IN THE SUPREME COURT OF FLORIDA

RICHARD W. RHODES, :

Appellant, :

vs. : Case No. 79,627

STATE OF FLORIDA, :

Appellee. :

_____ :

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ROBERT F. MOELLER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 234176

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Page references to the record on appeal in case number 79,627 (the instant case) are designated with the prefix "R". Page references to the record on appeal in case number 67,842 (prior appeal of Appellant's conviction and sentence of death) are designated with the prefix "PR".

STATEMENT OF THE CASE

On June 20, 1984, a Pinellas County grand jury returned an indictment charging Appellant, Richard Wallace Rhodes, with premeditated murder of Karen Jeter Nieradka. (R16-17) The offense allegedly occurred between February 29 and March 2, 1984. (R16)

Appellant was tried by a jury beginning on August 6, 1985, with the Honorable Helen S. Hansel presiding. (PR960) On August 19, 1985, Appellant's jury found him guilty as charged. (PR262, 2540) A penalty phase was conducted on August 27, 1985, which resulted in a seven to five death recommendation. (PR274,2750) Judge Hansel followed the recommendation, and sentenced Appellant to death on September 12, 1985. (R66-67,PR2909-2962,2985-2986)

Appellant appealed to this Court. (R68,PR305) On July 6, 1989, this Court issued its opinion in which it affirmed Appellant's conviction, but vacated his sentence of death because of several errors in the sentencing phase, and remanded for a new sentencing proceeding before a jury. (R70-84)

Appellant's new penalty phase was conducted on February 11-14, 1992, with the Honorable W. Douglas Baird presiding. (R504-1184)[1] After receiving evidence from both the State and the defense, Appellant's jury recommended by a vote of ten to two that he be sentenced to die in the electric chair. (R453,1179)

---

[1] Appellant's case was initially assigned to the Honorable Anthony Rondolino, who voluntarily recused himself, for reasons not appearing in the record. (R251)

On March 20, 1992, Appellant was again sentenced to death, with Judge Baird reading his already-prepared sentencing order into the record. (R488-491,1190-1199) The court found three aggravating circumstances: (1) Appellant committed the capital felony while he was under a sentence of imprisonment (that is, on parole). (R488,1192) (2) Appellant was previously convicted of a felony involving the use or threat of violence to another person. (R488-489,1192-1193) (3) The capital felony was committed while Appellant was engaged in commission of an attempted sexual battery. (R489,1193-1194) The court found two statutory mitigating circumstances, Appellant's age at the time of the offense, and that Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (R489-490,1194-1196) The court found additional mitigation in the fact that Appellant was abandoned by his parents as a child and never experienced a normal family life, and that Appellant had spent most of his life in institutions that were never able to adequately address his needs. (R490,1196-1197) The court specifically rejected as mitigating circumstances that Appellant suffered from extreme mental or emotional disturbance, or was under extreme duress at the time of the offense. (R490-491,1197-1198)

Appellant timely filed his notice of appeal to this Court on March 20, 1992. (R492) The court below adjudicated Appellant insolvent, and appointed the Public Defender for the Tenth Judicial Circuit to represent him on appeal. (R493-495,499)

STATEMENT OF THE FACTS [2]

On February 11, 1992, before Appellant's resentencing trial began, the court, counsel, and Appellant discussed a letter Appellant wrote to Judge Horace Andrews in which Appellant expressed dissatisfaction with his court-appointed attorney, John Swisher. (R408-413,508-533) The court also conducted an in-camera hearing on this matter on February 11 with only the judge, Appellant, defense counsel, and the court reporter present (R527,1205-1238), and conducted another brief in-camera hearing the following day, at which only the judge, Appellant, and the court reporter were present. (R533,1238-1241) At the February 12 hearing, Appellant stated that he was "not asking that Mr. Swisher be dismissed" as his attorney (R1240), and Swisher continued to represent Appellant during the proceedings below. (R504-1199)

During the jury selection process, after the court and the prosecutor had questioned the first group of prospective jurors, the court sua sponte excused Melissa Blackham and Chris Varellan, despite defense counsel's statement that he "want[ed] to keep her [Blackham]." (R606-607)

State's Case

The State presented the "live" testimony of four witnesses at Appellant's penalty retrial. (R795-949)

---

[2] As originally drafted, Appellant's Statement of the Facts went into more detail than what appears in this version of Appellant's brief. Appellant was forced to make substantial cuts in his recitation of the facts due to this Court's strict and arbitrary limit of 100 pages for initial briefs.

Gary Wright was formerly a police officer for the City of Coquille, Oregon. (R796) He investigated an armed robbery that occurred at Jean's Food Center on the afternoon of November 18, 1973. (R797-798) Appellant, who was 20 years old at the time, was arrested because he matched the description of the perpetrator, and on November 20, Pickett identified him as the man who committed the robbery. (R798-799,802-803,823) When Wright saw Appellant on November 20, he was crying; according to Wright, he was weeping because he had been caught. (R833)

Out of the presence of the jury, the court and counsel took up the question of the admissibility of certain statements Appellant made after his arrest. (R803-818) The court ruled the statements admissible over defense objections, but granted Appellant a standing objection to Wright's testimony regarding Appellant's statements. (R811-818)

Wright testified before the jury that on November 21, 1973, he was returning Appellant to jail following court proceedings in the armed robbery case when Appellant initiated a conversation. (R818) Appellant mentioned that he had been in a mental institution in California, and that he was going to use that as a defense to avoid prosecution for armed robbery. (R818-819) Appellant said that he was not really crazy. (R819) Wright said, "Crazy like a fox?" (R819) Appellant answered, "Yeah." (R819)

Another conversation with Appellant was conducted on November 23, 1973, after Appellant sent a note saying that he wanted to give a complete statement in exchange for a promise of psychiatric help.

(R819) This interview was taped, and lasted about 45 minutes. (R819) Wright indicated to Appellant before speaking to him that Wright could not make any promises that Appellant would spend his time in a mental institution. (R820) Appellant then told Wright that he and Chuck Woolford had discussed robbing the market on the morning of November 18. (R820) They borrowed a car from a friend of Woolford's, and obtained a .25 caliber handgun, six rounds of ammunition, and a brown wig from Woolford's mother. (R820) They test-fired the gun to make sure that it was functional and that the ammunition was good. (R820) Appellant put on the wig before they got to the store. (R820-821) They parked at the rear of the store and waited until the parking lot was empty, whereupon Appellant entered the store with the handgun tucked in his belt. (R821) He produced the handgun, approached Pickett, who was alone in the store, pointed the gun at her chest, and said, "Give me all of your money." (R821) She took the money and put it on the counter, but Appellant told her to pick it up. (R821) Pickett took the money and handed it to Appellant, who put it in his pocket. (R821) Still pointing the gun at Pickett, Appellant backed out the door, ran behind the store and got in the car. (R821) They stopped at a local dump, where they disposed of the wig, and returned to Woolford's house. (R821) Appellant explained to Wright that he had Pickett pick up the money and hand it to him, and had backed out of the store, so that he would not leave any prints. (R821) When Wright asked Appellant what was going through his mind at the time of the robbery, Appellant said that he was not nervous or scared,

that he kind of got a high out of it. (R821-822) Wright testified, "I think his words were kind of gets you up." (R822) Wright asked Appellant during the interview what he would have done if a police officer had come upon the scene. (R822) Appellant answered that "it would depend on the situation, but that he would defend himself." (R822)

When Wright saw Appellant at the jail again on November 26, 1973, his"actions were totally reversed" from what Wright had seen before. (R829) Appellant was very meek and was rocking back and forth in his chair, with his head lowered to the floor. (R829)

At the times Wright spoke with Appellant, Wright was aware of Appellant's mental problems, and knew that Appellant had been in the hospital since he was a teenager. (R827)

On redirect examination of Wright, the prosecutor asked about his knowledge of Appellant's past. (R830) Wright responded that he knew that Appellant had "been in mental institutions, in jails, he had been arrested on numerous occasions." (R830) The prosecutor then asked, "Been in trouble with the law a lot?" (R830) Wright answered, "Yes, sir, and that he--[,]" whereupon he was interrupted by a defense objection on relevancy grounds, and a request that the jury be instructed to disregard Appellant's prior arrests. (R830-831) The court overruled the objection, but admonished the assistant state attorney not to "go any further with this." (R831)

Continuing with his redirect, the prosecutor asked Wright whether Appellant had been evaluated by a doctor in the course of the armed robbery case, to which the witness responded in the

affirmative. (R832) Wright testified that he had reviewed the doctor's report from the state hospital that was submitted in the case. (R832) The prosecutor then asked, "And did it indicate that he was feigning these or faking these?" (R832) Defense counsel objected to the witness repeating what a doctor's report said, but the court overruled the objection. (R832) The prosecutor then asked, "Do you recall what the doctor's report said about the defendant's mental condition?" Wright answered, "That he did not appear to have a mental condition, as I recall. I don't have that particular report with me today. But his actions on the 26th appeared to be fake to me. They weren't indicative of the action I had seen prior to that." (R833) Shortly thereafter defense counsel moved the court for a mistrial because he had never seen the doctor's report in question, and was unable to confront it. (R833-835) This time the court sustained the objection, but refused counsel's request to instruct Appellant's jury to disregard any reference to the doctor's report. (R834-835)

During Wright's testimony, the court admitted into evidence State's Exhibit Number 2AA, a certified copy of the judgment and sentence showing Appellant's conviction for the Oregon armed robbery. (R425,822)

Jerry Rowlett was formerly with the Mineral County Sheriff's Office in Hawthorne, Nevada. (R840-841) According to Rowlett, Appellant was staying at the Hawthorne Hotel on the night of April 2, 1978, when he attacked the woman who ran it, Mrs. Adducchio, with a knife and knocked her down. (R841-846) Adducchio told

Appellant that if he wanted money, she would give him all the money in the house, but Appellant said, "Lady I am going to cut your throat." (R846) Appellant apparently noticed that the door was open and got up to close it, whereupon Adducchio sat up and started screaming for help. (R846) Appellant knocked Adducchio down again, and told her that he was going to kill her, that he had a gun and would finish her off. (R846) At that point, two men who lived at the hotel came and opened the door. (R846) Appellant got up and ran to the back door going into an alley, but it was locked. (R846) Appellant broke a window, jumped through it, and apparently went down the alley. (R846)

During the struggle with Appellant, Adducchio sustained cuts on her neck, chest, and left hand as she was trying to force the knife away from her. (R847-848)

Appellant was initially charged with attempted murder in the incident, but was ultimately convicted of battery with a deadly weapon and attempted robbery as the result of a plea bargain. (R842,860,862-863)

Rowlett conceded that his testimony was based upon what other people had told him, specifically, his interview with the victim two days after the occurrence. (R862-863)

During Rowlett's testimony, the court admitted into evidence State's Exhibit Number 4AA, a certified copy of the judgment and sentence showing Appellant's conviction for the Nevada attempted robbery and battery with a deadly weapon (R427,860-861), as well as State's Exhibit Number 7AA, a color photograph of the victim, Mrs.

Adducchio, showing the injuries that she suffered during the incident. (R429,848)

Following Rowlett's testimony, the court admitted into evidence State's Exhibit Number 3AA, a certified copy of a judgment and sentencing showing that Appellant was convicted of assault in the third degree in Oregon in 1976 (R426,866), and State's Exhibit Number 5AA, a parole agreement between Appellant and the Nevada Board of Parole Commissioners from the conviction of battery with a deadly weapon, showing a parole expiration date of April 16, 1985. (R428,866-867)

Steve Porter was formerly a detective with the Pinellas County Sheriff's Department. (R872-873) On March 23, 1984, he responded to a possible homicide scene in St. Petersburg, where a decomposed body had been found that morning. (R873) A berm was being constructed at the Wyoming Antelope Gun Club of debris from buildings that were being torn down in the area, for the purpose of preventing projectiles from going beyond the firing range. (R873) In the debris, which included a yellow police and fire tape, Porter observed a badly decomposed female body. (R874,885) He did not see any clothing except for a brassiere, still fastened, that "had been pulled up, appeared to be, over the top," and was "up around the neck and shoulder area," and a silver chain with a silver medallion with a black stone in the middle. (R874,923) Some of the debris consisted of green-colored wood, which Porter later learned came from the old Sunset Hotel in Clearwater, which had been torn down on March 15. (R875) Mr. Porter noticed that the right leg from

the body was missing from the kneecap down. (R876) [(It was found at a later date. (R923)] Also, there was a hole in the neck, and a large hole in the right arm. (R876) An autopsy was conducted at the medical examiner's office that day, which revealed several fractured bones, including the hyoid bone. (R876-877)

That night, Porter received a tentative identification of the body as being that of Karen Jeter Nieradka, which was later confirmed through her fingerprints, which were on file at the Pinellas County Sheriff's Office. (R878-879,926) He met with the victim's husband, Richard Nieradka, who stated that he and the victim were separated, and that he had last seen her on February 15, 1984 at a bar in Clearwater called Angel's. (R879-880) Nieradka also said that his wife had been driving a white 1973 Dodge Dart that was her only means of transportation, and with which she would not have parted. (R880)

The next day, Porter learned that Nieradka's car was at Westside Storage in Crystal River, Florida; it had been impounded when Trooper Drawdy of the Florida Highway Patrol stopped Appellant on March 2, 1984. (R880-881) Drawdy told Porter that upon being asked how he came to be in possession of the car, Appellant told Drawdy that his girlfriend, Linda, whose last name he could not pronounce, had loaned him the car. (R881) Drawdy found a name tag in Appellant's pocket with the name "Richard Nieradka" on it; Appellant could not explain why he had this tag. (R881) Porter spoke with Richard Nieradka again, and learned that his wife had used the tag as a key chain. (R882) Porter went to the storage facility in

Crystal River where the car was located and made some observations of the car's contents, including a red felt tip pen that was on the dashboard. (R882)

On March 26, 1984, Porter and Detective Leroy Kelly of the Pinellas County Sheriff's Office interviewed Appellant at the Citrus County Sheriff's Office. (R882-883) When Porter advised Appellant that they were conducting a criminal investigation, Appellant said, "I know why you're here. You're here on a murder investigation." (R883) This surprised Porter, and led him to consult with Detective George Simpson of the Citrus County Sheriff's Office, who informed Porter that he had not told Appellant that the Pinellas detectives were there on a murder investigation. (R885)[3] Appellant then gave the detectives various stories pertaining to Karen Nieradka. In one of them, he stated that he had dropped Nieradka and someone named "Bear" off at the beach, which he changed to the Sunset Hotel, on February 29 or March 1, 1984, and had not seen them again. (R886-888) In another version, Appellant said that he had dropped Nieradka and a man named "Crazy Angel" off at the Sunset Hotel, presumably for the purpose of having sex. (R890-892,895-896,900) Crazy Angel came back alone, and when Appellant asked about Nieradka, Crazy Angel said she was dead. (R891-893,896-897,901) Crazy Angel paid Appellant to drive Nieradka's car out of the state. (R891,893,896,899) In yet another story, Appellant said that he transported Nieradka, Kermit

---

[3] Porter's testimony regarding what Simpson told him came in over defense objections. (R883-885)

