IN THE SUPREME COURT OF FLORIDA

ANTHONY WASHINGTON, :

Appellant, :

vs. : Case No. 80,537

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

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STATEMENT OF THE CASE

On April 12, 1990, a Pinellas County grand jury returned a three-count indictment against Appellant, Anthony Neal Washington. (R 1-8) The first count alleged the premeditated murder of Alice Berdat. (R 1)[1] Count two charged that Appellant burglarized Berdat's dwelling and committed a battery upon her. (R 1) The third count alleged that Appellant committed a sexual battery upon Berdat using physical force likely to cause serious personal injury. (R 1) All three offenses allegedly occurred on August 17, 1989. (R 1)

On July 25, 1990, the State filed a notice that it would be seeking an enhanced penalty against Appellant pursuant to section 775.084 of the Florida Statutes; a copy of said notice was served on Appellant on July 29, 1990. (R 152-153)

Among the pretrial motions Appellant filed was a motion to suppress blood drawn from Appellant on September 5, 1989, as well as hair samples taken from him at the same time, and any evidence or testimony derived therefrom, which the Honorable Brandt C. Downey, III, heard on November 1, 1991, and denied. (R 602-604, 616, 1816-1879).[2]

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[1] The surname of the victim herein is spelled two ways in the record on appeal: B-e-r-d-a-t and B-e-r-d-o-t. The former spelling is used more often than the latter, and will be employed by Appellant in this brief.

[2] The motion was renewed several times during Appellant's trial. (R 2449-2450, 2549, 2552-2553, 2560-2561)

Appellant also filed several motions seeking to compel the State to provide him with additional discovery regarding DNA evidence which the prosecution intended to present at Appellant's trial. (R 827-829, 949-951, 1183-1185, 1193-1255) The court below did require the State to provide Appellant with some of the information he sought, but not all of it, and denied Appellant's motion to compel the deposition of FBI Technician Anne Baumstark, who actually performed the DNA analysis on evidence submitted in this case. (R 863-864, 1016, 1190, 1279) Appellant then filed a motion in limine seeking to preclude the State from introducing at trial evidence regarding the DNA analysis or any conclusions therefrom (R 1281-1284), but the motion was ultimately denied, and the evidence admitted. (R 2005-2015, 2455-2523)[3]

Another pretrial motion Appellant filed was a Motion to Suppress Out-of-Court Identification and Any Attempted In-Court Identification of Defendant by Witness Robert Leacock, which the court heard on the morning of the first day of Appellant's trial, and denied. (R 1065-1067, 1988-2004)

Appellant's jury trial took place on July 14-17, 1992, with the Honorable Susan F. Schaeffer presiding. (R 1979-2754) During jury selection, the defense objected to the State's peremptory challenge to a black venireman. (R 2215-2217) The court overruled the objection after the prosecutor gave his reason for excluding the juror in question (R 2215-2217) After all strikes had been

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[3] During Appellant's trial, a defense subpoena was sent to Baumstark at the FBI laboratory in Washington, D.C., but the Bureau refused to honor the subpoena. (R 1527-1528)

exercised, and prior to the jurors being sworn, defense counsel renewed his objection and moved for a mistrial, to no avail. (R 2221-2223)[4]

On July 16, 1992, Appellant's jury returned verdicts finding him guilty as charged on all three counts of the indictment. (R 1505-1507,2702)

Penalty phase was held on July 17, 1992. (R 1670-1786, 2738-2754) After receiving additional evidence from the State and from the defense, Appellant's jury recommended that Appellant be sentenced to life imprisonment. (R 1510, 2749-2750)

On August 6, 1992, Appellant filed a written memorandum addressing the sentence that should be imposed upon him (R 1530-1536), followed by a supplemental memorandum on September 4, 1992. (R 1553-1566) The State also filed an original and a supplemental sentencing memorandum, on September 1 and 4, 1992. (R 1544-1552, 1567-1571)

At a hearing held on August 14, 1992, the State presented documents to support its request that Appellant be treated as an habitual offender with regard to his non-capital offenses (R 1787-1803, 1881-1905), and the court entertained arguments from counsel for the State and for the defense pertaining to what sentence Appellant should receive for the first degree murder. (R 1905-1916)

On September 4, 1992, the court denied Appellant's motion for new trial, which was filed on July 22, 1992, and imposed sentences.

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[4] The motion for mistrial was renewed after the State rested its case. (R 2558-2559)

(R 1523-1525, 1918-1977) On the burglary and sexual battery counts, the court sentenced Appellant as an habitual violent felony offender to consecutive life sentences, with 15 year minimum mandatories. (R 1626-1628, 1925-1928) As to Appellant's murder conviction, the court overrode the jury's life recommendation and sentenced Appellant to die in the electric chair. (R 1572-1594, 1625, 1929-1977) The court found four aggravating circumstances (R 1572-1580, 1931-1944): 1.) The capital felony was committed by a person under sentence of imprisonment. 2.) Appellant was previously convicted of another felony involving the use or threat of violence to the person. 3.) The capital felony was committed while Appellant was engaged in the crimes of burglary and sexual battery. 4.) The capital felony was especially heinous, atrocious or cruel. As for mitigating circumstances, the court specifically rejected Appellant's age of 32 at the time of the offense as constituting a statutory mitigating circumstance, and did not find any other statutory mitigating factors to apply. (R 1580-1582, 1944-1947) The court found some nonstatutory mitigation in Appellant's positive character traits, but afforded it minimal weight. (R 1584-1587, 1957) The court also discussed, but rejected, several other proposed mitigating factors, including Appellant's potential for rehabilitation and/or ability to live within the prison system, drug abuse, emotional or psychological problems (including Appellant's childhood and family background), and that

Appellant did not intend to kill the victim. (R 1582-1591, 1947-1969)[5]

Appellant timely filed his notice of appeal to this Court on September 21, 1992 (R 1804), and the Public Defender for the Tenth Judicial Circuit was appointed to represent him on appeal. (R 1815)

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[5] Between July 21, 1992 and August 10, 1992, 15 people, including the victim's son and other relatives, wrote to Judge Schaeffer to urge her to inflict the ultimate punishment upon Appellant. (R 1601-1622) However, at the hearing of August 14, 1992, the court indicated that she would not consider these letters in her sentencing decision, nor would she consider the remarks of the victim's son in the presentence investigation expressing his belief that Appellant should be sentenced to death, and at the sentencing hearing on September 4, 1992 and in her written sentencing order, the court stated that she had not considered these matters. (R 1579-1580, 1886-1888, 1943-1944)

STATEMENT OF THE FACTS

Guilt Phase

Alice Berdat moved to a two-bedroom villa in Pinellas County in October, 1988. (R 2257-2258) She lived there alone. (R 2258)

On August 17, 1989, around 2:00 p.m., a neighbor of Alice Berdat called Berdat's son, Henry, and his wife and told them that there was something wrong, that they had better come down. (R 2262) Berdat and his wife lived nearby, and they immediately went to Alice Berdat's villa. (R 2258,2262) Henry Berdat entered the master bedroom and found his mother lying on the floor to the right of the bed. (R 2263, 2310, 2312) There was a hearing aid and a set of false teeth on the floor. (R 2263) The room was in disarray, while the rest of the house was not. (R 2263) Henry Berdat bent down and felt his mother's cheek. (R 2267) It was cold. (R 2267) He asked the neighbor to call 911. (R 2267, 2270-2271)

Michael Darroch, a detective with the Pinellas Park Police Department, was assigned to investigate the instant offenses, and arrived at Alice Berdat's residence on Lake Villa Drive at approximately 6:25 p.m. (R 2309-2310, 2333) There were no signs of forced entry. (R 2338, 2343, 2379) In the rear porch area, Darroch observed a newspaper dated 8-17-89, as well as the plastic bag in which the paper came. (R 2312-2313) Nothing was obviously in disarray in any of the rooms except for the master bedroom. (R 2313) There Darroch observed the victim on the floor. (R 2313) Her night coat or night shirt was open, with only the top button buttoned. (R 1412, 2313-2314) Her panties were missing, but her

bra was in place. (R 1412, 1415, 2314) The fitted sheet was still on the bed, but the blanket and top sheet that had apparently been on the bed had been pulled down and were entangled in the victim. (R 2314) On top of the bed was a jewelry box with some of its drawers pulled out and some jewelry. (R 1388, 1395, 1397, 2316) At the foot of the bed were a pair of slippers and a page from the newspaper. (R 1387, 1396, 1398, 1399, 2314-2315) Also on the floor were Berdat's upper and lower false teeth, one of her hearing aids, and her glasses, with the frame broken and one of the lenses out. (R 1387, 1396, 1398, 1399, 2315) Some clothing that appeared to have come from a dresser, drawers of which were open, was strewn about the room. (R 1408, 1409, 2315) There were what appeared to be dirty scuff marks on certain areas of the bed. (R 1389, 2316-2317) In addition to the blood that was on the victim, there was a very small amount of blood towards the foot of the bed, as well as on the two pillowcases, which had been removed from the pillows. (R 2316-2317)

Crime scene technicians from the Pinellas Park Police Department as well as the Pinellas County Sheriff's Department processed the scene. (R 2319-2321) They attempted to obtain fingerprints, but none suitable for comparison purposes was lifted. (R 2320-2321, 2338-2341, 2372-2374, 2378, 2380-2383) Technican Dan Levy did take into evidence a hair found underneath the vaginal area of the deceased, a hair found in her vaginal area, a hair found on her "backside," a hair found on the robe the deceased was wearing, and some hair found on the bathroom floor. (R 2321, 2374-2375, 2550)

These were sent to the Florida Department of Law Enforcement, where microanalyst Marianne Hildreth examined them. (R 2321-2322, 2376, 2401, 2408-2409, 2412-2419, 2550-2551) She found five hairs to exhibit the same microscopic characteristics as the known pubic hairs of Appellant: one hair that was purportedly from the vaginal area of Alice Berdat, one purportedly from a sheet underneath the vaginal area of Berdat, one purportedly from the victim's backside, one purportedly from her housecoat, and one purportedly found in debris from a flat sheet. (R 2412-2417) There was also a Negroid head hair contained in debris that purportedly came from a pillow-case, which was too short to be compared to a standard, and a Negroid body hair contained in debris that purportedly came from a fitted sheet, which could not be compared with the known head and pubic hair samples from Appellant that Hildreth received, as well as a Negroid body hair in the pubic combings of the victim. (R 2404, 2417) Hildreth could not say that any of the questioned hairs she examined came from Appellant, to the exclusion of everyone else. (R 2407-2408, 2420-2422, 2430-2431) On cross-examination, Hildreth acknowledged that when she initially compared the questioned hairs with the known hairs from Appellant, three of the questioned hairs showed dissimilarity with Appellant's know pubic hairs, which prompted Hildreth to request that an additional pubic hair sample be obtained from Appellant. (R 2424-2426) She received the second submission of hairs from Appellant more than two years after the first. (R 2428)

