IN THE SUPREME COURT OF FLORIDA

JOHN C. MARQUARD,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

CASE NO. 81,341

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ST. JOHNS COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On November 20, 1991, police arrested John Christopher Marquard[1], the appellant, on an active warrant charging him with murder. (R 4-6) On December 6, 1991, the St. Johns County, Fall Term, Grand Jury indicted Marquard for principle to first degree murder. (R 1) It should be noted that this was an interim presentment and the Fall Term again met April 24, 1992, and issued a supersedeas indictment charging Appellant with first degree murder[2] and armed robbery[3] of Stacey Ann Willets. (R 41) On December 18, 1991, Appellant filed his notice of intent to participate in discovery. (R 21) On April 14, 1992, the State

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[1] In this brief, counsel will use Appellant and Marquard interchangeably.

[2] § 782.04(1)(a)1 and/or 2, Fla.Stat.

[3] § 812.13(1) and (2)(a); § 775.087(2)(a), Fla. Stat.

moved for a determination of Appellant's competency to stand trial. (R 32) On April 24, 1992, the State motioned for an order directing production of psychiatric records of Appellant and a motion for handwriting exemplars. (R 44) On May 12, 1992, the court granted the order directing Appellant to submit the handwriting exemplars and for the production of medical or psychiatric records of Appellant. (R 66, 67) Counsel for Appellant filed an amended order appointing a neurologist to examine the defendant, and motioned for appointment for an expert mental health professional pursuant to Florida Rule of Criminal Procedure 3.216(a). (R 102)

On July 13, 1992, Appellant filed a motion to dismiss requesting, inter alia, that the part of count one of the supersedeas indictment pertaining to first degree felony murder be dismissed and that count two of the indictment be dismissed. (R 125) On July 21, 1992, the State filed the traverse to Appellant's motion to dismiss pursuant to Florida Rule of Criminal Procedure 3.190(d). (R 147)

Appellant filed motions attacking the constitutionality of the various aspects of Florida's capital sentencing scheme. (R 115, 137) Appellant also made a motion for statement of particulars regarding aggravating circumstances and a motion for use of special verdict form for the unanimous jury determination of statutory aggravating circumstances. (R 131,142)

Appellant filed two motions to suppress evidence. (R 227, 232) The first motion was to suppress statements made by

defendant obtained on November 19, 1991. (R 227) The second motion was to suppress the knives and camouflage pants seized from Appellant's residence on November 17, 1991. (R 232) Concerning the motion to suppress statements by defendant obtained on November 19, 1991, the court initially denied the motion without hearing. (R 637) However, the court thereafter did take testimony and further argument of counsel and took the motion under advisement. (R 675) Concerning the motion to suppress the knives and camouflage pants, following a hearing, the court reserved ruling on the motion, and allowed the evidence at trial over objection. (R 675, 1317)

Appellant filed an amended motion to dismiss that portion of count one of the supersedeas indictment pertaining to first degree felony murder against the defendant and count two of the same indictment. (R 236) The State filed a traverse of the defendant's amended motion to dismiss. (R 248) The court denied the amended motion to dismiss. (R 282)

The State filed a motion to appoint mental health expert for the purpose of capital sentencing proceedings and an order for mental health examination of defendant, (R 423) and the motion was granted over defense objection. (R 687)

This case proceeded to a jury trial on January 11, 1992. (R 705-1784) Immediately before jury selection began, the trial court reconsidered its earlier order granting the State's motion to have a mental health expert examine defendant. (R 699) After a short discussion the court stated that Dr. Merwin, the

State's expert, could not re-interview the defendant, but rather could sit in on the penalty stage and listen to the defense mental health professional testify and based on that testimony could testify based on what he heard in that session. (R 703) As jury selection got under way, the trial court denied Appellant's motion for continuance and change of venue. (R 720-721) During jury selection, the court granted two of the State's cause challenges of jurors. (R 851, 915)

At trial, the court allowed introduction of the victim's shirt and boots over defense objection on relevance grounds. (R 981) Evidence of Appellant discussing "silent kills", i.e. how to kill somebody silently without anybody hearing, was permitted over defense objection and subsequent motion for mistrial denied. (R 1077) The State also sought to introduce a picture of the victim (State Exhibit M) over defense objection on the grounds of relevancy. The picture depicted the victim's features of downs syndrome. (R 1091) Shortly thereafter, the State informed the court that Dr. Merwin, their State expert had arrived for the penalty phase. (R 1093) At that time the State requested that Dr. Merwin be permitted to sit in and observe the remainder of the trial. (R 1093) The defense objected to Dr. Merwin being present after "the rule" had been invoked. (R 1095) The court overruled defense objection. (R 1095) The court also denied defense subsequent motion for mistrial. (R 1096)

The State introduced the knives allegedly used in the

murder over defense objection, renewing their motion to suppress and chain of custody. (R 1129-1133) The State also attempted to introduce a facsimile of the Kukri knife used by the defendant in the murder. (R 1033) Objection to the introduction of the facsimile of the Kukri knife was overruled. (R 1145) The defense also objected to the testimony of Andrew Beyer who stated that the night of defendant's arrest he made admissions concerning his involvement in the first degree murder during a telephone call from the jail. (R 1257) The court overruled the objection and subsequent motion for mistrial. (R 1274) Appellant renewed the Motion to Suppress his confession and consent to search his apartment, which was denied. (R 1317)

At the conclusion of the State's case-in-chief, Appellant's motion for judgment of acquittal and renewal of motions for mistrial were denied. (R 1368) Appellant requested a modification of the standard jury instruction; the request was denied. (R 1379) Based on improper comment by the prosecutor during final summation, Appellant objected and moved for a mistrial. The objection was overruled and the motion for mistrial denied. (R 1415) Following deliberations, the jury found Appellant guilty as charged of first degree murder and armed robbery with a firearm. (R 1465)

The penalty phase began on January 15, 1992. (R 1599) The State presented one witness, the defense one witness and one rebuttal witness for the State. The trial court denied Appellant's request for special jury instructions. (R 1525) The

trial court allowed over defense objection, the testimony of Patricia Rauls, a parole officer from North Carolina, who testified that Appellant was placed on parole in March of 1991 for a misdemeanor charge. (R 1607) The trial court allowed over defense objection the Appellant's criminal history and other improper statements during the cross-examination of the defense psychological expert, Harry Krop. (R 1672-1674) The trial court also allowed over defense objection, State's forensic psychology expert, Dr. Merwin, to testify that a majority of people he interviewed at the jail suffer from anti-social personality disorder. (R 1704)

Following deliberations, the jury returned with an advisory verdict recommending the death sentence (12-0). (R 1780, 476) The trial court sentenced Appellant to death finding four aggravating circumstances and a number of non-statutory mitigating circumstances. (R 538-543) The trial court sentenced Appellant for a term of natural life imprisonment on the armed robbery. (R 547) Following a short hearing, Appellant's motion for new trial was denied by the trial court. (R 1792) Appellant filed a notice of appeal on February 24, 1993. (R 582) This Court has jurisdiction. Art.V, Section 3(b)(1), Fla. Const.

STATEMENT OF THE FACTS

Jerry Stalvy, a 16-year old student was hunting near Deer Bottom Road in St. Johns County, November of 1991. (R 957) While chasing his hunting dogs, he came across bones and some rags that appeared to be clothing. (R 958) After coming across the bones, Jerry Stalvy ran off to get his parents, who thereafter summoned the police. (R 960)

Susan Biesiada, evidence technician for the St. Johns County Sheriff's office testified that she found clothing within a ten foot area, and that human bones were scattered through out the sixty foot diameter of the clearing. (R 978) The human remains were taken to the medical examiner's office for examination. (R 1007) The medical examiner found that there was an incised wound on one of the spinous processes in the mid-neck, and there appeared evidence of previous orthodontic care in the teeth. (R 1007-1008)

Several days later the dental records of the suspected victim, Stacey Willets were brought down from Wilmington, N. C. (R 1008) Upon examination of the dental records, it was determined that the remains were those of Stacey Willets. (R 1009) Upon further examination of the remains, it showed that the fifth vertebrae on the cervical vertebrae showed a cut defect and the medical examiner testified that one-third had been cut off with a heavy-blade instrument. (R 1011) There were also knife like injuries in the left chest area of the fifth and sixth rib. (R 1012) The medical examination determined the cause of

death was due to multiple knife wounds. (R 1013)

Patricia Greenhalgh, a detective with the St. Johns County Sheriff's Department, stated that keys belonging to the victim Stacey Willets' 1981 Mustang were found among the skeletal remains in St. Johns County. (R 1022) Detective Greenhalgh went to North Carolina to interview a suspect Michael Abshire. (R 1026) After providing Miranda warnings, said suspect made a statement. (R 1030) Detective Joseph Freshley of the Pinellas Park Police Department questioned Marquard of the whereabouts of Stacey Willets. (R 1057) According to Detective Freshley, Marquard admitted meeting the victim, Stacey Willets in Wilmington, North Carolina. Subsequently, they left North Carolina with Mike Abshire, and went to Florida, got a motel, and began looking for work. (R 1061) Marquard could not find work, but Stacey was offered work and refused. (R 1062) Several arguments broke out in that Stacey Willets was not pulling her weight. (R 1062) Then, according to Marquard, Stacey Willets came home one night with another man, stating she was leaving. (R 1062) Marquard then asked to buy her car, and she then sold it for $200 and left. (R 1062) She later returned asking for money and Marquard refused. (R 1062)

Mike Abshire testified that he met Marquard in Wilmington, North Carolina in 1989. (R 1086) Thereafter they discussed leaving North Carolina for Florida for job prospects. (R 1087) In May 1991, Abshire met Stacey Willets and took her to Marquard's house where the three decided to move south together,

using Stacey's car and sharing expenses. (R 1089-1090)

On Sunday, June 23, 1991, the three packed Stacey Willets' car and headed to Georgia to find work. Abshire and Appellant brought their collection of knives along, including a Kukri knife. (R 1097-1098) Appellant also had a set of keys made of Stacey Willets' car without her knowledge. (R 1099) During a stop in South Carolina, Appellant told Abshire that they should find a lonely spot on the road, that he was going to kill Stacey Willets because he was tired of arguing with her. (R 1100)

The plan to kill Stacey Willets in South Carolina was abandoned and the three arrived in St. Augustine the next day at dawn. (R 1003) The three checked into a motel and began to look for work. (R 1103) The following day the three continued to look for work and then checked into a new motel. (R 1103) However, at the end of the second day, Stacey Willets and Appellant had a bad argument about locating work. (R 1103)

The third day in St. Augustine, Appellant and Mike Abshire went to a rooming house that Appellant had stayed at in the past. (R 1111) Appellant arranged to get a room there for two. (R 1112) After leaving the rooming house, Abshire questioned Appellant about why he had not told the person at the rooming house about Stacey Willets. (R 1112) At that point, Appellant again brought up the subject of killing Stacey Willets. (R 1112) The two then drove back to their motel and planned the murder of Stacey Willets. (R 1113) They ultimately agreed to

take Stacey Willets to a secluded area in the woods and kill her. (R 1113)

When Abshire and Appellant arrived back at the motel, they told Stacey Willets they were going to a party that night, off State Road 16. (R 1115) Between 8 and 10 p.m. the three drove out State Road 16 looking for a bridge with water under it, where there would be alligators to destroy evidence of the murder. (R 1116-1118) After finding a suitable location, Abshire and Appellant stopped the car and put on their military web gear with assorted knives strapped to their bodies. (R 1121) The three then walked single-file into the woods with Abshire first, Stacey Willets second and Appellant third. (R 1122) Because of the dense foliage and darkness, Abshire and Appellant could not find a trail to the water, so Abshire and Appellant decided to head back to the car. (R 1123) At that point Abshire heard a muffled scream and turned and saw Appellant grabbing Stacey Willets from behind and stabbing her. (R 1125) Appellant then threw Stacey Willets to the ground. (R 1125) Stacey Willets still appeared to be alive, so Appellant put her face in the water until she stopped breathing. (R 1126) Appellant then told Abshire to stab the victim, which he did. (R 1126) Appellant and Abshire took their knives and hacked at Stacey Willets' neck. (R 1126) Appellant then produced a folding shovel and they began digging a hole but there were too many roots. So they chopped shrubs and covered Stacey Willets' body with branches. (R 1126) Abshire and Appellant then went back to

the motel, washed up and disposed of the victim's personal items. (R 1164, 1165)

The night of Appellant's arrest, he called back to his house and spoke to Andrew Beyer. (R 1262) Beyer asked Appellant if it was true he committed first degree murder. (R 1262) Appellant stated," yeah," it was with Michael Abshire; they both did an equal amount of killing to keep the other person quiet. (R 1263) Also on the night of Appellant's arrest, he was questioned by Detective Frank Welborn. Appellant was read his rights and signed a waiver of rights form. (R 1327) During the interview, Detective Welborn obtained information from North Carolina from detectives who had interviewed Michael Abshire. (R 1329) Hours later, the defendant was re-read his rights and executed a Miranda form and made a taped confession. (R 1335-1345)

In Appellant's confession, he stated that the night of Stacey Willets' death, they were going to see "Howey" at a place by the river. (R 1337) Once there, they pulled off on a dirt road, exited the car and stating walking with Michael Abshire in the lead. (R 1337) They got on a trail which had a dead end, and then Mike Abshire starting back-tracking. (R 1338) At that point something happened. Appellant did not remember exactly what, but the next thing he knew Stacey Willets was lying down, face down on the ground and he was standing over her with a dagger in his hand. (R 1338) That was the extend of what Appellant could remember except for covering her up in a panic and "just running the hell away." (R 1339)