Villanueva, and Crazy Angel to the hotel and parked at a gas station across the street while the others went inside. (R902-903) After about 20 minutes, Appellant went inside to see what was happening. (R902-903) He found Nieradka and the three men on the third floor; Crazy Angel had his hands around her throat and was strangling her. (R903) Nieradka was not fighting but was "laying there very peaceful." (R903-904) When Porter asked why Nieradka's clothes had been removed if there had been no rape, Appellant replied that although there was no rape, he knew for a fact that she had had sex a couple of hours before her death. (R904) He went on to say that the three men held her down and pulled her jeans down. (R904) He said that "her ass was grass and she knew it," and that she "fought pretty good, too." (R904) Appellant then changed his story again, and said that it was Villanueva who was responsible for killing Nieradka, and that Appellant had learned about her death after the fact. (R904-907) In one of the two versions Appellant told naming Villanueva alone as the responsible party, he stated that Villanueva told him Nieradka was killed because she "didn't want to put out," and Villanueva tried to hold her down and choked her in the process. (R906-907) In another version involving Villanueva, Appellant said that he was present with him and Nieradka in the Sunset Hotel. (R907-909) The other two were drunk, but Appellant was sober. (R908) Villanueva struck Nieradka and tried to stab her with a piece of wood. (R908) She did not resist or struggle. (R908) Villanueva raped Nieradka, despite Appellant's

efforts to get him to stop. (R908-909) Appellant denied that he raped or killed Nieradka. (R909)

Another interview was conducted with Appellant on March 29, 1984. (R911-912) This time Appellant stated that he had talked to Villanueva after the killing when Villanueva asked him to help get rid of the body, but Appellant refused. (R911-912) He did agree, however, to get rid of Nieradka's car. (R912) Appellant also told the detectives that he could not have killed anyone, as he had neurological damage to his arms as a result of being cut on several occasions, and was incapable of choking anyone. (R912)

Appellant was interviewed once more on April 12, 1984. (R914) Among other things, he stated that he was telling "all these stories to push it off on someone else so I don't end up in the electric chair." (R914-915)

Detective Porter served an arrest warrant on Appellant for the murder of Karen Nieradka on April 27, 1984. (R917) While being transported from the Citrus County Sheriff's Office to Pinellas County, Appellant said that if the detectives could promise that he would spend his life in a mental hospital facility, he would tell them how Nieradka died. (R917) He then indicated that she died accidentally, as a result of a fall from the third floor of the Sunset Hotel, at which point Appellant began smiling. (R917-918) When asked if he was lying, Appellant said that Detective Porter

would not get the truth until after Appellant was convicted. (R198)[4]

During Porter's testimony, the court admitted into evidence State's Exhibit Number 1, color photographs of the old Sunset Hotel, State's Exhibit Number 3, color aerial photographs of the berm surrounding the Wyoming Antelope Gun Club, State's Exhibit Number 4, color photographs of the area where Karen Nieradka's body was found, State's Exhibit Number 5, color photographs of Karen Nieradka's body, State's Exhibit Number 29, color photographs of Nieradka's car, and State's Exhibit Number 32, the note that was found under the driver's seat in Nieradka's car. (R430,431,432,433,435,436,918-920)

Dr. Joan Wood, the Chief Medical Examiner for the Sixth Judicial Circuit, responded to the Wyoming Antelope Gun Club on March 23, 1984, and observed the somewhat decomposed body of a white female, who was later identified to her as being Karen Nieradka. (R942-943) The only clothing present was a brassiere, and there was also a piece of jewelry. (R942-943) [Of course, the medical examiner did not know whether Nieradka was wearing clothes when she died; she only knew how the body was found. (R949)] Nieradka had been dead from two to eight weeks. (R946) Dr. Wood performed the

---

[4] Porter attempted to locate Bear and Crazy Angel, but was unsuccessful. (R888,892-893,927-928) He did find Kermit Villanueva working on a potato farm in Idaho. (R905-906) Villanueva told Porter that he had last seen Appellant several years ago while incarcerated in prison. (R906) He denied ever being in Florida. (R906) Villanueva's employer provided Porter with time sheets which indicated that Villanueva had been working in Idaho during the time period in question. (R906,934)

autopsy later that day at her office and opined that the cause of Nieradka's death was manual strangulation, based upon the lack of other obvious causes and a fracture of the left wing of the hyoid bone. (R943-946) There was an injury to Nieradka's neck, a hole that measured two and one-half by one and three-fourths inches, as well as numerous broken bones; however, it appeared that all the bones, with the exception of the hyoid, had been broken post-mortem. (R944-949) Dr. Wood found that Nieradka suffered from cirrhosis of the liver, but saw no other evidence of natural disease. (R944) The medical examiner could not determine whether Nieradka had engaged in sexual intercourse prior to death, because of the length of time that she had been dead. (R947-948)

Following the testimony of the four "live" witnesses (Gary Wright, Jerry Rowlett, Steven Porter, and Dr. Joan Wood), the State read the testimony of three witnesses who testified at the guilt phase of Appellant's original trial, Harvey James Duranseau, Michael Guy Allen, and Edward Cottrell. (R954-955) [Bench conferences and objections that were sustained were omitted. (R1007-1008)] This testimony came in over defense objections; the State represented that Allen was in prison in Michigan, Duranseau was in federal prison in Illinois, and Cottrell was in state prison in Daytona Beach, and the court ruled that the witnesses were unavailable, and so informed the jury. (R949-954) The court reporter did not report the testimony as it was read (R954-955), and so this Court and counsel must rely upon the record from Appellant's previ-

ous appeal in order to establish what Duranseau, Allen, and Cottrell said.

Harvey Duranseau testified at Appellant's guilt phase in 1985 that he and Appellant were cellmates at the Citrus County Jail. (PR1832) The first evening that Appellant was in jail, he had some scratch marks on his groin area that appeared to be raw and fresh and to have been made by a fingernail, although they could have been made by barbed wire or brambles. (PR1839,1845-1846)

Appellant told two different stories regarding a motor vehicle he was driving when arrested. (PR1834-1835) He initially said that he had the car on loan from his girlfriend, Jan, but later said that he had bought it from a middle-aged man who been murdered. (PR1835)

Appellant was generally not interested in watching the news, but he became interested one day when there was a broadcast regarding a dead body found at a Clearwater landfill. (PR1836) That day he switched all the stations and wanted to catch all the different newscasts. (PR1836) Many days after that, he watched the news regularly. (PR1836) After the initial newscast, Appellant asked Duranseau questions regarding dead bodies. (PR1836-1837) On numerous occasions, the issue of strangulation came up, and whether the police could determine the cause of death on a deteriorated body. (PR1837-1838) When he mentioned the word "strangulation," Appellant would make a gesture with his hands and sometimes go to his throat. (PR1838) He mentioned a hotel or motel Sunset, which he said was under demolition. (PR1838) In relation to questions

regarding the deterioration of a body, Appellant discussed a time frame of three weeks to a month, and referred to the body as rolled up in something like linoleum, carpeting, or tar paper. (PR1837-1838)

After Appellant was visited by a detective from the Pinellas County Sheriff's Department, he said, "'Between me and you, the only people that know what occurred is me, and I'm not going to tell,'" and the girl, and Appellant made a gesture with his hands as though he were strangling someone. (PR1839-1840)

Duranseau did not believe most of what Appellant told him, and Appellant never told Duranseau that he killed Karen Nieradka, or did this particular murder. (PR1858,1860)

Michael Allen, who had been convicted of a felony six times and had escaped twice, testified at the guilt phase of Appellant's original trial that he, Wayne Templeton, and Appellant were good friends at the Pinellas County Jail. (PR2079,2085) Appellant said that the person he supposedly killed was some girl with whom he was out partying. (PR2080) When Allen asked if he shot her, Appellant replied that he tried to break her neck. (PR2080-2081) Appellant said that he and the girl had "gotten it on," and she became angry afterwards and threatened to tell her "old man." (PR2080-2081) They fought, and Appellant knocked her out. (PR2080-2081) Appellant also said that she deserved everything she got. (PR2081-2082) Appellant made sure that he did not have any evidence, and said that if anybody in the cell told the detectives anything about his case, he would find out through his lawyer, and that "snitch" would

be dead. (PR2083) Appellant also told Allen that there was someone who had given a deposition against him and was in prison in Michigan, and asked Allen if he knew anyone in prison in Michigan, so that Appellant could send word to the guy. (PR2082-2083)

One morning, a detective went into Appellant's cell, and afterward Wayne Templeton asked him what it was all about. (PR2084) Appellant replied that the detective told him that the "old man" of the girl he killed was in jail. (PR2084) Appellant thought that the sheriff's department was trying to "set him up" with the man, and Appellant believed that if he ever went into a hallway wearing leg shackles and handcuffs, the man would be waiting. (PR2084) Appellant said that if that ever happened, the man would get worse than his "old lady" got. (PR2084)[5]

Finally, Edward Cottrell, who had been convicted of escape four times, testified in 1985 that he knew Appellant when they were both in the Pinellas County Jail. (PR2031,2041) Cottrell spoke to Appellant many times about his case, and wrote down what he heard. (PR2031-2032) Appellant told Cottrell that he helped Karen take her "old man" home one night in February. (PR2032-2033) On the way back to Mano's, Appellant told her that he and a partner had bought a hotel and were having it torn down to rebuild, and wanted to show it to her. (PR2032-2033) When they were at the "Sunset Fort Harrison Hotel," Appellant tried to "get into her pants," but she resisted. (PR2033) The second time, she hit him, and he hit her

---

[5] Much of Allen's testimony came in over various defense objections and motions to strike. (PR2064-2076,2082,2083,2087-2088)

back, choked her, and hit her in the head and/or neck with a board. (PR2033) Appellant then took her clothes, watch, ring, and purse, and hid the body under some carpet or rubbish. (PR2033-2034) He took the money out of her purse, then threw it and the clothes into a river between Hudson and New Port Richey, and sold her watch and some eight-track tapes to someone in a bar. (PR2034-2035) Appellant's eyes would get big when he talked about choking her. (PR2036) Appellant changed his story many times during his conversations with Cottrell. (PR2034)

Although no promises had been made to Cottrell, he was hoping for a lighter sentence on his charges of sexual battery, aggravated assault, and felon in possession of a firearm in exchange for his testimony against Appellant, and his sentencing had been postponed several times because of Appellant's trial. (PR2028,2044-2045)

After the prosecutor read the previous testimony of Duranseau, Allen, and Cottrell, the State proffered the testimony of Joy Walker, an investigator for the state attorney's office, out of the presence of the jury. (R956-959) Walker testified that approximately two or three weeks ago, she located Michael Guy Allen in the Ohio State Prison system, where he was serving a sentence of 15 to 25 years that was imposed in 1989. (R956-957) She located Edward Cottrell the morning before her testimony; he was in the Florida State Prison system in Daytona Beach, with a release date in 1993. (R957) Walker also located Harvey James Duranseau the morning before she testified. (R957) He was at Metropolitan Federal Penitentiary in Chicago, Illinois, with a release date in 1994. (R957

958) Walker obtained this information through the administration of each prison system, and had no contact with the individuals in question, nor did she make any efforts to have them transported to the courthouse for Appellant's penalty trial. (R958) Following Joy Walker's testimony, the State rested. (R959)

Appellant's case

Appellant's presentation at the sentencing proceeding below consisted of the testimony of Appellant's brother, James Rhodes, who was three years younger than Appellant, and who came from Washington State to testify on his behalf, the testimony of Dr. Donald Taylor, a psychiatrist, and various medical, prison, and Catholic Social Service records from Appellant's past. (R440,441, 960 1003, 1011 1037,1053-1073)

Appellant was born in Santa Rosa, California, in 1953, and had two brothers besides James. (R440,960-961) In addition, Appellant had four half-brothers and two half-sisters. (R961)

Appellant's parents were migrant workers who physically and sexually abused Appellant until he was five years old, when the parents abandoned their children. (R962-963,1014-1015,1054,1068-1069)[6] Their parents gave them no explanation; one day they were

---

[6] James Rhodes testified that he had not been sexually molested or physically abused by his parents, nor did he recall seeing them hit or beat Appellant. (R988) However, James also testified that a psychiatrist told him that he had "a real good brain" for pushing out of his mind unpleasant events that happened at an early age, and that not being able to remember was one of his "biggest problems." (R1003) James did recall one time when Appellant reported to him that Appellant had been sexually abused, but Appellant did not say by whom. (R961,991) James also recounted an incident that occurred when he was 25 and his mother was in her (continued...)

just gone. (R963) Their children survived by eating sauerkraut for about a week straight. (R962) Their parents later divorced. (R961-962)

Appellant's father was a very bad alcoholic who was imprisoned on at least three occasions. (R975,1022) His mother was imprisoned as well. (R1023)

James testified that he had a number of fights with Appellant when they were younger, some of them precipitated by Appellant's abuse of animals. (R992)

James was placed in various foster homes, in which he was physically and mentally abused, and also spent time in juvenile hall, at a boys' ranch, and at the California Youth Authority, which James described as "a small prison for boys from the ages of nine to eighteen," and from which James was released when he was 18. (R971-975,990)

Appellant was placed in an orphanage, followed by placement in juvenile detention homes, foster homes, and the California Youth Authority. (R441,1015) Appellant was sometimes placed back into the home with his father and his new wife, where he was again physically or sexually abused, until he was removed from the home permanently at age 10. (R1015)

---

[6](...continued)
40's. When she came to visit him, "the first thing she wanted to do was go to bed with [him]." (R1002) James testified that this made him "so sick" that he told his mother "to pack her stuff and leave." (R1003)

In 1963, Appellant was place in the St. Vincent's School for Boys in San Rafael, California for a few months, but was discharged in June. (R440) In a letter Appellant wrote to his parents while at school, he said that he was "very mad from [them] kicking [him] out of the house." (R440) Appellant ran away from the school twice during his short tenure there. (R440) His parents never visited him nor corresponded with him while Appellant was at St. Vincent's. (R440) Appellant did very little work and was poorly motivated toward school. (R440) His discharge form from St. Vincent's described Appellant as having "all the symptoms of a severely emotionally disturbed boy," and stated that Appellant was "a pathetic boy who even looked like a waif." (R440) [The phrase "pathetic boy" was used twice in the one and a half page discharge form. (R440)]

Evaluations done when Appellant was 10 and again when he was 12 indicated that he was severely disturbed at those ages. (R1015) It was predicted that if Appellant did not receive proper treatment, he could some day have aggressive tendencies. (R1024) Appellant had an abnormal electroencephalogram, which can be consistent with a seizure disorder, and was placed on Dilantin for seizure problems. (R1016) Appellant was also diagnosed as a hyperactive child, and placed on stimulants, but was not able to follow through with all the prescribed treatments, as his foster parents were not able to afford the medication. (R1016)

In 1965, when he was 12, Appellant was placed in the Napa State Hospital, and was diagnosed as having chronic undifferentiat-

ed schizophrenia. (R440,964,1016,1030-1031) Because of this diagnosis, Appellant was not able to continue treatment with Dilantin and stimulants, but was placed on medications such as Thorazine or Mellaril. (R1016-1017) Appellant was discharged in 1970, only to be readmitted in 1971 upon threatening to commit suicide. (R440) Appellant telephoned the hospital and stated that he had been without his medications for 24 hours, and was hearing voices telling him to kill himself. (R440)

Appellant had another bout with auditory hallucinations telling him to kill himself in June, 1972 after he stopped taking his phenothiazine medications for a week, and was hospitalized once again for 72 hours of observation. (R440)

James testified concerning an incident that occurred after Appellant's release from Napa State Hospital. (R965-967) He said that Appellant held their little brother, who was about 10 or 11 at the time, over the edge of a freeway overpass, ready to drop him. (R965-966) Their brother was mentally disabled, and James guessed that Appellant "figured he was probably doing him a favor." (R967) James intervened, telling Appellant to "put him down or else," and Appellant did so. (R966)