Dr. Joan Wood the Chief Medical Examiner for the Sixth Judicial Circuit, examined the body of Alice Berdat at the scene on August 17, 1989. (R 1635, 1639) She observed injuries to Berdat's face, including bruises, and petechial hemorrhages about the eyes and within the eyes. (R 1640) Wood also saw fingernail marks on the left leg, inside below the knee, and some bruising on the right leg, as well as blood coming from the vagina. (R 1642) Berdat's body was transported to the medical examiner's office, where Dr. Wood learned that she was 64 1/2 inches tall and weighed 102 pounds. (R 1643) Wood also noticed an injury to the hard palate of the roof of Berdat's mouth, which was consistent with a fingernail mark. (R 1643) Wood opined that injuries to Berdat's face were made when an object such as a hand was placed over the face and the lower half of the nose. (R 1645) There were a number of bruises to Berdat's right arm and hand, most of them on the upper arms. (R 1646) The bruising of the upper arms was typical of holding marks created by pressure from the thumb and fingers about the arms. (R 1647) Dr. Wood also found some bruising in the leg and groin area. (R 1647, 1649-1651) Marks on the legs were consistent with being created by putting pressure against the inside of the legs with the hands, and Wood opined that these bruises were created while Alice Berdat was still alive. (R 1650) Dr. Wood also observed some areas of injury about the vagina and urethra, which she believed were inflicted while Berdat was alive, and found that there was sperm in the vagina. (R 1651-1652, 1663) She took swabs from Berdat's genital area, as well as from her mouth and anus, which she gave to

Technician Levy. (R 1651-1653) Dr. Wood expressed the opinion that there was non-consensual penetration by a penis. (R 1653-1654)

Dr. Wood's internal examination revealed 17 rib fractures, which created a life-threatening condition called "flail chest." (R 1655-1657) She believed that these fractures resulted from an adult kneeling with both knees on Berdat's chest. (R 1657) Wood also found four separate areas of bruising to the tissues of the scalp, which must have been caused by something impacting against Berdat's head, or her head impacting against some object. (R 1657-1658) Examination of the neck area revealed multiple areas of bruising to the muscles, fracture of both sides of the hyoid bone, and fractures of the supporting tissues, cartilage that formed the voice box. (R 1658-1659) These were "classic examples of manual strangulation injuries." (R 1660)

Dr. Wood's conclusion as to the cause of Alice Berdat's death was "homicidal violence, including manual strangulation and blunt trauma to the chest with multiple rib fractures." (R 1660) It would have taken somewhere between 30 seconds to three minutes to cause death by strangulation. (R 1662)

Based upon her examination of Berdat's body at the scene, Dr. Wood thought that she had probably been dead since about 10:00 that morning. (R 1660-1661, 1666-1667) However, the vitreous potassium level indicated that the time of death was approximately 8:00 a.m.; it could have been as much as two hours earlier or two hours later. (R 1660-1662, 1664-1667)

On September 14, 1989, Special Agent Mark Babyak, assigned to the serology unit at the FBI laboratory in Washington, D.C., received some swabs of evidence from the Pinellas Park Police Department. (R 2432, 2439) Upon examining the submission, he was able to detect the presence of blood on vaginal and oral swabs, but did not attempt to characterize the blood further. (R 2441-2442) He also got a positive preliminary test for blood on the anal swabs, but could not get a conclusive identification for blood. (R 2442-2443) Babyak tested for semen as well, and found it present on the vaginal and anal swabs, but not on the oral swabs. (R 2444)

Dwight Adams, a special agent with the FBI, assigned to the DNA Analysis Unit of the laboratory in Washington, D.C., testified at Appellant's trial regarding the procedure used by the FBI for DNA analysis, called Restriction Fragment Length Polymorphisms, or RFLP. (R 2456-2468) The analytical process took about eight weeks to perform. (R 2471) Adams worked with a technician, Anne Baumstark, as a team. (R 2468-2473) Baumstark performed the various steps in the FBI protocol for DNA profiling (extracting the DNA, digesting it, etc.) (R 2469-2484) Adams checked her work on "almost a daily basis," relying on photographs taken at various stages of the process and "bench notes" prepared by the technician, and then interpreted the results. (R 2469-2472, 2475-2484) Over defense objections (R 2484-2498), Adams testified that there was a match between the DNA found in semen on the vaginal swabs from the victim and the DNA in the known blood sample of Appellant. (R 2500-2507) Using the FBI's black population database, which consisted

of 500 individuals, Adams determined that the probability of finding another unrelated individual chosen at random from the population with DNA matching that of Appellant would be approximately one in 195,000 individual. (R 2507-2509)[6]

There was a chance that other individuals could have a similar DNA profile, "but a very rare chance." (R 2509) Adams conceded that DNA matching is not a means of positive identification, and does not have the same "power. . . of a fingerprint that would eliminate all individuals except for just one." (R 2511)

In August of 1989, Appellant, Anthony Washington, was an inmate at Largo Community Correctional Work Release Center, which was about two and one-tenths miles from the entrance to The Lakes subdivision where Alice Berdat resided. (R 2323, 2346-2347) He was assigned to work for Cocoa Masonry, which was within walking distance of the Center. (R 2276, 2347, 2349) The records kept by the Center indicated that on August 17, 1989, an officer signed Appellant out at 6:00 a.m., and another officer signed him back in at 9:17 a.m. (R 2350, 2353, 2360, 2324) According to the time sheets kept by Cocoa Masonry, Appellant was not sent to a job site to work on August 17, 1989; the job for that day may have been rained out or there may have been a lack of work for Appellant to do. (R 2279, 2282-2283, 2324)

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[6] Adams testified that since the FBI's report was prepared in this case, additional individuals had been added to the relevant database, and that the likelihood of selecting a black individual at random having a DNA profile like that of Appellant would now be approximately one in 400,000. (R 2519, 2521-2522)

On August 18, 1989, David Mizell, a concrete finisher with Cocoa Masonry, was working at a Food Lion job site when someone who looked like Appellant tried to sell him a small gold watch. (R 2277-2281, 2288-2291) Mizell did not buy the watch, but another Cocoa Masonry employee, Robert Leacock, purchased it that day for five dollars. (R 2278-2281, 2291, 2293-2296)[7] Henry Berdat later identified the watch as having belonged to his mother. (R 2259-2262, 2325-2327)

On August 29, 1989, after Appellant completed his workday and returned to the Largo Community Correctional Center, he was placed in handcuffs, told that he was being terminated from the work release program and transferred, and taken to his room. (R 2354, 2361, 2364,2366-2370) When Corrections Officer Edward Duncan entered the room, Appellant asked him if he was being charged with murder. (R 2362, 2367, 2370) Duncan responded that he did not know what Appellant was talking about, and if something was going on, Appellant did not need to talk to Duncan any further. (R 2362) A disciplinary hearing was then held, which resulted in a finding that Appellant was guilty of "failure to remain in the area of specified limits" because he was not at Cocoa Masonry on August 17. (R 2351-2352, 2360-2364, 2369) According to Lieutenant Donald Dewitt of the Largo Correctional Center, after the hearing, Appellant said, "You are treating me like I killed somebody." (R 2352-

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[7] Over defense objections, Detective Michael Darroch was permitted to testify that he showed to Leacock a picture of Anthony Washington on August 31, 1989, and that Leacock said that that was the man he bought the watch from. (R 2327-2330)

2353, 2357) Appellant was thereafter transferred to Zephyrhills, a more secure facility than Largo. (R 2351, 2357, 2364, 2368-2369)

When the State rested its case, Appellant moved for a judgment of acquittal as to all three counts of the indictment, which the court denied. (R 2558-2560)

The defense rested without presenting any evidence. (R 2564)

The defense thereafter renewed all motions for mistrial, evidentiary motions, and motions for judgment of acquittal. (R 2593) The court adhered to the rulings that were made previously on these motions. (R 2593)

Penalty phase

The sole witness presented by the State at Appellant's penalty phase was Mary Beth Weigers, who testified regarding an incident that occurred on August 25, 1989 when she was employed as a housekeeper at the Residence Inn. (R 1682-1689)[8] Weigers was cleaning a room in the late afternoon when a man, whom she identified in court as Appellant, entered the room, threw her down on the bed, and raped her. (R 1684-1686) The man then strangled her with his arms until she was unconscious. (R 1686-1687) When she woke up, the man was still in the room, and he strangled her again until she was unconscious. (R 1687) When Weigers came to the second time, the man was gone. (R 1687) She called the front desk and asked them to call 911. (R 1687) The police came and investigated what

[8] Weigers was one of those who wrote a letter to Judge Schaeffer urging her to sentence Appellant to "the most extreme sentence possible" and "to the full limit of the law." (R 1602-1603)

happened. (R 1687-1688) Weigers composed a composite with a detective that evening, and later identified the clothes that the man had been wearing. (R 1688) She was present in the courtroom when Appellant pled and was sentenced. (R 1688)[9]

The State also put into evidence a judgment and sentence dated March 20, 1990, showing that Appellant entered a plea of nolo contendere to sexual battery and was sentenced to 15 years in prison (this was the Mary Beth Weigers incident) (R 1433-1437, 1691-1692), and a judgment and sentence dated July 20, 1988, showing that Appellant entered a plea of nolo contendere to burglary of an occupied dwelling with an assault or battery therein, and was sentenced to six years in prison. (R 1438-1443, 1691-1692)

Dr. Sidney Merin, a clinical psychologist and neuropsychologist, testified for the defense. (R 1695-1722) In addition to interviewing Appellant and taking a history, Dr. Merin or his testing assistant administered the following battery of psychological tests: Revised Beta Examination, Clinical Analysis Questionnaire, Minnesota Multiphasic Personality Inventory-2, Peabody Picture Vocabulary Test, Sentence Completion Test, Thematic Apperception Test, and the Wonderlic Personality Test. (R 1700-1704) On formal IQ tests, Appellant scored "at the lower-end of the average range [which extends from 90 to 109], and in one respect even below the average range." (R 1706) However, from the less formal intellectual exercises it may became clear to Dr. Merin that Appellant's

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[9] Weigers' testimony was admitted over defense objections. (R 2715-2717) After she testified, the defense renewed its objection and moved for a mistrial. (R 1688-1689)

"level of intelligence was probably well into the average range, and maybe in some respects a little bit above average, probably in the IQ level of 110 to 115." (R 1707)

Dr. Merin found no indication of such impairment of Appellant's brain that might have interfered with his ability to reason and to think clearly, nor was there any evidence of psychosis. (R 1707-1708) Appellant was not neurotic, and he was not a "full-blown sociopathic personality." (R 1713) However, Merin did find that Appellant "had grown up very early in life with tremendous feelings of dependency." (R 1709) He was actually a very weak and a dependent personality with a behavioral problem; he developed a "'reaction formation', going in the opposite direction from what he actually felt himself to be." (R 1709-1710, 1719) Appellant spent at least part of his childhood in the Liberty City area of Miami, which Merin described as "an environment that is not conducive to the learning of what we refer to as the stereotype social values." (R 1710) It was an area where there were many conflicts, and it lent itself to acting tough, which was quite a challenge for one such as Appellant, who was basically weak. (R 1710-1711) But Appellant had the intellect and physical capabilities to appear to be tough and to exploit and take advantage of people in order "to hide the essence of his weakness." (R 1710-1711) He had scrapes with other people and problems with the law that began at a young age and continued. (R 1719-1720)