PENALTY PHASE

A. Aggravation.

Over strenuous objection, Patricia Rauls, Parole Officer in the State of North Carolina testified that Appellant was placed on parole in March of 1991 for a misdemeanor larceny. (R 1600-1609) Patricia Rauls further testified that Appellant failed to appear for his June 24, 1991, parole reporting, and as a result, a violation report was submitted in July of 1991. (R 1600-1609)

B. MITIGATION

Appellant called psychologist, Harry Krop, to present mitigation evidence. (R 1613) Dr. Krop testified that Marquard came from a dysfunctional family, in that his parents separated when he was six or seven years old. (R 1625) There was a bitter divorce and custody battle where Appellant stayed with his mother, while his two sisters stayed with his father. (R 1625) According to Marquard's father, the reason they obtained custody of the two daughters was because the mother was physically abusive of the two girls. (R 1625) According to the mother, Marquard's father was physically abusive to her and also to Marquard. (R 1625) Marquard reported that he was physically abused by both of his parents. (R 1625)

Harry Krop further testified that Appellant's mother has a history of alcohol abuse and was a treated in-patient for alcoholism. (R 1625) After Appellant's parents' marital separation, he did not see his father for four to five years. (R

1625) According to the mother, Appellant did not see his father during that period because he was afraid of him. (R 1625) As he was talking with both parents, Harry Krop determined that there was a behavior pattern on the part of both parents, referred to as parental alienation syndrome. (R 1626) A parental alienation syndrome is essentially when one parent, usually a custodial parent, does things or says things to a child or in front of a child which attempts, either consciously or unconsciously to alienate the child from the other parent. (R 1626)

At the time of the parental separation, Marquard began to get into trouble. (R 1627) Harry Krop stated that Marquard started drinking when he was eight years old and starting using drugs and alcohol somewhere around eight or nine years old. (R 1627) Marquard also reported being sexually abused by a neighbor when he was five or six years old. (R 1627) The abuse consisted of frequent anal sex. (R 1627) Mr. Krop further testified that in the four to five year separation from his father, he also did not see his two sisters who he was very close to prior to their untimely separation. (R 1627)

When Marquard was eleven, he was sent to a group home, because he was having difficulty adjusting to living with his mother. (R 1629) He stayed in the boys home for eighteen months. (R 1629) According to the records at the boys home, Marquard initially did very well made some progress in the first year. At the fifteen to sixteen month period he had a visit with his sisters. (R 1629) After the visit with his sisters,

Appellant regressed and came back talking about more violent types of things. He would talk about weapons. This change was reported by staff as being the result of the influence of Marquard's sisters who were reportedly involved in a motorcycle gang at the time of their visit. (R 1629)

The records also reflected that Appellant's mother was telling Appellant during some of the home visits that she would welcome taking Appellant back home with her. (R 1630) The appellant would then return back to the boys home with the expectation of soon being taken back home with his mother; however, when the boys home staff attempted to get the mother to come in and meet with them and talk about her taking Appellant home, she would not show up for the meetings. (R 1630) With Appellant regressing in the boys home, the staff felt he needed more intensive work and he was referred to what they called a therapeutic foster care situation, which is another family specifically trained in working with emotionally disturbed children. (R 1630) Marquard was in that system for approximately sixteen months. (R 1630) At this time Marquard's father was contacted. Soon thereafter, the father took Marquard home with him for about two years. (R 1630)

During the two year period with his father, Appellant was again having difficulty adjusting. (R 1630) He had difficulty in school, exhibited behavior problems, at which time he was referred to a group home for emotionally disturbed adolescents. (R 1631) Appellant was in the group home for a

short period of time where it was determined that his problems were too serious. Then he was referred to a State hospital where he stayed for the next sixteen months. (R 1631)

After Marquard was released from the State hospital, it was determined that the family situation was too unstable; but because of his age, he really could not be placed back in a foster situation and he was let out to live on his own. (R 1631) From that point on, Marquard simply lived a transient type existence, moving around from one place to another, having difficulty adjusting, and having an unstable environment. (R 1631)

Harry Krop testified that Marquard was diagnosed with different types of personality disorders in the past. (R 1634) He stated that he tried to put a specific diagnosis on him, but because Marquard fit in so many different categories, and his personality traits broke across different personality diagnosis, he would have to diagnosis him as having a "personality disorder not otherwise specified." (R 1634) Krop explained that this diagnosis is backed up by Appellant's records, i.e. that he was an individual with borderline traits who reacts to stress with inappropriate acting out, who tends to be manipulative, a person who also engages in self-injury, self-destructive type behavior, often times for attention seeking purposes. (R 1635) Moreover, he stated that this individual engages in certain psychotic like behaviors at times. (R 1635) Harry Krop stated that Marquard was diagnosed in the past as having explosive personality disorder.

(R 1635) This is an individual who reacts to stress in a manner that is totally out of proportion with a given situation. (R 1635) It might be a situation that might create some anger or frustration in all of us; but the person who has lost control and has low frustration tolerance essentially can explode and engage in violent behavior. (R 1635)

Harry Krop concluded with a statement that Marquard has serious psychological difficulties. (R 1638) Krop stated that Marquard is a seriously disturbed individual, and this condition has resulted in Marquard not being able to really be a contributing or functioning member of society. (R 1638,39) This condition has prevented Marquard from being able to lead a stable life style either vocationally or socially. Based on Marquard's condition, Dr. Krop concluded that Marquard has a serious mental disorder or serious emotional problem. (R 1639)

State Rebuttal

Dr. Merwin was called as a State expert on forensic psychology. (R 1693-95) Dr. Merwin concluded that Appellant suffered from anti-social personality disorder. (R 1698)

SUMMARY OF ARGUMENTS

POINT I The trial court erred when it granted the State's challenge for cause of juror Robinson where although he stated he was opposed to the death penalty, he could nonetheless listen to the instructions of the court and follow the law. Such an error is in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 22 of the Florida Constitution.

POINT II The trial court erred in refusing to suppress evidence seized where Appellant's consent to search his residence was not given voluntarily.

POINT III The trial court erred in permitting the State to introduce irrelevant bad character evidence concerning "silent kills" where no "Williams Rule" notice was given, or the probative value of such evidence was substantially outweighed by the prejudice to the appellant to receive a fair trial.

POINT IV The trial court erred in denying the defense motion for judgment of acquittal of count II of the indictment for armed robbery where any taking of property of the victim occurred after her murder and was merely an afterthought.

POINT V The trial court erred in sustaining the State's objection to defense counsel's argument in mitigation that it could consider consecutive terms of imprisonment in lieu of a death sentence. Sustaining the objection was an impermissible limiting of mitigation evidence in violation of Lockett v. Ohio and Jones v. State.

POINT VI The trial court erred in permitting, over objection, improper cross-examination of a State mitigation witness during the penalty phase. The trial court permitted the State to expose the defendant's complete criminal history, including the exact specifications of the charges where the probative value of such information was outweighed by the prejudice to the defendant.

POINT VII Over objection, the trial court erred in instructing the jury and finding the aggravating circumstance of "under sentence of imprisonment" where the evidence of whether the defendant was under such status was not proven beyond a reasonable doubt.

POINT VIII Over objection, the court instructed the jury that, in recommending the appropriate sanction, they could consider whether these murders were especially heinous, atrocious or cruel. As a matter of law, that circumstance is inapplicable. The jury reasonably based their recommendation of death entirely on this faulty consideration, and certainly it influenced their recommendation. The State cannot show that the erroneous giving of this particular unsupported instruction was harmless error, especially where only three other statutory aggravating circumstances were defined by the Court. Accordingly, the death sentence must be reversed and the matter remanded for a new penalty phase.

POINT IX The finding that the murder was committed for pecuniary gain is unsupported by the evidence. It appears that

the victim was killed after numerous heated arguments and the defendant was "tired of arguing with her." Because this aggravating circumstance does not apply it should be struck and the matter remanded for resentencing before a new jury.

POINT X The finding that the murder was committed in a cold, calculated and premeditated manner is unsupported by the evidence. The killing lacked "heightened premeditation." The aggravating circumstance must be struck and the matter remanded for resentencing.

POINT XI The defendant is entitled to a new trial where he was denied the right to a fair trial based upon the cumulative effect of numerous errors. Specifically, the repeated introduction of irrelevant physical evidence, and irrelevant and prejudicial testimonial evidence; improper argument by the prosecution; and the manifest unfairness of permitting Dr. Merwin to observe the trial during guilt phase after making previous ruling that such witness was sequestered until the penalty phase, taken together denied the defendant a fair trial and a new trial is required.

POINT XII Section 921.141, Florida Statutes is unconstitutional and therefore defendant's judgment and sentence must be reversed and remanded.

POINT I

THE TRIAL COURT VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 22 OF THE FLORIDA CONSTITUTION BY EXCUSING FOR CAUSE ONE QUALIFIED JUROR OVER DEFENSE OBJECTION.

Introduction

The law is clear that prospective jurors may not be excluded for cause "simply because they voice general objections to the death penalty or express conscientious or religious scruples against its infliction." Witherspoon v. Illinois, 391 U.S. 510, 522 (1968); Lockhart v. McCree, 476 U.S. 162, 176 (1986). This principle was reaffirmed by the United States Supreme Court in Gray v. Mississippi, 481 U.S. 648 (1987). There, the Court reiterated what the constitutional standard to be used to determine if a juror may be excluded for cause as being not whether the juror would have a difficult time imposing the death penalty; rather "the relevant inquiry is whether the jurors views would 'substantially impair the performance of his duties as a juror in accordance with his instructions and his oath'." Gray v. Mississippi, 481 U.S. at 658, quoting Adams v. Texas, 448 U.S. 38, 45 (1982). See also Wainwright v. Witt, 469 U.S. 412, 424 (1985).

The constitutional basis of that standard was emphasized in Gray:

> It is necessary, however, to keep in mind the significance of a capital defendant's right to a fair and impartial jury under the Sixth and Fourteenth Amendments.

> Justice Rehnquist in writing for the Court, recently explained: "It is important to remember that all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases as long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." Lockhart v. McCree, 476 U.S. 162, 176 (1986).
>
> The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would "frustrate the State's legitimate interests in administering constitutional capital sentencing schemes by not following their oaths." Wainwright v. Witt, 469 U.S. at 423. To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It "stack(s) the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law." Witherspoon v. Illinois, 391 U.S. at 523.

Gray v. Mississippi, 481 U.S. at 658, 659.

In Adams v. Texas, 448 U.S. at 49, the Court ruled that jurors could not be excluded if they stated they would be "affected" by the possibility of the death penalty since such indication could mean "only that the potentially lethal consequences or decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally."

> Neither nervousness, emotional involvement, nor inability to deny or confirm any affect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. The grounds for

> excluding these jurors were consequently insufficient under the Sixth and Fourteenth Amendments.

448 U.S. at 50. The standard for limiting the exclusion of jurors was specifically approved by the court in Wainwright v. Witt, 469 U.S. at 423-424, which also reiterated that the burden of demonstrating that the challenged juror would not follow the law in accordance with his oath and that the instruction of the court is on the party seeking exclusion of the juror, i.e., the State. Id. In the present case, it is clear that prosecution did not meet its burden to establish exclusion.

Juror Robinson

It is clear that juror Robinson had never considered the issue of capital punishment prior to voir dire. When the State questioned whether Mr. Robinson had served on a jury before, he answered, no he had not. (R 868) Then the following exchange occurred:

> THE STATE: Okay. The same questions. I want to ask you about the rules that we all share that apply to a courtroom such as this. You have any problem with the fact that Mr. Marquard is presumed innocent at this point and the burden is totally on the State of Florida? Any problems or concerns or questions you have about that?
>
> MR. ROBINSON: No, I don't.
>
> THE STATE: Okay. How about the death penalty question?
>
> MR. ROBINSON: Well, I don't know about that, either.
>
> THE STATE: I'm sorry?
>
> MR. ROBINSON: I don't know about that,

either.

THE STATE: Is it something --

MR. ROBINSON: If I could.

THE STATE: Do you want to say that again for her benefit?

MR. ROBINSON: Never occurred to me in that --

THE STATE: You never thought you'd be faced with this situation?

MR. ROBINSON: That's right.

THE STATE: Okay. Probably most people are in the same boat. Let me ask you this way. I don't know if I can simply ask you if you would be willing to follow law. Are you opposed -- do you know whether or not you are opposed to the death penalty?

MR. ROBINSON: I think I would be.

THE STATE: You just don't think it should be used?

MR. ROBINSON: That's right.

THE STATE: Okay. That's fine. You're certainly entitled to that feeling. Well, the question would be, <u>what if the Judge were to tell you this is the law</u> and if certain factors outweigh other factors or -- first proven and then outweighed the mitigating factors, you should recommend to the court death. <u>Would you disregard what the judge told you</u>?

MR. ROBINSON: <u>No, I'd be willing to follow orders</u>. (emphasis added)

(R 869-870) The State then asked a hypothetical question that if there were sufficient proof to recommend death but you [sic] Robinson "are really opposed to the death penalty what do you think you would do." Robinson replied, that he didn't know but

in this hypothetical he thought he wouldn't impose death. The State continued with the same hypothetical asking Robinson if someone is really opposed to the death penalty, no matter what the judge said, no matter what the evidence was, could that person vote for the death penalty no matter what the circumstances? And Robinson stated under that hypothetical that would be right. (R 70)

The use of hypothetical questions to juror Robinson that did not expressly elicit juror Robinson own personal convictions concerning capital punishment in no way discounts Robinson's statement made previously that he could follow the law. Such inquiry is rather irrelevant to the issue of whether juror Robinson himself, rather than a hypothetical person, could follow the law and vote to recommend death. The relevant inquiry was posed by defense counsel when he questioned Robinson directly, and not hypothetically, whether or not he could follow the law:

> DEFENSE COUNSEL: And Mr. Robinson, I think there were a few more questions for you about would -- if the judge -- if there were the situation, the judge were to instruct you on the law on the recommendation of what sentence to impose, could you follow the law, listen to the instructions and follow the law?
>
> MR. ROBINSON: Yes I could.