James felt that being institutionalized for so long at Napa State made Appellant's condition worse. (R969-970,993) When he came out, Appellant was less communicative than before, more withdrawn, and had trouble with interpersonal relationships. (R969-970)

After Appellant's arrest in 1973, he was examined by a psychiatrist in Coos Bay, Oregon, Dr. James Martin, who found Appel-

lant to be psychotic, and diagnosed Appellant as having a "schizophreniac reaction, chronic and differentiated with antisocial traits." (R441) Dr. Martin indicated that Appellant was not competent to stand trial, and that at the time he allegedly committed his offense, he lacked substantial capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law. (R441)

Appellant was admitted to the Oregon State Hospital in 1973, where he underwent a psychiatric evaluation by a doctor W.R. Weissert. (R441) In addition to Appellant's "deprived family background," Dr. Weissert's report noted Appellant's extensive involvement with "the drug scene and also with alcohol abuse." (R441) The report also stated that Appellant had married a 16 year old girl in Auburn, California in April, 1973. (R441) Dr. Weissert concluded that Appellant had an antisocial personality, but did not suffer from any psychosis. (R441)

While at the Oregon State Correctional Institution in 1974, Appellant was "significantly depressed, presumably on the basis of much self-dislike and a sense of frustration about how to plan his life," and was placed on Mellaril as a result. (R441) A counselor for the Oregon Corrections Division evaluated Appellant as a "hyperactive, mentally disturbed youngster from childhood," who had "[n]umerous traumatic, school and behavior problems during eary [sic] years, many foster home placements, failures." (R441) Appellant demonstrated "little physical and/or emotional control," and had evidenced "many bizarre acts of behavior." (R441) Appellant

often appeared "out of contact with reality." The counselor also noted that Appellant would "often feign mental illness if he believe[d] it to be to his advantage." (R441)

When Appellant was released from prison, he and his wife stayed with James for a couple of months. (R907) Appellant never came out of his room; he stayed in there with the lights off all the time. (R907) There was not much communication between James and his brother, but Appellant did say that it was hard for him to handle life, and that he did not know why he was doing the things he was doing. (R907-908)

James also had problems with the law as an adult; he robbed a store in Nevada, and later served time for violating probation. (R976-978) He had about a dozen felony convictions, assault and battery related. (R979)

When James moved to Washington, he got married. (R978) He could not control his anger, and beat his wife, but later went to "anger management" and learned to take out his frustrations in a gym he had at home. (R978-980,1000) James "absolutely" felt that his temper had to do with his upbringing; he was abused in the foster homes into which he was placed, causing him to strike back, and had to fight even for food when he was locked up. (R980-981)

James had his own business, helping people to find places to live. (R980,985-986) He also raised money for Vietnam Veterans (even though James himself could not get into the service) and coached kids who wanted to play hockey. (R980,986-987)

James's and Appellant's brother, Kenny, was "violent in his own way." (R982) If he became upset, he would look to other people to do his fighting. (R983) The government took care of Kenny; he could not hold a job, as he was pampered in the foster home in which he was placed, and never had to work. (R983-984)

James thought that Appellant's upbringing "absolutely" had something to do with the situation in which Appellant found himself, because nobody was ever there to help him. (R984) People had been too willing to label Appellant as a "bad guy," and push him into a mental hospital or other institution, instead of sitting down with him and attempting to assist him in solving his problems. (R984)

On the morning of February 14, 1992, after his brother had testified and before Dr. Taylor testified, Appellant made a "motion for mistrial on the grounds of inadequate representation." (R1009-1010) The motion was based upon defense counsel's failure to produce available records to substantiate his claim that Appellant had been physically, mentally, and sexually abused as a child. (R1009-1010) The court denied the motion. (R1010)

Dr. Donald Taylor interviewed Appellant for about one and one half to two hours on November 20, 1991, when he took a complete history and conducted a mental status examination. (R1014,1027) Dr. Taylor had also been provided with a packet of psychiatric records from previous hospitalizations and evaluations. (R1013-1014,1054)

In Dr. Taylor's opinion, Appellant was misdiagnosed at the Napa State Hospital as a schizophrenic, and thus received the wrong medication; he should have been diagnosed as a hyperactive child with a conduct disorder, and medicated accordingly. (R1016-1017) Most likely, the drugs that Appellant was given to treat schizophrenia merely kept him sedated, and he did not receive much active treatment for his problems. (R1017,1022) Once Appellant reached his adult years, there was not any realistic chance of successful treatment. (R1020 1021)

Dr. Taylor opined that on the date of the offense, Appellant was under the influence of extreme mental or emotional disturbance. (R1018,1061-1062) He was a severely emotionally disturbed child who continued to be emotionally disturbed as an adult. (R1018) Taylor also believed that Appellant was operating under duress at the time, due to the "ample evidence that . . . he was severely intoxicated by alcohol." (R1018) Further, there was a possibility that Appellant's ability to conform his conduct to the requirements of law was impaired, but Taylor could not express an opinion on this with reasonable medical certainty. (R1019-1020,1067) Although Appellant did have his own internal value system as to what was right and what was wrong, he had not grown up with a "normal healthy value system" which incorporated "normal, middle class values." (R1055-1056)

When Taylor asked about the circumstances of the murder, Appellant had no recollection for the events surrounding it, which would be consistent with someone who was experiencing a blackout

due to alcohol, especially one who had a history of a seizure disorder. (R1031-1032,1069-1070,1072-1073) He did tell Taylor, however, that he and Karen Nieradka had drunk one half case of Scotch on February 27, 1984. (R1059)

It was fair to say that Appellant was a product of his environment and his genes. (R1021-1023) The environment in which Appellant grew up, involving as it did physical and sexual abuse and abandonment at age five, took its toll, and antisocial behavior, which runs very strongly in families, was exhibited by both of Appellant's parents and by his brother. (R1021-1023)

Appellant's IQ tested at 82, compared with a normal IQ of 100, and a score of 70 which indicates mental retardation; Appellant thus was closer to being retarded than to being average. (R1023)

What usually happens with someone who has a severe personality disorder such as Appellant's is that they exhibit aggressive behavior in their twenties or thirties. (R1025) Thereafter, if they are not dead or in prison, the violent behavior tends to burn out some time in the late thirties or forties, and they tend to lead a marginal life. (R1025)

It was fair to say that, based upon Appellant's history, what happened was somewhat predictable. (R1025) Out of the hundreds of child abuse cases that Taylor had seen, Appellant was "probably the most severely abused and neglected person that [Taylor had] ever come across. . ." (R1026,1068,1071) In Taylor's opinion, Appellant never really had a chance. (R1025)

An incident occurred during the State's cross-examination of Dr. Taylor which prompted Appellant's attorney to move for a mistrial and ask to be removed from the case. (R1037-1051) The prosecutor was asking about various documents which stated that Appellant was a pathological liar. (R1036-1037) He asked about one document from a friend of Appellant, Don Bederly, which quoted Appellant as saying, "I just open my mouth and the lies come out, and I've done it all my life." (R1037) Shortly thereafter, Appellant apparently grabbed his attorney, John Swisher, by the arm in order to get his attention, which prompted a removal of the jury. (R1037-1038,1044-1045) Appellant complained that his counsel had told him that what Don Bederly said could not be used as evidence, and that Swisher could have brought Bederly in as a witness, as Appellant requested, but chose not to. (R1038-1040) Appellant moved for a mistrial, pro se, because his attorney had made the decision not to call Bederly as a witness without consulting him. (R1050)[7] The court denied both motions for mistrial (the one made by Appellant's counsel, as well as the pro se motion). (R1041,1050) Appellant asked to be removed from the courtroom and allowed to return to his cell, although he stated that he would not be disruptive if her were to remain. (R1042-1051) The court informed Appellant of his constitutional right to be present, but Appellant stated that he desired not to remain, and he was taken back to the

---

[7] Swisher stated that he had talked to Don Bederly, who could not be in court because of his health (he had arthritis) and his age (78). (R1047) He also stated that he discussed the matter with Appellant. (R1047)

holding cell. (R1045 1051) When the jury returned, the court instructed them as follows (R1052-1053):

> THE COURT: Members of the jury, during the lunch break it came to the Court's attention that Mr. Rhodes did not wish to participate or continue to be physically present during further proceedings in this trial. I have talked with Mr. Rhodes personally, and with the court reporter and with the attorneys, and I'm satisfied that this is a free and voluntary decision on his part, and it's not a decision that's made because of any illness he may be suffering from or any improper pressures being placed upon him.
>
> Mr. Rhodes' absence is not to be considered by you in any way as prejudicial against him. He has a right to be present or to be absent, and he's chosen not to be physically present during these proceedings. I'll be checking with him later just to make sure that that is still his position. I don't want you to think that his presence here would cause any disruption or anything like that, he simply does not want to be here, and I can't compel him to be here if those are his desires.
>
> The Florida Law and Rule of Criminal Procedure specifically go to the Defendant being present. And I had to make sure that what he wanted to do was to be absent, and that was his decision, and that appears to be the case. So we can proceed with the further proceedings in this trial in his absence. An again you are not to consider that in any way regarding your decision. Okay.

Appellant was absent during the rest of Dr. Taylor's testimony, and during the testimony of the State's rebuttal witness, but returned for the jury charge conference and stayed for the remainder of the proceedings. (R1112)

State's rebuttal

Dr. Sidney Merin, a clinical psychologist and neuropsychologist, examined certain documents pertaining to Appellant, but did not interview him. (R1077-1079,1083-1084,1102) Merin expressed his

opinion that Appellant was not under the influence of extreme mental or emotional disturbance at the time the instant homicide was committed. (R1084) He explained that Appellant was "a man who had gained a particular level of functioning all through his life." (R1084 1085) There was not "any doubt but that he did have a very poor, very conflicted, very chaotic background. And he had this type of background or had very strong influences from rather destructive parents or parent figures up until about twelve years of age." (R1085) In the records that Merin examined, Appellant's home situation was characterized as "intolerable." (R1097) However, Merin felt that Appellant must have benefitted from his years in the State hospital, and emerged as someone who "was already capable of making decisions in life." (R1085,1103) Merin believed that because of Appellant's background, he was probably told frequently that what he was doing was wrong, so that "he had pretty much of an awareness of society's value system, not only from the very poor environment out of which he grew,. . .but certainly from his experiences in the hospital and thereafter." (R1085 1086)

Merin found that Appellant did not suffer from any kind of mental disturbance, but likely had an emotional disturbance. (R1086-1088) His problems were primarily of a behavioral nature, which Merin "would largely refer to as a personality disorder;" Appellant had an antisocial personality. (R1088-1089)

Merin did not believe that the homicide was committed while Appellant was under extreme duress. (R1089) He saw no evidence of anything that represented unusual stress for Appellant, and did not

think that Appellant was drinking to any significant extent that night. (R1089)

In Merin's opinion, Appellant understood right from wrong at the time of the homicide, and was capable of conforming his behavior to the requirements of the law. (R1089-1090) He was capable of planning and capable of anticipatory behavior. (R1090)

Merin questioned whether Appellant's IQ score of 82 represented his true intelligence. (R1090-1092) He acknowledged the possibility that Appellant could in fact be "dull normal." (R1091) But he felt that it was "more like" Appellant that he "simply declined or refused or resisted involving himself in the testing procedure." (R1091) Although Appellant was not educated, and "may well have had an early learning disability," he was "very bright." (R1091)

Merin did not see any indication of a history of blackouts or alcohol abuse in the records that he examined. (R1093-1094) With regard to Appellant's abnormal EEG and his taking of the anti-seizure medication Dilantin, Merin saw no evidence that Appellant ever actually had seizures; an abnormal EEG is frequently associated with a learning disability, which Appellant probably had, and which may have been one of the reasons that Appellant performed poorly in school and had early problems in getting along with people. (R1094-1095) A learning disability which results in an abnormal EEG may be indicative of brain dysfunction. (R1106)

One of the documents that Merin had examined was a transcript of the testimony of Dr. Walter Afield, a psychiatrist who had interviewed Appellant, in which Afield expressed his opinions that

Appellant was under an extreme emotional or mental disturbance in February of 1984, and was under extreme duress, and that Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (R1079,1100,1101-1102)

Jury instructions

Before the jury retired to deliberate, the court orally instructed on the following aggravating circumstances (R1159):

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence. First, the crime for which Richard Wallace Rhodes is to be sentenced was committed while he was under sentence of imprisonment. Secondly, the Defendant has been previously convicted of a felony involving the use or threat of use of a firearm, the crimes of Armed Robbery, Assault, Attempted Robbery, and Battery with a Deadly Weapon are felonies involving the use of or threat of use of violence to another person. Thirdly, the crime for which the Defendant is to be sentenced was committed while he was engaged in the commission, or an attempt to commit the crime of sexual battery.

The court went on to define "sexual battery," and what would constitute an attempt, as well as reasonable doubt. (R1159-1160) The court orally instructed on the following mitigating circumstances (R1161-1162):

> Among the mitigating circumstances you may consider, if established by the evidence are: One, the crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance. Two, the Defendant acted under extreme duress. Three, the capacity of the Defendant to conform his conduct to the requirements of the law was substantially impaired. Four, any other aspect of the Defen-

> dant's character or record, or any other circumstance of the offense.

The written instructions that went back with Appellant's jury defined the second aggravating circumstance in the following terms (R444):

> 2. The defendant has been previously convicted of a felony involving the use of threat or use of violence. The crimes of Armed Robbery, Assault, Attempted Robbery and Battery with a Deadly Weapon are felonies involving the use of or threat of use of violence to another person.

The court told the jurors that if they had any questions about the instructions, they should "feel free to rely on the written copy of the instructions" with which each juror would be provided. (R1175)

Jury's question

During deliberations, the jury presented the following question to the court, in writing (R452,1177): "Subject: 99 years plus 1. No possibility of parole? Are we the jury allowed to vote for this measure of punishment[?]" The court answered the question as follows (R1177-1178):

> THE COURT: Folks, I have reviewed your question and discussed this with counsel. I can advise you as follows: The Defendant has been convicted of first degree premeditated murder. Under the law of Florida there are only two possible choices as to a sentence that I can impose. I have no choice, I can either impose life imprisonment with no possibility of parole for twenty-five years, or death. Those are the only two sentences that are an option for this crime. I hope with that information you will now be able to go back and continue your deliberations.

Sentencing hearings

A brief hearing was held before Judge Baird on March 17, 1992, at which the court expressed his understanding that there were no other witnesses, and no other evidence or testimony that Appellant wished to present prior to sentencing, and asked Appellant if this were true, to which Appellant responded, "This is true, Your Honor." (R1186-1187) Sentence was actually imposed on March 20, 1992, when the court read his pre-prepared sentencing order into the record. (R1190-1199)

SUMMARY OF THE ARGUMENT

The trial court should not have excused prospective juror Melissa Blackham on his own motion following questioning by the court and the prosecutor. Blackham's voir dire answers did not show that she was irrevocably committed to vote against the death penalty in all circumstances, nor did the questioning establish that she could not follow the law, or that her views on capital punishment would prevent or substantially impair the performance of her duties as a juror. Moreover, defense counsel was never given an opportunity to question Blackham about any subject before she was removed by the court sua sponte, and so Appellant had no chance to rehabilitate her. The court's precipitous action deprived Appellant of his right to a fair trial, and to due process of law.