Dr. Merin went on to explain that reaction formation is one of the mechanisms that people use to deal with uncomfortable situa-

tions. (R 1711) Although probably everyone uses it, Appellant had practiced it for so many years that it was almost something that came naturally to him. (R 1711-1712) Dr. Merin also noted that Appellant used "projection," or blaming others for characteristics that were really within Appellant, and denial. (R 1712) It was not surprising at all that Appellant had indicated to Merin that Appellant did not do the things with which he had been charged. (R 1714)

The probabilities were great that Appellant would not plan to kill someone; he was more of an opportunist. (R 1715) Rather than planning to kill Alice Berdat, he may have wished to render her incapable of doing anything against him. (R 1715)

Dr. Merin believed that, unlike the true sociopath, Appellant was capable of developing a conscience. (R 1716) He had the ability to live in confinement and abide by the rules, although it might take some period of time for him to do so. (R 1716-1717)

Appellant's 51 year old mother, Willie Mae Washington, lived in Miami, and had worked with mentally retarded people for 23 years at Landmark Learning Center. (R 1724-1725)

Appellant's family moved to Miami when he was about two years old. (R 1726) His father, who died at age 48, had a concrete business for 13 years; Appellant worked with his father, and was a hard worker. (R 1726-1727)

Appellant, who was 35 years old at the time his penalty phase was held, had three children, whom he helped support when he was living in Miami and earning income. (R 1727, 1729)

Appellant completed high school at Carol City in North Miami, where he played football and was a successful wrestler. (R 1730)

Appellant was not a disobedient child; he was always kind to his mother, and she felt that he loved her. (R 1728-1729)

Eventually, Appellant began to be involved with the wrong people and started doing the wrong things. (R 1730) His mother heard that he was on illegal drugs, although she personally never saw him take any. (R 1728, 1730)

After Appellant's mother testified, the defense asked the court to take judicial notice of the deposition of the medical examiner, Dr. Joan Wood. (R 1731-1735) Defense counsel wanted to use a portion of the deposition in arguing to the jury, without re-calling Dr. Wood to testify "live." (R 1731) The court initially stated that she would allow the deposition to be introduced, and would also allow the State to call the witness live, but then ruled that the deposition could not be used, as the witness was available to testify. (R 1733-1735)

Dr. Wood then testified for the defense. (R 1736-1742) She reiterated her conclusion that the two causes of Alice Berdat's death were asphyxiation by strangulation and flailed ribs. (R 1737) Because there were no significant bruises visible on Berdat's chest, a relatively broad band of force must have been applied, indicating that the rib fractures most likely were caused by someone kneeling on her chest. (R 1737-1740) There was no evidence of the type of trauma that might come from a beating to the chest area, or from a large object being dropped or thrown on that area.

(R 1738) Berdat had osteoporosis; a younger individual with that type of pressure on the chest would not have been likely to sustain the fractured ribs that Berdat sustained. (R 1738) The flailed chest would have been very painful, and would have been one of the factors that put Berdat into shock, and shock may alter one's perception of what is occurring. (R 1739, 1741) Dr. Wood could not determine if Berdat was in shock prior to her death. (R 1741)

One who was choked in the manner in which Berdat was choked would lose consciousness in perhaps 30 to 45 seconds, and might also die in that time. (R 1738-1739)

There was no evidence that Berdat had been tortured. (R 1741)

During defense counsel's argument to the jury, the State lodged an objection which the court sustained. (R 1772-1773)

The court instructed Appellant's jury that they could consider in aggravation that the crime for which Appellant was to be sentenced was committed while he was under a sentence of imprisonment, that Appellant had been previously convicted of a another capital offense or of a felony involving the use or threat of violence to some person, that the crime for which Appellant was to be sentenced was committed while he was engaged in committing or attempting to commit or flight after committing or attempting to commit the crime of robbery or sexual battery or burglary, and that the crime for which Appellant was to be sentenced was especially heinous, atro-

cious or cruel. (R 2739-2740)[10] The court also instructed as follows (R 2740):

> The kind of crime intended to be include [sic] the [sic] as [sic] heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily tortuous [sic] to the victim.

The mitigating circumstances upon which the jury was instructed were Appellant's age, and any other aspect of his character or record or background and any other circumstance of the offense. (R 2740-2741)

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[10] Defense counsel objected to Appellant's jury being permitted to consider the especially heinous, atrocious or cruel aggravator. (R 1745-1748, 2720-2725)

SUMMARY OF THE ARGUMENT

The State should not have been permitted to excuse prospective juror Johnny Welch, a black man, peremptorily. Welch's voir dire answers did not show that his views on the death penalty in any way disqualified him from serving on Appellant's jury, and the State failed to show a valid, race-neutral reason for removing him. Furthermore, it was unconstitutional for the State to exercise its strikes in such a manner as to remove from sitting on the jury all those persons who may have been "weak" on capital punishment.

Appellant's consent to search, obtained by three police officers who confronted the incarcerated subject in a small interrogation room, was not shown by the State to have been given knowingly and voluntarily. The record does not establish that Appellant was informed that he had a right to refuse the officers' request for his hair and blood. Furthermore, Detective Darroch deliberately employed a stratagem of not informing Appellant that he was a suspect in the instant murder case that was designed to delude Appellant as to his true position so that he would be more willing to provide the requested samples, and Darroch's suggestion to Appellant that he could absolve himself of blame in the Residence Inn sexual battery by consenting to the seizure applied additional subtle, but improper, coercive pressure.

The court below erred in refusing to suppress the out-of-court identification of Appellant purportedly made by State witness Robert Leacock from a photograph as the man who sold Leacock a watch that was later linked to the victim's residence. The use of

a single photograph, instead of a photopack, was unnecessary, and impermissibly suggestive, and the harm in using it was exacerbated by the form of the question posed by Detective Darroch when he showed the picture to Leacock. Furthermore, Leacock indicated that he had only limited contact on the job with the man who sold him the watch, and there was a discrepancy in the evidence regarding the degree of certainty Leacock displayed when he supposedly identified the person depicted. The error in admitting the evidence in question cannot be harmless, as the State's case was entirely circumstantial, with the watch being one of the few pieces of evidence that could link Appellant to the offenses, and the prosecutor made use of the out-of-court identification Leacock allegedly made during his closing argument to Appellant's jury.

Appellant was deprived of his right to discover evidence, and his right to confront and cross-examine the witnesses against him, by the trial court's denial of his motion to compel the deposition of Technician Anne Baumstark, who performed DNA testing, the results of which were used by the prosecution at Appellant's trial. Furthermore, the State's failure to present the testimony of the technician at trial resulted in an absence of a proper predicate for the testimony of FBI Special Agent Dwight Adams, and his conclusions regarding the DNA should have been excluded.

The circumstantial evidence presented below was insufficient to establish that Appellant was the person who committed the offenses in question. The hair and DNA evidence, testimony concerning statements Appellant made that were subject to interpretation, and

evidence concerning Alice Berdat's watch raised at most a suspicion that Appellant may have been the perpetrator, but did not point unerringly to Appellant as the guilty party. The prosecution's case was lacking in the more conclusive type of evidence, such as fingerprints or a confession, which could have established who the offender actually was.

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

The trial court should not have overridden the life recommendation of Appellant's jury. A rational basis exists in the evidence for the jury's decision, particularly in the testimony of Dr. Merin and Appellant's mother regarding the factors that shaped his life, resulting in personality and behavioral problems, and Appellant's potential for rehabilitation. None of the factors cited by the court--the defense penalty phase argument, the fact that the jury did not know the law pertaining to age as a mitigating circumstance, and that the jury was not privy to Appellant's non-violent criminal record--justified thwarting the will of the community as expressed in the jury's penalty verdict.

Appellant's consecutive sentences of life imprisonment with 15 year minimum mandatories on the two non-capital counts for which he was convicted must be reversed. The State failed to establish that Appellant had a prior conviction for any of the felonies enumerated in section 775.084(1)(b)1. which would qualify him for treatment as an habitual violent felony offender. Furthermore, the count for sexual battery with the use of physical force likely to cause serious personal injury was a life felony, and as such, not subject to enhancement under the habitual offender law. Finally, the minimum mandatory sentences could not legally be made consecutive where all the offenses for which Appellant was convicted arose from a single episode.

Two written judgments were filed in the circuit court. However, this case involves only one set of offenses against a single victim. One of the judgments is therefore extraneous, and must be stricken.

ARGUMENT

ISSUE I

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

During the jury selection process below, the State used one of its peremptory challenges to excuse prospective juror Johnny L. Welch. (R 2215) Defense counsel thereupon objected because Welch was one of only two black people on the jury panel. (R 2215) The court asked the State to respond. (R 2215) The prosecutor first noted that he had not excused the other black person from the jury panel, then said that he was excusing Welch because he "clearly indicated that he was strongly opposed to the death penalty in all cases..." (R 2215-2216) The assistant state attorney went on to note that he had excused other jurors (Ms. Muller and Ms. Lake) who were not black for the same reason, that is, that they were opposed to the death penalty. (R 2216) The court ruled that the State had a race-neutral reason for excusing Welch, and allowed the challenge, whereupon defense counsel objected on the grounds that Appellant, who is a black man, was being denied a fair cross section of the community and a jury of his peers. (R 2217) Prior to the jury being sworn, Appellant again objected to the manner in which the State had exercised its peremptories, citing the fair cross section requirement and the impropriety of systematically

excluding people from the jury who were opposed to the death penalty, and moved for a mistrial, to no avail. (R 2221-2223)

The use of peremptory challenges to exclude potential jurors from service solely on the basis of their race is barred by both the Constitution of the United States and the Constitution of the State of Florida. Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); State v. Neil, 457 So. 2d 481 (Fla. 1984). This Court recently established a bright-line rule requiring an inquiry pursuant to Neil whenever an objection is made that a peremptory challenge is being used in a racially discriminatory manner, State v. Johans, 613 So. 2d 1319 (Fla. 1993), but at the time of Appellant's trial, the party objecting to the manner in which peremptories were being exercised was required to demonstrate a likelihood that jurors were being challenged solely because of their race, any doubt about which was to be resolved in favor of the complaining party. Neil; State v. Slappy, 522 So. 2d 18 (Fla. 1988); Tillman v. State, 522 So. 2d 14 (Fla. 1988). Once the complaining party made the necessary showing, the burden would then shift to the other party to show that the questioned challenges were not being exercised solely on the basis of race. Neil.