The trial court granted the State's motion challenging juror Robinson for cause stating:

> I don't believe you've shown a prima facie case that he has been stricken because of his color. You carefully calculated your

> question and when you asked him about the death penalty that last time around -- you didn't ask him about death penalty, you just said, would you follow the instructions of the court? My observation of Mr. Robinson is that he agrees with you whenever you say something, and he is certainly not going to disagree with you. So if you say, will you follow the instructions of the court, he nods his head yes, I'll follow instructions of the court. But if you ask him the question, would you vote for the death penalty under any circumstances, he says no, I would not. That's basically what he said. The objection is overruled and Mr. Robinson is stricken for cause.

(R 915-916)

It is clear from juror Robinson's answers that, to the day of trial, he'd never considered the issue of capital punishment. He wrestled with the issue throughout voir dire. His answers made it abundantly clear that he did not know the procedure of the law, but was willing to learn to apply the law in an appropriate case. As would any reasonable person, juror Robinson recognized a passing judgment that a fellow human being should die is a momentous decision, not to be taken lightly. The State seemed to read juror Robinson's hesitancy to kill an individual as an inability to recommend death in the appropriate case. Robinson's answers revealed the contrary. Although a decision to impose the death penalty was a weighty one for juror Robinson (as it should be) he never expressed an irrevocable commitment to vote for a life sentence regardless of the evidence. Rather, he concluded that he could follow the judge's instructions and could obviously consider a death recommendation if warranted by the evidence and the law.

Conclusion

The erroneous exclusion of even one juror in violation of the Adams-Witt-Gray standard is constitutional error which goes to the very integrity of the legal system and could never be written off as "harmless error". Gray v. Mississippi, supra; Davis v. Georgia, 429 U.S. 122 (1976); Chandler v. State, 442 So.2d 172 at 174-175 (Fla. 1983). "Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the constitution." Witherspoon, 391 U.S. 519-523.

The State is not permitted to so stack the deck against the defendant and thus deprive him of due process of law. Accordingly, the defendant was tried by an unconstitutionally seated jury. The defendant's judgments and sentences must be reversed and the case remanded for new trial before a fair and impartial jury.

POINT II

THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS AS EVIDENCE KNIVES AND CAMOUFLAGE PANTS SEIZED WHERE APPELLANT'S CONSENT TO SEARCH HIS RESIDENCE WAS INVOLUNTARY.

Facts

On November 17, 1991, from the hours of 7:00 p.m. to 1:30 a.m. Deputy Welborn of the St. Johns County Sheriff's Office interrogated Appellant. Before interrogation, Appellant executed a constitutional rights form and stated that he understood them and signed it. During the questions, Deputy Welborn received a call from his sergeant relaying a message from Detective Greenhalgh regarding statements made by Michael Abshire concerning the death of Stacey Willets. Deputy Welborn shared that information with Appellant. After being confronted with that information, Appellant began to relate the factual circumstances leading to Stacey Willets death. After Appellant made his initial confession, a written consent to search his residence was obtained. At the time Appellant signed the consent to search, he was a suspect in the Stacey Willets murder and was not free to leave the Sheriff's office at that time.

Consent was not voluntary based on the totality of circumstances.

Where the validity of a search rests on a consent, the State has the burden of proving the necessary consent was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority. Florida v. Royer, 460 U.S. 491, 497 (1983) In the case sub judice, Deputy

Welborn testified that the Appellant showed no hesitation in signing a consent form and he didn't use any intimidation, harassment or threats to get him to sign it. (R 646) Appellant contends that this kind of conclusory testimony by Deputy Welborn is nothing more than a showing that Appellant submitted to Detective Welborn's showing of lawful authority.

A determination that consent was voluntarily given is a finding of fact to be made in light of all circumstances. It is a matter which the government has the burden of proving. United States v. Mendenhall, 446 U.S. 544, 557 (1980) The factors to aid in this determination include:

> 1. The voluntariness of the defendant's custodial status;
>
> 2. The presence of coercive police procedures;
>
> 3. The extent and level of the defendant's cooperation with the police;
>
> 4. The defendant's awareness to his right to refuse consent;
>
> 5. The defendant's education and intelligence; and
>
> 6. The defendant's belief that no incriminating evidence will be found.

United States v. Lopez, 911 F.2d 1006, 1010 (5th Cir. 1990). The court should further consider whether the person who consented was detained and questioned for a long or short time, was threatened physically, intimidated or punished by the police, or was in custody or under arrest when the consent was given.

United State v. Chaidez, 906 F.2d 377, 380-381 (8th Cir. 1990). Moreover, an alleged voluntary consent to search must be viewed with great caution if given after arrest. United States v. Shields, 573 F.2d 18, 23 (10th Cir. 1978).

Examining the totality of the circumstances, Appellant's consent was not voluntarily made. In the instant case, Marquard had been subjected to over three hours of police interrogation. He was not free to leave. There was no inquiry by the detectives of Marquard of whether he was under the influence of drugs or alcohol. Nor was there any inquiry as to his educational status or intelligence level. The Fourth Amendment proscribes unreasonable searches and seizures; it does not prescribe voluntary cooperation. As the United States Supreme Court observed in Florida v. Bostwick, 501 U.S. 406, 410 (1991), the cramped confines of a bus are one relevant factor which should be considered in evaluating whether a passengers consent is voluntary. Undoubtedly, this Court could find no more of a coercive environment than an interrogation room of police headquarters. Finding that the consent was given in such a coercive environment in combination with the totality of other circumstances, this Court should conclude that the consent was involuntarily given and the evidence obtained therefor should have been suppressed.

POINT III

THE TRIAL COURT ERRED BY PERMITTING THE PROSECUTION TO INTRODUCE IRRELEVANT BAD CHARACTER EVIDENCE.

Introduction

The law is clear that evidence of other crimes, wrongs and acts is admissible if it is relevant because it is probative of a material issue other than bad character or propensity of an individual. Bryan v. State, 533 So.2d 744, 746 (Fla. 1988) The legislature has expressed this view in Section 90.404(a) which restates the Florida law as determined by Williams v. State, 110 So.2d 654, 659, 652 (Fla. 1959)

Before a trial judge can determine whether Williams Rule evidence should be admitted under Section 90.404(a), counsel must identify the fact or issue that the evidence is being offered to prove. If that fact or issue is not of consequence to the cause of action, it is not material to the case therefor the evidence will not be admissible to prove it under Section 90.404(2). Castro v. State, 547 So.2d 111, 115 (Fla. 1989)[4]

Assuming arguendo that the trial judge finds the

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[4] In Castro the state offered testimony of certain acts done to the victim by Castro to prove victim's state of mind. (The record discloses that the victim's state of mind was never an issue. Therefore, testimony establishes mental state was irrelevant. Therefore Florida courts have found that evidence was not admissible under Section 90.402 when the evidence was offered to prove the defendant's identity, intent and state of mind because in the facts of each of these cases those issues were not material. Bolden v. State, 543 So.2d 423 (Fla. 5th DCA 1989); Castro v. State, 547 So.2d 111, 115 (Fla. 1989); Coller v. State, 418 So.2d 238 (Fla. 1982)

Williams Rule evidence to be relevant, it still is not admissible when its probative value is substantially outweighed by its duly prejudicial nature. Appellant recognizes that most evidence presented against a defendant is prejudicial or otherwise there would be little reason for the State to offer it. Therefore, Appellant submits similar fact evidence is not inadmissible simply because it is prejudicial. However, when the probative value of the evidence is outweighed substantially by the undue prejudice that evidence will impart to the jury, it is inadmissible. Henry v. State, 574 So.2d 73, 75 (Fla. 1991) The trial court also must consider whether there is a sufficient time nexus between the collateral occurrences and the conduct in question. Heuring v. State, 513 So.2d 122 (Fla. 1987) McGough v. State, 302 So.2d 751 (Fla. 1974) Where the prior Williams Rule evidence is too remote, the necessary probative value will not be present and the evidence would be inadmissible. Heuring, supra.

How to make a silent kill

Before calling State witness, Michael Abshire,[5] the State requested a proffer outside the presence of the jury. The initial proffer went as follows:

> Q Did you ever discuss with him about how to kill people with a knife?
>
> A Yes sir.

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[5] Michael Abshire was previously tried and convicted of first degree murder for his involvement in the death of Stacey Willets.

Q Would you tell us what that was? Who said what?

A Sometimes it was pretty elaborate; different ways, different types of knives, silent kills.

Q What's a "silent kill?"

A How to kill someone just silently, without, you know, making any noise or anybody else hearing.

Q And what else about killing people with knives.

A Mostly what knives are good for what and different ways.

* * *

Q Okay. Let me ask you this: Did Mr. Marquard tell you how he learned the different ways to kill people with knives.

A Yes sir. Two ways. Once, he said -- told everybody he was a Navy Seal -- that was pretty elaborate there -- and the other was every other Sunday taking classes with swords.

Q With swords?

A Right

(R 1070-1073) During the proffered cross examination of Mr. Abshire, it was disclosed that these sort of discussions took place over a long period of time, basically the whole time that Mr. Abshire knew Appellant, which was from 1989 through mid to late 1991. (R 1074) At the conclusion of the proffer, defense counsel objected to this testimony on several grounds. First, Florida Statute 90.403: Relevancy of the evidence is inadmissible if its probative value was substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative

evidence. Second, that this is similar fact evidence which the State had not given the defense the required notice of intent in introducing through Mr. Abshire.[6] (R 1076, 1077) The trial court, without making any inquiry to the State as to what was their purpose for introducing this testimony concerning silent kills, etc., overruled the defense objection. (R 1078) Defense counsel subsequently moved for mistrial, which was also denied by the trial court. Although the trial court did recognize the standing objection throughout the testimony. (R 1078)

During the direct examination of Mr. Abshire, the State purposely sought to elicit the testimony concerning silent kills:

> Q Okay. Had you ever talked with Mr. Marquard about how to kill somebody with a knife?
>
> A Yes sir.
>
> Q What type things would you say to each other?
>
> DEFENSE COUNSEL: Judge, I renew my objection to this type of testimony.
>
> THE COURT: The objection is overruled.
>
> A Talked about what knives used different ways, different methods, different places and -- you know, on the body to use the knife, different ways, how to make silent kills.
>
> Q And what's a "silent kill?"
>
> A That's ... like in the military, it's taking out a sentry for a quiet -- there's no

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[6] Florida Evidence Code, Section 90.404(2)(b)(2) provides: When the State in a criminal action intend to offer evidence of other criminal offenses under paragraph (a), no fewer than 10 days before trial, the State shall furnish to the accused a written statement of the acts or offense it intends to offer...

sound, usually like, you know, cutting the throat or straight, you know, like knifing, you know, straight in, that type of deal (demonstrating).

Q How about did you ever talk about how to stab someone near around the heart?

A Yes, sir. ... in between ---- I'm not sure which rib it is; but, you know, like from the rear, you go right up in and go into the heart and lung and, from the front, the same way.

Q Now, these are things you all talked about?

A Yes, sir. We read about them in like Soldier of Fortune Magazine countless novels.

(R 1118, 1119)

Error to introduce irrelevant bad character evidence

Over Appellant's objection, the prosecution was permitted to present bad character evidence regarding statements Appellant made over a two year period prior to the incident for which he was on trial. Specifically, the prosecution was permitted to listen to testimony that Appellant had talked about various ways to kill people with knives and other objects and specifically "silent kills." It was reversible error to admit this irrelevant bad character evidence over Appellant's objection.

The allegation that Appellant discussed various ways on how to kill people with knives years prior to the murder of Stacey Willets was simply irrelevant to whether he committed the crimes charged. The prosecution's theory in this case was not that Appellant killed Stacey Willets because of his fascination

with knives and killing. Rather, the prosecution's theory was that Appellant murdered Stacey Willets after heated arguments and a desire to steal her car. Consequently, the use of statements by Appellant detailing various ways to kill people with knives years before the murder of Stacey Willets was not relevant to the State's theory, but instead constituted irrelevant bad character evidence.

This error had wide implications. Not only did the jury hear the inflammatory testimony thus tainting their guilt and penalty deliberations, the trial court used this evidence in support of his sentencing appellant to death. In the trial court's sentencing order the trial court concluded:

> She was killed for three reasons:
>
> (1) Defendant wanted to get rid of her. She argued with him and hadn't found a job and he, Abshire and Stacey were short on money, two people spend less money than three.
>
> (2) Defendant wanted her car, her money and other property. Defendant and Abshire had no transportation without Stacey's car.
>
> **(3) Defendant and Abshire played games. They discussed killing people and how you would kill someone with knives. Defendant wanted to know what it was like to kill someone.** (emphasis added)

(R 543)

<u>"Williams Rule" Notice; Improper "Williams Rule" Evidence</u>

In the instant case, the State filed no Williams Rule notice with respect to these facts and the jury received no Williams Rule charge. The rules of evidence provide that when the state intends to offer similar fact evidence it must provide

notice to the defense ten days before trial. See Section 90.404(2)(b) The notice should contain a list of the collateral acts or offense which the state seeks to offer during its case-in-chief. The notice enables defense counsel to prepare to rebut this evidence before trial.