The court below should not have allowed the State to present extensive hearsay evidence at the proceedings below, some of which Appellant had no opportunity to confront or rebut, particularly certain testimony of Gary Wright, and the prior testimony of three "jailhouse snitches" from the guilt phase of Appellant's original trial. Wright gave prejudicial testimony regarding an anonymous doctor's report that suggested that Appellant did not have a mental condition, but was feigning or faking his symptoms. The State failed to carry its burden of establishing that the three witnesses who had been Appellant's cellmates were unavailable; the prosecution made no effort whatsoever to secure their presence so that they could give "live" testimony. Appellant was unable to confront or cross examine the transcripts which the prosecutor read into

evidence, and some of the testimony contained therein was irrelevant and inflammatory.

The State introduced several improper considerations into the proceedings below by way of argument and evidence. Part of the State's opening statement was an argument in favor of two aggravators which were inapplicable (HAC and CCP), and served only to inflame the jury. Via Gary Wright's testimony, the State presented irrelevant evidence of Appellant's prior brushes with the law, and irrelevant details of the Oregon armed robbery for which Appellant was convicted, as well as prejudicial statements Appellant made following his arrest for the robbery, which were not shown to have been voluntarily made, and were obtained in violation of Appellant's rights to counsel and to remain silent.

Appellant's jury was fundamentally misled by the prosecutor during voir dire and by the court in his instructions. The assistant state attorney improperly diminished the jury's role in the sentencing process by indicating that responsibility for Appellant's fate lay elsewhere. The court gave the jury confusing instructions which permitted consideration of a non-statutory aggravating circumstance, namely, that Appellant had "been previously convicted of a felony involving the use or threat of a firearm." As a result, the jury's death recommendation is tainted, and the sentence of death predicated on the recommendation cannot be considered sufficiently reliable to pass constitutional muster.

Appellant's jury should not have been permitted to consider in aggravation that the capital felony was committed during a sexual

battery or attempted sexual battery, and the court should not have found that Appellant was attempting to commit a sexual battery when Karen Nieradka was killed, as the evidence did not support such an aggravating circumstance. Appellant was not charged with sexual battery or attempt, and there was no physical evidence whatsoever to indicate that any type of sexual activity had taken place. The fact that Nieradka was wearing only a bra when her body was found several weeks after her death was of no moment, in view of the fact that the body had apparently gone through the destruction of the Sunset Hotel, and the transportation of the debris therefrom to the Wyoming Antelope Gun Club, which could easily account for the lack of clothing. Although some of the stories Appellant told did suggest some form of sexual activity, they did not necessarily show that any such activity was non-consensual and committed by Appellant upon a still-living person. Additionally, the court's finding demonstrates that the court did not understand that a resentencing is a completely new proceeding at which the "clear slate" rule applies, because the court attempts to bolster his finding by citing this Court's conclusion from Appellant's first appeal that there was sufficient evidence of attempted sexual battery.

The court erred in imposing sentence upon Appellant without affording him an opportunity to be heard in person. Furthermore, the court considered improper matters in his sentencing order, and the order contains flawed and incomplete legal analysis.

Appellant's sentence of death is disproportionate. One of the aggravating circumstances the court found should not have been

found, and the remaining two are not entitled to much weight. Appellant's case in mitigation, based upon his extremely bad childhood, is much more compelling. Furthermore, despite various factors that tainted the jury's recommendation, two jurors voted for life, and additional jurors probably would have, if they had the option of voting for a sentence that assured that Appellant would spend his life in prison.

One of the two written judgments for murder filed herein must be stricken. There was only one homicide. Appellant's first murder conviction has never been overturned. The later filed judgment for murder is extraneous.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY EXCUSING FOR CAUSE A JUROR WHO WAS QUALIFIED TO SERVE, IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 22 OF THE FLORIDA CONSTITUTION.

After the initial group of prospective jurors had been questioned by the court and the prosecutor, a bench conference was held at which the court asked whether there was "any reason to keep [Melissa] Blackham and [Chris] Varellan on the jury?" (R606) Defense Counsel John Swisher stated that he "want[ed] to keep her [Blackham]," whereupon the following exchange occurred (R606-607):

> THE COURT; She said she already doesn't want to do it.
>
> MR. SWISHER: I'd like to keep her.
>
> THE COURT: Well, I know you'd like to keep her, because she's already said she doesn't want to be here. And doesn't want to do it.
>
> MR. SWISHER: Judge, if you do that for cause I can't say anything about it.
>
> THE COURT: I'm not going to force somebody to stay on a jury when they told me in public they don't want to be here. That's not good for you and it's not good for your client. For that reason -- I mean, if you want to replace them now, you know, and give the State a shot at them after you're done, or we can just avoid questioning them, it's up to you. But I don't want her to stay. She's already expressed an opinion about not wanting to be here, and I don't want her to say anything or Mr. Varellan to say anything that is going to

somehow affect the rest of the jurors, because we already know they're not going to be here.

MR. SWISHER: If you're going to get rid them, get two people in there now.

THE COURT: Okay. Is that acceptable?

MR. MOONEY [Prosecutor]: Fine. And he can question them and I can get up and question the two. Fine.

The bench conference then terminated, and Blackham and Varellan were excused because of their "views." (R607)

Presumably, the court based his excusal of Melissa Blackham on her views regarding capital punishment; no other possible basis for Blackham's removal for cause appears in the record.[8] However, Blackham's voir dire answers did not show that she was disqualified to serve on Appellant's jury, and she should have been permitted to consider Appellant's case.

Unless a venireman is irrevocably committed before the trial begins to vote against the death penalty regardless of the facts and circumstances of the case, he cannot be excluded for cause. Johnson v. State, 608 So. 2d 4 (Fla. 1992); Davis v. Georgia, 429 U.S. 122, 97 S. Ct. 399, 50 L. Ed. 2d 339 (1976). Prospective

---

[8] When questioned about friends or relatives in law enforcement, Blackham said that she had a step-uncle who was on the Baltimore County police, and a step-cousin who was a corrections officer in Pinellas County at the time of Appellant's resentencing trial. (R554) She indicated that she did not think this would affect her ability to sit as an impartial juror, but she did not know. (R554) Also, Blackham answered, "Probably," when the prosecutor asked her if she thought it was going to "upset" her "too much" to look at certain pictures. (R600) These responses hardly rose to the level of legitimate reasons for striking someone for cause, and the court below did not seem to base his excusal of Blackham on these responses.

jurors may not be excluded for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Witherspoon v. Illinois, 391 U.S. 510, 522, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1986); Lockhart v. McCree, 476 U.S. 162, 176, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986).

As refined in Adams v. Texas, 448 U.S. 38, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980), the applicable proposition of law is:

> a juror may not be challenged for cause based upon his views about capital punishment unless these views could prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

448 U.S. at 45. Accord Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985); Foster v. State, 18 Fla. L. Weekly S 215 (Fla. April 1, 1993). The Adams Court ruled that jurors could not be excluded if they stated that they would be "affected" by the possibility of the death penalty since such indication could mean "only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally." 448 U.S. at 49.

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

448 U.S. at 50. This standard for limiting the exclusion of jurors was specifically approved by the Court in Wainwright v. Witt, 469 U.S. at 423-424. In Gray v. Mississippi, 481 U.S. 648, 658-659, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987), the Court explained the constitutional basis for the standard:

> It is necessary. . .to keep in mind the significance of a capital defendant's right to a fair and impartial jury under the Sixth and Fourteenth Amendments.
>
> Justice Rehnquist, in writing for the Court, recently explained:
>
> "It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." Lockhart v. McCree, 476 US 162, 176, 90 L Ed 2d 137, 106 S Ct 1758 (1986).
>
> The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would "frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." Wainwright v. Witt, 469 US, at 423, 83 L Ed 2d 841, 105 S Ct 844. To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It "stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law." Witherspoon v. Illinois, 391 US, at 523, 20 L Ed 2d 776, 88 S Ct 1770, 46 Ohio Ops 2d 368.

The voir dire answers given by prospective juror Blackham did not demonstrate that she was disqualified to serve in accordance

with the principles discussed above. The trial court's initial questioning on the subject of capital punishment showed that Blackham had no problem with it (R563):

> THE COURT: Okay. All right. Let me ask Miss Blackham, and then I want to go down the row here, ma'am, are you opposed to the death penalty?
>
> VENIREWOMAN BLACKHAM: No.
>
> THE COURT: Okay. Would your views on the death penalty interfere with or substantially impair, do you believe, your ability to make a decision in this case?
>
> VENIREWOMAN BLACKHAM: I don't believe so.

Later, upon being questioned by the prosecutor, Blackham expressed some discomfort over making a decision on life or death when she did not hear all the guilt-phase evidence, but the prosecutor was able to allay her concerns (R574-575):

> MR. MOONEY [Prosecutor]: Does it bother you all that you don't have the opportunity to hear all the evidence as to the guilt, and how the State of Florida proved the guilt of the Defendant? Does that bother anyone?
>
> VENIREWOMAN BLACKHAM: Yes.
>
> MR. MOONEY: What bothers you about that?
>
> VENIREWOMAN BLACKHAM: I don't feel comfortable making a decision on life or death when I wasn't a party to the process beforehand.
>
> MR. MOONEY: Okay. I'm going to take a little bit of that burden off you and tell you you're going to hear about what this man did when he killed someone. You'll hear the facts of that case but you're not going to hear everything in the original trial. There was about fifty witnesses that were called during that trial. And the jury of twelve people found him guilty of first degree murder. In

this particular case, you're going to hear from two -- what we're going to do is call live witnesses, two live bodies. You'll hear from the detective, a man by the name of Steve Porter, who was a detective with the Pinellas County Sheriff's Office at the time. And he'll tell you basically what the case was about, what the facts of the case were, some of the things like that. So you get to hear about those facts. You'll also hear from Dr. Joan Wood, who is the medical examiner, who will tell you a little bit about the cause of death. And we're going to give you those facts as to what happened. What I need to make sure everyone understands first off, that's not all the witnesses we have, and you're not here to second guess or to worry about the guilt. 'Cause he's guilty. He's a convicted murderer. Can you all accept that?

THE VENIRE: Yes.

MR. MOONEY: Okay. Does that take a little bit of the burden off you? When you hear that some of the evidence -- you know, you'll basically hear everything. It's just not, you know, we would be here for a month of Sundays if we paraded another fifty people and had to go through the guilt phase again and jumped into the penalty phase. Does that take a little bit of the anxiety off you?

VENIREWOMAN BLACKHAM: Well, yes.

Blackham then answered flatly, "No," when the prosecutor asked if the prospective jurors had any problems with the fact that they were "not going to hear from all those witnesses." (R577) After Assistant State Attorney Mooney described the process of weighing aggravating and mitigating circumstances, and the jury venire as a whole indicated that they "could do something like that" (R582-584), the following dialogue took place between the prosecutor and Blackham (R584-586):

MR. MOONEY: Okay. You know, one of the ways that -- you know, it's an easy question

to ask you, are you for the death penalty, if you're for or against it, but then kind of give us a little bit -- when we try to put it in a spectrum. I've taken all these weirdo tests where they have, do you strongly agree, agree, have no opinion, strongly disagree -- or disagree and strongly disagree. You have this spectrum. You could put down at this end at a one that says I strongly disagree and put ten down here, I strongly agree with the death penalty. There are some people that would say if you take a life you deserve to die. That's not the law. So you know, you can't be so far off.

We had a juror one time that said I believe in the death penalty, they should be terminated with extreme prejudice. That's not fair for anybody. On the other hand, we have the people that say it's not right. And I'm not here to debate philosophical differences about that. That's already been decided and we have to accept that.

I'm going to ask you all where you put yourself. Do you put yourself over here, terminate with extreme prejudice, or do you put yourself over here and say no, I can't do it, that's not right for us. Miss Blackham, what do you think, where you are at?

VENIREWOMAN BLACKHAM: Sort of in the middle.

MR. MOONEY: Sort of in the middle. Okay.

VENIREWOMAN BLACKHAM: However, that was based on the information that I had prior to today.

MR. MOONEY: Okay. Well --

VENIREWOMAN BLACKHAM: I mean, that was my feeling before. I'm having difficulty with this.

MR. MOONEY: And I'm not going to kid you to say it's an easy thing. Obviously, it's not. Now even with what you've heard, do you put yourself square in the middle or are you a little bit to the right of strongly disagree, or little bit to the left toward strongly agree?

VENIREWOMAN BLACKHAM: Probably in the middle and a little bit --

MR. MOONEY: To the strongly disagree? Is that about imposing -- in other words, if you had to put yourself on one side you're more towards not imposing than imposing?

VENIREWOMAN BLACKHAM: Probably.

Finally, the following exchange occurred between the prosecutor and Blackham (R600-601):

MR. MOONEY: I'm going to sit down now. Is there anything that we've talked about -- we haven't talked about that you want to bring to our attention? Here's your last chance to say it. The judge gave you all the opportunity at the beginning when we read to you the fact that he was convicted of first degree murder, of looking at life imprisonment with no possibility of parole for twenty-five years, or death by electrocution, and I was surprised that people didn't raise their hand. Are there people now that after they heard this and talked about it a little bit that basically just want to say no, I don't want make this decision?

VENIREWOMAN BLACKHAM: I don't. I thought I made that clear.

The two portions of voir dire quoted last above indicate, at most, that Blackham was having "difficulty" going through the jury selection process in Appellant's case, and did not particularly want to make a decision as to whether Appellant should receive a death sentence or a sentence of life imprisonment. However, none of Blackham's responses indicated that she could not or would not follow the law upon which she would be instructed by the court; she did not retreat in any substantial way from her original answers to the court that she was not opposed to the death penalty, and that her views on the death penalty would not interfere with or sub-

stantially impair her ability to make a decision in the instant case. Most likely, Blackham was not the only prospective juror who had some qualms about going through the death-qualification process, and who would rather not have to make the difficult decision on what sentence to recommend, but these are simply not factors which disqualify a juror from service in accordance with the principles discussed above, and the court applied an incorrect legal standard in letting Blackham off the hook simply because she may not have wanted to be in the courtroom.

Perhaps an even more egregious error appears in the trial court's failure to allow Appellant's attorney to question prospective jurors Blackham and Varellan at all before he excused them on his own initiative. Defense Counsel John Swisher's entire voir dire before Blackham and Varellan were excused consisted of the following (R605):

> THE COURT: Mr. Swisher?
>
> MR. SWISHER: I'm going to go through each one of you and ask you a question that you may or may not want to discuss with me, if you don't, tell me. But it's something that may be a factor in this case. And I kind of -- I like to know a little bit about your background. If you prefer to talk to us about it in private, say so. We can arrange to do that also, okay, outside the presence of the other jurors. And I want to start with Miss -- I can't read my writing, Blackham, is that right?
>
> VENIREWOMAN BLACKHAM: Uh-huh.
>
> MR. SWISHER: Is there anything in your family background --

Thereupon the court interrupted the examination and asked counsel to approach the bench and excused Varellan and Blackham. (R606) In O'Connell v. State, 480 So. 2d 1284 (Fla. 1985), this Court condemned the trial judge's excusal of two death-scrupled jurors after their voir dire examination by the prosecutor where defense counsel had no opportunity to examine these jurors or try to rehabilitate them.[9] Counsel for Appellant here likewise was given no chance to question Blackham (or Varellan) about her views on capital punishment, or any other subject, before the court struck her on his own motion. For the court to decide that he had heard enough after the prosecutor completed his questioning, without giving the defense any opportunity whatsoever to attempt to rehabilitate the juror, which is what the trial judge in O'Connell did, violated Appellant's right to due process and to an impartial jury.