The court below at least implicitly recognized that Appellant had made the necessary threshold showing when she called upon the State to respond to Appellant's objection to the excusal of prospective juror Welch. Kibler v. State, 546 So. 2d 710 (Fla. 1989). The reason the prosecutor gave for removing Welch was not a valid racially-neutral one under the facts and circumstances of this

case. With regard first of all to the prosecutor's suggestion that he was not exercising peremptories in a racially-exclusionary manner because he had not removed another black prospective juror, no showing need be made of a systematic effort to exclude all members of a given race from the jury; the issue is whether any juror has been removed because of his or her race, and the striking of a single black juror because of race is unconstitutional. Slappy; Tillman; Thompson v. State, 548 So. 2d 198 (Fla. 1989). Thus, the prosecutor's statement that he allowed another black person to remain on the jury was irrelevant and did not address the issue of whether prospective juror Welch was improperly removed. Although this Court has indicated that opposition to the death penalty may constitute a legitimate reason for exercising a peremptory challenge [see, for example, Atwater v. State, 18 Fla. L. Weekly S496 (Fla. Sept. 16, 1993) and Holton v. State, 573 So. 2d 284 (Fla. 1990)], the answers Welch gave did not establish that he was a candidate for removal because of his views on the death penalty. Although he did indicate opposition to capital punishment (R 2097), Welch stated that he felt that he could return a verdict of guilty if the State proved its case, and could put aside his personal views and return a death recommendation if this were an appropriate case for a death sentence. (R 2097-2098) [Compare Welch's answers with those of prospective juror Aldridge in Valentine v. State, 616 So. 2d 971 (Fla. 1993). Aldridge stated that although he would not want to be the one to say a person should be electrocuted, he personally was not opposed to the death penalty and would recommend it

if the aggravating circumstances outweighed the mitigating. This Court found Aldridge's views on capital punishment to provide "no objective basis whatsoever," independent of his race, for the State to have removed him peremptorily. 616 So. 2d at 974.] As for the prosecutor's argument that he had removed other jurors who were not black because of their views on capital punishment, at least one of these jurors, Ms. Lake, unlike Welch, gave answers indicating that her views would, or at least could, interfere with her ability both to consider Appellant's guilt or innocence and to return a death recommendation. Lake stated that she was "not sure" that she could return a guilty verdict, knowing that the court could sentence Appellant to die (R 2089-2090), and when the court asked Lake if her feelings against the electric chair would be so strong that she would never recommend the death penalty, Lake responded, "I'm having some real strong feelings about being responsible for somebody's fate in life, yeah." (R 2088-2089) Welch expressed so such hesitancy about his role as a juror, stating clearly that he could both return a verdict of guilty and recommend a sentence of death, if appropriate.

Finally, a few words need to be said regarding the prosecutor's admission that he was using his strikes to remove from the jury all those whom he perceived to be "weak" on the death penalty, and defense counsel's argument against the propriety of selecting a jury in this manner. Although it may be a moot point in light of the jury's life recommendation [see Bumper v. North Carolina, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968)], such a practice

is inconsistent with the constitutional principles expressed in cases such as Gray v. Mississippi, 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987), Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985), Adams v. Texas, 448 U.S. 38, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980), Davis v. Georgia, 429 U.S. 122, 97 S. Ct. 399, 50 L. Ed. 2d 339 (1976), Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), Foster v. State, 614 So. 2d 455 (Fla. 1992), and Johnson v. State, 608 So. 2d 4 (Fla. 1992). A jury selected in this manner does not comport with the Sixth Amendment right to an impartial jury, and does not fulfill Fourteenth Amendment due process requirements.

For these reasons, the trial court should not have permitted the prosecutor to strike black prospective juror Welch peremptorily; Appellant is entitled to a new trial.

ISSUE II

THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE THAT WAS SEIZED FROM HIM, AS THE STATE DID NOT CARRY ITS BURDEN OF PROVING THAT APPELLANT'S CONSENT WAS KNOWINGLY AND VOLUNTARILY GIVEN.

Appellant, through counsel, filed a Motion to Suppress Evidence on October 24, 1991 (R 597-599), an amended version of which was filed on October 25, 1991. (R 602-604) As amended, the motion sought suppression of hair samples and blood taken from Appellant on September 5, 1989, because Appellant's consent was not voluntary and knowing. (R 602-604)[11] The motion was heard on November 1, 1991 by the Honorable Brandt C. Downey, III. (R 1816-1879) Michael Darroch of the Pinellas Park Police Department testified at the hearing that he was assigned to investigate the Alice Berdat homicide that occurred on August 17, 1989, as well as a rape that occurred at the Residence Inn in Pinellas Park on August 25. (R 1818) He received a description of the perpetrator of the rape and prepared a composite therefrom, which he took to the Largo Community Correctional Center where Appellant was an inmate, and narrowed his investigation down to Appellant as the suspect. (R 1819-1821) Darroch also considered Appellant as a possible suspect in the Berdat homicide. (R 1820, 1838, 1840)

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[11] Although Appellant's motion sought suppression of both the blood and hair that was taken from him, this issue will concentrate upon the blood only, as additional samples of Appellant's hair were taken pursuant to a State motion that was not objected to by Appellant's trial counsel. (R 281-282, 2758-2759)

On August 31, 1989, Darroch spoke with David Mizell and Robert Leacock, and learned that about two weeks earlier, Appellant had sold a watch to Leacock for five dollars. (R 1829-1830) Darroch recovered the watch from Leacock's residence. (R 1830) Darroch showed a photograph of Appellant to Leacock, who identified Appellant as the person who had sold him the watch. (R 1830-1831) Darroch spoke by telephone with Alice Berdat's son, Henry, regarding any jewelry that had belonged to the victim, and Henry Berdat described the watch in some detail. (R 1831) Berdat later identified the watch from a photograph. (R 1831-1832)

Darroch conducted several interviews with Appellant, one of which took place at the Zephyrhills Correctional Center on September 5, 1989. (R 1822) Darroch did not have a search warrant when he went there, although he believed that he probable cause to obtain a court order for Appellant's hair and blood. (R 1837-1838) Darroch had consulted with the state attorney's office about the possibility of getting an order to compel blood and hair samples, but they told him, "'We want you to ask first.'" (R 1837)

Two other officers accompanied Darroch to Zephyrhills. (R 1838-1839) Darroch read Appellant his Miranda rights, which Appellant indicated that he understood, however, Darroch did not tell Appellant that he could consult with an attorney regarding whether or not he should give a blood sample. (R 1822-1823,1850) Appellant denied participating in the August 25 rape at the Residence Inn. (R 1823-1824) Darroch asked Appellant for blood and hair samples, telling him that these would help prove or disprove that he commit-

ted the sexual battery;[12] Darroch did not mention the Alice Berdat homicide, as his strategy for the interview was not to lay all his cards on the table. (R 1824-1826, 1840-1841, 1850-1851) Appellant consented to his hair and blood being taken. (R 1824) These items were not sent for analysis in the rape case, because when Darroch subsequently interviewed Appellant on September 19, 1989, he admitted that he was the person who had sex with the woman at the Residence Inn, for which he paid her $20. (R 1825, 1842-1843) The hair and blood was sent to the FBI for comparison in the homicide case. (R 1826, 1843) Darroch first interviewed Appellant about the homicide on September 25, 1989. (R 1826) Appellant did not admit that he participated in the homicide. (R 1826) Initially, Darroch told Appellant that his hair matched in the sexual battery case at the Residence Inn. (R 1827) During the interview on the 25th, Darroch told Appellant that the hair had actually matched in the homicide case, and Appellant responded by asking, "How in the hell did my hair get someplace I never had been?" (R 1827-1828) Darroch also indicated to Appellant that he believed the results would show that Appellant's DNA was at the scene of the crime; Appellant said it could not happen because it wasn't him. (R 1828) Appellant did not protest to Darroch concerning the fact that his hair and blood had been used in the homicide investigation. (R 1827-1828)

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[12] On deposition, Darroch stated that he told Appellant that he would need Appellant's blood and hair and so forth to prove that Appellant did not commit the sexual battery at the Residence Inn. (R 1845-1846)

Darroch had determined that on August 17, 1989, Appellant left the work release center at 6:00 a.m. and returned at 9:17 a.m., and did not work that day. (R 1832) During the interview with Darroch, Appellant indicated that if he did not work with Cocoa Masonry on a particular day, Appellant would return back to the work release center by 8:00 a.m. (R 1832) Appellant did not have a recollection of his whereabouts between 6:00 a.m. and 9:17 a.m. on the 17th. (R 1832-1833)

On September 25, 1989, Marianne Hildreth of FDLE told Darroch that the hair found at the scene of the homicide was "negroid in characteristic." (R 1833-1834)

Darroch also reviewed deposition notes from two people who worked at the work release center which indicated that after the disciplinary hearing at the center where it was determined that Appellant would be transferred to Zephyrhills, Appellant asked if he was being charged with murder, and commented that he was being treated like he had killed someone; Darroch was not certain when he read the deposition notes. (R 1834-1835, 1837)

At the conclusion of the suppression hearing, Judge Downey ruled that Appellant's consent was validly obtained, and denied the motion. (R 1878-1879)

Warrantless searches and seizures are per se unreasonable both under the Fourth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 12 of the Constitution of the State of Florida. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); Norman v. State, 379 So. 2d

643 (Fla. 1980); Lockwood v. State, 470 So. 2d 822 (Fla. 2d DCA 1985). Where, as here, the State seeks to justify use of evidence seized without a warrant, the prosecutor bears the burden of demonstrating the applicability of one of the few specifically established and well-delineated exceptions to the warrant requirement. Raffield v. State, 351 So. 2d 945 (Fla. 1977); Hornblower v. State, 351 So. 2d 716 (Fla. 1977); Norman. In order to rely upon the consent exception to justify a warrantless search, the prosecutor bears the burden of proving that the defendant freely and voluntarily consented. Bumper v. North Carolina, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968); Bailey v. State, 319 So. 2d 22 (Fla. 1975); Norman; Acosta v. State, 519 So. 2d 658 (Fla. 1st DCA 1988); Lockwood. And "it must be shown by the State that strong circumstances are present in a case for it [the consent exception] to qualify as an acceptable alternative to preservation of constitutional rights of citizens." Bailey, 319 So. 2d at 26. Mere conclusions of an officer are insufficient to establish valid consent. Bailey. Rather, voluntariness of the consent is to be determined from the totality of the circumstances. Norman; Acosta.

When Appellant was asked to consent to the taking of his blood and hair, he was incarcerated at Zephyrhills on other charges; he was not a free man. He was confronted not by one, but by three officers, in a small interview room approximately eight by twelve. (R 1838-1839) No exigencies appear in the record that would have made it difficult or impossible for the detectives to obtain a warrant, if probable cause therefor existed. Appellant was in prison

and neither he nor his blood nor his hair was going anywhere. Detective Darroch believed that he had sufficient probable cause for obtaining a court order for the hair and blood, but did not seek one, because the state attorney's office, for whatever reason, wanted him to "ask first." Therefore, Darroch deliberately devised a "strategy" to conceal information from Appellant by telling him only that he was a suspect in the rape at the Residence Inn, while saying nothing about Appellant being a suspect in a murder, even though Darroch considered Appellant to be a suspect in the Alice Berdat homicide, and was apparently primarily interested in gathering evidence that could be used against Appellant in that case, rather than in the sexual battery case. Furthermore, Darroch imbued his stratagem with added persuasive power by indicating to Appellant that he could clear himself in the rape case by giving his blood and hair. Police techniques calculated to exert improper influence, or to trick or delude the suspect as to his true position, will result in exclusion of self-incriminating statements thereby obtained. Thomas v. State, 456 So. 2d 454 (Fla. 1984); State v. Manning, 506 So. 2d 1094 (Fla. 3d DCA 1987). These same principles must apply where, as here, the police employ a deliberate strategy of deception in order to obtain incriminating evidence by way of a search and seizure, rather than by way of statements from the suspect. See Hoffa v. United States, 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374, 381 (1966) ("The Fourth Amendment can certainly be violated by guileful as well as by forcible intrusions into a constitutionally protected area. [Citation omitted.])"