The Appellant contends that the sanction for failing to provide timely notice should be similar to that when the state calls a rebuttal witness after not complying with Appellant's demand for discovery of rebuttal witnesses under Rule of Criminal Procedure 3.220(l). In such instances, the trial court would conduct what has become known as a "Richardson Hearing"[7] to determine whether the defendant has been prejudiced, and if so, what would be the appropriate sanction. In Wilcox v. State, 367 So. 2d 1020 (Fla. 1979), this Court suggested the following sanctions for such discovery violations:

(1) A short recess;

(2) A continuation of the trial;

(3) Exclusion of the testimony or the witness; or,

(4) Mistrial.

Wilcox, supra at 1023. Since no inquiry was made by the trial court, it is difficult to assess the procedural prejudice to defense, and therefore, the appropriate sanction. Nonetheless, Appellant contends that the failure to make such inquiry is reversible error because no procedure is available for appellate

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[7] This characterization is from the procedure directed by this Court in the case of Richardson v. State, 246 So.2d 771 (Fla. 1971)

courts to determine from the record the impact of such errors.

Improper Williams Rule Evidence

The Appellant contends that the evidence should have also been excluded as improper Williams Rule evidence.[8] This Court has recognized no distinction where the evidence of bad acts comes from prior statements of the defendant concerning the applicable of the Williams Rule.

In Jackson v. State, 451 So.2d 458 (Fla. 1984), this Court held that the evidence of the fact that the evidence of collateral crimes comes from prior statements from the defendant does not exempt it from the Williams Rule. The facts and circumstances surrounding the Jackson case has many similarities to the instant case. In Jackson the key witness at trial was an accomplice, James Lucas. Jackson often shared heroin and other drugs with Lucas. Lucas had testified at trial that Jackson picked up the victims with Lucas driving and got into arguments over drugs and subsequently shot them in the car with Lucas assisting Jackson in disposing of the bodies. Lucas eventually told the detectives about the murder and Jackson's arrest and subsequent trial were the result. Despite the eyewitness accomplice testimony of Lucas, the State introduced the testimony from Sylvester Dumas. During direct examination of Dumas by the

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[8] Section 90.404(2)(a), Florida Statutes (1991). Similar fact evidence for other crimes, wrongs or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, but it **is inadmissible when the evidence is relevant solely to prove bad character or propensity.**

State, he testified about an occasion where Jackson had pointed a gun at him and boasted of being a "thoroughbred killer" from Detroit. On appeal to this Court, Jackson argued that that testimony was impermissible and prejudicial. This Court agreed stating that "we envision no circumstance in which the objected to testimony could be "relevant to a material fact in issue" nor has the State suggested any." Jackson at 461. This Court concluded that the testimony in Jackson is precisely the kind forbidden by the Williams Rule and Section 90.404(2), and further stated:

> There is no doubt that this admission [to prior unrelated crimes] would go far to convince men of ordinary intelligence that the defendant was probably guilty of the crime charged. But, the criminal law departs from the standard of the ordinary in that it requires proof of particular crime. Where evidence has no relevancy except as to character and propensity of the defendant to commit the crime charged, it must be excluded. [Citing to Williams].

Jackson at 461.

Similar to Jackson, the State introduced evidence that Marquard talked about various ways to kill people with knives. This Court should conclude as it did in Jackson that Abshire's testimony was not relevant to a material fact in issue, and there was no relevancy supplied by the State.[9] This evidence was

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[9] In the trial court's sentencing order, the relevance of the bad character evidence was explained by the trial court as going to the motive for the killing. (R 543) This finding of motive by the trial court was at best speculative, considering the timing of Marquard's and Abshire's conversations related to the time of the murder. Appellant argues that since motive is not an "ultimate issue" in a case, evidence of motive has less

legally prejudicial and requires a new trial.

Conclusion

The State may attempt to argue that any error in the admission of the testimony about silent kills was harmless. Appellant strongly disagrees. In fact, this Court in Straight v. State, 397 So.2d 903, 908 (Fla. 1981) held that the erroneous admission of collateral crimes evidence "is presumed harmful error because of the danger the jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Accord Castro v. State, 547 So.2d 111, 115 (Fla. 1989); State v. Drolett, 549 So.2d 1172 (Fla. 2d DCA 1989); Delgado v. State, 573 So.2d 83 (Fla. 2d DCA 1990).

The test for harmless error is whether an appellate court can say beyond a reasonable doubt that the error did not effect the verdict. State v. DiGuillio, 491 So.2d 1129, 1139 (Fla. 1986) Based on a review of the record, the evidence of Appellant's guilt was his own confession wherein he admits to his presence at the crime scene but has no memory of what occurred; and the testimony of the accomplice, Michael Abshire, who admits his own involvement in the crime and then also implicates Appellant as being directly involved in the murder. There was no physical evidence whatsoever linking Appellant to the murder of Stacey Willets. Based on this quantum of evidence, it can't be

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probative value than evidence that is introduced to an ultimate issue. Therefore, great caution must be used in introducing evidence of motive where such evidence will be highly prejudicial.

said that the admission of Appellant's discussion about silent kills and various ways of killing people could not have affected their verdict beyond a reasonable doubt. Therefore, Appellant argues that it was reversible error for the trial court to admit this irrelevant bad character evidence or Williams Rule evidence.

POINT IV

THE TRIAL COURT ERRED BY DENYING DEFENSE MOTION FOR JUDGEMENT OF ACQUITTAL ON COUNT TWO ARMED ROBBERY WHERE ANY TAKING WAS AN AFTERTHOUGHT OF THE MURDER.

At the close of the state's case and conclusion of the case, defense counsel moved for a Judgement of Acquittal of Count II of the indictment (Armed Robbery) which was denied each time by the trial court. (R 1368, 1453) Appellant moved for Judgement of Acquittal, contending, inter alia, that there was no competent evidence to support that the killing of Stacey Willets was for the purpose of taking her property.

It appears that the trial judge denied the Judgement of Acquittal based upon the testimony of accomplice Abshire of a conversation in North Carolina three days before the murder in Florida. Appellant and the victim had a heated argument and Marquard suggested murdering Stacey Ann Willets for her money and car:

> Q: I want to go back to the scene, and if you could, tell the jury what the motivation was that you two had talked about for killing Stacey Willets.
>
> A: Well, what he said was that for the $600.00 she had and the car, that, you know, by the time --
>
> Q: When did he say that?
>
> A: In North Carolina.
>
> Q: So that's -- that was earlier on?
>
> A: Yes, sir.....

(R 1150,51) However, the evidence shows that Willets was murdered as a reaction to the numerous arguments they had

beginning in North Carolina and ending the night she was murdered. No financial gain was achieved by Marquard in this situation, and the taking and use of her car was apparently an afterthought:

> By the time we did it, you know, there was almost, no money, you know. (R 1151)

It is critical to the understanding of the motivations of this senseless murder that the taking of property had nothing to do with it. Note that when the state asked for the motivations for the murder to accomplice Abshire, he recounted the discussion he had earlier (three to four days prior to the murder) with Marquard, and not the discussions that occurred immediately before the murder. This is likely due to the fact that since the discussion in North Carolina, there were numerous heated arguments between Marquard and Willets. From these arguments, Marquard came to the warped resolution that she deserved to die. The hypothesis that the murder was committed to get the victim's car belies the evidence that Marquard, Abshire and Willets each had keys to the car and all three drove the car intermittently. In fact, accomplice Abshire actually ended up with the car and was arrested months later in possession of the car and charged with driving without a license. (R 1170)

To be sure, Marquard wanted to use Willets' car to flee the murder scene. Marquard and Abshire had been driving the car for the last four days. The <u>theft</u> of Willets' car after the murder was necessary to flee a remote area of St. Johns County, and was merely an afterthought. One cannot rob a dead man. <u>See</u>,

Jones v. State, 569 So.2d 1234 (Fla. 1990) and Taylor v. State, 138 Fla. 762, 190 So. 262 (1939).

The Appellant submits that if this Court holds that the trial court erred by not granting the Judgment of Acquittal as to the armed robbery count, the Appellant is entitled to a new penalty phase before a new jury. A new penalty phase is required because the trial court instructed and subsequently found that the murder was "committed while he (Appellant) was engaged in the commission of a robbery." (R 538) If this court determines that the armed robbery charge fails as a matter of law, then it was improper for the jury to be instructed and for the judge to find such an aggravating circumstance.

POINT V

THE TRIAL COURT VIOLATED THE SIXTH, EIGHT AND FOURTEENTH AMENDMENTS BY RESTRICTING DEFENSE COUNSEL'S ARGUMENT TO THE JURY CONCERNING THE CONSEQUENCES AND APPROPRIATENESS OF SENTENCES OF LIFE IMPRISONMENT.

Section 921.141(6), Florida Statutes (1991) lists seven statutory mitigating circumstances. The Florida Standard Jury Instructions provide an additional, eighth, "catch all" mitigating circumstance: "Any aspect of the defense character or record, and any other circumstance of the offense." In Lockett v. Ohio, 438 U.S. 586, 604, 57 L.Ed.2d 973, 990 (1978), the United States Supreme Court concluded that the Eighth and Fourteenth Amendments require that:

> The sentencer ... not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record in any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

See also Eddings v. Oklahoma, 455 U.S. 104 (1982); Hitchcock v. Dugger, 481 U.S. 393 (1987); Skipper v. So. Carolina, 476 U.S. 1 (1986).

In the case sub judice, at the conclusion of the penalty phase the following occurred during the argument of defense counsel:

> MR. PEARL [defense counsel]: .... But it certainly is true that the -- the legislature did not intend for every first degree murderer to be put to death. I submit to you that the legislature, in drawing up the statutory scheme, intended only a relatively few of the worst be put to death and the rest should not suffer death, but should suffer

> long imprisonment. In this case, let me remind you, if you find and recommend that Marquard, John Marquard, should be given life instead of death, he will, in the first instance, be sentenced -- and it is the only sentence he can receive in this case for first degree murder -- and will receive a sentence of life imprisonment which he must serve a minimum mandatory 25 years in prison before he becomes eligible for release. I want to remind you further that there is a second conviction which you have voted in a separate verdict, and that is for armed robbery, a very, very serious crime in the state for which the judge could --
>
> MR. ALEXANDER: I object to an instruction on the other charge, Your Honor.
>
> THE COURT: The objection is sustained. You will confine it to what is before the court today.
>
> MR. PEARL: Your Honor, I cannot cite you the case; but I have read a Supreme Court case which said that ... matter of fact, it was my own case in Palatka in which it was said that I was -- I would be permitted to argue on the possibility of other sentences in the same case, even though we were not talking about that.
>
> THE COURT: The objection is sustained.

(R 1743-1745) The ruling prevented defense counsel from arguing the propriety of a life sentence based upon the length of time that Marquard would be confined if not executed. Further, the admonition gave the jury the impression that such a consideration by them was improper, thereby rendering the jury recommendation unreliable under the Eighth Amendment.

"[A]ny sentencing authority must predict a convicted persons probable future conduct when engaged in the process of determining what punishment to impose." Jurek v. Texas, 428 U.S.

262, 275, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

> The court has --- held that evidence that a defendant would in the future pose a danger to the community if he was not executed and may be treated as establishing an "aggravating factor" for purposes of capital sentencing. (citation omitted) Likewise, evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. I/under [Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)], such evidence may not be excluded from the sentence for consideration.

Skipper v. So. Carolina, 476 U.S. 1, 5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (footnote 1 in pertinent part, states, "[I]t is also the elemental due process requirement that the defendant not be sentence to death on the basis of information which he had no opportunity to deny or explain. Gardner v. Florida, 430 U.S. 349, 362, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).")

Specifically, the right to due process and effective representation of counsel demand that a defendant, through his counsel, be afforded adequate opportunity to address the appropriateness of the death sanction. Restriction by the trial court in this case of defense counsel's argument in the presence of the jury interfered with defense counsel's ability to adequately represent a client and further rendered the advisory sentence unreliable under the Eighth Amendment. A jury recommendation is an integral part of a death sentence and it is afforded great weight by the sentencer. By restricting defense counsel's ability to argue the appropriateness of a life sentence due to the fact that Marquard would have been removed from

society for a period of his natural life, the judge prevented Marquard from addressing an extremely relevant consideration to assist the jury to intelligently weigh the appropriateness of a recommendation of a life sentence in a capital felony.

In closing argument defense counsel Pearl tried to alert the trial court to a Florida Supreme Court ruling directly on this issue. The case Mr. Pearl was referring to was Jones v. State, 569 So.2d 1234 (Fla. 1990). Jones involved an appeal for two convictions of first degree murder and a sentence of death. During the closing argument in Jones, defense counsel was prevented from arguing that Jones could be sentenced to two consecutive minimum 25 year prison terms on the murder charges should the jury recommend life sentences. This Court rejected the State's argument that that claim was speculative because the actual sentencing decision is clearly within the province of the court, and not the jury. This Court concluded:

> Counsel was entitled to argue to the jury that Jones may be removed from society for at least fifty years should he receive life sentences in each of the two murders. The potential sentences are relevant consideration of "the circumstances of the offense" which the jury may not be prevented from considering.

Jones v. State, at 1240.

In the instant case, Appellant was found guilty of a capital felony punishable by death or life imprisonment with a minimum mandatory 25 years in prison and a life felony punishable up to a term of natural life. In closing argument, defense counsel sought to address the appropriateness of imposition of a

life sanction on Marquard where the life sentence for the capital felony could be made to run consecutively to the life sentence in the underlying felony conviction, meaning Marquard would not be eligible for parole for a term of his natural life. Clearly the line of argument was relevant; clearly the restriction of that line of argument was reversible error under the Sixth, Eighth and Fourteenth Amendments.

In conclusion, the restriction of defense counsel's argument that was correct and otherwise relevant denied Marquard his rights to due process, to address the evidence and the law, and to effective representation of counsel. The death sentence is based on a faulty recommendation by the jury. Accordingly, a new penalty phase is required.