It is instructive to compare the voir dire conducted in the instant case with the voir dire in Sanchez-Velasco v. State, 570 So. 2d 908 (Fla. 1990). There the trial judge asked a general screening question of prospective jurors regarding scruples against the death penalty. This Court agreed that the initial question "was not adequate by itself" to disqualify potential jurors. 570 So. 2d at 915. However, no reversible error was committed because

---

[9] In Green v. State, 575 So. 2d 796 (Fla. 4th DCA 1991), the court applied O'Connell in the context of a non-capital case, reversing where the trial court had excused two jurors who expressed doubt that they could be impartial due to their feelings about alcohol and drug abuse without allowing defense counsel to examine either juror before they were excused.

follow-up questions were asked of all jurors who indicated opposition to the death penalty. No juror was excused unless he or she indicated unequivocally that he or she could not follow the law. Here, no questioning of Melissa Blackham occurred that showed that she could not follow the law. To the extent that the trial court may have gleaned the impression that Blackham could not follow the law based upon her questioning by the court and the prosecuting attorney, he acted precipitously in excusing Blackham sua sponte without hearing her answers to the questions that Appellant's attorney was going to ask her.

The exclusion from a capital jury of a juror who is qualified to serve violates the rights to an impartial jury and due process of law of the person to be sentenced. Gray v. Mississippi; Davis v. Georgia; Witherspoon v. Illinois; Amends. VI and XIV, U.S. Const.; Art. I, §§ 9 and 22, Fla. Const. Melissa Blackham was improperly removed from Appellant's jury, and Appellant's sentence of death must be vacated as a result.

ISSUE II

THE COURT BELOW ERRED IN PERMITTING THE STATE TO PRESENT EXTENSIVE HEARSAY EVIDENCE AT APPELLANT'S RESENTENCING PROCEEDING, SOME OF WHICH APPELLANT HAD NO OPPORTUNITY TO CONFRONT OR REBUT.

Generally, hearsay evidence is inadmissible, and any witness (except an expert) must have personal knowledge of the matters about which he testifies. §§ 90.604, 90.802, Fla. Stat. (1991). In capital sentencing proceedings, however, "[a]ny . . . evidence

which the court deems to have probative value may be received regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." §921.141(1), Fla. Stat. (1991). The defendant's right to confront and cross-examine the witnesses against him applies at the sentencing phase of a capital trial. Engle v. State, 438 So. 2d 803 (Fla. 1983); Walton v. State, 481 So. 2d 1197, 1200 (Fla. 1986) ("The sixth amendment right of an accused to confront the witnesses against him is a fundamental right which is applicable not only in the guilt phase, but in the penalty and sentencing phases as well.")

The State's presentation below concerning other violent felonies of which Appellant had been convicted was based largely upon hearsay evidence. For example, Jerry Rowlett conceded that his testimony regarding the assault upon Mrs. Adducchio at the Hawthorne Hotel was based solely upon what other people had told him, specifically, his interview with the victim two days after the incident, and that he had no personal knowledge as to what took place. (R862-863) The State's evidence as to the Oregon robbery also must have been hearsay, most likely from an interview with the victim of that incident, to the extent that it did not come from Appellant's own (inadmissible) statements to the police. (Please see Issue III in this Brief.)[10]

---

[10] One of the reasons that the Court vacated Appellant's death sentence in his previous appeal was that the State went too far in presenting evidence of Appellant's prior violent felonies by introducing into evidence a tape recording of an interview that (continued...)

Additional hearsay came in over defense objections during the testimony of former detective Steve Porter when he recounted what Detective George Simpson of the Citrus County Sheriff's Office told him regarding what information had been given to Appellant prior to his interview with the detectives from Pinellas County (R883-885), and when Porter told the jury what Rebecca Borton had told another detective about seeing Karen Nieradka with Appellant. (R909-911) This issue will concentrate, however, upon particular hearsay that came in during Gary Wright's testimony, as well as the prior testimony of the three "jailhouse snitches" that was read by the prosecution.

Gary Wright testified about the robbery at Jean's Food Center in Coquille, Oregon in 1973, and Appellant's arrest for that offense. (R795-839) During cross-examination, Wright acknowledged that he was aware of Appellant's mental problems, and knew that Appellant had been in the hospital since he was a teenager. (R827) On redirect of Wright, the prosecutor asked whether Appellant had been evaluated by a doctor in the course of the armed robbery case, to which Wright responded in the affirmative, and further stated that he had reviewed the doctor's report from the state hospital that was submitted in the case. (R832) The prosecutor then asked, "And did it indicate that he was feigning or faking these?" (R832)

---

[10](...continued)
Jerry Rowlett [or "Rolette," as his surname is spelled in the opinion] conducted with the victim of the Nevada incident, Mrs. Adducchio; this was evidence which Appellant could not confront, cross-examine, or rebut. Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989).

Appellant's objection to the question was overruled, and the prosecutor asked if Wright recalled what the doctor's report said about Appellant's mental condition. (R832-833) Wright answered, "That he did not appear to have a mental condition, as I recall. I don't have that particular report with me today. But his actions on the 26th appeared fake to me. They weren't indicative of the actions I had seen prior to that." (R833) Shortly after Wright gave this testimony, defense counsel moved the court for a mistrial because he had never seen the doctor's report in question, and was unable to confront it. (R833-835) The court apparently saw the error of his ways, as this time he sustained the objection, but refused counsel's request to instruct the jury to disregard any reference to the doctor's report, and did not grant a mistrial. Clearly, what was contained in an anonymous doctor's written report was hearsay that Appellant could not cross-examine, confront, or rebut, and Wright's references to the report should not have been permitted. The implication that the doctor, whoever he was, had determined that Appellant not only did not have any mental condition, but was faking symptoms of mental illness, obviously was very damaging to Appellant's efforts to establish the mental problems that he had as a result of his horrible childhood and deprived upbringing, which formed the core of the case in mitigation. Appellant's jury must necessarily have viewed Appellant's case with a jaundiced eye in light of Wright's testimony, and he was manifestly prejudiced by the use of this hearsay.

With regard to the State's reading of the testimony of Harvey Duranseau, Michael Allen, and Edward Cottrell from the guilt phase of Appellant's previous trial, the subject of former testimony is addressed in both the Evidence Code and the Florida Rules of Criminal Procedure. Florida Rule of Criminal Procedure 3.640(b), which defense counsel cited below (R950), and which applies in the context of the granting of a new trial, provides as follows:

> (b) **Witnesses and Former Testimony at New Trial.** The testimony given during the former trial may not be read in evidence at the new trial unless it is that of a witness who at the time of the new trial is absent from the state, mentally incompetent to be a witness, physically unable to appear and testify, or dead, in which event the evidence of such witness on the former trial may be read in evidence at the new trial as the same was taken and transcribed by the court reporter. Before the introduction of the evidence of an absent witness, the party introducing the evidence must show due diligence in attempting to procure the attendance of witnesses at the trial and must show that the witness is not absent by consent or connivance of that party. Amended Sept. 24, 1992, effective Jan. 1, 1993 (606 So.2d 227).

The Evidence Code provides an exception to the hearsay rule for former testimony where the declarant is unavailable. § 90.804, Fla. Stat. (1991). Section 90.804(1) defines unavailability in the following terms:

> **90.804 Hearsay exceptions; declarant unavailable.**
>
> (1) DEFINITION OF UNAVAILABILITY.--"Unavailability as a witness" means that the declarant:
> (a) Is exempted by a ruling of a court on the ground of privilege from testifying concerning the subject matter of his statement;

> (b) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so;
> (c) Has suffered a lack of memory of the subject matter of his statement so as to destroy his effectiveness as a witness during the trial;
> (d) Is unable to be present or to testify at the hearing because of death or because of then existing physical or mental illness or infirmity; or
> (e) Is absent from the hearing, and the proponent of his statement has been unable to procure his attendance or testimony by process or other reasonable means.
>
> However, a declarant is not unavailable as a witness if such exemption, refusal, claim of lack of memory, inability to be present, or absence is due to the procurement or wrongdoing of the party who is the proponent of his statement in preventing the witness from attending or testifying.

Former testimony may not be substituted for oral evidence where the witness is available, Abbe v. Abbe, 68 So. 2d 565 (Fla. 1953), and the burden is upon the party seeking to use the former testimony to demonstrate the unavailability of the witness. Jackson v. State, 575 So. 2d 181 (Fla. 1991); Outlaw v. State, 269 So. 2d 403 (Fla. 4th DCA 1972). The State was required to establish what steps it took to secure the appearance of the three "jailhouse snitches." McClain v. State, 411 So. 2d 316 (Fla. 3d DCA 1982). The State's own witness, Joy Walker, an investigator with the state attorney's office, established that the State took no steps to secure the appearance of Duranseau or Allen or Cottrell. All the State did was to ascertain that the three were in various prisons; Walker admitted that she did not make any efforts to have them transported to the courthouse for Appellant's penalty trial.

(R958) Subsection (1)(e) of Florida Statute 90.804 (which is the only subsection even arguably applicable here) clearly requires more than merely establishing the whereabouts of the witnesses. The proponent of the former testimony must employ "process or other means" in order to try to procure the attendance of the witnesses, which the State failed to do. Although it might have been difficult to secure the presence of the two out-of-state witnesses, nothing in the record suggests that this could not have been accomplished. See Chapter 942, Florida Statutes (1991), Interstate Extradition of Witnesses, which is a uniform act that has been adopted in both Ohio, where Allen was incarcerated, and Illinois, where Duranseau was incarcerated. 23A Fla. Stat. Ann. 100-101 (Supp. 1993). And securing the presence of the in-state witness, Cottrell, should have been as simple as presenting an order to transport to Judge Baird for his signature. If these witnesses were necessary to the State's case, the State should have made a determined effort to bring them before the jury to testify in person. This Court emphasized the importance of "live" testimony in the capital sentencing context in Corbett v. State, 602 So. 2d 1240, 1244 (Fla. 1992), in which the Court required that a substitute judge who did not hear the evidence presented during penalty phase must conduct a new sentencing proceeding before a jury, and may not rely upon the "cold record." Neither the judge nor the jury below heard the testimony that occurred at Appellant's original trial, and both should have had the benefit of "live" testimony, rather than the "cold record" of the witnesses' previous testi-

mony. The State utterly failed to demonstrate the unavailability of the three witnesses in question, and the trial court should not have permitted their testimony to be read to Appellant's jury.

Even if the State had carried its burden of proving that Duranseau, Allen, and Cottrell could not be brought to court for some reason, it is questionable that their prior testimony qualified as admissible "former testimony" within the meaning of section 90.804(2)(a), Florida Statutes (1991), which provides for admission of testimony given by an unavailable witness at another hearing in the same or different proceeding if the party against whom the testimony is offered "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." While Appellant, through his former counsel, had an opportunity to cross-examine the witnesses in question when Appellant was tried before, it must be remembered that they were guilt phase witnesses. As this Court has recognized, "'Substantially different issues arise during the penalty phase of a capital trial that require analysis qualitatively different than that applicable to the guilt phase.'" Lawrence v. State, 18 Fla. L. Weekly S 147, 148 (Fla. Mar. 11, 1993) [quoting Castro v. State, 547 So. 2d 111, 115 (Fla. 1989).] Appellant's motive to develop the testimony of Duranseau, Allen, and Cottrell at the guilt phase of his previous trial may have been much different than it would have been had they testified at penalty phase, and it is not clear that the previous testimony of these witnesses met the requirements for an exception to the hearsay rule pursuant to the terms of the Evidence Code.

For these reasons the testimony that was read by the prosecutor below did not qualify for admission as an exception to the hearsay rule, and Appellant had no way to vindicate his right to confront and cross-examine the witnesses when they testified by way of a written transcript. See Rhodes, 547 So.2d at 1204 (Appellant did not have opportunity to confront and cross-examine witness who "testified" via tape recording).

One can only speculate as to why the State felt the need to present the former testimony of the three "jailhouse snitches" at all. A resentencing is not a retrial of the defendant's guilt or innocence, Chandler v. State, 534 So. 2d 701, 703 (Fla. 1988), and yet it seems that the evidence in question was primarily designed to convince Appellant's sentencing jury he was "really guilty." Some of what the three witnesses had to say may have been relevant to the aggravator of a homicide committed during the course of another felony, in this case, sexual battery or attempted sexual battery. (Edward Cottrell's testimony was the only evidence presented throughout the proceedings below which directly implicated Appellant in an act of non-consensual sex.) But there was no justification for presenting portions of the witnesses' testimony that did not relate to any aggravating circumstance, and served merely to cast Appellant in a bad light. Particularly outrageous was the testimony of Harvey Duranseau that Appellant threatened to kill anyone who "snitched" on him. (PR2083) Testimony suggesting that a defendant in a capital case would kill again has been condemned by this Court as "highly prejudicial." Derrick v. State, 581 So.

2d 31, 36 (Fla. 1991). See also Teffeteller v. State, 439 So.2d 840 (Fla. 1983); Grant v. State, 194 So. 2d 612 (Fla. 1967) (improper for prosecutor to argue that jury should recommend the death penalty because the defendant might otherwise be released from prison and kill again). Even at penalty phase, where the scope of evidentiary admissibility is somewhat expanded, the evidence must meet the basic test of relevance. Chandler; §§ 90.402 and 921.141(1), Fla. Stat. (1991). The testimony at issue contained matters that were not relevant, but were highly inflammatory, and so the improper admission of this testimony can in no way be deemed harmless error.

By admitting the former testimony of Harvey Duranseau, Michael Allen, and Edward Cottrell, the court below deprived Appellant of rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 2, 9, 16, 17, and 22 of the Constitution of the State of Florida, including the rights to due process of law and confrontation of witnesses. See Gardner v. Florida, 430 U.S. 349, 362, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) (denial of due process when death sentence imposed based in part on information defendant had no opportunity to deny or explain). The jury's death recommendation was tainted by its receipt of this evidence, and the resulting sentence of death must be vacated.

ISSUE III

THE COURT BELOW ERRED IN PERMITTING THE STATE TO INJECT IRRELEVANT AND PREJUDICIAL MATTERS INTO THE PROCEEDINGS BELOW, INCLUDING EVIDENCE OF APPELLANT'S STATEMENTS FOLLOWING HIS ARREST FOR ROBBERY IN OREGON WHICH WERE OBTAINED IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS.

In Issue II of his brief, Appellant has discussed the inadmissibility of certain hearsay evidence that was adduced at Appellant's new penalty phase. This issue deals with the State's injection into the proceedings of other improper matters, by way of argument and evidence.

During the prosecutor's opening statement to the jury, he was describing the manner in which Karen Nieradka allegedly was killed, and said (R778):

> So he [Appellant] took her [Nieradka] into the old hotel. And he wanted to have sex with her, and she refused. He became angry. He became so angry that he put his hands around her throat, and squeezed and squeezed and squeezed, until Karen Nieradka--

At that point, counsel for Appellant objected that the prosecutor was appealing to the emotions of the jury and was attempting to argue two inapplicable aggravating circumstances, especially heinous, atrocious, or cruel, and cold, calculated and premeditated. (R778-779) Counsel asked for a cautionary instruction to be given to the jury, but the court overruled the objection. (R779) The prosecutor then continued his argument in the same vein (R780):

> Strangulation takes time. You don't pull a trigger and they die. You don't stab them in the heart and they die. Strangulation takes

> time. And manual strangulation takes putting the hands on the throat and pressing until the life is gone. And that's what he did in this case. He strangled her to death.

This argument did not pertain to any of the aggravators applicable to this case. It appears, as Appellant's attorney argued, that the prosecutor was attempting to argue HAC and/or CCP, but in Appellant's previous appeal, this Court found these factors inapplicable under the facts of this case, Rhodes v. State, 547 So. 2d 1201, 1207 (Fla. 1989), and the prosecutor did not attempt to have the jury instructed on them during the charge conference below. (R1112-1120) The irrelevant argument could only have been an improper attempt to inflame the jury and prejudice them against Appellant, and the trial court should have take corrective action after the argument occurred.