Because Appellant was not informed that he was a suspect in the Berdat homicide, and that the police were seeking evidence against him in that case, he was not aware of the potential consequences of his consent to the taking of blood and hair, and his consent was therefore not voluntary and knowing. Appellant's consent was also vitiated by the coercive force, albeit subtle, of Detective Darroch's implication that Appellant could clear himself in the rape case by giving the samples. See Schneckloth ("Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force.") 36 L. Ed. 2d at 863. In examining circumstances surrounding consent, "account must be taken of subtly coercive police questions..." Schneckloth, 36 L. Ed. 2d at 864; Denehy v. State, 400 So. 2d 1216 (Fla. 1980) (consent not voluntary if there is evidence of coercion); State v. Justice, 18 Fla. L. Weekly D2085, 2086 (Fla. 5th DCA Sept. 24, 1993) (evidence that "police, either explicitly or impliedly, used coercion, threats, or force, or made any representations, committed any fraud, or used any pretext to obtain" records that were seized would have made exclusionary rule applicable); Lockwood (constitutional guarantee against unreasonable searches and seizures is violated where consent is obtained through use of force, pressure or coercion). Finally, the record does not reflect that the police informed Appellant that he had a right to refuse to give his hair and blood, which is one of the factors to be considered in determining the voluntariness of any alleged consent. Schneckloth; Bailey; Acosta. Although Detective Darroch

testified that he read Appellant his Miranda rights from a card issued by the state attorney's office (R 1822-1823, 1839), the typical Miranda warning does not incorporate advice that one can refuse a search, as Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) was concerned with incriminating statements. Darroch testified specifically that he did not tell Appellant that he had a right to consult with an attorney regarding whether or not he should give a blood sample. (R 1822-1823, 1850)

Consent searches are subject to "the most careful scrutiny" so as to avoid sanctioning the possibility of official coercion. Schneckloth, 36 L. Ed. 2d at 864. See also United States v. Dichiarinte, 445 F. 2d 126, 128 (7th Cir. 1971) ("...consents to search are carefully examined for evidence of coercion or duress[,]" particularly in the absence of a written waiver or warnings concerning Fourth Amendment rights.) Subjecting the circumstances surrounding Appellant's supposed consent to this degree of scrutiny should have led the court below to grant Appellant's motion to suppress. The blood that was taken from him was absolutely critical to the State's case, as it resulted in the DNA evidence, which was a large part of the prosecution's ability to link Appellant to the scene of the crimes. (Please see Issue IV herein for further discussion regarding the DNA evidence.) Appellant's rights under the Fourth and Fourteenth Amendments to the United States Constitution, as well as Article I, sections 9 and 12 of the Florida Constitution, were violated by the improper search

and seizure, and the resulting evidence that was admitted at his trial. As a result, Appellant must be granted a new trial.

ISSUE III

THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE IDENTIFICATION OF APPELLANT MADE BY STATE WITNESS ROBERT LEACOCK, AS THE PROCEDURE WHICH RESULTED IN THE IDENTIFICATION WAS UNDULY SUGGESTIVE.

On April 24, 1992 Appellant filed, through counsel, a "Motion to Suppress Out-of-Court and Any Attempted In-Court Identification of Defendant by Witness Robert Leacock." (R 1065-1067) The motion was heard before Appellant's trial, on July 14, 1992. (R 1988-2004)

Detective Michael Darroch of the Pinellas Park Police Department testified for the State at the suppression hearing. (R 1989-1995) On August 31, 1989, he went to a job site and spoke with a number of people who worked on a crew with Appellant. (R 1989-1990) David Mizell and several other people informed Darroch that Appellant had been attempting to sell jewelry to people who worked on the crew. (R 1990) Mizell specifically told Darroch that Bob Leacock had bought a watch from Appellant for five dollars, and other individuals identified Washington by name as the person who sold the watch to Leacock. (R 1990-1992) Darroch and another detective spoke with Leacock at his residence. (R 1990-1991) Leacock told Darroch that he had bought a watch for five dollars about two weeks before, and the detectives later recovered the watch from Leacock. (R 1991, 1993) Darroch could not recall whether Leacock said that he bought the watch from Anthony Washington, or just simply from a "colored guy" that he worked with. (R 1994) Darroch testified that the name "Washington" was said, but

he did not remember whether he or Leacock said it first. (R 1992, 1994) [At the November 1, 1991 hearing on another motion to suppress filed by Appellant (please see Issue I herein), Darroch testified that it was he who brought up the name "Washington" first, and that Leacock "said yes." (R 1848)] Darroch showed Leacock a single photograph and asked if that was the person he bought the watch from, and Leacock said that it was. (R 1992, 1994-1995)

At the suppression hearing, defense counsel relied upon portions of Leacock's deposition. (R 1996-1998, 2000-2001) Leacock was uncertain of the name of the person from whom he bought the watch, but indicated that he "did buy a watch off a colored guy." (R 1996) He described the person a being about "five five, five six" in height and as being fat, over 200 pounds. (R 1997) When the detective showed him the single photograph, Leacock said that he "believe[d] that was him..." (R 1998) Leacock also stated in his deposition that he had seen the person in question "on the job just very few times, a couple of times" (R 1998), and said that he did not think he would recognize him if he saw him again. (R 2000-2001)

The court denied the motion to suppress Leacock's identification. (R 2004)

Robert Leacock thereafter testified before Appellant's jury that Appellant looked like the man from whom he bought the watch. (R 2295) Apparently dissatisfied that Leacock had not rendered a positive identification of Appellant as the watch-seller, the State elicited from Detective Darroch, over defense objections, testimony

that on August 31, 1989, he showed a photograph of Anthony Washington to Leacock, and that Leacock told Darroch "that was the person he bought the watch from." (R 2327-2330)

"Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401, 411 (1972).

The procedure used by Detective Darroch to procure Leacock's identification of Appellant was unduly suggestive, and Appellant's motion to suppress should have been granted. In Way v. State, 502 So. 2d 1321, 1323 (Fla. 1st DCA 1987), the court observed: "Certainly, use of a single photograph is one of the most suggestive methods of identification possible and is impermissibly suggestive under most circumstances." The show-up technique, in which a witness is presented with only one possible suspect for identification, was characterized by this Court in Blanco v. State, 452 So. 2d 520, 524 (Fla. 1984) as "inherently suggestive." Similarly, in State v. Cromartie, 419 So. 2d 757, 759 (Fla. 1st DCA 1982), the court stated that "[t]he show-up identification is, by its nature, suggestive in that, unlike a line-up, a witness is presented with only one possible suspect for identification..." However, it is not merely the fact that a single photograph was presented to Leacock, but rather the totality of the circumstances that must be examined to ascertain whether the identification procedure was impermissibly suggestive. Neil v. Biggers; Blanco; Cromartie.

It should first be noted that the State failed to establish any reason why it had to use an inherently suggestive photo identification procedure. Detective Darroch testified at the July 14 hearing that he had put photopacks together before, he just did not do so in this case. (R 1995) The record discloses no exigency that would have precluded him from using the less suggestive technique of a photopack. This was not a situation where the offense had recently occurred, and it was necessary for a suspect to be taken back to the scene of the offense for an immediate show-up identification while the event was still fresh in the mind of the victim or a witness.

Furthermore, the question put to Leacock when he was shown the photograph--"Is this the person that you bought the watch from?" (R 1995)--itself suggested that the person depicted was the person Leacock should identify.

In addition, there was a discrepancy in the testimony regarding Leacock's degree of certainty that the man shown in the picture was the man who sold the watch. While Darroch indicated at trial that Leacock was "sure" of his identification from the photograph (R 2329), Leacock himself testified on deposition that he merely believed the man shown in the picture was the right person (R 1998), and at trial was even less certain, testifying that when he was shown the picture, he "wasn't sure" that he recognized the person, noting that he "only worked with the guy maybe once or twice." (R 2296-2297)

These circumstances can lead only to the conclusion that the identification procedure followed by Detective Darroch out of court, when it was not subject to judicial scrutiny, was inherently suggestive, and rendered Leacock's purported identification of the single photograph of Appellant unreliable. Admission of testimony concerning the identification, which included the picture shown to Leacock itself (R 2329-2330), cannot be considered harmless. The State's case was purely circumstantial, with Appellant's supposed selling of the watch to Leacock one of the few pieces of evidence the State was able to muster to link Appellant with the offenses against Alice Berdat. (Please see Issue V herein.) Furthermore, the prosecutor relied upon the photo identification in his argument to the jury at guilt phase, stating (indeed, overstating) that Leacock was "[a]bsolutely" able to identify Appellant from the picture, and that he "had no problem" doing so. (R 2623-2624)

Appellant was deprived of due process of law by the admission of the improper evidence, and must receive a new trial as a result.

ISSUE IV

THE COURT BELOW ERRED IN PERMITTING THE STATE TO PRESENT EXPERT TESTIMONY REGARDING DNA EVIDENCE WHERE APPELLANT'S DISCOVERY AND CONFRONTATION RIGHTS WERE THWARTED AND THE STATE FAILED TO ESTABLISH AN ADEQUATE PREDICATE FOR ADMISSION OF THE EVIDENCE.

The DNA evidence the State presented below through the testimony of FBI Special Agent Dwight Adams was absolutely vital to the State's case. While there was little doubt that crimes were committed against Alice Berdat, the identity of the perpetrator was very much at issue. The DNA testimony provided one of the few pieces of evidence, and probably the strongest piece of evidence, that the State had to try to prove that Appellant was the offender.

Although Adams was the only one to testify at Appellant's trial regarding the DNA testing and analysis that was performed by the FBI, he was not the person who actually performed the testing procedures; these were done by a technician named Anne Baumstark. Appellant sought to compel Baumstark's deposition (R 1183-1185), but the court refused to do so. (R 1279, 2819-2835) The court did require the State initially to disclose the identity of each technician who performed any part of the DNA testing, finding such disclosure required by the rules of discovery (R 1016), and found that Technician Baumstark "was not merely ministerial," but denied the request to compel her deposition because "the State was not intending to call the witness in the trial of this cause..." (R 1279)

In Florida, "The scope of discovery, unless privileged or limited by order of the court, includes any relevant matter or

information that appears reasonably calculated to lead to the discovery of admissible evidence." Ivester v. State, 398 So. 2d 926, 930 (Fla. 1st DCA 1981). With regard specifically to the taking of depositions, Florida Rule of Criminal Procedure 3.220(h)(1) provides that the "defendant may take the deposition upon oral examination of any person who may have information relevant to the offense charged." However, this seemingly very broad provision is limited elsewhere by disallowing defense depositions of those persons whom the State designates as either having performed only a ministerial function with respect to the case or whom the prosecutor does not intend to call at trial, and whose involvement with and knowledge of the case is fully set out in a police report or other statement furnished to the defense, although even these persons may be deposed when the trial court so orders, upon a showing of good cause by the defendant. Fla. R. Crim. P. 3.220(h)(1)-(A), 3.220(b)(1)(A). Although the court below found that Technician Baumstark could not be deposed because the State did not intend to call her at trial, the court made no finding with regard to the portion of the rule requiring that the person's involvement with and knowledge of the case be fully set out in a police report or other statement furnished to the defense. Furthermore, the defense did establish good cause for needing to depose Baumstark, and the request to do so should have been granted. Appellant needed to question her with regard to her own qualifications and proficiency in DNA analysis, as well as asking her about her execution of the protocol for DNA analysis in this case (whether there

were any problems, any unusual events that took place, any distractions that may have interrupted the procedure, etc.). Although Baumstark submitted an affidavit in which she stated that she had "no independent recollection of the analysis" she did in this case, and would have to rely upon her notes (R 1187-1189), this document could not substitute for permitting the defense to further probe her recollection in the setting of a discovery deposition.

