one. (R 753-755) Appellant contends on appeal that the trial court committed reversible error in denying proposed instructions 1-12 (R 1210-1225), number 14 (R 1228), number 16-18 (R 1230-1232), and numbers 21-22 (R 1235-1236).

Due process of law applies "with no less force at the penalty phase of the trial in a capital case" than at the guilt determining phase of any criminal trial. Presnell v. Georgia, 439 U.S. 14, 16-17 (1978). The need for adequate jury instructions to guide the recommendation in capital cases was expressly noticed in Gress v. Georgia, 428 U.S. 153, 192-3 (1976):

> The idea that a jury should be given guidance in its decision making is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law .... When erroneous instructions are given, retrial is

> often required. It is quite simply a hallmark of our legal system that juries by carefully and adequately guided in their deliberations.

The instructions given in this case were far from adequate to avoid the constitutional infirmities that inhered in death sentences imposed under the pre-Furman statutes. Furman v. Georgia, 408 U.S. 238 (1972). Appellant's death sentence rests in part on the inadequately instructed jury's recommendation.

All of the rejected instructions recited in the preamble to this point were correct statements of the law and were applicable to Appellant's case. The standard instructions did not clearly tell the jury that the state bore the burden to show that the aggravating factors outweighed the mitigating factors. [Proposed instruction #2] The death penalty is reserved for only the most aggravated and unmitigated of cases. [Instruction # 4A] The jury never learned that the legislature has established eleven statutory aggravating factors, only two of which were even arguably applicable to Appellant. [Instruction #6] The jury never found out that they could not "double" a single aspect of the offense to support more than one aggravating circumstance. [Instructions #9 and 9A] The rest of the requested instructions clarified vague and confusing standard jury instructions. They also would have helped the jury in their analysis and weighing process.

Contrary to the trial court's assertion, the standard jury instructions did not cover most of the specially requested instructions. Florida Rules of Criminal Procedure 3.390 provides

that the presiding judge shall charge the jury upon the law of the case. Unfortunately, Appellant's jury was not adequately instructed. Hence, his death sentence is constitutionally infirm.

POINT X

IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE IN PART UPON A FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL.

In State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) this Court held:

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

Recognizing that all murders are heinous, in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this Court further refined its interpretation of the legislatures intent that this aggravating circumstance only applies to crimes especially heinous atrocious and cruel. In Lewis v. State, 398 So.2d 432 (Fla. 1981) this Court stated the principle that "a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is a matter of law not heinous, atrocious and cruel."

In Krampff v. State, 371 So.2d 1007 (Fla. 1979) this Court reversed a finding of heinous, atrocious and cruel where the defendant had brooded for three years over his divorce from

his wife. He then procured a gun and shot his wife three times, the last of which was a point blank shot to her head. In several other cases this Court has revered a finding of heinous, atrocious and cruel in situations involving worse scenarios than the instant case. See e.g. Menendez v. State, 368 So.2d 1278 (Fla. 1978)[defendant shot victim twice as he stood with his arms raised in a submissive position]; Lewis v. State, 377 So.2d 640 (Fla. 1979)[defendant shot the victim in the chest and then shot him several more times as he tried to escape]; Simmons v. State, 419 So.2d 316 (Fla. 1982)[defendant attacked the victim in her home and killed her by two hatchet blows to her head]: Teffeteller v. State, 439 So.2d 840 (Fla. 1983)[victim suffered shotgun blast to the abdomen, lived for several hours in undoubted pain and knew he was facing death]; Rembert v. State, 445 So.2d 337 (Fla. 1984)[victim beaten with a club one to seven times and lived for several hours; Herzog v. State, 439 So.2d 1372 (Fla. 1983)[female victim induced by defendant to take drugs, after which she was gagged, placed on a bed and smothered with a pillow and ultimately dragged into the living room where she was successfully strangled to death with a telephone cord].