The other matters involved in this issue took place when improper evidence was admitted during the testimony of Gary Wright, the former police officer for the City of Coquille, Oregon, who described an armed robbery that occurred at Jean's Food Center in that city back in 1973, for which Appellant was prosecuted. The prosecutor below asked Wright whether he was able to determine what Appellant had done prior to committing the robbery, "how he obtained the weapon, things like that?" (R799) Wright answered, "Yes," whereupon there was an objection by defense counsel to the relevancy of this line of questioning, as it was an attempt by the State to prove the cold, calculated and premeditated aggravating circumstance, which this Court had already found to be inapplicable in its opinion in this case. (R799-801)

Wright went on to testify that Appellant had recruited a 16 year old boy to drive a vehicle, which they had borrowed that morning, during the robbery. (R801-802) The boy was supposed to get 50 percent of the proceeds. (R802) He had taken a .25 automatic that was used in the robbery from his mother's house, as well as six rounds of ammunition, and a wig that Appellant wore during the robbery. (R802) En route to the store, Appellant and his cohort test-fired the gun to make sure that it worked, and that the ammunition was good. (R802)

The testimony in question appears to have been an attempt to establish CCP as it related to the Oregon robbery; no other reason for eliciting it is evident. However, aggravating circumstances that might be applicable to some collateral offense cannot be used in aggravation of the crime for which the defendant is being sentenced. See Lucas v. State, 376 So. 2d 1149 (Fla. 1979) (sentencing court's consideration of heinous and atrocious nature of attempted murders that occurred contemporaneously with murder for which appellant was being sentenced constituted improper consideration of non-statutory aggravating factor); Perry v. State, 522 So. 2d 817 (Fla. 1988) (premeditation and planning that went into another felony that the defendant committed at the same time he committed the murder for which he was being sentenced could not be transferred to the murder for purposes of CCP); Gorham v. State, 454 So. 2d 556 (Fla. 1984) (same). Furthermore, while the State is permitted to introduce some of the details surrounding a conviction for a prior violent felony in a capital sentencing proceeding, this

Court recognized in Appellant's previous appeal that such testimony is subject to certain limits. Rhodes, 547 So. 2d at 1204-1205. The State ventured beyond reasonable limits when it introduced evidence regarding the degree of planning that went into a robbery that occurred almost two decades before Appellant was sentenced for the Nieradka homicide. Such detailing of a collateral offense for which sentence has already been imposed invites punishment for it, a double jeopardy violation. Cf. United Stated v. Halper, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989) (although sanction denominated 'civil,' when it could only be punishment for offense already punished, sanction violated double jeopardy; use of details invites jury to punish prior offense); Graham v. West Virginia, 224 U.S. 616, 32 S. Ct. 583, 586, 56 L. Ed. 917 (1912) (approving a habitualization statute, but noting it limited evidence to facts or prior offense and offender's identity, not reopening questions of guilt, unlike introducing details).

In addition, the State should not have been permitted to use Appellant's own statements to the police that he made after his arrest for the Oregon robbery. The court and counsel took up the question of the admissibility of Appellant's statements out of the presence of the jury. (R804-818) After some initial confusion regarding whether Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), was applicable in 1973 when the statements were made (R804), the testimony of Gary Wright was proffered as to the circumstances surrounding Appellant's statements. (R805-814)

Wright testified that they "had Miranda in 1973," and he read Appellant his rights from a card on November 20. (R805-806) Appellant did not waive his right on that date; [h]e did not desire to talk," and wanted a lawyer. (R806,813) The following day, Appellant refused to talk and asked for a lawyer, whereupon Wright "quit questioning him." (R811,183) However, on the 21st, Appellant initiated a conversation as he and Wright were returning to jail. (R811-813) Appellant made mention of being in a mental institution in California and said that he was going to use that as a defense to avoid prosecution for armed robbery, but that he really was not crazy. (R811) Wright "mentioned crazy look [sic] a fox, and he said yeah." (R811) On November 23, Appellant sent a note stating that he wanted to give a complete statement in exchange for a promise of psychiatric help. (R807) Wright did not make Appellant any promises of psychiatric help, but took a taped statement in which Appellant confessed to the robbery at Jean's Market. (R806-808) Wright reminded Appellant of his Miranda rights by asking him "if he had remembered the Miranda rights I had read to him. And he indicated that he had." (R807)

Appellant objected to the statements as being violative of Miranda, and objected on relevancy grounds as well. (R811-812,814-815) However, the court ruled that "the statements given by the Defendant were given knowingly, freely, voluntarily after being made aware of his Miranda rights and after he voluntarily waived those rights." (R815-816) The court further found that Appellant's statements were "admissible as relevant to the issue of his mental

capacity, mental state and the nature and motive, planning, preparation of the crime which is being put forward as part of the aggravating circumstances." (R816) The court permitted Appellant to have a standing objection to the statements. (R818) Wright then testified in the presence of the jury about the statements Appellant made on November 21, 1973 when Wight was returning Appellant to jail following court proceedings (the "crazy like a fox" episode), as well as the statements Appellant made on tape on November 23. (R819-822) During the taped statement, Appellant discussed planning the robbery with Chuck Woolford and preparing for it, as well as details of how the robbery was executed, and what he and Woolford did afterward. (R820-821) When Wright asked Appellant what was going through his mind at the time of the robbery, Appellant said that he was not nervous or scared, that he kind of got a high out of it. (R821-822) Wright testified, "I think his words were kind of gets you up." (R822) Wright asked Appellant during the interview what he would have done if a police officer had come upon the scene. (R822) Appellant answered that "it would depend on the situation, but that he would defend himself." (R822)

Appellant would first note that the trial court's remarks that Appellant's statements were relevant to the "nature and motive, planning, preparation of the crime which is being put forward as part of the aggravating circumstances" lend further support to the notion that the State was attempting to prove a non-statutory aggravating factor, namely, the cold, calculated, and premeditated nature of the Oregon robbery, as discussed above. With regard to

whatever relevance the testimony elicited may have had to Appellant's "mental capacity, mental state," Appellant had not yet put his mental state into issue at the time Wright testified as the first State witness, and so any rebuttal evidence that the State was attempting to present was premature, to say the least, and irrelevant to the issues before the court and the jury at that time.

Before Appellant's statements could be admitted, the State was required to prove that they were made freely and voluntarily. Lego v. Twomey, 404 U.S. 477, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972); Roman v. State, 475 So. 2d 1228 (Fla. 1985); Brewer v. State, 386 So. 2d 232 (Fla. 1980); Drake v. State, 441 So. 2d 1079 (Fla. 1983); Williams v. State, 441 So. 2d 653 (Fla. 3d DCA 1983); Fillinger v. State, 349 So. 2d 714 (Fla. 2d DCA 1977). The determination as to the voluntariness of a confession must be arrived at by examining the totality of the circumstances that surrounded its making. Haynes v. Washington, 373 U.S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963); Blackburn v. Alabama, 361 U.S. 199, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960); State v. Dixon, 348 So. 2d 333 (Fla. 2d DCA 1977); Roman.

To put Appellant's statements in the proper context, it must first be remembered that Appellant had an IQ of only 82, and had spent time in a California mental institution. (R811,1023)[11] See

---

[11] However, the testimony regarding Appellant's IQ had not come in at the time of the suppression hearing, and Appellant's mental history was developed much more fully in subsequent testimony.

Blackburn as it pertains to a suspect's mental condition affecting the voluntariness of his statements.

The United States and Florida Constitutions require that all questioning of an in-custody defendant cease where, as here, he asserts his right to counsel during custodial interrogation. Amends. V, VI, U.S. Const.; Art. I, Sec. 9, Fla. Const.; Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981); Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); Traylor v. State, 596 So. 2d 957 (Fla. 1992); Kyser v. State, 533 So. 2d 285 (Fla. 1988); Long v. State, 517 So. 2d 664 (Fla. 1987); Smith v. State, 492 So. 2d 1063 (Fla. 1986). No other form of questioning is permitted, unless the defendant voluntarily initiates further questioning about the subject of the offense. Ibid. Moreover, once a defendant asserts his right to counsel, there can be no valid waiver of his rights without the actual presence of counsel. Minnick v. Mississippi, ___U.S. ___, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990); Traylor v. State, 596 So. 2d 957 (Fla. 1992). In addition, the authorities are required to scrupulously honor any invocation by the defendant of his right to cut off questioning. Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975). These principles were violated in the instant case.

With regard to the November 21 statement, although Wright's testimony at the suppression hearing was not crystal clear, it does appear that Wright persisted in questioning Appellant on the 21st despite his invocation the day before of his rights to counsel and

to terminate questioning, because Wright testified that he "quit questioning him [Appellant]" when he refused to talk and asked for a lawyer. (R811,813) By continuing to question Appellant on the 21st, when he had already asked for a lawyer on the 20th and invoked his right to remain silent, Wright did not scrupulously honor Appellant's constitutional protections. Even if Appellant initiated the conversation with Wright as they were returning to jail, this did not justify Wright in asking the "crazy like a fox" question, particularly without rereading Appellant's rights to him. The November 21 statement was significant in the context of this case because it suggested that Appellant was inclined to use his background of being institutionalized to fabricate a defense, which undermined Appellant's attempts to establish mitigation.

As for the statements of November 23, again Wright did not reread Appellant his rights, although he asked Appellant if he remembered them. (R807) Although Appellant supposedly initiated the exchange with the police, his willingness to give a statement was <u>conditional</u>; Appellant wanted to give a complete statement <u>in exchange for a promise of psychiatric help</u>. (R807) Wright testified at the suppression hearing that he did not make any promises of psychiatric help. (R807) When the prosecutor asked, "Did you represent or tell him that prior to interviewing him?" Wright answered, "Yes, sir, it's on the statement." (R807) In fact, however, the transcript of the interview with Appellant, which was marked for identification below, but not admitted into evidence, does not bear out Wright's contention; nothing in the transcript

indicates that Wright told Appellant prior to the interview that Wright could not promise him psychiatric help. (R438)

Courts have long recognized the principle that a confession or statement that is extracted by an sort of threats or violence, or procured by any direct or implied promises, however slight, is inadmissible, because it may not have been voluntarily made. Bram v. United States, 168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 568 (1897); Haynes v. Washington, 373 U.S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963); Frazier v. State, 107 So. 2d 16 (Fla. 1958); Lawton v. State, 152 Fla. 821, 13 So. 2d 211 (Fla. 1943); Fillinger v. State, 349 So. 2d 714 (Fla. 2d DCA 1977); Hawthorne v. Sate, 377 So. 2d 780 (Fla. 1st DCA 1979); Foreman v. State, 400 So. 2d 1047 (Fla. 1st DCA 1981); Brokelbank v. State, 407 So. 2d 368 (Fla. 2d DCA 1981); State v. Kettering, 483 So. 2d 97 (Fla. 5th DCA 1986). In Bram the Supreme Court of the United States reasoned than any degree of influence that is exerted upon the accused will render his subsequent confession inadmissible, because the law cannot measure the force of the influence used or decide upon its effect on the mind of the prisoner. The Fourteenth Amendment requires the choice to confess to be the "voluntary product of a free and unconstrained will." Haynes, 10 L. Ed. 2d at 521. Put another way, any incriminating statement that is to go before the jury must have been a "free will offering." Williams v. State, 188 So. 2d 320, 327 (Fla. 2d DCA 1966), modified, 198 So. 2d 21 (Fla. 1967). The State failed to establish below that Appellant's statements were the product of his own unfettered will. Rather, he was expecting

to receive a quid pro quo for his statements in the form of help with his mental problems. Therefore, Appellant's statements were not shown to have been freely and voluntarily made.

Furthermore, the statements in question had no relevance to any legitimate aggravating circumstances, and portion were highly prejudicial. Wright's testimony that Appellant said he was not nervous or scared during the robbery, but "kind of got a high out of it," and said that it "kind of gets you up," indicated to the jury that Appellant enjoyed criminal activity, thus portraying him in a very unfavorable light. Perhaps even more troubling is the court's admission of the answer Appellant gave when asked what he would have done if a police officer had come upon the scene during the robbery, that is, that "it would depend on the situation, but that he would defend himself." (R822) As defense counsel below pointed out, this involved a matter of pure speculation. (R809-810) In White v. State, 403 So. 2d 331, 337 (Fla. 1981), this Court observed that ". . . a person may not be condemned for what might have occurred. The attempt to predict future conduct cannot be used as a basis to sustain an aggravating circumstance. [Citation omitted.]" The implication in the statement that Appellant would have killed any police officer who arrived is the type of highly prejudicial evidence which this Court has condemned. Derrick v. State, 581 So. 2d 31 (Fla. 1991); see also Teffeteller v. State, 439 So. 2d 840 (Fla. 1983); Grant v. State, 194 So. 2d 612 (Fla. 1967).

One final example of irrelevant, highly prejudicial testimony occurred during redirect of Wright when the prosecutor was asking about his knowledge of Appellant's past. Wright said that he knew that Appellant had "been in mental institutions, in jails, he had been arrested on numerous occasions." (R830) The prosecutor then asked, "Been in trouble with the law a lot?" (R830) Wright answered, "Yes, sir, and that he--[,]" whereupon defense counsel objected on relevancy grounds, and requested that the jury be instructed to disregard Appellant's prior arrests. (R830-831) The court overruled the objection, but told the prosecutor not to "go any further with this." (R831)

> Evidence of collateral crimes, wrongs, or acts committed by the defendant is admissible if it is relevant to a material fact in issue; such evidence is not admissible where its sole relevance is to prove the character or propensity of the accused. §90.404(2)(a), Fla. Stat. (1987); Castro v. State, 547 So.2d 111, 114-15 (Fla. 1989); Williams v. State, 110 So.2d 654 (Fla.), cert.denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959).

Czubak v. State, 570 So.2d 925, 928 (Fla. 1990). Clearly, Wright's testimony was not relevant to any material issue in this case; that Appellant had been "arrested on numerous occasions" and "[b]een in trouble with the law a lot" did not relate to any of the aggravating circumstances set forth in section 921.141(5), Florida Statutes (1991).

In Dixon v. State, 426 So. 2d 1258, 1259 (Fla. 2d DCA 1983), the court wrote that "[t]he admission of evidence of an accused's prior arrests is ordinarily deemed so prejudicial that it automatically requires reversal. . . ." Similarly, in Nickels v. State, 90

Fla. 659, 106 So. 479, 488 (Fla. 1925), this Court stated that it is generally "harmful error to admit evidence of other or collateral crimes independent of and unconnected with the crime for which the defendant is on trial." And more recently the Court has stated that erroneous admission of irrelevant collateral crimes evidence "is presumed harmful because of the danger that the jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Straight v. State, 397 So. 2d 903, 908 (Fla. 1981). Accord: Peek v. State, 488 So. 2d 52, 56 (Fla. 1986).

The improper argument and evidence which has been discussed above, taken as a whole, hopelessly tainted the jury's penalty recommendation herein. Appellant's sentence of death, predicated in part on the tainted recommendation, is not sufficiently reliable to stand without violating the principles embodied in the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States, and Article I, Sections 2, 9, 16, 17, and 22 of the Constitution of the State of Florida.

ISSUE IV

THE DEATH RECOMMENDATION HEREIN IS UNRELIABLE BECAUSE APPELLANT'S JURY WAS MISLED REGARDING ITS ROLE IN THE SENTENCING PROCESS, AND WAS PERMITTED TO CONSIDER A NON-STATUTORY AGGRAVATING CIRCUMSTANCE.