In Hill v. State, 535 So. 2d 354 (Fla. 5th DCA 1988), the court recognized the need for full and timely discovery where the State seeks to introduce DNA evidence. The court noted:

> One factor which deprived appellant of a fair trial was a due process violation regarding the introduction of critical DNA test results. At 5:00 p.m. on the Sunday before the Monday trial appellant was for the first time permitted the right to interview and depose the expert witnesses who had performed the tests to determine whether a DNA match could be obtained. See Andrews v. State, 533 So. 2d 841 (Fla. 5th DCA 1988). On the morning of trial appellant asked for a continuance of the trial in order to try to form a defense, if he could, to the expert testimony. The denial of that motion for continuance was error because fairness, state and federal constitutional due process rights and the Florida Rules of Criminal Procedure require that witnesses be disclosed and made available to a defendant in a criminal case in sufficient time to permit a reasonable investigation regarding the proposed testimony. This is especially true in a case where innovative scientific evidence is the subject.

535 So. 2d at 355 (emphasis supplied).

Although Anne Baumstark was not present at Appellant's trial, she in effect "testified" against him through the testimony of her supervisor, Dwight Adams, who necessarily relied upon Baumstark's

work in formulating his conclusions. Without having an opportunity to come face-to-face with Baumstark at his trial, Appellant was deprived of his constitutional right to confront and cross-examine the witnesses against him. Amend. VI, U.S. Const.; Art. I, §16, Fla. Const.; State v. Clark, 614 So. 2d 453 (Fla. 1992). Additionally, Appellant was hampered in his efforts to cross-examine the witness who did testify regarding DNA (Dwight Adams) by virtue of the court's refusal to allow Appellant to discover what Baumstark might say about the testing procedures.

Appellant would also point out that the State took inconsistent positions below as to whether Appellant was entitled to learn whatever information Baumstark might be able to provide. At a hearing held on February 25, 1992 on one of Appellant's motions seeking to compel the State to provide him with more information about DNA and to continue the trial, the State presented a man named Steve O'Keefe, who had "gone into the whole history of DNA in Florida and other jurisdictions..." (R 2772) O'Keefe had the following to say regarding to what discovery the defense might be entitled (R 2775-2776--emphasis supplied):

> At present we feel that the only thing that should be done in a case such as this when the FBI protocols have been followed is to provide the defense an opportunity to have a deposition of the technician or the serologist or microbiologist, whoever conducted the analysis at FBI headquarters and to have at that deposition the records of how the test was conducted, who conducted the test and the results of the test. Whether there were any problems encountered, whether there were any--what they call mechanical difficulties.
>
> Akin to the same thing we do when we are examining the results of an intoxilyzer test.

> We want to find out if the person who does the test is properly certified. Did they follow the rules. Did they protect samples. Were there any problems with the instruments that are used. We can't find any cases that show any more than that is required.

It appears that the State's own expert thus was conceding that the defense was entitled to take the deposition of the person who performed the DNA testing, in this case, Anne Baumstark. And yet at the hearing of June 9, 1992, the State, in the form of a different assistant state attorney than the one who appeared at the hearing of February 25, opposed the taking of Baumstark's deposition. The prosecution should not be permitted to flipflop in this manner.

Finally, in Robinson v. State, 610 So. 2d 1288, 1291 (Fla. 1992), this Court noted that a proper predicate must be established before the results of scientific tests and experiments (specifically, DNA analysis) may be admitted. See also, with regard to the factual predicate that must be laid before expert testimony may be admitted, Spradley v. State, 442 So. 2d 1039 (Fla. 2d DCA 1983); Lang Pools v. McIntosh, 415 So. 2d 842 (Fla. 1st DCA 1982); R.P. Hewitt & Associates of Florida, Inc. v. McKimie, 416 So. 2d 1230 (Fla. 1st DCA 1982). Without any testimony from the technician who did the actual testing, Adams (who had no direct personal knowledge of what was done, he only knew what Baumstark told him that she did) had no factual basis for his conclusions; the predicate for admitting his conclusions had not been met.

For these reasons, the trial court erred in allowing the State to introduce the DNA evidence at Appellant's trial. A new trial must be the result.

ISSUE V

INSUFFICIENT EVIDENCE WAS ADDUCED AT TRIAL TO ESTABLISH THAT IT WAS APPELLANT WHO PERPETRATED THE OFFENSES AGAINST ALICE BERDAT.

As discussed in Issues II, III and IV above, much of the evidence the State adduced at Appellant's trial to establish that he was the perpetrator of the offenses against Alice Berdat was inadmissible and should not have come in. However, even if all the evidence was properly admitted, it did not establish that Appellant was the person who committed the crimes.

The trial court and the attorneys all recognized that this was a circumstantial evidence case. The court gave Appellant's jury the old circumstantial evidence instruction while charging them during the guilt phase, which was requested by both the defense and the State. (R 2537-2538, 2679-2680)

Where, as here, proof of guilt is circumstantial, the conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. Heiney v. State, 447 So. 2d 210 (Fla. 1984); McArthur v. State, 351 So. 2d 972 (Fla. 1977). The evidence the prosecution put forth below was not sufficiently conclusive to eliminate the hypothesis that someone other than Appellant was responsible for the offenses against Alice Berdat.

The evidence against Appellant consisted essentially of hairs, DNA, statements Appellant made, and testimony about the watch he supposedly sold to Robert Leacock. With regard first of all to the watch, neither Leacock, nor the other witness who testified at Appellant's trial as to the watch sale, David Mizell, was able

positively to identify Appellant in court as the person who sold the watch. (R 2290, 2294-2295) And, Detective Darroch's testimony notwithstanding, Leacock testified that he had not been certain of his identification of Appellant from the single photograph he was shown by Darroch on August 31, 1989. (R 2296-2297) Furthermore, Mizell's knowledge of the watch transaction came from what Leacock told him (R 2291), and was therefore hearsay. Even if Appellant was the person who sold the watch to Leacock, this would not eliminate the hypothesis that he acquired the watch in some perfectly innocent way, as by finding it.

The statements Appellant made at the Largo Community Correctional Center when he was being told that he was being transferred, when he asked if he was being charged with murder, and said that he was being treated like he killed somebody, were equivocal at best, and fell far short of constituting any kind of confession. It is a reasonable hypothesis that they were the startled reaction of someone who was suddenly told, with little or no explanation, that his work release status was being terminated, and that he was being shipped off to do hard time.

Although State witness Marianne Hildreth testified that hairs found at the scene were consistent with Appellant's known hairs, she was unable to say that any of the questioned hairs came from Appellant, to the exclusion of anyone else. (R 2407-2408, 2420-2422, 2430-2431) Nor could it be established when and under what circumstances the questioned hairs came to be at the crime scene. Furthermore, Hildreth's testimony was rendered suspect by the fact

that her initial comparison showed dissimilarity between the questioned hairs and Appellant's known hairs, which prompted her to call for an additional hair sample from Appellant, a fact that Hildreth did not reveal to Appellant's jury until she was cross-examined by defense counsel. (R 2424-2426, 2428) Similarly, the DNA evidence that was adduced was far from conclusive. Special Agent Dwight Adams conceded that there was a chance, albeit rare, that other individuals could have a DNA profile similar to Appellant's, and that DNA matching is not a means of positive identification, and does not have the same "power...of a fingerprint that would eliminate all individuals except for just one." (R 2509, 2511) In Appellant's case, although Berdat's residence was checked for fingerprints in several different ways, none of Appellant's was found therein. (R 2320-2321, 2340-2341)

In addition to the lack of prints, it should be noted that Alice Berdat lived in a predominantly white area, where the sight of a black man such as Appellant would be somewhat unusual, and yet there was no indication that the police received any reports of suspicious activity in that part of town on the morning Berdat was killed, nor did any of Berdat's neighbors indicate that they saw a black man when they were interviewed. (R 2334-2338)

Finally, the fact that Berdat's residence showed no sign of forced entry (R 2338, 2343, 2379) could have indicated that she knew the person who attacked her, and thus opened her door to him.

Nothing in the record indicates that Berdat and Appellant knew one another.[13]

Although the circumstantial evidence here may have

> furnished a suspicion of guilt, it fell far short of circumstances of "a conclusive nature and tendency, leading on the whole to a reasonable and moral certainty that the accused and no one else committed the offense charged." Owens v. State, 432 So. 2d 579, 581 (Fla. 2d DCA 1983) (emphasis in original).

Moberly v. State, 562 So. 2d 773, 775 (Fla. 2d DCA 1990).

> Circumstantial evidence must lead "to a reasonable and moral certainty that the accused and no one else committed the offense." Hall v. State, 90 Fla. 719, 720, 107 So. 246, 247 (1925). Circumstances that create nothing more than a strong suspicion that the defendant committed the crime are not sufficient to support a conviction. [Citations omitted.]

Cox v. State, 555 So. 2d 352, 353 (Fla. 1989). In Cox this Court held the evidence insufficient to support the conviction of the appellant, who had been sentenced to death for first-degree murder, and ordered his acquittal. The evidence against Anthony Washington was similarly inconclusive. Here, as in Cox, the State's evidence, taken as a whole, could have created only a suspicion, rather than proving beyond a reasonable doubt, that Washington, and only Washington, committed the burglary and sexual battery and murdered the victim. No matter how strongly the evidence might suggest guilt, it is the duty of this Court to reverse where that evidence

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[13] An alternative explanation for the lack of forced entry was provided by Berdat's son, Henry, who testified that his mother was not used to air conditioning, and preferred to open the windows and doors. (R 2259)

innocent. Horstman v. State, 530 So. 2d 368 (Fla. 2d DCA 1988); Jackson v. State, 511 So. 2d 1047 (Fla. 2d DCA 1987).