POINT VI

THE TRIAL COURT ERRED IN PERMITTING CROSS-EXAMINATION INTO APPELLANT'S CRIMINAL HISTORY DURING THE PENALTY PHASE.

The defense physiatric expert, Dr. Harry Krop testified that Appellant suffered from "personality disorder not otherwise specified." (R 1634) Relying upon the case of Jones v. State, 612 So.2d 1370 (Fla. 1993) the trial court permitted over objection the state's cross-examination of Dr. Krop of the criminal history of Appellant:

> Q: And the reason that he was actually brought to the home at that time was because he had been arrested for unauthorized use of a motor vehicle at the age of 15 or 16; isn't that correct?
>
> A: That's what the record suggests, yes.
>
> Q: Now, after he reached adult status, are you familiar with the fact that he was charged and arrested on a charge of sexual battery where a firearm had been threatened to be used on the victim?
>
> A: I'm aware that he was accused of that, yes.
>
> Q: And are you familiar with the fact that he entered a plea of guilty to the lesser charge of assault on a female in October 1987?
>
> A: Yes.
>
> Q: And he was about 21 years old at that point; is that correct?
>
> A: I believe so, yes.
>
> Q: Are you familiar with the fact that about a year later, in October 1988, he was charged with indecent liberties on a minor child?
>
> A: I'm aware of that, yes.
>
> Q: And are you familiar with the fact that he was

convicted for that offense and received three years' sentence by the Judge in that case in North Carolina?

A: Yes.

Q: And are you also familiar with at approximately that same period of time, after he had been charged with taking indecent liberties, that he tried to convince some court psychiatrists or psychologists to place him in a mental health facility rather than incarcerate him because he recounted fantasies of killing Judge Goodson, who was the judge in the case, and also a probation officer?

A: I'm familiar with that report, yes.

(R 1672-1674) The Appellant recognizes that some latitude should be given by the state in "eliciting the whole truth of matters that are not fully explained during direct examination;" Jones, at 1374 quoting McCrae v. State, 395 So.2d 1145 (Fla. 1980), cert. denied, 454 U.S. 1041, 102 S.Ct. 583, 70 L.Ed.2d 486 (1981). However, there must be some limits.

The Appellant argues that such evidence must pass muster on both relevancy grounds[10] and undue prejudice and/or confusion.[11] Concerning relevancy, the material issue that the defense was attempting to demonstrate to the jury was that Appellant had symptoms throughout his life of various personality disorders. Specifically, features of one particular disorder

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[10] Evidence tending to prove or disprove a material fact under section 90.401 of the Florida Evidence Code.

[11] Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence under section 90.403 of the Florida Rules of Evidence.

were not dominant in Marquard's past history, therefore categorizing him into one particular personality disorder was difficult. The fact that Appellant has a criminal history may have some relevance to suggest that his dominant personality disorder is anti-social personality disorder. However, the introduction during cross-examination of the particulars of appellant's arrests and convictions (especially sexual battery and taking liberties with a minor) was not relevant to disprove Dr. Krop's diagnosis.[12]

Concerning prejudice and confusion, the appellant contends there is no more prejudicial evidence in this case than to disclose that the Appellant was charged with sexual battery (Appellant's a rapist), and taking liberties with a minor (Appellant's a child molester). Even if providing the jury the exacting details of Appellant's criminal history is relevant, in this particular case the prejudice that such evidence has on a layman juror while considering the life or death of a human being must outweigh **substantially** its probative value. This was not a case where the claims of Dr. Krop and the State's expert Dr. Merwin were radically different. In fact, the trial court concluded in its sentencing order that:

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[12] Appellant argues that the broad sweep of the Jones holding that expert testimony "opens the door" should be modified and guidance given to the trial courts. Appellant recommends that where the criminal history of a defendant is relevant the cross-examination should be limited to the following questions: Was defendant ever arrested for a felony? How many times? Was defendant ever convicted of a felony? How many times? Was defendant ever convicted of a crime involving dishonesty? How many times, etc.?

> The Court finds that Defendant suffers from either a personality disorder not otherwise specified or an antisocial personality. There is not much difference between the two.

(R 542) This court should find that under the facts and circumstances of this case the state was permitted to cross the line into irrelevant or prejudicial evidence that substantially impaired the jury's ability to provide a just sentencing recommendation under the law.[13] Therefore, this court should reverse and remand for a new sentencing determination before a new jury.

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[13] This is especially true where the trial court provided no cautionary instruction on how the jury was to consider this highly inflammatory evidence.

POINT VII

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND FINDING THE AGGRAVATING CIRCUMSTANCE UNDER SENTENCE OF IMPRISONMENT.

The state called Patricia Rawls, who testified that she was employed as a parole officer in Wilmington, North Carolina since 1976. (R 1600,1601) She further testified that she took on parole supervision of Appellant in March of 1991, and that Appellant was under parole supervision between June 1, 1991 and June 30, 1991. (R 1605) Thereafter, the state introduced a certified copy of Judgement and Commitment for a two year sentence dated February 13, 1991 for the crime of misdemeanor larceny. (R 1606)

Counsel for Appellant objected to this evidence on the ground that the Florida Legislature did not intend that a misdemeanor violation of parole should be used as an aggravating circumstance.[14] The appellant asserts that the trial court erred to instruct and thereafter find this aggravating circumstance beyond a reasonable doubt for two reasons: 1) Evidence was insufficient to support the aggravating circumstance; 2) parole does not exist in Florida for Second Degree Misdemeanors and should not recognized from North Carolina.

Insufficient Evidence

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[14] Defense counsel emphasized that the defendant should not be placed in the electric chair based upon a violation of parole for the offense of petit larceny which in Florida is punishable from up to sixty days.

The record shows that Appellant was issued a Judgement and Commitment for two years for misdemeanor larceny on February 13, 1991. The Parole Officer testified that she was assigned his case in March of 1991 and supervised him for months.

The Appellant contends that there was no evidence to show whether he actually served any prison term on this charge, and therefore, whether he was actually under a term of imprisonment for the misdemeanor charge.[15] Simply providing testimony from a "Parole Officer" from North Carolina that he was under my "Parole Supervision" is woefully inadequate to prove this aggravating factor beyond a reasonable doubt. The fact that this was "Misdemeanor Parole" should have alerted the trial court that a proffer was required to determine whether one, the appellant was actually committed to state prison for a misdemeanor (an item not possible in Florida); two, predicate laid by an expert witness that "misdemeanor parole" in North Carolina has all the features of parole in Florida to sustain this aggravating factor beyond a reasonable doubt consistent with Lewis v. State, 398 So.2d 432 (Fla. 1981); Mills v. State, 476 So.2d 172 (Fla. 1985). Without such evidence presented, this aggravating factor was not proved beyond a reasonable doubt and it was error to instruct the jury and rely on such a finding in support of the death sentence.

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[15] There was no evidence presented to show Appellant's whereabouts from the February 13, 1991 Judgement and Commitment to the time Patricia Rawls took on the case assignment in March 1991.

Second Degree Misdemeanor not applicable in Florida

Under Florida law, inmates are eligible for parole if they receive a sentence of 13 months or more.[16] Those convicted under Florida law of petit larceny are in violation of a second degree misdemeanor punishable for up to sixty days in the county jail.[17] Therefore, under Florida law it is not possible for Appellant to be under a sentence of imprisonment had he been convicted in Florida of misdemeanor larceny. Since Appellant is being prosecuted under Florida law, the laws of Florida should be used in determining which aggravating factors should apply, and the disparate treatment of offenders in North Carolina should not be used to make a person "death eligible" in Florida.

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[16] Florida States 947.16

[17] Florida Statutes 812.014; 775.082; and 775.083

POINT VIII

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND FINDING THE AGGRAVATING CIRCUMSTANCE OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER.

The defendant's statements indicate that he could not remember how Stacey Willets was murdered.[18] The accomplice Michael Abshire testified that Marquard grabbed the victim from behind and stabbed her at least once, and then threw her to the ground and pretty much just looked at her, and then saw she was still alive and put her face under the water till she quit breathing (R 1125). After state prompting to elicit further details of the victim's suffering, Abshire testified that when he initially saw the victim stabbed he went into shock and from the time he stabbed the victim and threw her on the ground he was in a daze. (R 1154) The state specifically asked:

> Q. Did you ever see her...her neck, the front of her neck slit?
>
> A. Yes, sir. I saw it. I saw---I didn't see him do it, but I saw it afterwards.
>
> Q. Describe that.
>
> A. Her---it looked like her throat had been cut, like maybe before I turned around; but I didn't see it. I

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[18] "Something happened. I don't remember exactly what. But the next thing I know, she laying down on the ground, face down, and I'm standing over her...She's laying on the ground, one hand's up under her, one hand's out beside her towards her head. She's got a red splotch on the back where it seems to be blood had seeped into her jacket. Her legs were stretched out. She's laying with her head looking to her right shoulder...She's not moving." (R 1338, 1339)

just saw the throat cut.
Q. Okay. And that was when--you saw that when she was on the ground?

A. She was on the ground, yes, sir.

(R 1154, 55) The medical examiner testified that there was evidence of two stab wounds between the fifth and sixth rib in the vicinity of the heart. (R 1012)

Appellant submits that there was no testimony that the victim was aware of her impending death. Furthermore, there was no testimony that the victim suffered any pain as a result of the initial knife wounds. In fact, based on the statements of Marquard and the testimony of Abshire, immediately after being stabbed there was no evidence whatsoever presented as to what was the reaction of the victim to the assault. It is fair to conclude due to the lack of evidence that Stacey Willets lost consciousness immediately upon being attacked.

At the penalty phase jury charge conference the state requested that the jury receive instructions concerning an especially heinous, atrocious or cruel murder. (R 1501) Marquard objected on the basis that the instruction was wholly unsupported by the evidence. (R 1515); the objection was overruled. (R 1516) The state thereafter argued to the jury that the statutory aggravating circumstance applied:

> He turns around {Abshire} and sees a knife blow to the chest (demonstrating). He sees this man (indicating) who's made that choice to do that drop her or put her on the ground stomach-down, and he sees her neck has already been slit. Now, we know at this point, she apparently still seems to be conscious because she's screaming, and at some point, I would submit to you, prior to being struck in the chest, her throat has been

> slit (indicating). Now, I don't care if it's only for a few seconds or a minute or two. The terror and the agony she had to feel must have been unbelievable.

(R 1736, 1737) The above argument is not supported by any evidence whatsoever. There was no testimony that the victim's throat was slit before she received the fatal stab wounds to the chest, and there was no evidence that the victim screamed after being stabbed in the chest.

"A homicide is especially heinous, atrocious or cruel when 'the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Buenoano v. State, 527 So.2d 194 (Fla. 1988), quoting State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). "Acts committed independently from the capital felony for which the offender is being sentenced are not relevant to the question of whether the capital felony itself was especially heinous, atrocious, or cruel." Trawick v. State, 473 So.2d 1235, 1240 (Fla. 1985); See Halliwell v. State, 323 So.2d 557 (Fla. 1975).

A judge may properly instruct on all of the statutory aggravating circumstances, notwithstanding evidentiary support. Straight v. Wainwright, 422 So.2d 827, 830 (Fla. 1982); See also Jacobs v. Wainwright, 450 So.2d 200, 202 (Fla. 1984) (reading verbatim all statutory aggravating and mitigating). It is not improper for a judge to refuse to instruct the jury on mitigating circumstances that are not supported by the record. Roman v.

State, 475 So.2d 1228, 1234 (Fla. 1984) ("The standard jury instructions instruct the judge to give instruction on only those aggravating and mitigating circumstances for which evidence has been presented."); Lara v. State, 464 So.2d 1173, 1179 (Fla. 1984)("We find no error. The judge followed the standard instructions and specifically addressed all circumstances and gave instructions of those aggravating and mitigating circumstances for which evidence had been presented.") The note to the judge contained in the Standard Jury Instructions in Criminal Cases, 2d Ed. expressly states, "Give only those aggravating circumstances for which evidence has been presented." p. 80 (emphasis added)

In the instant case, the trial court did not instruct on all the aggravating circumstances. The trial court elected to instruct on only those aggravating circumstances for which he believed were supported by the evidence. Therefore, appellant contends that the trial court erred in instructing the jury on the aggravating circumstances of an especially heinous, atrocious or cruel murder where a timely objection was made and where there was no evidentiary support whatsoever for the instruction. It is expressly submitted that giving the unsupported instruction over objection violated the Eighth Amendment, in that the presence of that legally improper instruction was confusing and misleading to the jury concerning their recommendation of the appropriate sanction.

The presence of the instruction was prejudicial and

confusing. This was not a situation where the jury was read verbatim all of the statutory aggravating circumstances which, if unobjected to, is apparently not reversible error. See Straight v. Wainwright, supra. The jury in this case received instructions on only four aggravating circumstances.

This particular aggravating circumstance, due to the subjectivity involved, violates the Eighth Amendment because it fails to adequately channel the discretion of the jury.

> To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge of balance the facts of the case against the standard of activity which can only be developed by involvement with the trials of numerous defendants. Thus, the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience.

State v. Dixon, 283 So.2d 1, 8 (Fla. 1975)(emphasis added). See Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); Godfrey v. George, 446 U.S. 420 (1980).