A. Caldwell Violation

During voir dire examination of the prospective jurors for Appellant's new penalty trial, the prosecutor below attempted to

dispel the concerns expressed by some jurors about having to return a life or death recommendation (R591-592):

> MR. MOONEY [Prosecutor]: Folks, let's get one thing clear right here. It's not you, it's not me, it's not Judge Baird. Really, he's the one that ultimately passes sentence. You're here to decide whether or not that man over there, James Rhodes, under our law has demonstrated a forfeiture of his life. Okay. Don't put this burden on yourself that says I'm responsible. You're not responsible for what he did. He's responsible for his own actions. That's what you're here to decide. So you know, no one's going to come to you and say, you know, hey, you're the one, you're not the one. You're the conscience of our community. You're the people who have to decide in your own hearts under the law. Can you say in your mind by what he's done in his life, he's forfeited his right to exist. So I encourage you all not -- it is a heavy burden; we've accepted that. But it's not so bad that you're the one responsible. You didn't do this. He did. He's responsible for his own actions. So I ask you all to not just throw the whole world on your shoulders.
>
> So knowing that, that you're not the one, and you shouldn't feel responsible for what he did, where would you put yourself, at a five, that all you want to hear is what it is, and depending on the facts and the law you go which way or the other -- one way or the other?

In these remarks, the State's representative improperly diminished the jurors' role in the sentencing process by suggesting that responsibility for Appellant's fate lay elsewhere, and not with the jury.[12]

---

[12] At the beginning of the voir dire process, the court below instructed the prospective jurors that the verdict of the penalty phase jury was "advisory in nature, and it's not binding on the Court. The jury recommendation is given great weight and deference when the Court determines which punishment is appropriate." (R536) In his final instructions to Appellant's jury, the court said, (continued...)

In Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), the United States Supreme Court held that the Eighth Amendment requirement of heightened reliability in capital sentencing is impermissibly compromised where the jury has been led to believe that the responsibility for determining the propriety of a death sentence rested elsewhere. Noting that its capital punishment decisions were premised on the assumption that a capital sentencing jury is aware of its "truly awesome responsibility," the Court wrote:

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

Caldwell v. Mississippi, supra (105 S. Ct. at 2641-42).

In Mann v. Dugger, 844 F. 2d 1446 (11th Cir. 1988), the Eleventh Circuit determined that the Caldwell principle is applicable to the Florida sentencing scheme, notwithstanding the potential availability of the "override" provision of the statute, which, under certain carefully limited circumstances, permits (but never requires) the trial court to reject the jury's recommended sentence. See Tedder v. State, 322 So. 2d 908 (Fla. 1975), and its numerous progeny. Under Florida law, the jury's recommendation "is entitled to great weight, reflecting as it does the conscience of

---

[12](...continued)
"Your advisory sentence is entitled by law and will be given great weight in determining what sentence to impose. It is only under rare circumstances that this Court could impose a sentence other than what you recommend. As you've been told, however, the final decision as to what punishment shall be imposed is the responsibility of the judge." (R1158)

the community, and should not be overruled unless no reasonable basis exists for the opinion." Richardson v. State, 437 So. 2d 1091, 1095 (Fla. 1983); see e.g. McCampbell v. State, 421 So. 2d 1072 (Fla. 1982); Tedder v. State, supra. Misleading the jury into minimizing their sense of responsibility for the death sentence makes the sentence unreliable. See Mann v. Dugger.

The vital role of Florida juries in the capital sentencing process has been given renewed emphasis in several recent cases. For example, in Espinosa v. Florida, 505 U.S. ___, 112 S. Ct. 2926, 120 L. Ed. 2d 854, 859 (1992), the Supreme Court recognized that "Florida has essentially split the [sentencing] weighing process in two" between the judge and the jury. And in Johnson v. State, 18 Fla. L. Weekly S 90 (Fla. Jan. 29, 1993), this Court noted that "the Florida penalty-phase jury is a co-sentencer under Florida law [citations omitted]." 18 Fla. L. Weekly at S 90. The can now be no doubt that Caldwell is fully applicable in Florida, and that the parties and courts involved in capital litigation must not say anything that might take away from the jurors' obligation to take seriously their part in the determination as to what sentence the defendant will receive.

B. Non-statutory Aggravator

In his oral instructions to the Appellant's jury, the court below submitted three aggravating circumstances for the jury's consideration. (R1159) The second aggravator that the jury was permitted to consider was that Appellant had "been previously convicted of a felony involving the use or threat of use of a firearm,

the crimes of Armed Robbery, Assault, Attempted Robbery, and Battery with a Deadly Weapon are felonies involving the use or threat of use of violence to another person." (R1159)

The aggravating circumstances enumerated in section 921.141-(5), Florida Statutes (1991) are exclusive, and no other aggravating factors may be considered by the jury or the court in determining what punishment is appropriate. Grossman v. State, 525 So. 2d 833 (Fla. 1988); Miller v. State, 373 So. 2d 882 (Fla. 1979); Elledge v. State, 346 So. 2d 998 (Fla. 1977). Conviction of a felony involving the use or threat of use of a firearm is not one of the aggravating circumstances listed in the statute, and this non-statutory aggravating circumstance should not have been submitted to the jury. The court further confused the issue by telling the jury that armed robbery, assault, attempted robbery, and battery with a deadly weapon are felonies involving the use or threat of use of violence to another person. Of course, conviction of a felony involving the use or threat of violence is an aggravating circumstance pursuant to section 921.141(5)(b), Florida Statutes (1991), but this aggravator was not properly submitted to the jury.

Judge Baird recognized his error before the jury retired to deliberate its recommendation, and the written jury instructions that were sent back with the jury refer to the correct aggravating circumstance, that is, previous conviction of a felony involving the use or threat of use of violence. (R444,1173-1175) However, the court did not orally correct the mistake, but merely told the

jurors that if they had any questions about the instructions as the court had given them, they should "feel free to rely on the written copy of the instructions" with which each juror would be provided. (R1175) This was not even sufficient to put the jurors on notice that there was any problem with the instructions as given, let alone to remedy the problem; nothing in the record indicates that the jurors even read the instructions.

The Supreme Court emphasized the importance of suitable jury instructions in Gregg v. Georgia, 428 U. S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (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. [Footnote and citation omitted.] When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

49 L. Ed. 2d 885-886. Appellant's jury was not "carefully and adequately guided" in its deliberations, but was given written instructions which conflicted with the oral instructions, and the oral instructions improperly allowed the jury to consider an illegal aggravating circumstance.

In cases such as Omelus v. State, 584 So. 2d 563 (Fla. 1991) and Jones v. State, 569 So. 2d 1234 (Fla. 1990), this Court has vacated death sentences where the penalty phase jury was permitted

to consider inapplicable aggravating factors. Appellant's death sentence here must likewise be overturned, where the court submitted to the jury an aggravating circumstance that was outside the roster of permissible aggravators approved by the legislature.

C. Conclusion

A Florida capital defendant is entitled by law to a meaningful jury recommendation [see Richardson v. State, supra, at 1095)], and in cases where a death sentence was predicated on a tainted jury death recommendation, this Court has not hesitated to reverse for a completely new penalty proceeding. See e.g., Patten v. State, 467 So. 2d 975 (Fla. 1985) (improper "Allen charge" given to deadlocked penalty jury); Robinson v. State, 487 So. 2d 1040 (Fla. 1986); Toole v. State, 479 So. 2d 731 (Fla. 1985) (inadequate jury instructions on penalty phase); Dragovich v. State, 492 So. 2d 350 (Fla. 1986) (improper cross-examination in penalty phase); Teffeteller v. State, 439 So. 2d 840 (Fla. 1983) (prosecutorial misconduct in penalty phase closing argument); Trawick v. State, 473 So. 2d 1235 (Fla. 1985); Dougan v. State, 470 So. 2d 697 (Fla. 1985) (improper evidence and argument); Valle v. State, 502 So. 2d 1225 (Fla. 1987) (improper exclusion of evidence offered in mitigation).

Although Appellant's trial attorney did not lodge an objection to the matters raised herein, Appellant's jury was fundamentally misled as to its role in the sentencing process by the prosecutor's voir dire examination, and fundamentally misled in its consideration of aggravating circumstances by the erroneous and confusing

instructions given by the court below. Under these circumstances, the sentence of death predicated upon the tainted jury recommendation is not sufficiently reliable, and cannot stand without violating Appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States, and Article I, Sections 2, 9, 16, 17 and 22 of the Constitution of the State of Florida.

ISSUE V

THE COURT BELOW ERRED IN INSTRUCTING THE JURY ON, AND FINDING IN AGGRAVATION, THAT THE CAPITAL FELONY WAS COMMITTED WHILE APPELLANT WAS ENGAGED IN COMMITTING A SEXUAL BATTERY OR ATTEMPTED SEXUAL BATTERY.

One of the aggravating circumstances that Appellant's jury was permitted to consider was that the crime for which Appellant was to be sentenced was committed while he was engaged in the commission, or an attempt to commit, the crime of sexual battery. (R1159-1160) And in his sentencing order, the court below found in aggravation that the capital felony was committed while Appellant was engaged in the commission of an attempted sexual battery, as follows (R489, 1193-1194):

> 3. This capital felony was committed while the Defendant was engaged in the commission of an attempted sexual battery. This aggravating circumstance was established beyond a reasonable doubt.
>
> During the Guilt Phase of this Defendant's trial, as well as the two Penalty Phases, evidence was introduced establishing that the victim's body was nude when discovered, with only her bra around her neck. In addition, virtually all of the varied stories told by

> the Defendant in his statements to investigators suggest some form of sexual activity in connection with her death. Although the condition of the victim's body was too deteriorated to determine if sexual activity had occurred, this Court concurs with the Florida Supreme Court in finding that "there was sufficient evidence of attempted sexual battery to support this aggravating factor". Rhodes v. State, 547 So.2d 1201 (Fla. 1989).

The evidence presented below was insufficient to justify submitting the aggravator in question to the jury, and did not support the trial court's conclusion that it had been established beyond a reasonable doubt. Appellant was not charged with either sexual battery or attempted sexual battery. (R16-17) The medical examiner testified that she could not determine whether Karen Nieradka had engaged in sexual intercourse prior to her death, because of the length of time that she had been dead (R947-948), and there was no physical evidence to indicate that any type of sexual activity had taken place. The fact that Nieradka's body was found clad only in a brassiere was probative of nothing under the facts and circumstances of this case. The State's theory was that Nieradka had been killed at the old Sunset Hotel, which was then torn down and the debris transported to the Wyoming Antelope Gun Club to form part of the berm that was being constructed there. The fact that numerous bones in the body were broken post-mortem showed that the body experienced substantial trauma after death, presumably when the Sunset Hotel was demolished and the debris transported to the gun club, which could easily account for the removal of the clothing. [The medical examiner testified that she did not know whether Nieradka was wearing clothes when she died; Dr. Wood only

knew how the body was found. (R949)] Although some of the statements Appellant made to the detectives did suggest that some form of sexual activity might have taken place, Appellant never told the detectives that he was the person who engaged in sexual activity with Nieradka; in fact, he specifically denied raping her. (R909) Furthermore, not all the stories he told indicated that whatever took place was non-consensual. For example, one of the early versions Appellant recounted to Detective Porter was that Crazy Angel and Karen Nieradka entered the Sunset Hotel for the presumed purpose of having consensual sex. (R890-892,895-896) Another story was that Nieradka willingly entered the hotel with Kermit Villanueva while Appellant led the way. (R907) And, Michael Allen's testimony indicated that Appellant and Nieradka had been "partying" and had "gotten it on," and that the homicide occurred only when she thereafter became angry. (PR2080-2081) It should also be noted that in at least two of the stories he told to Detective Porter, Appellant portrayed Nieradka as not resisting. When Crazy Angel had his hands around Nieradka's throat and was strangling her, she was not fighting, but was "laying there very peaceful" (R903-904), and when Kermit Villanueva attacked her, the "weird thing" was that Nieradka did not resist or struggle. (R908) These statements lend support to the conclusion that either what took place was with Nieradka's consent, or perhaps, that the non-resistance was due to the fact that she had already expired when any sexual activity occurred, which would rule out a finding of

sexual battery. Owen v. State, 560 So. 2d 207 (Fla. 1990); Jones v. State, 569 So. 2d 1234 (Fla. 1990).

An aggravating circumstance may not be weighed in imposing a death sentence unless it is proven beyond a reasonable doubt. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973); Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992). Where, as here, the evidence of an aggravating factor is circumstantial, it cannot satisfy the burden of proof unless it is "inconsistent with any reasonable hypothesis which might negate the aggravating factor." Geralds, 601 So. 2d at 1163. See also Eutzy v. State, 458 So. 2d 755, 757-758 (Fla. 1984) and Peavy v. State, 442 So. 2d 200, 202 (Fla. 1983). Here, reasonable hypotheses exist that no sexual activity took place at all, or that any such activity was consensual, or that any non-consensual assault was committed by someone other than Appellant, or that any sexual activity occurred post-mortem and thus cannot be considered in aggravation.

In addition to the lack of evidence to support the trial court's finding of the section 921.141(5)(d) aggravating circumstance, the court's reliance upon this Court's finding in Appellant's previous appeal that "there was sufficient evidence of attempted sexual battery to support this aggravating factor" indicates that the trial court misunderstood the nature of a resentencing proceeding. This Court has characterized resentencing as "a completely new proceeding," Preston v. State, 607 So. 2d 404, 408 (Fla. 1992), and "a totally new proceeding" Hall v. State, 18 Fla. L. Weekly S 63, S 65 (Fla. Jan. 14, 1993), at which the "clean

slate" rule applies. Preston, 607 So. 2d at 408. The trial court should not have used this Court's conclusion about the aggravating factor in question from Appellant's previous appeal to support his finding in this new proceeding, particularly when the evidence presented the last time around may well have been different from what was presented this time. The requirement that the trial court independently evaluate the aggravating and mitigating circumstances is one of the fundamental requirements of Florida's capital sentencing statute. Dixon, 283 So. 2d at 8; Ross v. State, 386 So. 2d 1191, 1197 1198 (Fla. 1980). The court below, however, erroneously relied upon this Court's opinion in Rhodes I to support his finding, in derogation of this principle.

Because Appellant's jury was instructed on an inapplicable aggravating circumstance, its death recommendation is tainted. See Omelus v. State, 584 So. 2d 563 (Fla. 1991); Jones. Appellant's sentence of death, predicated upon a tainted jury recommendation and an inapplicable aggravating circumstance as found by the sentencing court, is not sufficiently reliable to pass constitutional muster under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 2, 9, 16, 17 and 22 of the Constitution of the State of Florida.

ISSUE VI

THE COURT BELOW ERRED IN FAILING TO AFFORD APPELLANT AN OPPORTUNITY TO BE HEARD IN PERSON PRIOR TO IMPOSING SENTENCE, AND IN PREDICATING APPELLANT'S SENTENCE UPON INAPPROPRIATE CONSIDERATIONS, WITHOUT SUFFICIENT AND LEGALLY CORRECT ANALYSIS.

In Spencer v. State, 18 Fla. L. Weekly S 162, 163 (Fla. March 18, 1993), this Court recently outlined the procedure that needs to be followed by trial courts in capital cases before sentence is imposed, as follows:

> First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. Second, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then, in accordance with section 921.141, Florida Statutes (1983), the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order.

This procedure was not followed in the instant case, as the court below never afforded Appellant the opportunity to be heard personally regarding what sentence he should receive. A brief hearing was held before Judge Baird on March 17, 1992, at which the court expressed his understanding that Appellant had no other witnesses, evidence, or testimony to present, and asked if this were true, to which Appellant responded that it was. (R1187) However, the court did not ask Appellant if he had anything he wished to say on his own behalf relative to his sentence. At the court proceeding held on March 20, 1992, the court merely read his already-prepared sentencing order into the record, without any preliminaries. (R1190-1199) In accordance with Spencer and principles of fairness and

due process, Appellant should have been asked if he wished to address the court before the court determined what sentence to impose.

Furthermore, the court's sentencing order is defective in several particulars. [13] The sentencing order in a capital case must reflect that a determination as to which aggravating and mitigating circumstances apply under the facts of a particular case is the result of "a reasoned judgment" by the trial court. State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973). Florida law requires the judge to lay out the written reasons for finding aggravating and mitigating factors, then to personally weigh each one in order to arrive at a reasoned judgment as to the appropriate sentence to impose, and the record must be clear that the trial judge "fulfilled that responsibility." Lucas v. State, 417 So. 2d 250, 251 (Fla. 1982). The written findings do not serve merely to memorialize the trial court's decision, Van Royal v. State, 497 So. 2d 625, 628 (Fla. 1986), and the "trial judge's findings in regard to the death sentence should be of unmistakable clarity so that [this Court] can properly review them and not speculate as to what he found." Mann v. State, 420 So. 2d 578, 581 (Fla. 1982). The sentence prepared by the court below does not pass muster under these principles.

---

[13] Appellant has already discussed in Issue V in this brief the fact that the court should not have found in aggravation that the capital felony was committed while Appellant was engaged in the commission of an attempted sexual battery, and will not repeat that argument here, but incorporates it by reference.

In the second paragraph of his sentencing order, the court states that he "considered the findings of the Florida Supreme Court regarding aggravating and mitigating circumstances as the same are set out in its' [sic] previously cited opinion[,]" and states that he "considered and reviewed the evidence presented in the Guilt Phase of the trial held in August, 1985, before Judge Helen S. Hansel, as well as the evidence presented in the second Penalty Phase held in February, 1992." (R488,1191) The court should not have permitted himself to be influenced either by this Court's previous findings regarding the aggravating and mitigating factors, or by the evidence that was adduced during Appellant's trial in 1985. The resentencing below was a completely new proceeding at which the "clean slate" rule applied. Preston v. State, 607 So. 2d 404, 408 (Fla. 1992); Hall v. State, 18 Fla. L. Weekly S 63, 65 (Fla. Jan 14, 1993). One of the fundamental requirements of Florida's capital sentencing statute is that the trial court must independently evaluate the aggravating and mitigating circumstances. Dixon, 283 So. 2d at 8; Ross v. State, 386 So. 2d 1191, 1197-1198 (Fla. 1980). To the extent that the court below allowed this Court's assessment of the aggravation and mitigation in its previous opinion herein to affect his judgment, he did not fulfill the requirements of the statute. Furthermore, in Corbett v. State, 602 So. 2d 1240, 1244 (Fla. 1992), this Court required that a substitute judge (such as Judge Baird) who did not hear the evidence presented during penalty phase must conduct a new sentencing proceeding before a jury, emphasizing the need for both

the judge and jury to hear the same evidence that would be determinative of whether the defendant lived or died, rather than allowing the new judge to rely upon the "cold record" of prior proceedings. For the court below to have considered the cold record of the 1985 trial, evidence which the jury did not have the opportunity to consider, ran afoul of the principles expressed in Corbett.[14]

The trial court's discussion of what he calls "non statutory mitigating circumstances" is also flawed. The sentencing order discusses "extreme mental or emotional disturbance" and "extreme duress" under the category of non-statutory mitigators (R490,1196-1197), but both are clearly delineated as statutory mitigating circumstances in the capital sentencing statute. § 921.141(6)(b) and (e), Fla. Stat. (1991). And in his assessment of the section 921.141(6)(b) mitigating factor, the court applied an incorrect legal standard in stating that Appellant's impairment did "not rise to the level of extreme mental or emotional disturbance." (R490, 1197) In Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990), this Court stated as follows:

> Florida's capital sentencing statute does in fact require that emotional disturbance be "extreme." However, it clearly would be unconstitutional for the state to restrict the trial court's consideration solely to "extreme" emotional disturbances. Under the case

---

[14] In his finding in aggravation that the capital felony was committed while Appellant was engaged in the commission of an attempted sexual battery, the trial court specifically referred to evidence that was presented "[d]uring the Guilt Phase of this Defendant's trial, as well as the two Penalty Phases. . ." (R489,1193)

> law, any emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say. [Citations omitted.] Any other rule would render Florida's death penalty statute unconstitutional. [Citation omitted.]

The trial court's imposition of some arbitrary and undefined standard of extremity renders his rejection of the mitigating circumstance in question constitutionally infirm.

Near the end of his sentencing order the court below states "the conclusion of the jury, by a vote of ten (10) to two (2), that the mitigating circumstances were not outweighed by the aggravating circumstances." (R491,1198) If this is what the jury concluded, then they should have returned a life recommendation. The court apparently meant to say that the jury concluded that the aggravating circumstances were not outweighed by the mitigating circumstances, but this is another example of the lack of clarity that infects the sentencing order, as well as demonstrating a lack of care and attention to detail.

Finally, the court makes a finding that "the mitigating circumstances in this case do not outweigh the aggravating circumstances, and the murder of Karen Jeter Nieradka warrants the death penalty." (R491, 1198-1199) The court completely skipped the crucial first step in deciding whether the death penalty was appropriate for Appellant: he did not discuss whether the aggravating circumstances were sufficient in and of themselves to warrant the imposition of the ultimate sanction. § 921.141(3), Fla. Stat. (1991). This is significant, because the court seems to have shifted the burden to Appellant to establish sufficient mitigating

factors to overcome the aggravation without regard to whether the aggravation was enough to call for the death penalty. Furthermore, the court's conclusion that the mitigating circumstances did not outweigh the aggravating circumstances is not supported by any analysis whatsoever that might establish whether the court engaged in a rational weighing process before deciding what sentence to impose.

To uphold Appellant's death sentence on the basis of the order entered herein would deny Appellant his basic constitutional rights to due process of law and to be free from cruel and unusual punishments, as guaranteed by the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 9 and 17 of the Constitution of the State of Florida. Because the court below failed to make sufficient findings as required by section 921.141(3), Florida Statutes (1991), Appellant's death sentence must be vacated in favor of a sentence of life imprisonment.

ISSUE VII

THE TRIAL COURT ERRED IN SENTENCING RICHARD RHODES TO DEATH BECAUSE HIS SENTENCE IS DISPROPORTIONATE, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Eighth and Fourteenth Amendments require that capital punishment be imposed fairly, and with reasonable consistency, or not at all. Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S. Ct. 869, 71 L. Ed. 2d 1, 9 (1982). This Court's independent appellate review of death sentences is crucial to ensure that the death penalty is not imposed arbitrarily or irrationally. Parker v.

Dugger, 498 U.S. ___, 111 S. Ct. 731, 112 L. Ed. 2d 812, 826 (1991). This requires an individualized determination of the appropriate sentence on the basis of the character of the defendant and the circumstances of the offense. Id.

The death penalty is so different from other punishments "in its absolute renunciation of all that is embodied in our concept of humanity," Furman v. Georgia, 408 U.S. 238, 306, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Stewart, J., concurring), that application of the death penalty must be reserved for only the most aggravated and least mitigated of most serious crimes. DeAngelo v. State, 18 Fla. L. Weekly S 236 (Fla. April 8, 1993); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989); Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988); State v. Dixon, 283 So.2d 1, 7 (Fla. 1973). Appellant's cause does not qualify for the death penalty under these principles.

With regard to aggravation, only three aggravating factors were found by the court below, one of which, that the homicide was committed during an attempted sexual battery, should not have been found, as discussed in Issue V in this brief. Even if the aggravator was correctly found, the section 921.141(5)(d) aggravating circumstance is a particularly weak one, as it is inherent in every felony-murder prosecution, and so does little to set the crime apart from others that do not merit the ultimate sanction. This Court has implicitly recognized this in Rembert v. State, 445 So. 2d 337, 340-341 (Fla. 1984), wherein this Court reduced a death sentence to life imprisonment where the underlying felony was the

only aggravator, even though there were no mitigating circumstances and the jury recommended death. This Court has consistently reduced to life cases where the underlying felony is the only aggravating circumstance even though the jury recommended death. Proffitt v. State, 510 So. 2d 896 (Fla. 1987); Caruthers v. State, 485 So. 2d 496 (Fla. 1985); Menendez v. State, 419 So. 2d 312 (Fla. 1982).

As for the aggravating circumstance of under sentence of imprisonment, in Songer, 544 So. 2d at 1011, this Court characterized this factor as "almost total lack of aggravation." The Court also observed that the gravity of this circumstance was "somewhat diminished by the fact that Songer did not break out of prison but merely walked away from a work-release job." 544 So. 2d at 1011. Appellant did even less; he was merely still on parole at the time of the homicide.

The prior violent felony aggravator is entitled to little weight under the facts and circumstances of this case. There was some overlap with the "under sentence of imprisonment" factor, in that the trial court mentioned Appellant's 1979 Nevada conviction for battery with a deadly weapon and attempted robbery in connection with both. (R488-489,1192-1193) Furthermore, the felonies cited by the court were committed at least several years prior to the Nieradka homicide, and the latest was committed over 13 years before Appellant's resentencing; they were simply too old to provide any meaningful insight into Appellant's present character and fitness for a life sentence.

As for mitigation, the trial court recognized the presence of two statutory mitigating circumstances; Appellant's age at the time of the offense, and substantial impairment of Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. (R489-490,1194-1196) The court also found non-statutory mitigation in the fact that Appellant was abandoned by his parents and was never able to experience a normal family life, and in the fact that the "social welfare system of California was never able to adequately place the Defendant in a social environment that could address his needs as a child." (R490,1196-1197) With regard to the statutory mental mitigator the court found, he also found significance in the fact that Dr. Taylor, the defense expert witness, while of the opinion that Appellant was "severely emotionally disturbed . . . did not find that the Defendant was schizophrenic, as he had been diagnosed in California as a youth." (R490,1195) He noted that Dr. Taylor's opinion was "more consistent with the diagnosis of a personality disorder. . . " (R490,1195-1196) But whether Appellant's problems were diagnosed as "schizophrenia," or a "personality disorder," or something else really is of no moment; the labels are not important. What <u>is</u> important is that Appellant was scarred for life by his childhood of mental, physical, and sexual abuse, and abandonment by his mother and alcoholic father. Appellant came from the ultimate dysfunctional family, and never recovered from his early disastrous experiences. It is frankly extremely difficult for undersigned counsel fully to imagine the extreme trauma that Appel-

lant must have endured when he was subjected to such abuse and then ultimately rejected by his own parents, after which he was shunted from foster home to foster home to institution. His brother, James, who also had his share of problems as a result of his similar upbringing, afforded some insight into what it must have been like for Appellant when he described how he had to fight for his very survival from an early age. Although James and Appellant did not grow up together after they were abandoned, Appellant's experiences without his family were most likely similar to what James went through. Out of the hundreds of child abuse cases that Dr. Taylor had examined, Appellant was probably the most severely abused and neglected person that Taylor had ever come across. (R1026,1068,1071) The significance of Taylor's testimony that Appellant probably was not schizophrenic was not that Appellant was not severely disturbed, as the trial court seemed to indicate, but that Appellant did not receive the proper medication and treatment when he was in Napa State Hospital; he was being treated for one thing when his problem was something else. This fact is important when one evaluates the testimony of the State's rebuttal expert, Dr. Sidney Merin. While Merin acknowledged that there was no doubt that Appellant had "a very poor, very conflicted, very chaotic background," he assumed that Appellant would have gotten better during his stay in the hospital. Of course, this might not be true if, as Dr. Taylor indicated, Appellant was not on the right treatment regimen. Moreover, there was ample evidence that Appellant was far from cured when he emerged from Napa State. His brother

testified that he was worse when he came out; Appellant was less communicative than before, more withdrawn, and had trouble with interpersonal communications. (R969-970,993) Furthermore, Appellant's medical records showed that after his discharge from the hospital, he was readmitted on two subsequent occasions, in 1971 and 1972, as a result of experiencing auditory hallucinations telling him to kill himself. (R440)

A troubled background and family life has been recognized by this Court as mitigating in many cases. For example, Neary v. State, 384 So. 2d 881 (Fla. 1980); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982); Livingston v. State, 565 So. 2d 1288 (Fla. 1988). What this Court observed in Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990) upon vacating a death sentence that was imposed in accordance with a death recommendation is particularly applicable to Appellant's cause:

> The fact that a defendant suffered through more than a decade of psychological and physical abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary.

That Appellant's abuse finally came to an end and he was placed in a state hospital does not mean that his problems came to an end as well. As Dr. Taylor testified, Appellant was a severely emotionally disturbed child who continued to be emotionally disturbed as an adult; he never really had a chance. (R1018,1025)

Finally, a few words need to be said about the jury's death recommendation. For reasons that have already been discussed in this brief, and which are incorporated herein by reference, the jury's recommendation is tainted and unreliable. Yet despite having heard inadmissible evidence, as well as improper argument and instructions, two members of the jury voted for a life sentence. More importantly, perhaps, additional members of the jury would have voted for a sentence less than death if they had the option of voting for a sentence of 99 years plus one, with no possibility of parole; this is evident from the question the jury propounded to the trial court. (R452,1177) It is entirely possible that a majority of the jurors, maybe even all of them, would have voted to spare Appellant's life if they were able to have some assurance that he would spend it in prison; an unknown number of jurors obviously felt that Appellant's life was worth sparing, and that is something that this Court must take into serious consideration.

Proportionality analysis is not based on the number of aggravating and mitigating factors, but on the quality of the circumstances presented. See Fitzpatrick and Livingston. This Court's analysis of Appellant's cause must lead it to conclude that the quality of Appellant's evidence in mitigation is much more compelling than what was presented in aggravation. A life sentence must be the result.

ISSUE VIII

ONE OF THE TWO WRITTEN JUDGMENTS FILED HEREIN IS EXTRANEOUS AND MUST BE STRICKEN.

The record herein contains two written judgments for first degree murder, one dated September 12, 1985 (R60-61), and the other dated March 20, 1992. (R484-485)

There was only one homicide committed in the instant case, and therefore only one judgment should have been filed against Appellant. See Houser v. State, 474 So. 2d 1193 (Fla. 1985); Goss v. State, 398 So. 2d 998 (Fla. 5th DCA 1981). Although Appellant's death sentence was vacated in Rhodes v. State, 547 So. 2d 1201 (Fla. 1989) (R71-84), his conviction was left undisturbed. There was no reason to adjudicate Appellant guilty a second time for the Karen Nieradka homicide. The judgment dated March 20, 1992 is extraneous and must be stricken.

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, your Appellant, Richard Wallace Rhodes, prays this Honorable Court for relief as follows:

(1) Vacation of his sentence of death and remand for imposition of a life sentence; or (2) Vacation of his sentence of death and remand for a new penalty trial before a jury impaneled for that purpose; or (3) Vacation of his sentence of death and remand for a new sentencing hearing before the court only.

Appellant additionally asks for such other and further relief as this Court may deem appropriate.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 30th day of April, 1993.

Respectfully submitted,

Robert F. Moeller

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(813) 534-4200

ROBERT F. MOELLER
Assistant Public Defender
Florida Bar Number 234176
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

RFM/ddv