ISSUE VI

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

Appellant raised the issue of the unconstitutionality of the aggravating circumstance found in section 921.141(5)(h) of the Florida Statutes several times in the court below. It was dealt with extensively in his Motion to Declare Section 921.141(5)(h) Unconstitutional (R 97-103), and was raised again in Appellant's Demurrer to the Indictment. (R 793-804) Additionally, defense counsel argued that the especially heinous, atrocious or cruel factor is too vague to pass muster under the Constitution when they objected to allowing Appellant's penalty phase jury to consider this circumstance in aggravation. (R 1745-1748, 2720-2725) The trial court rejected all these challenges, and both instructed Appellant's jury on the aggravator in question (R 2739-2740), and found it to apply in her sentencing order. (R 1574-1579, 1932-1942)

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

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

Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235, 249-250 (1983) (footnote omitted). As it has been applied, however, Florida's especially heinous, atrocious or cruel aggravating factor has not passed constitutional muster under the above-stated principles, as it has not genuinely limited the class of persons eligible for the ultimate penalty. This fact is evidenced by the inconsistent manner in which this Court has applied the aggravator in question, resulting in a lack of guidance to judges who are called upon to consider its application in specific factual settings. The standard of review has vacillated. For instance, in Hitchcock v. State, 578 So. 2d 685 (Fla. 1990), this Court stated that application of the HAC statutory aggravating factor "pertains more to the victim's perception of the circumstances than to the perpetrator's," 578 So.2d at 692, whereas in Mills v. State, 476 So. 2d 172, 178 (Fla. 1985), the analysis concerned the perpetrator's intent: "The intent and method employed by the wrong-doers is what needs to be examined."

As this Court stated in Smalley v. State, 546 So. 2d 720 (Fla. 1989), the Supreme Court of the United States upheld the facial validity of the HAC factor in Proffitt against a vagueness challenge because of the narrowing construction this Court set forth in State v. Dixon, 283 So. 2d 1 (Fla. 1973). However, in Sochor v. Florida, 504 U.S. ___, 112 S. Ct. ___, 119 L. Ed. 2d 326 (1992), the Supreme Court strongly suggested that this Court has not adhered to the limitations purportedly imposed upon HAC by the definitions of "heinous," "atrocious" and "cruel" enunciated in Dixon:

> Sochor contends. . .that the State Supreme Court's post-Proffitt [v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976)] cases have not adhered to Dixon's limitation as stated in Proffitt, but instead evince inconsistent and overbroad constructions that leave a trial court without sufficient guidance. And we may well agree with him that the Supreme Court of Florida has not confined its discussions on the matter to the Dixon language we approved in Proffitt, but has on occasion continued to invoke the entire Dixon statement quoted above [in which this court gave its interpretation of the terms "heinous," "atrocious," and "cruel," and stated what types of capital crimes were intended to be included within these definitions], perhaps thinking that Proffitt approved it all. [Citations omitted.]

119 L. Ed. 2d at 339 [emphasis supplied].

The Supreme Court has also indicated in post-Proffitt cases that even definitions such as those employed in Dixon are not sufficiently specific to enable an aggravator like HAC to withstand a vagueness challenge. Shell v. Mississippi, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990); Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988).

Deaths by stabbing provide but one of many specific examples which could be cited of the Court's failure to apply the section 921.141(5)(h) aggravating circumstance in a rational and consistent manner. In cases such as Nibert v. State, 574 So. 2d 1059 (Fla. 1990), Mason v. State, 438 So. 2d 374 (Fla. 1983), and Morgan v. State, 415 So. 2d 6 (Fla. 1982), the Court has approved findings of especially heinous, atrocious, or cruel where the deaths resulted from stabbings. In Wilson v. State, 436 So. 2d 908 (Fla. 1983), however, a killing that resulted from a single stab wound to the chest was held not to be especially heinous, atrocious or cruel. In Demps v. State, 395 So. 2d 501 (Fla. 1981) the victim was held down on his prison bed and knifed. Even though he was apparently stabbed more than once (the opinion refers to "stab wounds" (plural) 395 So. 2d at 503), and lingered long enough to be taken to three hospitals before he expired, this Court nevertheless found the killing not to be "so `conscienceless or pitiless' and thus not `apart from the norm of capital felonies' as to render it `especially heinous, atrocious, or cruel' [citations omitted]." 395 So. 2d at 506. See also opinion of Justice McDonald concurring in part and concurring in the result in Peavy v. State, 442 So. 2d 200 (Fla. 1983) simple stabbing death without more not especially cruel, atrocious, and heinous). [For other examples of how various aggravating circumstances have been applied inconsistently, please see MELLO, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller, XIII Stetson L. Rev. 523 (1983-84).] The result

of the illogical manner in which the section 921.141(5)(h) aggravator has been applied is that sentencing courts have no legitimate guidelines for ascertaining whether it applies. Any killing may qualify, and so the class of death-eligible cases had not been truly limited.

The inconsistent rulings by this Court applying or rejecting the HAC factor under the same or substantially similar factual scenarios show that the factor remains prone to arbitrary and capricious application. These infirmities render the HAC circumstance violative of the Eighth and Fourteenth Amendments. Appellant's sentence of death imposed in reliance on this unconstitutional factor must be vacated.

ISSUE VII

THE TRIAL COURT ERRED IN SENTENCING ANTHONY WASHINGTON TO DEATH OVER THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT, BECAUSE THE FACTS SUGGESTING DEATH AS THE APPROPRIATE PENALTY WERE NOT SO CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER.

In Florida, the "capital sentencing jury's recommendation is an integral part of the death sentencing process." Riley v. Wainwright, 517 So. 2d 656, 657 (Fla. 1987). The recommendation of the jury represents the judgment of the community as to whether death is the appropriate penalty under the facts of the case being considered. Odom v. State, 403 So. 2d 936 (Fla. 1981).

The life recommendation of a jury must be followed if there is a reasonable basis therefor. Malloy v. State, 382 So. 2d 1190 (Fla. 1979). The jury's recommendation of life must be given great weight, and

> [i]n order to sustain a sentence of death following a jury's recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). See also Herzog v. State, 439 So. 2d 1372 (Fla. 1983); Riley. Stated another way, this Court "will not sustain an override unless the jury's life recommendation was entirely unreasonable. [Citations omitted.]" Wright v. State, 586 So. 2d 1024, 1031 (Fla. 1991).

The life recommendation in the instant case must be considered particularly strong, as it was returned despite the prosecutor's attempt to eliminate from the jury all persons who were "weak" on

the death penalty, as discussed in Issue I herein, and despite the fact that the jury was permitted to consider the unconstitutionally vague aggravating circumstance of especially heinous, atrocious or cruel, as discussed in Issue VI, and despite the fact that defense counsel's argument to the jury at penalty phase was improperly restricted, as will be discussed below.

Furthermore, even the trial court herself found some mitigation in Appellant's positive character traits, although she afforded it minimal weight. (R 1585-1587, 1957). In cases such as Thompson v. State, 456 So. 2d 444 (Fla. 1984), Gilvin v. State, 418 So. 2d 996 (Fla. 1982), and Welty v. State, 402 So. 2d 1159 (Fla. 1981), this Court vacated death sentences imposed over life recommendations, even though the trial courts had found no mitigating circumstances, because there was evidence in the record upon which the juries could have relied in mitigation. Appellant's jury was free to give the evidence of Appellant's positive character traits the weight that it felt appropriate, and this evidence could have formed a rational basis for the recommendation.

While the trial court's sentencing order runs to some 23 pages in length, only about two pages are devoted to the critical matter of her decision to override the jury's life recommendation. (R 1572-1594) The court essentially sets forth three reasons for the override: that the jury may have been swayed by improper argument by defense counsel, that the jury may have improperly considered Appellant's age as mitigating, and that the jury was not privy to Appellant's non-violent criminal record, which might have served to

counteract testimony about how Appellant supported his children, was a good father, and worked hard. (R 1592-1593)

The court first alleges impropriety in the "residual or lingering doubt argument" made by defense counsel. (R 1592) This argument was a very brief portion of the defense presentation. (R 1766-1768) Furthermore, as the trial court noted, there was no objection or request for a curative instruction when the argument was made. (R 1592, 1766-1768) If the argument was improper, the court could have and should have stopped it herself. See, for example, Teffeteller v. State, 439 So. 2d 840 (Fla. 1983) (comments of counsel during trial controllable by trial court in its discretion). It hardly seems fair to negate a jury's life recommendation on the basis of a brief argument that was not challenged when it was made. Additionally, residual doubt about guilt is something that sentencing juries in capital cases should be permitted to consider. In her dissenting opinion in King v. Dugger, 555 So. 2d 355, 360 (Fla. 1990), Justice Barkett noted her belief that "a jury is entitled to, and often does, mitigate a sentence because of 'lingering doubt' about the defendant's guilt..." If juries in other cases consider this factor, Appellant's jury also should have been permitted to consider it, particularly in light of the circumstantial nature of the evidence presented. See also Model Penal Code §201.6(1), which would preclude a death sentence where the evidence did not foreclose all doubt respecting the defendant's guilt because of the irrevocability of the capital sanction.

The trial court's sentencing order also finds fault with that portion of the defense argument to the jury which may have led the jury to believe that the evidence presented at guilt phase did not count as an aggravating circumstance, or did not count as much as what was offered at penalty phase, and that the state attorney decided what was aggravating. (R 1592) Without reciting defense counsel's argument here, suffice it to say that a fair reading of the argument indicates that counsel was essentially arguing the weight to be given to various aggravating factors, an argument which was entirely proper. If there was any suggestion that the prosecutor determines what is aggravating, to a large extent, prosecutors do determine aggravating circumstances, by virtue of the evidence they choose to present, and the aggravators upon which they request the court to instruct the jury.

Finally, the trial court's order finds a problem with Appellant's "uncontroverted argument" that dealt with lack of intent to kill. (R 1592-1593) As the court notes, the State did not request rebuttal argument. (R 1592-1593) The fact that the court "would probably have given it to" the State if requested is of no moment. It is not Appellant's fault if the argument did not occur to the prosecutor, who then failed to request additional argument. Furthermore, merely because the trial court found the evidence regarding lack of intent to kill unpersuasive (R 1588-1591) did not mean that the jury was also bound to find it so, particularly when one considers Dr. Merin's testimony that the probabilities were great that Appellant would not plan to kill

someone, and that he may have wished merely to render Alice Berdat incapable of doing anything against him. (R 1715)

A defendant in a capital case must be afforded wide latitude in presenting evidence as to the sentence to be imposed; the sentencer may not be precluded from considering as a mitigating circumstance any aspect of the defendant's character or record or any circumstances of the offense that he proffers as a basis for a sentence less than death. Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987); Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986). The right to due process and effective assistance of counsel demand that a defendant, through his attorney, likewise be afforded adequate opportunity to address the appropriateness of the death penalty. Exercise of that opportunity should not lead to negation of the jury's recommendation when the argument proves persuasive.

With regard to the matter of Appellant's age of 32 at the time of the offense, the court cites this Court's opinion in Echols v. State, 484 So. 2d 568 (Fla. 1985), and notes that Appellant's jury did not "know all of this law." (R 1593). The first question that arises is why the court instructed the jury on the mitigating circumstance of age if she felt that it was not an appropriate factor for the jury to consider. While the jury may not have known the law, the court presumably knew it. At any rate, Appellant does not read Echols as precluding, as a matter of law, the jury from

considering his age as a mitigating circumstance. In light of the testimony presented, Appellant's jury may reasonably have believed that Appellant was still young enough to learn from his mistakes and grow as a person, and yet would be relatively advanced in years when, if ever, he emerged from prison after serving his life sentence, so that he would be unlikely to engage in further criminal activity. Again, merely because the trial court was not persuaded that age was a mitigating factor here (R 1580-1582) did not mean that the jury was bound to reach the same conclusion.