An example of the valid finding of this aggravating circumstance can be found in Gardner v. State, 313 So.2d 675 (F.a. 1975) where the female victim suffered at least one hundred bruises on her body, numerous cuts and lacerations, and severe injury to her genitals and internal organs due to a sexual battery performed with a broom stick, bat or bottle. See also

Lucas v. State, 376 So.2d 1149 (Fla. 1979) where the defendant shot the victim, pursued her into the house, struggled with her, hit her, dragged her from the house and finally shot her to death as she begged for her life. This aggravating circumstance should be reserved for murders such as the ones in Gardner and Lucas which were "accompanied by such additional acts as to set the crime apart from the norm." Herzog, supra at 380. It ill serves the continued viability of the death penalty in Florida if the aggravating circumstance can be upheld under the facts of the instant case; the facts simply do not comport with a finding of an especially heinous, atrocious and cruel murder. In the instant case, the victim was killed as a result of several blows to his head with a heavy rock. There is nothing in the record to indicate that this beating occurred over a lengthy period of time. Rather, the evidence supports the theory that this was a frenzied attack which culminated in a major blow which caused death nearly immediately. Additionally, this Court has ruled that there is a causal relationship between the mitigating and aggravating.circumstances. See Huckaby v. State, 343 So.2d 29 (Fla. 1977); Miller v. State, 373 So.2d 882 (Fla. 1979). Therefore where heinous nature of an offense results from a defendant's mental disturbance the application of HAC is lessened. This is the situation in the instant case. The uncontroverted evidence is that Appellant suffered from episodic dyscontrol syndrome, a mental illness. The trial court found the presence of both mental mitigating factors. The uncontroverted

evidence clearly shows that Appellant had no control over his actions. These factors certainly combine to lessen the impact of the HAC factor. Because of the obvious emphasis placed on this factor by both the trial court and the jury, Appellant's sentence must be vacated and the cause remanded for a new sentencing proceeding.

POINT XI

IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN REJECTING UNREFUTED MITIGATING CIRCUMSTANCES.

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. Hardwick v. State, 521 So.2d 1071, 1076 (Fla. (1988). In Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), this Court enunciated a three-part test:

> [T]he trial court's first task ... is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. 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.

Id. (emphasis added). Accord Campbell v. State, 571 So.2d 415, 419-20 (Fla. 1990); Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990); Hardwick, 521 So.2d at 1076.

In Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court quoted prior federal and Florida decisions to remind trial courts that the sentencer may not refuse to consider, as a matter

of law, any relevant mitigating evidence. See, also, Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982) and Rogers v. State, 511 So.2d 526 (Fla. 1987). Where evidence exists to reasonably support a mitigating factor (either statutory or nonstatutory), the trial judge must find that mitigating factor. Although the relative weight given each factor is for the sentencer to decide, once a factor is reasonably established, it cannot be dismissed as having no weight. Campbell, 571 So.2d at 419-20.

In Nibert v. State, 574 So.2d 1063 (Fla. 1990), this Court held that, when a reasonable quantum of competent, uncontroverted evidence of mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been approved. Nibert, 574 So.2d 1066. A trial court may reject a mitigating circumstance as not proved, only where the record contains "competent substantial evidence to support the trial court's rejection of these mitigating circumstances." Kight v. State, 512 So.2d 922, 933 (Fla. 1987); Cook v. State, 542 So.2d 964, 971 (Fla. 1989)[trial court's discretion will not be disturbed if the record contains "positive evidence" to refute evidence of the mitigating circumstance]; see also Pardo v. State, 563 So.2d 77, 80 (Fla. 1990) [this Court is not bound to accept a trial court's findings concerning mitigation if the findings are based on a misconstruction of undisputed facts or a misapprehension of law].

In dealing with the uncontroverted, unrefuted evidence of Larry Kramer's mental problems, the trial court wrote:

13. <u>Episodic Dyscontrol Syndrome</u>

> The court has thoroughly reviewed the testimony of Dr. Jonathan Lipman. Dr. Lipman is of the opinion Larry Dean Kramer is suffering from episodic dyscontrol syndrome. Dr. Lipman is of the opinion that alcohol in combination with the Defendant's personality leads to a violent compulsive behavior to wit: the battery and ultimate death of Robert Andrew Milhausen and the battery and ultimate death of Walter Edward Traskos. There was no testimony in the record whatsoever of any violent behavior other than these two events in the live of Larry Dean Kramer. According to the defense's own testimony, Larry Dean Kramer began consuming alcohol at the age of 12 or 13 years and consumed alcohol up to and including the time of the murder of Walter Edward Traskos. The data relied upon by Dr. Lipman is scant, to say the least. By data, this Court is alluding to the test results performed on Larry Dean Kramer and the history that came from Larry Dean Kramer. Although the Court acknowledges that the disorder entitled episodic dyscontrol syndrome exists, the serious issue is presented as to whether or not Larry Dean Kramer was suffering from the same at the time he murdered Walter Edward Traskos. It appears the very predicate of Dr. Lipman's diagnosis rests upon the history presented to him by Larry Dean Kramer. The results of the clinical analysis questionnaire were most equivocal. Certainly the family of Larry Dean Kramer did not provide Dr. Lipman with any history of episodes of violence.
>
> Based upon the totality of the evidence presented to this mitigating factor, the Court rejects the opinion of Dr. Lipman that Larry Dean Kramer suffered from episodic dyscontrol syndrome at the time of the murder of Walter Edward Traskos. (R 1281-1282)