The jury in this case ought not to have had before them the consideration that the murder was especially heinous, atrocious or cruel, because clearly as a matter of law it was not. Moreover, the trial court should not have found this aggravating circumstance. In the trial court's sentencing order it stated:

> Chopping and stabbing and attempting to drown a defenseless, unsuspecting 22 year old women, with a bowie knife, a dagger and attempting to cut of her head with a Kukri head knife is extremely wicked and shockingly evil. Such conduct is designed to inflict a high degree of pain with indifference to the suffering

> of Stacey Ann Willets. Marquard cut Stacey's throat, stabbed her in the chest, attempted to drown her and attempted to behead her. Marquard threw her to the ground after cutting her throat and stabbing her. He held her face under water until she stopped breathing. Abshire stabbed her at Marquard's instruction then Marquard struck the back of her neck with his Kukri head knife. Abshire did the same with his bowie knife....Marquard had one hand over her mouth and a knife in the other hand cutting her throat and stabbing her in the chest. (emphasis added)

(R 539, 540) Appellant submits that the trial court erred by finding beyond a reasonable doubt that the conduct of Marquard was "designed to inflict a high degree of pain with indifference to the suffering of Stacey Ann Willets." The state presented no evidence that the victim suffered any pain at all. Appellant further submits that the trial court erred in finding beyond a reasonable doubt that the victim's throat was slit by Marquard first before giving the fatal blow to the chest. Again the state presented no evidence other than that the first and fatal blow was to the chest of the victim. The trial court's finding that Marquard attempted to behead appellant is irrelevant in light of Abshire's testimony that such action occurred after the victim was dead.

In anticipation of an argument by the State that the error is harmless, it is submitted that the erroneous presence of this particular instruction led the jurors to conclude, and reasonably so, that they were entitled to consider whether in their opinion these murders were especially heinous, or cruel and to base the death recommendation on this erroneous consideration. Furthermore, the trial court relied upon this aggravating factor

in determining that death was the appropriate sentence in this case. The jury would not appreciate, in the absence of a separate instruction in that regard, that acts on a corpse after the murder could not support the circumstance. See Halliwell supra. A lay person would inevitably conclude that these murders were especially heinous, atrocious or cruel. The State cannot meet its burden of showing beyond a reasonable doubt that the erroneous presence of this particular instruction in the face of a timely objection did not affect the recommendations of death by the jury. See State v. Lee, 531 So.2d 133 (Fla. 1988); Ciccarelli v. State, 531 So.2d 129 (Fla. 1988).

The death sentence must be reversed and the matter remanded for a new penalty phase with a new jury due to violations of the Fifth, Sixth, Eighth and Fourteenth Amendments. These violations were caused by the presence of an improper instruction and finding by the trial court that was wholly unsupported by the evidence. Timely and specific objections by defense counsel were overruled. The presence of that particular instruction under the facts of this case was so susceptible to confusion and misapplication by the jury that distortion of the reasoned sentencing procedure required by the Eighth Amendment as occurred; the recommendation of the jury is unreliable and flawed.

POINT IX

THE TRIAL COURT ERRED IN FINDING THAT THE MURDERS WERE COMMITTED FOR PECUNIARY GAIN.

The trial judge found the existence of Section 921.141(5)(f) as follows:

> There is no doubt that a principle motive of defendant and his accomplice Michael Abshire, was the taking of the automobile, money and other property from Stacey Ann Willets. Immediately upon rendering Stacey Ann Willets helpless Defendant took her money, her purse and wallet. He and Abshire took her car and other property. When Abshire was arrested he was in possession of her car. When Marquard was arrested he was in possession of her stereo.

(R 539)

Section 921.141(5)(f), Fla.Stat. (1991) provides: "The capital felony was committed for pecuniary gain." Blacks Law Dictionary defines pecuniary as "monetary; relating to money; financial; consisting of money or that which can be valued in money." Blacks Law Dictionary, Fifth Edition, p.1018.

> We also find no proof beyond a reasonable doubt that the killing was for pecuniary gain. Although there was evidence that Hardwick killed Pullum for stealing Quaaludes, this fact alone does not establish that the killing itself was to obtain financial gain. In the past, we have permitted this aggravating factor only where the murder is an integral step in obtaining some sought-after specific gain. Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). See Simmons v. State, 419 So.2d 316 (Fla. 1982). Since any financial advantage Hartwick could have expected in this case at most was indirect and uncertain, we cannot conclude that this aggravating factor existed beyond a reasonable doubt.

Hardwick v. State, 521 So.2d 1070, 1076 (Fla. 1988). In McCray v. State, 516 So.2d 804 (Fla. 1982) the defendant broke into a van and took guns, placing them in the woods next to the van. When the defendant returned to retrieve the guns he encountered the owner of the van; the owner was murdered. This Court disapproved the finding of the aggravating circumstance of pecuniary gain under these circumstances. Logically, that same reasoning applies here.

It appears that the trial judge found the existence of this aggravating circumstance because accomplice Abshire testified that three days before the murder in North Carolina Appellant and the victim had a heated argument and Marquard suggested murdering Stacey Ann Willets for her money and car.[19] However, the evidence shows that Willets was murdered as a reaction to the numerous arguments they had beginning in North Carolina and ending the night she was murdered. No financial gain was achieved by Marquard in this situation, and the taking and use of her car was apparently an after thought.[20] To be

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[19] Q: I want to go back to the scene, and if you could, tell the jury what the motivation was that you two had talked about for killing Stacy Willets.
A: Well, what he said was that for the $600.00 she had and the car, that, you know, by the time --
Q: When did he say that?
A: In North Carolina.
Q: So that's -- that was earlier on?
A: Yes, sir.....

[20] In fact, accomplice Abshire actually ended up with the car and was arrested months later in possession of the car and charged with Driving Without a License. (R 1170)

sure, Jones wanted to use Willet's car to leave the murder scene. This is not so say,, however, that the killing falls within the range of killings for pecuniary gain as defined by the Florida Legislature. That aggravating circumstance appears to be geared toward murders accomplished through hire or for direct reception of money. Mere use of the Willet's car would not have improved Marquard's financial worth, and as such the finding of that aggravating factor is improper pursuant to Scull v. State, 533 So.2d 1137, 1142 (Fla. 1988).[21]

The sole evidence that this crime was committed for pecuniary gain was the testimony of accomplice Abshire (See Footnote 19) relating a conversation that occurred three days earlier after an argument Marquard had with Willets. The murder of Willets was abandoned at that time, and there was no evidence to support the conclusion made by the trial court that the motivation for the actual murder was pecuniary gain. Because the evidence in this case fails to show beyond a reasonable doubt that Marquard committed the murder to improve his own financial gain, the pecuniary gain aggravating circumstance must be stricken, the death sentence vacated, and the matter remanded for resentencing with a new penalty proceeding.

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[21] While it is true that Scull took Villegas' car following the murder, it has not been shown beyond a reasonable doubt that the primary motive for the killing was pecuniary gain. As in Peek v. State, 395 So.2d 492 (Fla. 1980) it is possible that the car was taken to facilitate escape rather than as a means of improving his financial worth. Scull at 1142.

POINT X

THE TRIAL COURT ERRED IN FINDING THAT THE MURDERS WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION WHERE THE FINDING IS UNSUPPORTED BY THE EVIDENCE.

The trial court found that this murder was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification based upon the following:

> Before Marquard and Abshire left North Carolina, they discussed killing Stacey Ann Willets. Marquard brought it up again while in South Carolina and had tried to persuade Abshire to find a place on the way to Florida to kill her. After Marquard, Abshire and Stacey had been in St. Augustine for a few days Marquard and Abshire went to rent a room for two. On the way back to their motel they made their final plans to lure Stacey into the woods and kill her. There is overwhelming evidence that the idea originated with Marquard. The afternoon before she was actually killed Marquard and Abshire carefully concocted a story to lure her into an isolated area... There is no proof at all of any moral or legal justification. The identifiable motives are: (1) to get rid of her because she was a burden; (2) to take her property; (3) to experience killing a human being. (R 540)

The aggravating circumstance of murder committed in a cold and calculated manner without any pretense of moral or legal justification applies only to crimes which exhibit heightened premeditation greater than is required to establish premeditated murder, and it must be proven beyond a reasonable doubt. Gorham v. State, 454 So.2d 556 (Fla. 1984), cert denied 105 S.Ct. 941. "This aggravating factor is not to be utilized in every

premeditated murder prosecution," and is reserved primarily for "those murders which are characterized as execution or contract murders or witness elimination murders.' (citation omitted)." Bates v. State, 465 So.2d 490, 493 (Fla. 1985).

There appears to be in Florida, three distinct levels of premeditation; the "slight" premeditation that has been observed to be a nonstatutory mitigating circumstance, see Wilson v. State, 493 So.2d 1019 (Fla. 1986); Ross v. State, 474 So.2d 1170 (Fla. 1985); White v. State, 403 So.2d 331, 336 (Fla. 1981); the routine premeditation which exists in all premeditated murders but which does not rise to the level of cold, calculated and premeditated without any pretense of moral or legal justification, see Amoros v. State, 531 So.2d 1256 (Fla. 1988), and; the extensive period of premeditation and planning that gives rise to the finding of this aggravating circumstance. See Buenoano v. State, 527 So.2d 194 (Fla. 1988) There has also been vacillation as to whether this aggravating circumstance applies based on the manner of killing. See Caruthers v. State, 465 So.2d 496, 498 (Fla. 1985), or the murderers' state of mind at the time of the killing. See Johnson v. State, 465 So.2d 499, 507 (Fla. 1985). As contended in Point XII this aggravating circumstance is too vaguely worded and defined and it provides too much maneuverability to the juries, trial and appellant courts to impose/affirm the death penalty in the face of emotionally compelling facts. The evidence fails to support this aggravating circumstance under any of the prior approaches.

Specifically, Marquard had numerous heated arguments with Willets. After each heated argument Marquard would confide to accomplice Abshire that he was going to kill Willets. For unexplained reasons, each discussion of murdering Willets was abandoned. In fact, when Willets was murdered it was Abshire's testimony that they had got lost on the trial and were returning to the car, thereby abandoning the murder. For unknown reasons, Marquard suddenly grabbed Willet's and stabbed her to death. To be sure, Marquard intended to kill Willets, as determined by the verdict of guilt for premeditated murder. More is required to prove that the aggravating circumstance exists beyond a reasonable doubt.

There is simply insufficient proof that the murders fall under the definition of this statutory aggravating factor. To the extent that the murders were "planned" to allow Marquard to use the car, that aspect of the crime is already contained in the pecuniary gain finding. It appears more likely, however that the murders were simply done from an impulse of his personality disorder. Accordingly, this aggravating circumstance should be struck, the death sentences vacated and the matter remanded for resentencing.

POINT XI

APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BASED UPON THE CUMULATIVE EFFECT OF THE NUMEROUS ERRORS THAT OCCURRED BELOW.

Due Process Clauses of the United States and the Florida Constitutions provide an accused the right to a fair trial. Although an accused is not entitled to an error-free trial, he must not be subjected to a trial with error compounded upon error. See Perkins v. State, 349 So.2d 776 (Fla. 2d DCA 1977). Appellant submits that the was denied his right to a fair trial and is entitled to a new trial based upon the cumulative error of the points presented in this argument. Albright v. State, 378 So.2d 1234 (Fla. 2d DCA 1979) The following issues which either considered alone, in combination with another, or in combination with other points presented in this brief have the cumulative effect of denying Happ his constitutional right to a fair trial. In presenting these points, Appellant is also mindful of the growing application of the doctrine of procedural barr in our State and Federal court systems.

JUDGEMENT OF ACQUITTAL

Appellant contends that the trial court erred in denying his motion for judgment of acquittal made at the close of the State's case-in-chief, renewed following the defense case-in-chief, and renewed once again following the State's rebuttal. (R 2211-14, 2343, 2352) As defense counsel argued below, without the testimony of Michael Abshire, the State's case was entirely

circumstantial. Where the State fails to meet its burden of proving each and every necessary element of the offense charged beyond a reasonable doubt, the case should not be submitted to the jury and a judgment of acquittal should be granted. Posnell v. State, 393 So.2d 635, 636 (Fla. 4th DCA 1981) Appellant submits that Michael Abshire's testimony is incredible and not worthy of belief. This Court should reject Abshire's testimony as incompetent because he was waiting to be sentenced by the same Judge in the instant case for first degree murder. Without Abshire, the State's case fails.

IRRELEVANT PHYSICAL\PHOTOGRAPHIC EVIDENCE

During the guilt phase, the trial court allowed the State to introduce the victim's shirt and boot found at the murder scene, a facsimile of the "kukri" knife used on the victim, and a photograph of the victim taken while she was alive. Defense counsel objected to clothing and footwear on relevancy grounds (R 980); objected to the Kukri knife that it did not sufficiently resemble the actual knife (R 1144); and objected to the photograph because it depicted signs of Downs Syndrome, and was inflammatory and unnecessary. The trial court overruled the objection and allowed the evidence. (R 982,1092) The initial test for the admissibility of photographic as well as physical evidence is one of relevance. Straight v. State, 397 So.2d 903 (Fla. 1981) However, even relevant evidence is inadmissible if its "probative value is substantially outweighed by the danger of unfair prejudice." § 90.403, Fla.Stat. (1987) When a photograph

is relevant, it is admissible, unless what it depicts is so shocking in nature as to overcome the value of its relevancy. Alford v. State, 307 So.2d 433 (Fla. 1975) The Fourth District Court of Appeal ruled that a trial court erred in introducing an autopsy photograph of the victim's head. The court pointed out that the evidence was prejudicial and unnecessary. The danger of unfair prejudice far outweighed the probative value. Hoffert v. State, 559 So.2d 1246 (Fla. 4th DCA 1990) Although the probative value of pictures showing the remains of a murder victim is well established, what possible relevance to a material issue is a picture taken of the victim before the murder? None, and the reason the state introduced it was to inflame the passions of the jury. Appellant contends that the state had the same motivations for the introduction of the facsimile knife and the victim's shirt and boot.

IMPROPER ARGUMENT

During summation of the guilt phase, the prosecutor discussed the reliability of Abshire's testimony. The prosecutor argued:

> And maybe more importantly, if someone's lying to you, don't you think you'd find some inconsistencies? Think about it. Michael Abshire, talking about homicide, about killing Stacey, has given an April 7th interview, an April 15 interview, a November 16th interview, a deposition October 28th, a deposition October 15th. You look how thick it is, and we had him caught in one inconsistency. He was asked, Well, what did you do after you left Rosa Jones'? And he says, I can't really remember. That is the extent of his inconsistencies in all of this (indicating), as compared to what he said on the witness stand for hours. (emphasis added)

(R 1414,15) Defense counsel asked to approach the bench and objected to the state's reference of additional statements of Michael Abshire that were not in evidence. (R 1415)

The argument by the state referring to statements not in evidence was an attempt to bolster the credibility of his star witness, Michael Abshire, upon which their entire case rested. It is well founded that prosecutors must not comment on matters outside the evidence. See Huff v. State, 537 So.2d 1087 (Fla. 1983); Duque v. State, 460 So.2d 416 (Fla. 3rd DCA 1984); United States v. Lamerson, 457 F.2d 371 (5th Cir. 1972) In Adams v. State, 585 So.2d 1092 (Fla. 4th DCA 1991), the state's case rested upon the identification of the defendant as the perpetrator. In closing the prosecutor argued that:

> There's a transaction. He sees defendant Adams. He recognizes him. Yes he recognizes him. And why does he recognize him? Because Detective King is a narcotics officer on the beach. He's all over the place. He's made buys he's made sales. He sees lots of people---

Adams, supra at 1039. Defense counsel objected and objection was overruled. The Third District Court of Appeal reversed stating:

> [T]he prosecutor's attempt to bolster identification went beyond the evidence and only served to inflame the jury. Such a comment is intolerable and anathema to the constitutionally guaranteed words and spirit of a fair trial.

Adams, supra at 1094.

Appellant contends that an analogous error occurred in the instant case when the prosecutor bolstered the credibility of its star witness by referring to a thick pile of the witnesses' prior statements not in evidence. Such argument was inflammatory

and had the effect of shifting the burden of proof; i.e., that appellant had the burden of sifting through the pile of prior statements and find inconsistent statements. Since the State's case hinged upon the jury believing Abshire's testimony, such error by committed by the prosecutor can not be harmless.

RULE OF SEQUESTRATION

Immediately before jury selection began, the trial court ruled that the state's mental health expert, Dr. Merwin, could not reinterview appellant, but rather could sit in on the penalty stage and listen to the defense mental health professional testify and based on that testimony could testify based on what he heard in that session. (R 703) During the state's direct examination of their star witness, Michael Abshire, the State informed the court that Dr. Merwin, their State expert had arrived for the penalty phase. (R 1093) Despite the Court's previous ruling, the State requested that Dr. Merwin be permitted to sit in and observe the remainder of the trial. (R 1093) The defense objected to Dr. Merwin being present after "the rule" had been invoked, and argued that fairness required that Doctor Krop also be allowed to listen to Mr. Abshire. (R 1095) The court overruled defense objection stating:

> Well then, you should have had Doctor Krop here.

(R 1095) The defense counsel argued further that how could he have known that the Court would modify it's earlier order, which

the Court replied:

> All of us are required to know the law, and this case was decided in early December. It's of record. I assume you all read it.

(R 1096) Defense counsel then moved for mistrial, which the Court denied. (R 1096)

This court has stated that allowing witnesses to testify after the Rule of Sequestration has been violated is within the discretion of the trial court. In Burr v. State, 466 So.2d 1051 (Fla. 1985), this court focused upon its own review of the record and the proffered testimony and devised an "outcome determinative" test stating:

> Because it was thus shown that Ms. Footman's was not substantially different from what it would have been has she not heard Ms. Williams' testimony, the trial court did not abuse its discretion in allowing her to testify.

Burr at 1054. The appellant contends that the trial court improperly modified its earlier ruling on the sequestration of Dr. Merwin. The ruling was modified expressly for the purpose of allowing Dr. Merwin to observe witnesses and influence his testimony. The jury no doubt observed Dr. Merwin enter and sit in the courtroom, and had the impact of bolstering Dr. Merwin's testimony. The Court's contention that he was willing to level the playing field by allowing the Appellant's mental health expert Dr. Krop also sit in the courtroom was disingenuous considering the appellant's ability to get their expert there without prior notice. Such practices are violative of traditional notions of fundamental fairness and this court should

alert the trial bench that such antics will not be tolerated, especially in a capital trial. Fairness demands that Appellant be given a new penalty phase before a new jury.

IRRELEVANT OPINION EVIDENCE

During the direct examination of the State's mental health expert, Dr. Merwin, the state asked the following questions:

> Q: ...You've done, really, hundreds of evaluations of people who are in jail; isn't that correct?
>
> A: Several hundred, yes.
>
> Q: And would you say that the majority of those people suffer -- or, I shouldn't say "suffer," but you could diagnose them as having anti-social behavior tendencies or disorders?

(R 1704) At this point defense counsel objected to this line of questioning on the grounds that such inquiry was irrelevant to the issues before the court. (R 1704) The court overruled the objection and permitted Dr. Merwin to answer the question:

> A: I certainly have not done a diagnosis or a study of those individuals; but there are features of those --- many, many, many of those people that are certainly outlined in this description of anti-social personality disorder.

(R 1704) Such expert opinion testimony by Dr. Merwin totally lacked reliability and therefore was irrelevant to the issue of whether Marquard was suffering from anti-social personality disorder.[22]

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[22] Dr. Merwin's opinion has no reliability. It is as reliable as if he went to Florida State Prison and asked 100 inmates how many attended Florida State University, and if none

Appellant asserts that such expert testimony admitted over objection was highly prejudicial. The improper "expert" opinion clearly suggested to the jury that anti-social personality disorder is common among criminals. The state's motivation was undoubtedly to persuade the jury that since Marquard is a criminal, he shares the common behavioral problems of the general prison inmate population. The testimony was calculated to confuse the jury. The testimony had the likely outcome of causing the jury to ignore the mitigation testimony that Marquard was a seriously disturbed person, and caused the jury to determine that he was nothing more than a common criminal.

CONCLUSION

The errors complained of in this point, either alone, in combination with each other, or in combination with other points contained in this brief, justify granting a new trial. Their cumulative effect denied Happ a fair trial. Amend. V, VI,and XIV, U. S. Const; Art. I, §§ 9 and 16, Fla. Const.

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had, then he could conclude that if one attends Florida State University he does not have criminal tendencies.

POINT XII

CONSTITUTIONALITY OF SECTION 921.141, FLORIDA STATUTES.

1. The Jury

a. Standard Jury Instructions

Appellant made written requested changes to the Florida Standard Jury Instructions. (R 1835-1852) The trial court denied all requested changes. (R 1525) Appellant again asserts each objection to the Standard Instructions and argues that the trial court's ruling denied due process, a fair trial and a reliable sentencing recommendation contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16, 17 and 22 of the Florida Constitution.

The Appellant submits that the jury plays a crucial role in capital sentencing. Its penalty verdict carries great weight. Nevertheless, the jury instructions are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict.

i. Heinous, Atrocious, or Cruel

The instruction does not limit and define the "heinous, atrocious, or cruel" circumstance. This assures its arbitrary application in violation of the dictates of Maynard v. Cartwright, 486 U.S. 356 (1988); Shell v. Mississippi, 498 U.S. 1 (1990); and Espinosa v. Florida, 112 S.Ct. 2926 (1992). The "new" instruction in the present case (T 882) violates the Eighth Amendment and Due Process. The HAC circumstance is

constitutional where limited to only the "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Espinosa, supra. Instructions defining "heinous," "atrocious," or "cruel" in terms of the instruction given in this case are unconstitutionally vague. Shell, supra. While the instruction given in this case states that the "conscienceless or pitiless crime which is unnecessarily torturous" is "intended to be included," it does not limit the circumstance only to such crimes. Thus, there is the likelihood that juries, given little discretion by the instruction, will apply this factor arbitrarily and freakishly.

The instruction also violates Due Process. The instruction relieves the state of its burden of proving the elements of the circumstances as developed in the case law.[23]

ii. Cold, Calculated, and Premeditated

The same applies to the "cold, calculated, and premeditated" circumstance. The standard instruction simply tracks the statute.[24] Since the statutory language is subject to a variety of constructions, the absence of any clear standard instruction ensures arbitrary application. See Rogers v. State, 511 So.2d 526 (Fla. 1987) (condemning prior construction as too

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[23] For example, the instruction fails to inform the jury that torturous intent is required. See McKinney v. State, 579 So.2d 80, 84 (Fla. 1991) ("The evidence in the record does not show that the defendant intended to torture the victim").

[24] The instruction is: "The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification."

broad). Jurors are prone to similar errors. See Hodges v. Florida, 113 S.Ct. 33 (1992) (applying Espinosa to CCP and acknowledging flaws in CCP instruction). Since CCP is vague on its face, the instruction based on it also is too vague to provide the constitutionally required guidance. Any holding that jury instructions in Florida capital sentencing proceedings need not be definite, would directly conflict with the Cruel and Unusual Punishment Clauses of the state and federal constitutions. These clauses require accurate jury instructions during the sentencing phase of a capital case. Espinosa v. Florida, 112 S.Ct. 2926 (1992). The instruction also unconstitutionally relieves the state of its burden of proving the elements of the circumstance as defined by case law construing the "coldness," "calculated," "heightened premeditation," and "pretense" elements.

iii. Felony Murder

This circumstance fails to narrow the discretion of the sentencer and therefore violates the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions. Hence, the instruction violates the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions.

b. Majority Verdicts

The Florida sentencing scheme is also infirm because it places great weight on margins for death as slim as a bare majority. A verdict by a bare majority violates the Due Process and the Cruel and Unusual Punishment Clauses. A guilty verdict

by less than a "substantial majority" of a 12-member jury is so unreliable as to violate Due Process. See Johnson v. Louisiana, 406 U.S. 356 (1972), and Burch v. Louisiana, 441 U.S. 130 (1979). It stands to reason that the same principle applies to capital sentencing. Our statute is unconstitutional, because it authorizes a death verdict on the basis of a bare majority vote.

In Burch, in deciding that a verdict by a jury of six must be unanimous, the Court looked to the practice in the various states in determining whether the statute was constitutional, indicating that an anomalous practice violates Due Process. Similarly, in deciding Cruel and Unusual Punishment claims, the Court will look to the practice of the various states. Only Florida allows a death penalty verdict by a bare majority.

c. Florida Allows an Element of the Crime to be Found by a Majority of the Jury.

Our law makes the aggravating circumstances into elements of the crime so as to make the defendant death-eligible. See State v. Dixon, 283 So.2d 1 (Fla. 1973). The lack of unanimous verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the state constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal constitution. See Adamson v. Rickets, 865 F.2d 1011 (9th Cir. 1988) (en banc); contra Hildwin v. Florida, 490 U.S. 638 (1989).

d. Advisory Role

The standard instructions do not inform the jury of the

great importance of its penalty verdict. The jury is told that their recommendation is given "great weight." But in violation of the teachings of Caldwell v. Mississippi, 472 U.S. 320 (1985) the jury is told that its "recommendation" is just "advisory."

2. Counsel

Almost every capital defendant has a court-appointed attorney. The choice of the attorney is the judge's -- the defendant has no say in the matter. The defendant becomes the victim of the ever-defaulting capital defense attorney.

Ignorance of the law and ineffectiveness have been the hallmarks of counsel in Florida capital cases from the 1970's through the present. See, e.g., Elledge v. State, 346 So.2d 998 (Fla. 1977) (no objection to evidence of nonstatutory aggravating circumstance).

Failure of the courts to supply adequate counsel in capital cases, and use of judge-created inadequacy of counsel as a procedural bar to review the merits of capital claims, cause freakish and uneven application of the death penalty.

Notwithstanding this history, our law makes no provision assuring adequate counsel in capital cases. The failure to provide adequate counsel assures uneven application of the death penalty in violation of the Constitution.

3. The Trial Judge

The trial court has an ambiguous role in our capital punishment system. On the one hand, it is largely bound by the jury's penalty verdict under, e.g., Tedder v. State, 322 So.2d

908 (Fla. 1975). On the other, it has at times been considered the ultimate sentencer so that constitutional errors in reaching the penalty verdict can be ignored. This ambiguity and like problems prevent evenhanded application of the death penalty.

4. The Florida Judicial System

The sentencer was selected by a system designed to exclude African-Americans from participation as circuit judges, contrary to the Equal Protection of the laws, the right to vote, Due Process of law, the prohibition against slavery, and the prohibition against cruel and unusual punishment.[25] Because Appellant was sentenced by a judge selected by a racially discriminatory system this Court must declare this system unconstitutional and vacate the penalty. When the decision maker in a criminal trial is purposefully selected on racial grounds, the right to a fair trial, Due Process and Equal Protection require that the conviction be reversed and the sentence vacated. See State v. Neil, 457 So.2d 481 (Fla. 1984); Batson v. Kentucky, 476 U.S. 79 (1986); Swain v. Alabama, 380 U.S. 202 (1965). When racial discrimination trenches on the right to vote, it violates the Fifteenth Amendment as well.[26]

The election of circuit judges in circuit-wide races

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[25] These rights are guaranteed by the Fifth, Sixth, Eighth, Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution, and Article I, Sections 1, 2, 9, 16, 17, and 21 of the Florida Constitution.

[26] The Fifteenth Amendment is enforced, in part, through the Voting Rights Act, Chapter 42 United States Code, Section 1973, et al.

was first instituted in Florida in 1942.[27] Prior to that time, judges were selected by the governor and confirmed by the senate. 26 Fla.Stat. Ann. 609 (1970), Commentary. At-large election districts in Florida and elsewhere historically have been used to dilute the black voter strength. See Rogers v. Lodge, 458 U.S. 613 (1982); Connor v. Finch, 431 U.S. 407 (1977); White v. Register, 412 U.S. 755 (1973); McMillan v. Escambia County, Florida, 638 F.2d 1239, 1245-47 (5th Cir. 1981), modified 688 F.2d 960, 969 (5th Cir. 1982), vacated 466 U.S. 48, 104 S.Ct. 1577, on remand 748 F.2d 1037 (5th Cir. 1984).[28]

The history of elections of African-American circuit judges in Florida shows the system has purposefully excluded blacks from the bench. Florida as a whole has eleven African-American circuit judges, 2.8% of the 394 total circuit judgeships. See Young, Single Member Judicial Districts, Fair or Foul, Fla. Bar News, May 1, 1990 (hereinafter Single Member District). Florida's population is 14.95% black. County and City Data Book, 1988, United States Department of Commerce. In St. Johns, Volusia, Putnam and Flagler Counties, there are circuit judgeships, none of whom are black. Single Member Districts, supra.

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[27] For a brief period, between 1865 and 1868, the state constitution, inasmuch as it was in effect, did provide for election of circuit judges.

[28] The Supreme Court vacated the decision because it appeared that the same result could be reached on non-constitutional grounds which did not require a finding of intentional discrimination; on remand, the Court of Appeals so held.

Florida's history of racially polarized voting, discrimination[29] and disenfranchisement,[30] and use of at-large election systems to minimize the effect of the black vote shows that an invidious purpose stood behind the enactment of elections for circuit judges in Florida. See Rogers, 458 U.S. at 625-28. It also shows that an invidious purpose exists for maintaining this system in the Seventh Circuit. The results of choosing judges as a whole in Florida, establish a prima facie case of racial discrimination contrary to Equal Protection and Due Process in selection of the decision-makers in a criminal trial.[31] These results show discriminatory effect which, together with the history of racial bloc voting, segregated housing, and disenfranchisement in Florida, violate the right to vote as enforced by Chapter 42, United States Code, Section 1973. See Thornburg v. Gingles, 478 U.S. 30, 46-52 (1986). This discrimination also violates the heightened reliability and need for carefully channelled decision-making required by the freedom from cruel and unusual capital punishment. See Turner v. Murray, 476 U.S. 28 (1986); Beck v. Alabama, 447 U.S. 625 (1980).

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[29] See Davis v. State ex rel. Cromwell, 156 Fla. 181, 23 So.2d 85 (1945) (en banc) (striking white primaries).

[30] A telling example is set out in Justice Buford's concurring opinion in Watson v. Stone, 148 Fla. 516, 4 So.2d 700, 703 (1941) in which he remarked that the concealed firearm statute "was never intended to apply to the white population and in practice has never been so applied."

[31] The results in choosing judges in St. Johns, Volusia, Putnam, and Flagler Counties (two black county judges and no black circuit judges) is such stark discrimination as to show racist intent. See Yick Wo v. Hopkins, 118 U.S. 356 (1886).

Florida allows just this kind of especially unreliable decision to be made by sentencers chosen in a racially discriminatory manner and the results of death-sentencing decisions show disparate impact on sentences. See Gross and Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan.L.R. 27 (1984); see also, Radelet and Mello, Executing Those Who Kill Blacks: An Unusual Case Study, 37 Mercer L.R. 911, 912 n.4 (1986) (citing studies).

Because the selection of sentencers is racially discriminatory and leads to condemning men and women to die on racial factors, this Court must declare that system violates the Florida and Federal Constitutions. It must reverse the circuit court and remand for a new trial before a judge not so chosen, or impose a life sentence.

5. Appellate review

a. Proffitt

In Proffitt v. Florida, 428 U.S. 242 (1976), the plurality upheld Florida's capital punishment scheme in part because state law required a heightened level of appellate review. See 428 U.S. at 250-251, 252-253, 258-259.

Appellant submits that what was true in 1976 is no longer true today. History shows that intractable ambiguities in our statute have prevented the evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt. Hence the statute is unconstitutional.

b. Aggravating Circumstances

Great care is needed in construing capital aggravating factors. See Maynard v. Cartwright, 108 S.Ct. 1853, 1857-58 (1988) (Eighth Amendment requires greater care in defining aggravating circumstances than does due process). The rule of lenity (criminal laws must be strictly construed in favor of accused), which applies not only to interpretations of the substantive gambit of criminal prohibitions, but also to the penalties they impose, Bifulco v. United States, 447 U.S. 381 (1980), is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112 (1979). Cases construing our aggravating factors have not complied with this principle.

Attempts at construction have led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious or cruel" (HAC) circumstances making them unconstitutional because they do not rationally narrow the class of death-eligible persons, or channel discretion as required by Lowenfield v. Phelps, 484 U.S. 231, 241-46 (1988). The aggravators mean pretty much what one wants them to mean, so that the statute is unconstitutional. See Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting).

As to CCP, compare Herring with Rogers v. State, 511 So.2d 526 (Fla. 1987) (overruling Herring) with Swafford v. State, 533 So.2d 270 (Fla. 1988) (resurrecting Herring), with Schafer v. State, 537 So.2d 988 (Fla. 1989) (reinterring Herring).

As to HAC, compare Raulerson v. State, 358 So.2d 826 (Fla. 1978) (finding HAC), with Raulerson v. State, 420 So.2d 567 (Fla. 1982) (rejecting HAC on same facts).[32]

The "felony murder" aggravating circumstance has been liberally construed in favor of the state by cases holding that it applies even where the murder was not premeditated. See Swafford v. State, 533 So.2d 270 (Fla. 1988).

Although the original purpose of the "hinder government function or enforcement of law" factor was apparently to apply to political assassinations or terrorist acts,[33] it has been broadly interpreted to cover witness elimination. See White v. State, 415 So.2d 719 (Fla. 1982).

c. Appellate Reweighing

Florida does not have the independent appellate reweighing of aggravating and mitigating circumstances required by Proffitt, 428 U.S. at 252-53. Such matters are left to the trial court. See Smith v. State, 407 So.2d 894, 901 (Fla. 1981) ("the decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rest with the judge and jury") and Atkins v. State, 497 So.2d 1200 (Fla. 1986).

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[32] For extensive discussion of the problems with these circumstances, see Kennedy, Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L.Rev. 47 (1987), and Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making it Smaller, 13 Stetson L.Rev. 523 (1984).

[33] See Barnard, Death Penalty (1988 Survey of Florida Law), 13 Nova L.Rev. 907, 926 (1989).

d. Procedural Technicalities

Through use of the contemporaneous objection rule, Florida has institutionalized disparate application of the law in capital sentencing.[34] See, e.g., Rutherford v. State, 545 So.2d 853 (Fla. 1989) (absence of objection barred review of use of improper evidence of aggravating circumstances); Grossman v. State, 525 So.2d 833 (Fla. 1988) (absence of objection barred review of use of victim impact information in violation of Eighth Amendment); and Smalley v. State, 546 So.2d 720 (Fla. 1989) (absence of objection barred review of penalty phase jury instruction which violated Eighth Amendment). Capricious use of retroactivity principles works similar mischief. In this regard, compare Gilliam v. State, 582 So.2d 610 (Fla. 1991) (Campbell not retroactive) with Nibert v. State, 574 So.2d 1059 (Fla. 1990) (applying Campbell retroactively), Maxell (applying Campbell principles retroactively to post-conviction case, and Dailey v. State, 594 So.2d 254 (Fla. 1991) (requirement of considering all the mitigation in the record arises from much earlier decisions of the United States Supreme Court).

e. Tedder

The failure of the Florida appellate review process is

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[34] In Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977), this Court held that consideration of evidence of a nonstatutory aggravating circumstance is error subject to appellate review without objection below because of the "special scope of review" in capital cases. Appellant contends that a retreat from the special scope of review violates the Eighth Amendment under Proffitt.

highlighted by the Tedder[35] cases. As this Court admitted in Cochran v. State, 547 So.2d 928, 933 (Fla. 1989), it has proven impossible to apply Tedder consistently. This frank admission strongly suggests that other legal doctrines are also arbitrarily and inconsistently applied in capital cases.

6. Other Problems With the Statute

a. Lack of Special Verdicts

Our law provides for trial court review of the penalty verdict. Yet the trial court is in no position to know what aggravating and mitigating circumstances the jury found, because the law does not provide for special verdicts. Worse yet, it does not know whether the jury acquitted the defendant of felony murder or murder by premeditated design so that a finding of the felony murder or premeditation factor would violate double jeopardy under Delap v. Dugger, 890 F.2d 285, 306-319 (11th Cir. 1989). This necessarily leads to double jeopardy and collateral estoppel problems where the jury has rejected an aggravating factor but the trial court nevertheless finds it. It also ensures uncertainty in the fact finding process in violation of the Eighth Amendment.

In effect, our law makes the aggravating circumstances into elements of the crime so as to make the defendant death-eligible. Hence, the lack of a unanimous jury verdict as to any

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[35] Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) (life verdict to be overridden only where "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.")

aggravating circumstance violates Article I, Sections 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc). But see Hildwin v. Florida, 109 S.Ct. 2055 (1989) (rejecting a similar Sixth Amendment argument).

b. No Power to Mitigate

Unlike any other case, a condemned inmate cannot ask the trial judge to mitigate his sentence because Rule 3.800(b), Florida Rules of Criminal Procedure, forbids the mitigation of a death sentence. This violates the constitutional presumption against capital punishment and disfavor mitigation in violation of Article I, Sections 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. It also violates Equal Protection of the laws as an irrational distinction trenching on the fundamental right to live.

c. Florida Creates a Presumption of Death

Florida law creates a presumption of death where, but a single aggravating circumstance appears. This creates a presumption of death in every felony murder case (since felony murder is an aggravating circumstance) and every premeditated murder case (depending on which of several definitions of the premeditation aggravating circumstance is applied to the

case).[36] In addition, HAC applies to any murder. By finding an aggravating circumstance always occurs in first-degree murders, Florida imposes a presumption of death which is to be overcome only by mitigating evidence so strong as to be reasonably convincing and so substantial as to constitute one or more mitigating circumstances sufficient to outweigh the presumption.[37] This systematic presumption of death restricts consideration of mitigating evidence, contrary to the guarantee of the Eighth Amendment to the United States Constitution. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988); Adamson, 865 F.2d at 1043. It also creates an unreliable and arbitrary sentencing result contrary to Due Process and the heightened Due Process requirements in a death-sentencing proceeding. The Federal Constitution and Article I, Sections 9 and 17 of the Florida Constitution require striking the statute.

d. Florida Unconstitutionally Instructs Juries Not To Consider Sympathy.

In Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988), reversed on procedural grounds sub nom. Saffle v. Parks, 494 U.S. 484 (1990), the Tenth Circuit held that jury instructions which emphasize that sympathy should play no role violate the Lockett principle. The Tenth Circuit distinguished California v. Brown, 479 U.S. 538 (1987) (upholding constitutional instruction

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[36] See Justice Ehrlich's dissent in Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984).

[37] The presumption for death appears in §§ 921.141(2)(b) and (3)(b) which require the mitigating circumstances outweigh the aggravating.

prohibiting consideration of mere sympathy), writing that sympathy unconnected with mitigating evidence cannot play a role, prohibiting sympathy from any part in the proceeding restricts proper mitigating factors. Park, 860 F.2d at 1553. The instruction given in this case also states that sympathy should play no role in the process. A jury would have believed in reasonable likelihood that much of the weight of the early life experiences of Appellant should be ignored. This instruction violated the Lockett principle. Inasmuch as it reflects the law in Florida, that law is unconstitutional for restricting consideration of mitigating evidence.

e. Electrocution is Cruel and Unusual.

Electrocution is cruel and unusual punishment in light of evolving standards of decency and the availability of less cruel, but equally effective methods of execution. It violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. Many experts argue that electrocution amounts to excruciating torture. See Gardner, Executions and Indignities -- An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment, 39 Ohio State L.J. 96, 125 n.217 (1978) (hereinafter cited, "Gardner"). Malfunctions in the electric chair cause unspeakable torture. See Louisiana ex rel. Frances v. Resweber, 329 U.S. 459, 480 n.2 (1947); Buenoano v. State, 565 So.2d 309 (Fla. 1990). It offends human dignity because it mutilates the body. Knowledge that a malfunctioning chair could cause the

inmate enormous pain increases the mental anguish.

This unnecessary pain and anguish shows that electrocution violates the Eighth Amendment. See Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In re Kemmler, 136 U.S. 436, 447 (1890); Coker v. Georgia, 433 U.S. 584, 592-96 (1977).

CONCLUSION

Based on the foregoing cases, authorities, policies and arguments Appellant respectfully requests the following relief:

As to Points I through III and XI, vacate the convictions and sentences and remand for a new trial;

As to Point IV, vacate the conviction and sentence as to armed robbery and remand for discharge, and reverse and remand for a new penalty phase;

As to Point V through X, reverse and remand for a new penalty phase;

As to Point XII, vacate the death sentence and remand for imposition of a life sentence or, in the alternative, declare Section 921.141, Florida Statutes unconstitutional.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

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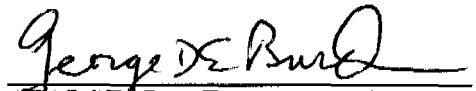
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to John C. Marquard, No. 122995, Union C. I. (A-1) 44-1218, P. O. Box 221, Raiford, FL 32083 on this 16th day of September, 1993.



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