As for the court's discussion concerning the fact that Appellant's jury was not "privy" to his "lengthy non-violent" record, Appellant would first note that it was the court herself who ruled that the jury could not receive evidence of non-violent offenses Appellant may have committed, when the defense stipulated that the statutory mitigating circumstance of no significant history of prior criminal activity did not apply. (R 2727) Furthermore, the sentencing court was not permitted to consider Appellant's non-violent record, as this is not one of the exclusive aggravating circumstances set forth in section 921.141(5) of the Florida Statutes. Spaziano v. State, 393 So. 2d 1119 (Fla. 1981). Moreover, while Appellant's jury may not have been aware of all the details concerning Appellant's criminal history, the jury did have considerable information in this regard. For example, the jury knew that Appellant was on work release for committing some offense(s) at the time he allegedly committed the instant crimes. And Dr. Merin testified about Appellant's scrapes with other people

and problems with the law that started at an early age. (R 1719) Perhaps even more significantly, the jury learned all about a violent offense for which Appellant was convicted, the rape of Mary Beth Weigers. Not only did the State introduce a judgment and sentence showing a conviction for that offense, the State also presented graphic live testimony from the victim herself. (R 1433-1437, 1682-1689, 1691-1692) Surely this type of evidence was more likely to influence the jury in a negative manner than any knowledge concerning non-violent offenses for which Appellant was convicted. Finally, although the trial court characterizes Appellant's non-violent criminal history as "lengthy," it is probably far less substantial than the histories of many capital appellants who come before this court. Please see presentence investigation at R 1597-1598. It is illogical to believe that the jury would have found this record to negate the positive character evidence that was presented when they did not find the evidence as to the rape of Mary Beth Weigers and the testimony concerning the offenses against Alice Berdat to negate it. See Richardson v. State, 437 So. 2d 1091, 1095 (Fla. 1983) in which this Court found error in the trial court's overriding of a jury's life recommendation where the override was predicated on the fact that the "jury's recommendation was not based on all available facts and evidence."

Most likely Appellant's jury was persuaded by the testimony of Dr. Merin and Appellant's mother that there is something salvageable in Appellant that does not call for his execution. Appellant is one who is reasonably intelligent, is capable of being a hard

worker, a successful athlete, a good father to his three children, and a loving and obedient son (R 1726-1727, 1728-1730), but someone who became involved with the wrong people, perhaps became involved in drugs, and was shaped by the environment in which he grew up in Liberty City so that he developed a dependent personality and a severe behavioral problem. (R 1709-1711, 1719, 1728, 1730) He is someone who is capable of developing a conscience and living in confinement and abiding by the rules, although it might take some period of adjustment for him to do so. (R 1716-1717)

The matters about which Dr. Merin and Appellant's mother testified have been recognized as legitimate mitigating circumstances in a number of cases. For example, rehabilitation potential: McCampbell v. State, 421 So. 2d 1072 (Fla. 1982); Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Carter v. State, 560 So. 2d 1166 (Fla. 1990); McCray v. State, 582 So. 2d 613 (Fla. 1991); employment history: Buckrem v. State, 355 So. 2d 111 (Fla. 1978); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Proffitt v. State, 510 So. 2d 896 (Fla. 1987); Fead v. State, 512 So. 2d 176 (Fla. 1987); McCampbell; Holsworth; parenthood: Jacobs v. State, 396 So. 2d 713 (Fla. 1981); positive traits/family testimony: Washington v. State, 432 So. 2d 44 (Fla. 1983); Thompson v. State, 456 So. 2d 444 (Fla. 1984); Perry v. State, 522 So. 2d 817 (Fla. 1988); Harmon v. State, 527 So. 2d 182 (Fla. 1988); Hallman v. State, 560 So. 2d 223 (Fla. 1990); Dolinsky v. State, 576 So. 2d 271 (Fla. 1991); Craig v. State, 585 So. 2d 278 (Fla. 1991); Wasko;

Holsworth; McCampbell. Therefore, they formed a legitimate basis for the life recommendation.

It appears that the trial court rejected the impact of Dr. Merin's testimony for primarily two reasons: Appellant had not been rehabilitated by his previous stays in prison, and there were no guarantees that he would be rehabilitated this time. (R 1584-1585) It appears from the record, however, that Appellant's prior periods of incarceration were of relatively short duration, certainly nothing like the life sentence with no chance of parole for 25 years that he would be serving in the instant case (R 1597), and Dr. Merin did clearly state that it would take some length of time for the regimentation of prison life to work its effect on Appellant. (R 1716-1717) This Court has never required an ironclad guarantee that someone would be rehabilitated by a life prison sentence before this element may constitute mitigation; implicitly recognizing that life is not as certain as that, all the cases have required is the potential for rehabilitation, which Appellant certainly demonstrated.

All in all, it appears that the court below, as did the trial judge in Rivers v. State, 458 So. 2d 762 (Fla. 1984), merely disagreed with the jury's recommendation, which is insufficient reason to justify an override. As in Rivers, in Appellant's case

> there was substantial evidence offered in mitigation which the jury could reasonably have relied upon in reaching its advisory verdict.

458 So. 2d at 765. The test, as Justice McDonald noted in his concurring opinion in Cheshire v. State, 568 So. 2d 908, 914 (Fla.

1990), "is whether the facts are such that the jury's recommendation is reasonable and not whether the judge would reach the same conclusion." In Appellant's case, the recommendation was reasonable, and should have been followed.

> We choose juries to serve as democratic representatives of the community, expressing the community's will regarding the penalty to be imposed. A judge cannot ignore this expression of the public will except under the Tedder standard adopted in 1975 and consistently reaffirmed since then.

Stevens v. State, 613 So. 2d 402, 403 (Fla. 1992). The Tedder standard for overriding the life recommendation of the jury was not met in Appellant's case. His death sentence must be vacated in favor of a sentence of life imprisonment.

ISSUE VIII

THE COURT BELOW ERRED IN SENTENCING APPELLANT AS AN HABITUAL VIOLENT FELONY OFFENDER AND IMPOSING CONSECUTIVE 15 YEAR MINIMUM MANDATORY PRISON TERMS FOR THE NON-CAPITAL OFFENSES OF BURGLARY AND SEXUAL BATTERY.

On July 25, 1990, the State filed a notice that it would seek an enhanced penalty against Appellant pursuant to section 775.084 of the Florida Statutes. (R 152-153) After Appellant was convicted of the three offenses charged in the indictment, the State followed up on this notice at a hearing held before Judge Schaeffer on August 14, 1992, by presenting the court with several judgments and sentences and other documents in support of its request that Appellant be treated as an habitual violent felony offender. (R 1787-1803, 1881-1905) The judgments and sentences that the State introduced showed that Appellant had been convicted of the following offenses: burglary (R 1789-1790), burglary of an occupied dwelling (R 1790-1795), burglary of a dwelling and petit theft (R 1796-1799), and burglary of a conveyance and grand theft in the third degree. (R 1800-1803)

On September 4, 1992, the court below sentenced Appellant to consecutive life sentences with 15 year minimum mandatories on the burglary and sexual battery counts for which Appellant was convicted in the instant case, finding that he qualified as an habitual violent felony offender. (R 1626-1628, 1925-1928) These sentences were improper for at least three reasons. To begin with, the State failed to establish that Appellant had the predicate

convictions necessary to qualify for treatment as an habitual violent felony offender. From remarks of the prosecutor at the hearing held on August 14, the State apparently was relying upon one of the burglary convictions, which the prosecutor represented was for a "[b]urglary with battery," to satisfy the requirement of a previous conviction for a felony involving violence. (R 1896-1897) However, neither burglary with a battery, nor any of the other convictions the State established below, is enumerated in section 775.084(1)(b)1. as an offense which may be used to support a finding that the person to be sentenced qualifies as an habitual violent felony offender. Without an enumerated felony having been proven, the court should not have sentenced Appellant as an habitual violent felon. Mathews v. State, 574 So. 2d 1174 (Fla. 5th DCA 1991); Trott v. State, 579 So. 2d 807 (Fla. 5th DCA 1991).

Furthermore, the offense of sexual battery with physical force likely to cause serious personal injury for which Appellant was convicted was a life felony. §794.011(3), Fla. Stat. (1989). Life felonies are not subject to enhancement under the provisions of the habitual offender statute. Lamont v. State, 610 So. 2d 435 (Fla. 1992); Knickerbocker v. State, 619 So. 2d 18 (Fla. 1st DCA 1993); Moore v. State, 608 So. 2d 926 (Fla. 2d DCA 1992); Barrett v. State, 18 Fla. L. Weekly D1920 (Fla. 4th DCA Sept. 1, 1993); Owens v. State, 18 Fla. L. Weekly D1944 (Fla. 2d DCA Sept. 1, 1993); Dukes v. State, 18 Fla. L. Weekly D1992 (Fla. 3d DCA Sept. 14, 1993); Green v. State, 18 Fla. L. Weekly D2003 (Fla. 4th DCA Sept. 15, 1993).

Finally, all three offenses charged in this case arose from a single criminal episode. It was therefore improper for Appellant to be sentenced to consecutive minimum mandatory sentences as an habitual violent felony offender; only concurrent minimum mandatories could be applied in this situation, if Appellant qualified for treatment as an habitual violent offender. Sweet v. State, 18 Fla. L. Weekly S447 (Fla. Aug. 5, 1993); Daniels v. State, 595 So. 2d 952 (Fla. 1992); Thomas v. State, 18 Fla. L. Weekly D1829 (Fla. 4th DCA Aug. 18, 1993).

For all these reasons, Appellant's sentences as an habitual violent felony offender on the second and third counts of the indictment filed herein must be reversed, and this cause remanded for resentencing.

ISSUE IX

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, burglary and sexual battery, one dated July 16, 1992 (R 1508-1509) [which was the date on which the court orally adjudicated Appellant guilty of the instant offenses (R 2702, 2707)], and one dated September 4, 1992 (R 1623-1624) [which was the date on which Appellant was sentenced (R 1918-1977)].

Only one set of offenses was committed against a single victim in this case, and therefore, only one judgment should have been filed against Appellant. See Mann v. State, 603 So. 2d 1141 (Fla. 1992); Houser v. State, 474 So. 2d 1193 (Fla. 1985); Goss v. State, 398 So. 2d 998 (Fla. 5th DCA 1981). One of the judgments filed in the circuit court is extraneous and must be stricken.

CONCLUSION

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

(1) Reversal of his convictions and sentences and remand to the trial court with directions that Appellant be discharged; or (2) Reversal of his convictions and sentences and remand to the trial court with directions that Appellant be afforded a new trial; or (3) Vacation of Appellant's sentences and remand to the trial court with directions to impose a life sentence for the murder and to resentence Appellant on the burglary and sexual battery counts; or (4) Vacation of Appellant's sentences and remand to the trial court with directions to conduct a new penalty phase proceeding before a new jury impaneled for that purpose and to resentence Appellant on the burglary and sexual battery counts; or (5) Vacation of Appellant's sentences and remand to the trial court with directions to resentence Appellant on all three counts.

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 20th day of October, 1993.

Respectfully submitted,

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