Appellant initially notes that the trial court's finding is in error in at least one material aspect. In addition to the two violent crimes, Appellant's sister testified that Appellant got violent when he drank. (R 733) This evidence was made known to

Dr. Lipman. The two instances of Appellant harming himself once by stabbing and once by shooting can also be considered violent outbursts. Most importantly, the trial court pointed to nothing in the record to refute Dr. Lipman's testimony. As this Court has clearly noted a trial court may reject a mitigating circumstance as unproven, provided the record contains "competent substantial evidence to support the trial court's rejection of these mitigating circumstances." Kight v. State, 512 So.2d 922, 933 (Fla. 1977). Not only should the trial court have accepted and recognized the mitigating circumstance that Appellant suffered from a mental illness, but it also should have considered this mental illness in its consideration of the aggravating circumstance of heinous, atrocious and cruel. Failing to do this, the trial court's findings are most unreliable. The error cannot be rendered harmless given the fact that the trial court found only two aggravating circumstances and much evidence was presented in mitigation and the trial court in fact found much evidence in mitigation including the two mental mitigating factors. This Court should remand the cause with instructions to impose a life sentence.

POINT XII

IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION. THE IMPOSITION OF THE DEATH PENALTY IS PROPORTIONALLY UNWARRANTED IN THIS CASE.

Under the totality of the circumstances in this case, imposition of the death penalty is proportionally unwarranted. There exists one valid aggravating circumstance, the fact that Appellant has a prior conviction for a violent felony. Even if this Court approves the application of the heinous, atrocious and cruel aggravating circumstance, there only exists two valid aggravating circumstances. There also exists valid mitigating circumstances, the proof of which is uncontroverted. This Court has noted that the death penalty, unique in its finality and total rejection of the possibility of rehabilitation, was intended by the legislature to be applied "to only the most aggravated and unmitigated of most serious crimes." State v. Dixon, 283 So.2d 1,7 (Fla. 1973); Holsworth v. State, 522 So.2d 348 (Fla. 1988). A comparison of the instant case to other cases decided by this Court leads to the conclusion that the death penalty is not proportionally warranted in this case. Blakely v. State, 561 So.2d 560 (Fla. 1990) (death sentence was disproportionate despite finding two aggravating circumstances: heinous, atrocious and cruel and cold, calculated and premeditated); Livingston v. State, 565 So.2d 1288 (Fla. 1988)

(death penalty disproportionate despite finding two aggravating circumstances: previous conviction of a violent felony and commission of the murder during an armed robbery); Farinas v. State, 569 So.2d 425 (Fla. 1990) (death sentence not proportionate where defendant convicted of first degree murder of girlfriend even though trial court properly found two aggravating circumstances: capital felony was committed while defendant was engaged in the commission of a kidnapping and capital felony was especially heinous, atrocious and cruel); Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988) (death penalty not proportionate despite finding of five aggravating circumstances and three mitigating circumstances; Wilson v. State, 493 So.2d 1019 (Fla. 1986) (death sentence not proportionately warranted despite trial court's proper finding of two aggravating circumstances and no mitigating circumstances); and Rembert v. State, 445 So.2d 337 (Fla. 1984) (death penalty was disproportional punishment for murder committed in course of a robbery where court found no mitigating circumstances).

The death sentence must be vacated in the instant case and the cause remanded with instructions to impose a life sentence.

CONCLUSION

Based on the foregoing cases, argument and authorities, Appellant respectfully requests this Honorable Court to grant the following relief: As to Point III reverse and remand with instructions to adjudicate Appellant guilty of second degree murder and to sentence thereon; as to Points I, 11, IV, V, and VI reverse and remand for a new trial; as to Points VII and IX reverse and remand for a new penalty phase; and as to Points VIII, X, XI and XII reverse and remand for imposition of a life sentence.

Respectfully submitted,

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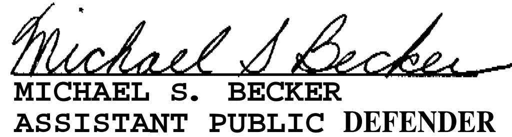
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Mr. Larry Dean Kramer, No. A 109626, P. O. Box 747, Starke, FL 32091 on February 3, 1992.



MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER