IN THE SUPREME COURT OF FLORIDA

BRETT A. BOGLE, :

Appellant, :

vs. : Case No. 81,345

STATE OF FLORIDA, :

Appellee. :

_____ :

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ROBERT F. MOELLER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 234176

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

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

TABLE OF CITATIONS (continued)

PRELIMINARY STATEMENT

The clerk of the circuit court did not number all pages of the record consecutively, but numbered the pages of the record containing documents from the court file, and then began with page 1 again when numbering the pages of the transcripts of the trial and hearings. To avoid confusion regarding to which pages Appellant is referring in this brief, Appellant will cite pages from the portions of the record containing documents from the court file by using "R" followed by the page number, and will cite pages from the transcripts of the trial and hearings by using "T" followed by the page number.

STATEMENT OF THE CASE AND FACTS

On October 2, 1991, a Hillsborough County grand jury returned a four-count indictment against Appellant, Brett A. Bogle. (R 24-27) Count One charged him with the murder of Margaret Torres on September 13, 1991 "from a premeditated design to effect" her death and/or while Appellant "was engaged in the perpetration of or an attempt to perpetrate the felony of Sexual Battery." (R 24) Count Two charged that Appellant committed a burglary at the dwelling of Katie Alfonso on September 1, 1991, during which he made an assault or battery upon Margaret Torres and/or Katie Alfonso. (R 24-25) Count Three alleged retaliation against a witness (Margaret Torres and/or Katie Alfonso) with bodily injury between September 1 and September 13, 1991. (R 25) Count Four charged robbery of Katie Alfonso on September 1, 1991. (R 26)

The Public Defender for the Thirteenth Judicial Circuit was appointed to represent Brett Bogle. (R 29)

The pretrial motions Bogle filed, through his counsel, included a Motion to Declare Florida Death Penalty Statute Unconstitutional (R 39-43), and a Motion to Declare Section 921.141(5)(h) Florida Statutes, Unconstitutional (R 47-56) These motions were heard by the Honorable Susan Bucklew on February 7, 1992, and denied. (R 3, T 1655-1660)

This cause proceeded to a jury trial on September 28-October 2, 1992, with Judge Bucklew presiding. (T 1-879)

Katie Alfonso was the older sister of the victim herein, Margaret Torres. (T 260-261) In July, August and September of

1991, Torres was staying at her grandparents' house, but stayed with Katie Alfonso about four or five days a week. (T 262) Alfonso was taking care of her sister's children during that time period; Torres and her husband were going through a divorce, and Torres did not have a job and could not take care of her children financially. (T 260-262, 286)

Katie Alfonso met Brett Bogle at the beginning of June in 1991. (T 263, 285) He moved in with her about three days later. (T 263, 285) It was Alfonso's understanding that Bogle would stay there only temporarily, but he ended up moving his belongings in and staying for about five or six weeks. (T 264)

Bogle and Margaret Torres did not get along; they bickered about various things. (T 264-266) Bogle complained to Alfonso about her sister being there so much, and told Torres that she did not belong there and was not needed. (T 265-266) Finally, Alfonso told Bogle that if he and Torres could not get along, then Alfonso was going to ask Bogle to move out. (T 266) Bogle tried to get along with Torres, but could not. (T 266-267) Ultimately, Alfonso did ask Bogle to leave because of the bickering between him and Torres. (T 266-267) At first, Bogle refused to go, but eventually did move out. (T 267) Thereafter, he called Alfonso constantly, wanting to get back together with her and to be given another chance. (T 268) He commented during the calls that Torres was a trouble maker, and that the best thing for Alfonso to do would be to get rid of her, because Bogle would help Alfonso with the things that Torres was doing. (T 268)

On September 1, Bogle called Alfonso. (T 269) He had moved out about a week earlier. (T 268) Bogle and a friend of his went with Alfonso and Torres to another county to buy beer. (T 269-270)[1] On the way there, everything was fine, but on the way back, "everything started again." (T 269-270) Bogle insisted that they stop at his apartment, apparently so that he could change clothes. (T 270, 288) He wanted Alfonso to come inside while Torres remained outside, but Alfonso told him no, and the two women went into the apartment together and waited for Bogle to change. (T 270) Bogle came out and wanted Torres to wait on the front porch, but she refused. (T 271) The four people and one other man then drove back to Alfonso's house. (T 271) Alfonso did not want Bogle to come in, as she was scared, because "they were already starting," and Bogle was calling Torres names such as "bitch" and "whore" and saying that she was a trouble maker. (T 271) Bogle got out of the car behind Alfonso and her sister, trying to follow them in, saying that he still had clothing there, which he did not. (T 271-272) Torres started "running her mouth, saying that she was going to call the cops," and Bogle "just blew up." (T 272) Alfonso had locked the screen door, and Bogle "just started busting the screen and the screened-in porch." (T 272) He threw Alfonso out of the way and went into the kitchen where Torres was making a telephone call. (T 272-273) He grabbed the telephone from Torres, twisting her hand, and she continued "yelling and stuff," and started

[1] Alfonso testified on direct examination that they had gone to Pinellas County (T 269-270), but conceded on cross-examination that it was actually Manatee County. (T 287-288)

crying. (T 272-273) Bogle jerked the telephone out in the kitchen, then jerked the telephone out of the bedroom. (T 273) He went into the bathroom and took a pair of white baggy Cavarichi pants that he said were his, but which actually belonged to Alfonso's son, out of the washer. (T 272-273) Also missing after Bogle left was some money--about fifty or fifty-four dollars that Alfonso had stuck in her pants pocket. (T 274-275, 290-291, 293) As he left, Bogle told Torres that if she called the cops and pressed charges on him, that she would not live to tell about it. (T 275)

A deputy sheriff arrived about five minutes after Bogle left, in response to the 911 call Torres was able to dial before Bogle took the telephone from her. (T 254-255, 275) The officer observed damage to the house that Bogle caused, as well as Torres's wrist, which had some red marks on it where it appeared that she had been grabbed, and Alfonso's neck, which had red marks around it that appeared to be those of someone's hand. (T 256-257, 275-276) The deputy referred the matter to the state attorney's office to review the matter and issue a capias. (T 258-259)

A day or two later Bogle called Alfonso at her mobile home. (T 276) He told her that she had better talk to her sister and tell her that she had better keep her mouth shut, because she was going to cause a lot of trouble, and it would be worse for her. (T 277) Alfonso was scared of Bogle, and told him that neither she nor her sister was going to press charges, and told him just to leave them alone. (T 277) Torres was standing nearby and yelled out that she was pressing charges, whereupon Bogle said that if she did, she was

not going to live to tell about it. (T 277-278) Bogle was upset, and said to Alfonso that she had "better talk to her because she better not press charges." (T 278)

Bogle called again on another occasion when Torres was not present, and Alfonso told him not to worry, that her sister was merely talking, and was not going to do anything. (T 278) Bogle said that Alfonso should get Torres out of her house because she was causing trouble for Bogle and Alfonso, and that it was because of Torres that they were not together any more. (T 278-279)

On September 12 at around 6:00 or 6:30 p.m., Torres called Alfonso and said that she was going out with a couple of friends, and would see her sister the next day. (T 279-280)

That evening, Alfonso babysat for her aunt and uncle, who had two children. (T 280) Bogle called between 11:00 and 11:30 and asked if he could come over, but Alfonso said no. (T 281) Bogle was furious. (T 281) He insisted that Alfonso talk to a friend of his, who said that Bogle really loved her, and that she should give him a second chance. (T 281) Alfonso said that she was not giving him any more chances. (T 281) Bogle came on the line and said that he loved Alfonso, but that she could be a real bitch sometimes, whereupon Alfonso hung up. (T 281)

Jeffrey Trapp came into contact with Brett Bogle at the Red Gables Bar on September 12. (T 374-375) Trapp did not notice any injuries or scratches to Bogle. (T 378) Trapp stayed at the Red Gables only a few minutes, then took Bogle and two other people to another establishment, Club 41, which was about a half-mile away.

(T 375-376) It was between 10:00 and 11:00 when they arrived at Club 41. (T 379) Trapp saw Margaret Torres there. (T 376) She was drinking by herself. (T 376, 379) A few minutes after they arrived at Club 41, Bogle approached Torres and had a conversation with her that lasted maybe two or three minutes, but Trapp could not hear what was being said over the music. (T 377) A few minutes afterward, Bogle approached Trapp and told him that Torres was "real trash," and said he used to go with her sister. (T 377) After approximately 45 minutes to an hour, Trapp left Club 41. (T 377) Torres and Bogle were still there. (T 378)

On September 12, Margaret Torres's aunt and uncle, Phillip and Tammy Alfonso, saw Torres at Starky's, and later at Club 41, which was next to the Beverage Barn. (T 407-409, 432, 440) Torres was by herself at both places. (T 407, 409, 432-433) Torres came to the Alfonsos' table at Club 41 and was talking with Tammy. (T 410, 433-434) Brett Bogle approached Phillip Alfonso while Torres was dancing, and asked if Torres was with him, to which Alfonso responded in the negative. (T 410-411, 434) Bogle, who was dressed all in white, showed Alfonso a scar on his right side from an accident that he had had at Palm River Road and 41, and said that he had gotten a settlement. (T 411, 435) The Alfonsos did not notice any other injuries to Bogle. (T 411, 435)

Margaret Torres left Club 41 about 1:00 or 1:15 a.m. without saying anything to her aunt and uncle. (T 412-413) Three to five minutes later, Brett Bogle also left the bar. (T 413)

The Alfonsos saw Bogle again outside when they left Club 41, which was about 45 minutes after Torres left. (T 413) He approached their car from the direction of the Beverage Castle and asked for a ride, but they refused, because they were going north, and Bogle was heading south. (T 414-415, 418, 435-436) He was dirty and his crotch was wet. (T 414-415) There were scratches on his forehead. (T 437) He was calm. (T 437) Phillip Alfonso did not remember if Bogle was wearing a shirt, but Tammy did not think that he was. (T 414, 436) When Phillip Alfonso remarked that Bogle looked "mighty dirty" to him, Bogle did not answer for a minute, but then went from saying that he was drunk and had passed out to saying that he had been in a car accident. (T 414, 437)

The Alfonsos stopped by Phillip's mother's house to see if Margaret Torres was there; she was not. (T 415) They then went to Katie Alfonso's residence, and learned that Torres was not there either. (T 415) Katie Alfonso went with her aunt and uncle to look for Torres, but they could not find her. (T 281-282, 415-416) They learned the next day what had happened to her. (T 283, 416)

Robert Wolf owned the Beverage Barn located at U.S. 41 and Gibsonton. (T 192) On September 13, 1991, he discovered the nude body of a female on his property at around 5:00 p.m. (T 193-194) Her head was "pretty badly beat up," and Wolf knew that she was dead. (T 194) There had been some cement splash stone under some drain pipes on the side of the building where the body was found, about 20 feet from it, but this was not in place when Wolf discovered the body on September 13. (T 199-200) There was some

cement block lying by the body. (T 198) Wolf called 911 and the police came out. (T 194, 202-203) Among the things they did was to cut out a part of the Beverage Barn where there were some fingerprints or handprints. (T 202-203, 249, 343, 372-373, 452-455) Law enforcement personnel were not able to process the prints at the scene, but sent the piece of metal to the FBI Lab "for them to attempt to preserve that photographically." (T 453)

Dr. Vernon Adams was the chief medical examiner for Hillsborough County. (T 204) On September 13, 1991, Adams went to the Beverage Barn in Gibsonton, arriving there at 6:55 p.m. (T 207) There were several representatives of the sheriff's office homicide detective unit on the scene when he arrived. (T 207) He observed the body in a grassy gully underneath a pair of palm trees near the fence along the property line on the south side of the Beverage Barn. (T 207-208) The body was ambient temperature. (T 211) Rigor mortis was present, but had begun to pass. (T 211) There was evidence of insect activity on the body. (T 211-212) The condition of the body was consistent with the woman having been dead for approximately 16 hours. (T 221) The head was in a pool of blood and dirt, with the right side of the face down, in a "concaved depression" in the soft, moist soil. (T 212) There was blood spatter on the left shoulder near the head, and also on the left thigh. (T 213) There were articles of clothing near the body--a head band, shorts, a brassiere, and socks scattered around. (T 208) The only clothing on the body itself was one sock. (T 208) Near the body were three pieces of concrete, two of which had "flanks"

on them, and two of which appeared to be broken from one piece. (T 208) They looked as though they were from a splash stone or concrete spillway. (T 208) The stone in the center of the group of three appeared to have blood along the edge, as well as hair-like fibers. (T 209-210, 213) There were plastic pipes emerging from the embankment between 20 and 40 feet away, and there was disturbed earth near the pipes where there might have been stones placed at some recent time. (T 208, 250) There were imprints in the soil around the body that did not have any specific definition. (T 248-250)

After the body was transported to the medical examiner's office for autopsy, Adams ascertained that the woman was four feet, eleven inches tall, and weighed 89 pounds. (T 214) She had a tearing wound right on the top of her head that ran from front to back, and was three and a half inches long. (T 214-215) This was caused by one blow, and was not necessarily lethal. (T 215-216) The woman also had multiple fractures of the left side of the skull. (T 215) Adams's opinion was that the damage to the left side of the head was caused by two blows superimposed on each other. (T 216) These two blows were lethal. (T 217) There were also indications of an impact to the right side of the face and neck: an area of abrasion to the neck, and fracture of the cricoid cartilage, which is the lower part of the voice box. (T 218) The scrapes had "corresponding striations which were similar to those of the other wounds and which were consistent with the implement which we discussed." (T 218) The tongue was also bruised "in

association with this injury complex." (T 219) The woman also had a bruise with scrape marks on the upper part of the chest on the left side in relation to the collar bone, and an abrasion on the back of the left shoulder. (T 219-220) Dr. Adams opined that the splash stone found at the scene caused the injuries to the torso and the left side of the head. (T 220) The wounds on the left side of the head were probably inflicted either last or near the end of the sequence. (T 220-221)

There were superficial tears of the top layer of skin around the woman's anus, and hemorrhage into the tissues beneath this area into the muscle, as well as some microscopic hemorrhage into the lining of the rectum. (T 222) These injuries were consistent with anal intercourse, and Adams believed that they were inflicted at about the time the woman died. (T 222, 224) There was no way for Adams to tell whether the intercourse was consensual or by force. (T 247-248)

Adams did not find any leukocyte reaction in any of the injuries that he looked at microscopically; the earliest time for white cells to appear in an injury is generally about three hours after the injury occurs. (T 223) Therefore, the injuries occurred within three hours of death. (T 247)

Adams took swabs from the victim's mouth, rectal area, and vagina for subsequent testing by the crime laboratory for the presence of semen. (T 224, 238) He also collected pubic hair samples from Margaret Torres, and collected her fingernails. (T 240-243)

In Adams's opinion, Torres was alive at the time of the infliction of most of the wounds, including the fatal wounds to the side of her head, based upon the presence of an air embolus in the heart. (T 225) She could have survived for as few as four breaths, or as long as several seconds, or even several minutes. (T 226) It was possible that the first blow she received could have rendered Torres unconscious, and that she died several seconds later. (T 246, 248) Adams opined that Margaret Torres was struck seven times by the splash stone. (T 237)

There was little or no blood in the body for two reasons: considerable blood had drained from the head wound into the soil, and "neurogenic shock," which is a reflex redistribution of blood out of the large veins and arteries and the heart into the skeleton in people who receive head wounds such as the ones incurred by the victim herein. (T 226-227)

The cause of death of Margaret Torres was determined to be blunt impact head trauma with skull fractures and lacerations of the brain. (T 238-239)

Torres's blood ethanol concentration was 0.26 percent. (T 245)

On the night of September 13, 1992, Detective Larry Lingo of the Hillsborough County Sheriff's Office went to a trailer looking for Brett Bogle, as he was a "possible suspect" in the instant homicide. (T 355-356) An individual named Guy Douglas came to the door. (T 356) Douglas was not cooperative at first (he told Lingo that he had had some problems with the police in the past), but he eventually agreed to allow Lingo to search his trailer. (T 357)

Lingo interviewed Douglas in the living room area and ascertained that Brett Bogle was in the mobile home, although Lingo did not see anyone else there. (T 358) Douglas, Corporal Lee Baker, who was with Lingo, and Lingo went to the rear of the trailer, to the bedroom, and called Bogle's name. (T 359) There was no response. (T 359) Lingo observed a movement in a bathroom to his right. (T 359) Lingo asked "if it was him," and asked him to come out, whereupon the shower curtain moved, and Bogle appeared behind it. (T 359) He was dressed, and was not showering or bathing. (T 359) Bogle came out of the bathtub, and Lingo observed a pair of men's trousers in the bottom of the tub that appeared to be wet. (T 360) The pants and a pair of sneakers that were in the living room of the trailer were impounded by Ronald Cashwell of the Hillsborough County Sheriff's Office crime scene unit, who was called to the scene. (T 344-347, 350-352, 360-361, 369-370) What appeared to be hairs that were found in the pants were sent to the FBI Laboratory, as were the shoes. (T 365-366, 369-370) In addition to the pants and sneakers, Lingo attempted to locate a light-colored shirt that had been described as the type of clothing that Bogle had been wearing earlier, but could not find a shirt that fit the description he had been given. (T 361-362) Bogle was taken back to the sheriff's office for an interview, and was subsequently arrested. (T 363) During the interview, Lingo noticed what appeared to be fresh scratches on Bogle's forehead. (T 363)

Michael Malone, an examiner of hair and fibers with the FBI Laboratory in Washington, D.C., examined the evidence recovered

from the trousers seized from the trailer and found one Caucasian pubic hair which microscopically matched the known pubic hair of Margaret Torres; it had been naturally (as opposed to forcibly) removed. (T 317-318) Malone conceded that hair "is not like a fingerprint," and hair comparisons do not constitute a basis for absolute personal identification. (T 313, 320) Apart from the debris from the trousers, Malone also examined 39 other items, which he grouped into three categories: items from the crime scene, items from Brett Bogle, and items from Margaret Torres. (T 327) All of the suitable hairs from the scene were consistent with Torres. (T 328) All of the suitable hairs from items pertaining to Bogle (except the one pubic hair) were consistent with his hair. (T 328) All of the hairs from Torres herself matched her hair, except for one dark brown head hair which exhibited mixed racial characteristics. (T 328)

Robert Grispino, a forensic serologist with the FBI Laboratory in Washington, examined three pieces of concrete splash stone for the presence of blood. (T 390-391) He found human blood on one of the three, but could not type it further. (T 391-392) He also examined the shoes and trousers seized from the trailer of Guy Douglas. (T 392) He found a drop of human blood on the left sneaker, but was unable to characterize it further. (T 392) He could find no blood on the pants. (T 392-393) In addition, Grispino examined fingernail clippings from Margaret Torres. (T 393-394) He found no blood on the left fingernails, but did find blood on the right fingernails, however, there was not enough for

him to determine whether it was human. (T 394) Grispino also examined several items for the presence of human semen: the four vaginal swabs, two anal swabs, and two oral swabs taken from Margaret Torres, as well as an exhibit identified as Torres's panties. (T 395-396) He found no semen on the anal or oral swabs, but did detect semen on all four of the vaginal swabs, as well as on the panties. (T 396-397)

Harold Deadman worked in the DNA Analysis Unit of the FBI Laboratory in Washington. (T 456) Special Agent Grispino submitted to the DNA Analysis Unit the vaginal swabs on which he had identified semen, as well as cuttings from the panties on which semen stains had been identified. (T 461-462) Insufficient DNA for analysis was obtained from the panties, but a small amount of "sperm DNA" was obtained from the swabs. (T 464-465) Deadman obtained DNA patterns for two of the three tests he conducted. (T 465) On one test, the DNA profile from the vaginal swab DNA matched Brett Bogle's profile, which was obtained using a known blood sample from Bogle. (T 462-463, 465) The second test that produced a result was inconclusive. (T 465) Although the patterns produced were visually consistent with Bogle's DNA profile, the intensity was such that Deadman was unable to measure the pieces of DNA, and so he could not determine that a match existed. (T 465-466) In the FBI's Black population data base, approximately 10 percent of the people would have profiles similar to the one developed in this case. (T 466-467) In the Caucasian data base, the profiles developed in this case occur in approximately 12 1/2

percent of the population. (T 467) In the Hispanic population data base, approximately 14 percent of the population would have matching profiles. (T 467)

After Brett Bogle's arrest, he called Katie Alfonso from the jail. (T 283-284) He denied killing her sister. (T 284) Bogle told Alfonso that he had seen her with her aunt and uncle at the Beverage Castle, crying, after Bogle got off work. (T 284) Alfonso asked why Bogle did not stop to find out what was going on. (T 284) Bogle responded that no matter what Alfonso said, he did not do it, and was going to prove to her that he did not do it. (T 284) He also asked if he and Alfonso could get back together again if Bogle "got proved innocent of all this..." (T 284)

When the State rested its case, Brett Bogle moved for a judgment of acquittal as to all four counts of the indictment. (T 473-493) The court granted the motion as to Count Four, the robbery charge. (R 181, T 474-477) With regard to Count Three, retaliation against a witness, the court agreed that there was "not sufficient evidence as far as the victim Katie Alfonso [,]" but denied the motion as it related to Margaret Torres. (T 477-484) The court denied the motion with regard to the counts charging murder and burglary. (T 484-493)

The defense rested without putting on any evidence. (T 494) Bogle's jury found him guilty as charged as to the three counts of

the indictment that were submitted for its consideration. (R 179-180, T 623)[2]

Penalty phase was conducted on October 2, 1992. (T 631-878) After receiving evidence from the defense, and rebuttal evidence presented by the State over objection, the jury returned an advisory verdict by a vote of seven to five that Brett Bogle be sentenced to death. (R 182, T 537-874)

On October 12, 1992, Bogle filed a Motion for New Trial (R 191-195), which Judge Bucklew heard on November 24, 1992 (T 880-930), and granted on December 22, 1992 as to the penalty phase only, due to improper rebuttal evidence that had been presented by the State. (R 216-218)

Bogle's new penalty trial was held on February 8-10, 1993. (T 953-1638) The State did not present any witnesses who had not testified at the original guilt phase of Bogle's trial.

Katie Alfonso testified again concerning her relationship with Bogle, and Bogle's tumultuous relationship with Margaret Torres, Alfonso's sister, and how Alfonso finally insisted that Bogle move out of her house, because the arguing "was getting out of hand." (T 1174-1178) She told the jury about the events of September 1, 1991 (the drive to another county to purchase beer, the incident when they arrived back at the trailer). (T 1178-1185) She testified regarding a telephone call she received from Bogle a day or two

---

[2] The record does not reflect whether the jury found Bogle guilty of first degree murder on a theory of premeditated murder or felony murder. Bogle's request for a special verdict form that would have so indicated was rejected. (T 500-501)

after the September 1 episode. (T 1183-1184) Bogle called and asked how everything was. (T 1183) While he and Alfonso were talking, Margaret Torres said in a loud voice, "You tell him I'm pressing charges." (T 1183-1184) Bogle replied, "You tell that bitch she won't live to tell about it." (T 1183-1184) Alfonso told Bogle not to worry, her sister was not going to press charges, even though Alfonso knew that Torres would not drop the charges, because Alfonso was scared. (T 1184)

On September 12, 1991, Torres called Alfonso and told her that she was going to Club 41 to dance, it was ladies' night. (T 1186) Torres, who usually stayed at her grandmother's house if she came in late, said that she would see Alfonso the next day. (T 1186)

That same night around 11:00, Brett Bogle called. (T 1186-1187) Alfonso had not seen him since September 1, but he had called, wanting to move back in. (T 1186) Bogle wanted to come over, but Alfonso refused, explaining that she was babysitting, and had to get up the next morning and go to work. (T 1187) Bogle had a friend of his speak to Alfonso on the telephone; the friend told her that Bogle was in love with her, and that he was a "pretty nice guy," and he did not know why Alfonso would not let Bogle come around. (T 1187) Alfonso told the friend that she did not want any more problems. (T 1187) Bogle came back on the line and said that sometimes Alfonso could act like a bitch. (T 1187)

Later, Alfonso went with her aunt and uncle to look for Margaret Torres, but they could not find her. (T 1188) Alfonso learned what had happened to her sister the next day when she got

off work. (T 1188) About 5:00 she saw the area around the Beverage Castle taped off, and stopped to investigate. (T 1188-1189)

Deputy S.J. Zdanwic of the Hillsborough County Sheriff's Office testified again regarding her investigation of the incident that occurred at Alfonso's trailer on September 1. (T 1165-1171) She responded to the 911 call that had been placed by Margaret Torres. (T 1165-1166, 1182) Although the telephone had been disconnected, the computer screen showed the location from which the call had been placed. (T 1166-1167, 1182) Brett Bogle was not at the mobile home when the deputy arrived. (T 1167-1168) Zdanwic observed physical damage to the trailer. (T 1166-1167) Katie Alfonso had red marks around her neck where it appeared that someone had grabbed her to choke her, and Margaret Torres had red marks on her left wrist where it appeared that she had been grabbed. (T 1168) Both women were very upset. (T 1168) They had been drinking, but Zdanwic did not consider them to be intoxicated. (T 1169-1170) Zdanwic attempted to call Brett Bogle, but could not locate him, and so she filled out a criminal report affidavit and forwarded it to the state attorney's office on the burglary charge so that they could put out a capias for his arrest. (T 1170-1171)

Jeffrey Trapp testified again about seeing Brett Bogle on September 12, 1991 at Red Gables, where Bogle was drinking beer, and transporting him and others to Club 41. (T 1217-1218, 1222) At Club 41, Trapp saw Bogle approach Margaret Torres, who was a regular at the bar, and have what appeared to be a normal conversation with her for two or three minutes, although Trapp could not

hear what was being said. (T 1218-1219, 1229-1230) Shortly thereafter, Bogle said something to Trapp to the effect that Torres was "real trash." (T 1219-1220) Trapp did not notice any scratches or bruises to Bogle's face or head area. (T 1221) Bogle was not drunk. (T 1222-1223)

Tammy Alfonso and Phillip Alfonso, Margaret Torres's aunt and uncle, testified again about seeing Torres on September 12 at a bar called Starky's, and seeing her later at Club 41. (T 1232-1234, 1246) Brett Bogle was also at Club 41. (T 1234-1235, 1247) He asked Phillip Alfonso if Torres was with them, and Alfonso said no, she was there on her own. (T 1235, 1247) Bogle also told Phillip about a car accident he had, and raised up his shirt to show him a scar on his side, and said that he was getting a settlement. (T 1248, 1254) Tammy Alfonso testified that she did not notice any injuries to Bogle's forehead or face, and Phillip Alfonso testified that he did not notice any injuries to his head. (T 1236, 1248) Bogle did not appear intoxicated. (T 1241-1242, 1258)

Margaret Torres had already left by the time the Alfonsos left. (T 1236) Tammy Alfonso did not see her leave, but Phillip did, and Phillip saw Bogle leave about two or three minutes later. (T 1241, 1248-1249) As the Alfonsos were leaving about 45 minutes thereafter, Bogle approached their car from the direction of the Beverage Castle and asked for a ride. (T 1236, 1249-1251) He "looked real dirty" and had a wet spot in his crotch, and scratches on his forehead. (T 1239, 1250-1251) Phillip Alfonso asked him why he was so dirty. (T 1237, 1250) Bogle responded that he had passed

out somewhere by the bar, and also said something about being in a car accident a week before. (T 1237) Bogle's demeanor was "[j]ust kind of scattered...saying one thing to another," and he was jumping from one conversation to another. (T 1238, 1242)

Detective Larry Lingo of the Hillsborough County Sheriff's Office testified concerning the finding and location of the body and his observations at the scene (T 1264-1268, 1280-1284), as well as his encounter with Brett Bogle at the mobile home in which Guy Douglas resided on the night of September 13, and the taking into evidence of the white pants and sneakers. (T 1269-1275) Lingo stated that when Bogle stepped out of the shower, he appeared to have some fresh scratches across his forehead. (T 1275-1276) On September 17, Lingo recovered some hairs from inside the zipper area of the white pants and submitted them to the FBI Crime Laboratory in Washington. (T 1277) He also submitted to the lab known head and pubic hair samples of Margaret Torres and Brett Bogle, and known blood samples of Torres and Bogle, and the clothing of Margaret Torres. (T 1278, 1285)

Special Agent Michael Malone of the FBI Lab in Washington testified again that a pubic hair which was represented as having been removed from a pair of white pants exhibited the same microscopic characteristics as the known pubic hair of Margaret Torres. (T 1306-1308) It had been naturally shed (as opposed to forcibly removed). (T 1312) Malone was unable to find any hairs or fibers from Brett Bogle on the clothing of Margaret Torres. (T 1312) In the debris from the victim, from her clothing or her

person, Malone did find a head hair from a mixed-race individual that did not match either Bogle or Torres. (T 1312-1313, 1316)

Dr. Vernon Adams, the medical examiner, testified once again regarding his observations at the scene where the body was found and during the autopsy, the injuries to Margaret Torres, his collection of Torres's fingernails and swabs from her vagina, anus and mouth, and the cause of death. (T 1328-1369) He stated that the laceration to the top of the head "was capable of being lethal," but that there were more severe injuries which "in all likelihood were more immediately lethal," namely, the two blows to the left side of the head, either one of which could have caused death. (T 1339, 1342-1347, 1363) One of these blows could have rendered Torres unconscious almost immediately, and she would have died within seconds after the infliction of these injuries. (T 1364-1365, 1368) Dr. Adams opined that the two blows to the side of the head were the last blows inflicted. (T 1367) The alcohol concentration in Torres's blood was .26, and in the fluid from the eye, which was the more reliable reading, it was .29 percent. (T 1354, 1361) At high concentrations, alcohol acts somewhat as an anesthetic and dulls the perception of pain. (T 1353-1354) The amount of alcohol in the body of Margaret Torres could have had some effect on her ability to feel pain on the night of the homicide. (T 1362) With regard to the injuries to Torres's anal area, these could have been sustained during consensual intercourse, if it was "rough and unlubricated," and could have occurred up to three hours prior to death. (T 1362-1363)

Harold Deadman of the FBI Lab's DNA Analysis Unit told the jury that Special Agent Robert Grispino developed blood on one specimen that was identified as fingernail clippings from Margaret Torres, but there was insufficient blood to conduct any type of DNA analysis. (T 1381) Grispino also developed seminal fluid on the vaginal swabs from Torres, but not on the anal or oral swabs. (T 1375-1376) Deadman isolated a small amount of DNA from the vaginal swabs, which he compared to the DNA from the known blood sample of Brett Bogle. (T 1376-1378) One test Deadman ran was inconclusive. (T 1378) Another test showed a match between the DNA from the swabs and the DNA from Bogle's blood. (T 1378) The third test also gave inconclusive results because the DNA profile was very weak. (T 1378) A profile similar to that of Bogle was obtained, so that he could not be excluded as the contributor of the DNA, but it was not intense enough to conduct the measurements necessary to determine if a match existed. (T 1378-1379) The DNA developed in this case was "a fairly common type." (T 1379-1380) In the FBI's black data base, approximately one in ten people would have similar DNA. (T 1379-1380). In the white data base, approximately one in eight. (T 1380) And in the Hispanic data base, approximately one in seven. (T 1380)

The defense presented the testimony of eight witnesses at Brett Bogle's new penalty trial. (T 1391-1544)

Dr. Arturo G. Gonzalez, a psychiatrist, read various depositions, police reports and testimony from members of Brett Bogle's family, and then examined Bogle at the Hillsborough County Jail on

June 17, 1992 for approximately two hours. (T 1395-1396, 1405) Dr. Gonzalez learned that Bogle was raised in a "very, very dysfunctional family." (T 1397) In fact, it was the most dysfunctional family Dr. Gonzalez had ever seen. (T 1397) The children were subjected to both psychological and brutal physical abuse. (T 1400) Their father was always putting them down, telling them that they were not good, they were worthless. (T 1400) He would hit them with belts as many as 25 times. (T 1400) Initially, the oldest boy, Bobby, was treated as the scapegoat, but when he left home, Brett became the scapegoat. (T 1398) Dr. Gonzalez termed the brutalization "more than just child abuse," and found it "incredible." (T 1402) The father introduced his children to drugs at an early age, and had them smoking "pot" when they were five, six, seven, eight years old. (T 1397) There was a picture the father had had taken of himself surrounded by his children when they were all "stoned," because he thought that that was funny. (R 309, T 1397-1398) After Brett Bogle was "turned onto" drugs by his father, he became addicted to pot, cocaine and alcohol. (T 1401)

Dr. Gonzalez testified concerning the long-term effects that alcohol and drugs can have on a person's capacity to make rational decisions or restrain himself. (T 1401-1402) In an acute intoxication phase, one's capacity to think and reason is diminished. (T 1401) That diminished capacity would affect one's ability to comport oneself with the law, depending upon the degree of intoxication, and would affect one's ability to have relationships with other human beings. (T 1401-1402) It would also affect a

person's ability to restrain himself in an argument; one would be more irritable and prone to lose one's temper. (T 1402)

Dr. Gonzalez determined that Brett Bogle had a number of beers on the night in question, at least six, and perhaps as many as 12. (T 1402-1404, 1422) Because Bogle was under the influence of alcohol at the time of the homicide, he was under "some type of influence of emotional mental disturbance." (T 1403, 1427) With regard to whether Bogle's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was impaired, Dr. Gonzalez initially testified that "that would be difficult to tell because it would depend upon the degree of intoxication at the precise time of the crime and that date," and Dr. Gonzalez did not "have that data," but he did approximate that Bogle had 10-12 beers that night. (T 1403-1404) Dr. Gonzalez concluded that because of his upbringing and the alcohol he consumed, Bogle's ability to conform his conduct to the requirements of law was impaired to some extent. (T 1427) Although Dr. Gonzalez did not find Bogle incompetent to stand trial, and did not find him to have been insane at the time of the offense, Bogle did have a borderline personality disorder, as well as a substance abuse problem, which is a psychiatric disorder. (T 1396-1397, 1406-1409)

Bogle denied to Gonzalez committing the instant homicide. (T 1422-1424)

Raye Brown, Brett Bogle's great aunt, characterized Bogle's father as a "very violent man" who treated his four children "very

badly. He beat them; he kicked them; he talked to them like they were dogs and [Brown] observed it." (T 1432-1433, 1438) The "children were beat for no apparent reason. If one child had done something wrong, they all got it or like one had to confess about the other one..." (T 1434) Brown described an incident that Brett Bogle witnessed when he about a year old where the father hit Cheryl, Brett's sister, so hard that her head hit the back of the breakfast nook. (T 1435) This "terrified" Brown, because she "thought he was going to kill her." (T 1435-1436) There was an occasion where Brown's husband talked to Mr. Bogle "about beating the children and the way that he did not pay attention to them." (T 1438) Bogle resented the admonition, and "got violent" with Brown's husband and "jumped on" him. (T 1436, 1438)

Brown described Brett Bogle as "a normal boy," with "a little ornery ways about him growing up," who did not exhibit violent behavior as a child. (T 1438-1439)

The last time Brown saw Brett Bogle before the homicide, he was with his father, who was "bragging about them going to bars and drinking and fighting." (T 1434-1435)

Richaye Brown, Brett Bogle's second cousin, described Bogle's upbringing as "[s]cary, violent." (T 1441) Brown recounted an incident that occurred when Bogle was three or four years old, and his sister, Cheryl, was six or seven. (T 1442-1443) Bogle's father saw two black handprints on the white walls by the front door and lined his four children up, wanting to know who put the handprints on the wall. (T 1442) If the children did not own up to who did

it, he was going to beat all of them. (T 1442) The three boys pointed to Cheryl, and her father started beating her head on the wall where the handprints were. (T 1442)

Despite what Brett Bogle had been convicted of, Brown still cared for him. (T 1443)

Martha Fairbrother had known the Bogle family since 1970 or 1971. (T 1444) She characterized Brett Bogle's upbringing by his father as "very violent, abusive." (T 1445) If one of the children did not admit fault for something that happened, they were all punished. (T 1445) Bill Bogle, the father, had mood swings that were affected by his drinking and whether things were going right for him, etc. (T 1445-1446) Besides alcohol, the elder Bogle used marijuana and, possibly, cocaine when his children were in the house. (T 1446-1447, 1455-1457) If Bogle had to take care of the children when his wife was at work, he would sometimes leave them alone, and Fairbrother would have to take care of them. (T 1447-1448) This occurred at an age when the children were not capable of taking care of themselves. (T 1448)

Brett Bogle witnessed numerous acts of abuse by his father against Brett's brother, Bobby, some of which were more violent than others. (T 1448) Fairbrother described an incident that occurred when Brett's mother was in the hospital, and Bill Bogle was taking care of the children at night. (T 1448) The children had taken a train set from the attic and put it together. (T 1448) Bill Bogle did not like that, and so he beat Bobby with his fist and a belt in the presence of the other children. (T 1448)

When Bill Bogle corrected the children, they were never allowed to explain their actions, they were just punished, usually with a belt or stick. (T 1448-1449) Fairbrother had even seen Bogle hang a tire iron over the children's heads and threaten them with it. (T 1449)

If Brett did something wrong, he owned up to it, and, in front of his father, tried to act as though it did not matter how his father treated him. (T 1449-1450) When his father was not there, however, it upset him; he could not understand why he was being treated so badly when Fairbrother's son, with whom Brett had a good relationship, was not. (T 1449-1450)

Brett was very close to his mother, Dola Bogle, whom he adored. (T 1450) She did a lot for the children, and Brett always knew that he could count on her to help protect him. (T 1450)

With regard to the relationship between Bill Bogle and his wife, as long as everything went his way, "there wasn't much said," but if Dola tried to defend the children, or discuss Bogle's violence or drug use, or expected him to be home at a certain time, then there were problems. (T 1450) Fairbrother had witnessed violence between the Bogles that occurred in front of the children. (T 1450-1451)

While he was in the Hillsborough County jail, Brett Bogle sent Fairbrother a drawing he did to thank her for her kindness. (R 336-337, 1451-1453)

Fairbrother still cared for Brett Bogle. (T 1449)

Mary Shrader considered Brett Bogle to be a good friend. (T 1459) Bogle used to work with Shrader's husband at Tampa Roofing Company. (T 1459) When they met about two years previously, Bogle was using his check and pawning his tools to buy crack cocaine. (T 1460) He was "flirtatious and funny and conversational," but was not responsible at all. (T 1463) Shrader's husband helped Bogle get away from that situation. (T 1460-1461, 1463-1464) Bogle was still working at Tampa Roofing when he met Katie Alfonso at Starky's. (T 1461-1462) He met her on a Friday night and "went straight with her from the bar to her mobile home." (T 1462) Bogle called Shrader's husband the next night and said, "I've met this woman and I think it might work out, she's older." (T 1462)

Bogle and Shrader's husband were involved in a car accident early in the morning on Friday, September 6, 1991 as they were on the way to work. (T 1465, 1471) Shrader's husband was driving when a woman coming from the opposite direction on Highway 41 did not stop at a stop light, and turned right in front of them, hitting and crushing the front of the car in which Bogle was a passenger, and causing it to hit a telephone pole. (T 1465) Bogle was thrown up over the seat and his head and face went into the windshield. (T 1465-1466) The Shraders' Cougar was totaled. (T 1470) Shrader saw Bogle at the hospital, where they were "taking glass particles out of his face and eyes and stitches." (T 1471-1472)[3] He had three

---

[3] During Shrader's testimony, defense counsel indicated his intention to show her three pictures of Brett Bogle that were taken by the police after his arrest and ask her whether the injuries to his face depicted therein were the same injuries Shrader saw at the (continued...)

cracked ribs, and a broken rib that punctured his lung and necessitated a tube being put into the side of his chest. (T 1475) He was crying out in excruciating pain. (T 1475) Bogle was released from the hospital on Sunday, although hospital personnel wanted him to stay longer. (T 1471-1472) He was not able to go back to work. (T 1476)

Bogle received a monetary settlement as a result of the car accident. (T 1477-1478) When the Shraders were without transportation, Bogle gave them some money from the settlement so that they could buy a car. (T 1477-1478) And after his arrest for the instant homicide, while he was in the Hillsborough County Jail, Bogle gave the Shraders money so that they could enjoy their anniversary. (T 1478-1479)

Bogle also sent Shrader and her children pictures that he had drawn when he wrote to them from jail. (T 1476)

Brett Bogle's sister, Cheryl Lynn Bogle, was housed at the Hillsborough County Jail at the time she gave her testimony at her brother's penalty trial. (T 1505) The charges she was facing included battery on a law enforcement officer as a result of an altercation with a deputy at the jail. (T 1513-1514)

Cheryl was 26, three years older than Brett. (T 1505) She described their father as "very abusive" toward Brett and all of the children, as well as to their mother. (T 1505) There was "[a] lot of verbal abuse; a lot of physical abuse; [the children] would

---

[3](...continued)
hospital. (T 1472-1474) The court sustained a State objection on relevancy grounds. (T 1474)

get beatings instead of spankings." (T 1506) At first William Bogle used a belt to administer the beatings; as the children grew older, he used his fist. (T 1506)

William Bogle abused drugs and alcohol in the household in front of the children. (T 1506) "He smoked marijuana a lot. He drank alcohol, beer, whiskey. There was cocaine in the house occasionally." (T 1506) Bogle introduced his children to drugs and alcohol. (T 1506-1507) Brett was probably about nine or 10 when his father introduced him to marijuana, and probably less than 16 when he was introduced to cocaine. (T 1506-1507) [Cheryl was 13 when her father introduced her to cocaine. (T 1507)] William Bogle administered drugs to Brett "[p]robably every day." (T 1509) Brett was 10 or 11 when the picture was taken of William Bogle and his children when they were all high on marijuana. (T 1507-1511)

Brett's father would frequently tell him "that he was a piece of shit. He wasn't any good." (T 1509) William Bogle referred to his children as "heathens" who "weren't ever going to be anything, or ever going to be any good." (T 1509)

The abuse that their mother suffered at the hands of their father in Brett's presence was "almost a daily thing." (T 1511) William Bogle would not work, and so their mother was working to support the family. (T 1511) Their father would come home drunk and curse their mother, physically abuse her. (T 1511) Cheryl had witnessed a lot of occasions where her father beat her mother, "pushed her over a tongue of a trailer, ripped her shirt off." (T 1511) When their mother attempted to intervene when their father

was trying to discipline Brett, their father would either turn on her or ignore her pleas and continue. (T 1511) The Bogles eventually divorced. (T 1508, 1514-1515)

Cheryl left home at age 17, an incident which Brett witnessed. (T 1511-1512) Cheryl and her mother had an argument, and her father told her to pack her "shit and leave." (T 1512) Cheryl had a lot of trophies from running track and cross-country that were very precious to her which her father kicked over. (T 1512) Her father had bought Cheryl a car that did not work, and she put all of her possessions in it, and ran down the street to get a friend to help push the car out of the driveway. (T 1512) Cheryl's father had a gun and told her that if her friend came in the yard, "he would fucking shoot her." (T 1512)

Cheryl had a daughter while she was in prison. (T 1514-1515) She allowed her father to take care of the girl for awhile, as he had remarried, and she thought that maybe his life had changed. (T 1515) Ultimately, William Bogle turned Cheryl's daughter over to HRS custody. (T 1515-1516)

Charles Robert "Bobby" Bogle, 28, was Brett's oldest brother. (T 1517) Brett was about five or six years old when his father first administered alcohol or drugs to him--marijuana. (T 1517-1518) When Brett was about 13, his father gave him cocaine. (T 1518) Brett also abused alcohol as a child when he was growing up; his father would give it to him. (T 1521) The picture in which William Bogle and his children were high on marijuana was taken by Bogle's girlfriend Pam, with whom he was living, when Brett was

probably nine or 10. (T 1518-1519) The whole time Brett and his siblings were growing up, they were drinking and getting high. (T 1521)

Their father would whip the Bogle children whenever they did anything wrong, even something minor. (T 1519-1520) William Bogle would use a belt, or his fists, or "whatever happened to be laying around at the time." (T 1520) Bobby recounted an incident that happened when he was about 15 that occurred in Brett's presence. (T 1520) Bobby had done something, he did not remember what, and his father picked up a rake and hit him with it and broke the handle. (T 1520) He then took off his belt and started beating Bobby not with the belt, but with the belt buckle. (T 1520)

Brett also witnessed violence between his father and his mother, which occurred "pretty often." (T 1520-1521) One time William Bogle hit Bobby with his fist and Mrs. Bogle stopped him, whereupon Bogle started beating his wife and Bobby could not stop him. (T 1521)

When Bobby was about 15, his father owned a shop in Tampa called Bill's Pit Stop where Brett and Bobby used to work on the weekends. (T 1522) Everyone that worked there got high. (T 1522)

Brett and Bobby were always close, and Brett looked up to Bobby as a big brother. (T 1522-1523) Bobby did not feel that he had been a good example, and felt kind of responsible for the position Brett was in. (T 1522-1523)

Bobby was serving a seven year sentence, with a three-year minimum mandatory, at Lake Correctional Institution for aggravated

assault with a firearm and false imprisonment. (T 1523) He was scheduled to get out in June, and Brett had told him that he hoped he would be able to change his life around, if not for himself, then for Brett, because Brett's life was gone now. (T 1523-1524)

Dola Bogle, Brett's mother, testified that he was born on May 1, 1969. (T 1525) He dropped out of school in the eleventh grade. (T 1525)

Brett's mother became aware of the drug and alcohol abuse he underwent at the hands of his father after the children were grown; they were given marijuana and cocaine at very early ages. (T 1525-1526) The Bogles had separated after being married for 17 years when William Bogle went to live with Pam, and the picture was taken when Bogle and his children were high on drugs. (T 1527-1528)

Of Dola Bogle's four children, the only one who was not in jail or prison was Brett's fraternal twin brother, Brian, who was a Marine sergeant stationed in Okinawa. (T 1528-1529, 1534) Brett and Brian had totally different personalities. (T 1534-1535) Brett was "boisterous" and "outgoing," while Brian was very quiet. (T 1535) Brian had the ability to walk away when his father was trying to provoke him, while Brett would "run his mouth" and "make matters worse." (T 1535)

Brett was a "breach birth." (T 1529) When he was 18 months old he drank some pine oil cleaner which went into his lungs, and he was in the hospital for seven days with chemical pneumonia. (T 1529) Brett had hernia surgery at the age of three. (T 1529) He

was hyperactive, for which he was placed on Ritalin for over a year, and "was constantly getting banged, hurt; sutures." (T 1529)

Brett's father first moved out of the house when Brett was around nine or ten. (T 1530) The Bogles got back together for awhile, but the father left them again when Brett was 16. (T 1530)

The first time they separated, William Bogle would be in and out of the house, and would tell the children that they were the reason he was not there; he loved their mother, and it was all their fault because they were so bad. (T 1530-1531) Throughout their childhood their father constantly told the children that they were no good, they were worthless. (T 1531)

William Bogle would administer beatings to Brett "[w]henever the mood struck him." (T 1531) It was "a fairly often occurrence" for all the children. (T 1531) The discipline would not be appropriate; William Bogle "would completely lose it, like he didn't know when to stop...[I]t was just like he went wild." (T 1531)

William Bogle would have mood swings as a result of alcohol and drugs. (T 1532) The family never knew when he walked in the room if he was going to be okay or if he was going to be violent, and they had to really watch what they said and did for fear of setting him off. (T 1532) When his cocaine abuse became worse, William Bogle started accusing his wife of sexual misconduct. (T 1533) She was not allowed to be anywhere by herself. (T 1533) One morning at 2:00 as Dola lay in bed, she heard something click at her head, and her husband said, "'If you don't tell me what you've

been doing, I'm going to blow your fucking brains out.'" (T 1533-1534) She responded, "I'm not going to lie, even to the point that it costs me my life. So, if that's what you must do, here, you pull the trigger." (T 1534) Bogle then backed off, and Dola left the house. (T 1534) She finally got her husband to go to a psychiatrist, where he was diagnosed as "schizophrenic induced by cocaine." (T 1532)

The Bogle children were not allowed to associate with other children, because as William Bogle's drug use got worse, he did not want anyone to know about it, except the people he did drugs with. (T 1535-1536) Dola and the children were all "like prisoners." (T 1536)

When Dola tried to intervene in the discipline of her children, her husband would "turn on" her in a "rage," and she "would get the brunt of it." (T 1532)

When Brett left home, it was not of his own accord; his father literally threw him out of the house. (T 1530)

At the time Brett was involved in the car accident, he was working full time for Tampa Roofing. (T 1536-1537) Although it was hard and hot work, "for the first time in his life he stuck with it." (T 1537) But after the accident, he could not move. (T 1537) When Dola saw her son at the hospital the day after the accident, it was very painful for him to breathe. (T 1537) Brett left the hospital as soon as they got his collapsed lung to where it would stay inflated. (T 1537)

Brett's mother had observed her son's artistic talents; he sent her drawings pretty often. (T 1538)

Dola Bogle concluded her testimony by reading a letter from Brett's brother, Brian, which discussed the circumstances under which Brett and his brothers and sister grew up. (T 1540-1544)[4]

The defense rested following Dola Bogle's testimony. (T 1545)

The State presented one rebuttal witness, Detective Larry Lingo, who testified that when he made contact with Brett Bogle on September 13, Bogle told him that on September 12 he had worked all day doing some painting for his landlord, and that during the estimated two hours that Bogle was in Lingo's presence on September 13, Bogle did not complain of any physical pain or discomfort, nor did he appear to be in pain or discomfort. (T 1551-1552)

The trial court instructed Bogle's jury that it could consider any of the following aggravating circumstances that were established by the evidence (T 1614-1616): (1) The defendant has been previously convicted of another capital offense, or of a felony involving the use or threat of violence to some person. (2) The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of or attempted commission of the crime of sexual battery. (3) The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. (4) The crime for which the defendant is to be sentenced

---

[4] This letter is quoted in its entirety in Issue VI in this brief.

was especially heinous, atrocious and cruel. The court instructed that the following were among the mitigating circumstances that the jury could consider, if established by the evidence (T 1616-1617): (1) The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance. (2) The capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. (3) The age of the defendant at the time of the crime. (4) Any other aspect of the defendant's character, record or background, and any other circumstance of the offense.

The jury recommended by a vote of 10 to two that Brett Bogle be sentenced to death. (R 234, T 1633)

A sentencing hearing was held on February 15, 1993. (T 1640-1654) At that hearing, Judge Bucklew denied a Motion for New Trial that had been filed by defense counsel. (R 242-245, T 1642-1643) With regard to the non-capital offenses of burglary of a dwelling with an assault or battery and retaliation against a witness, the sentence recommended under the guidelines was five and one half to seven years in prison, with a permitted range of four and one half to nine years (R 259), but the State sought to have Brett Bogle treated as an habitual felony offender. (R 235, T 1643-1647) The court declined to treat Bogle as an habitual offender, but did impose sentences in excess of the guidelines, due to the capital offense which could not be scored. (R 260, T 1651) She sentenced Bogle to consecutive sentences of life for the burglary and five

years for the retaliation against a witness. (R 254-257, 260, T 1651) The court sentenced Bogle to death for the murder, finding the following aggravating circumstances (R 252-253, 261-263, T 1649-1651): (1) Bogle was previously convicted of a felony involving the use of or threat of use of violence to some person. (2) The capital felony was committed while Bogle was engaged in the commission of a sexual battery. (3) The crime was committed for the purpose of avoiding or preventing a lawful arrest. (4) The capital felony was especially heinous, atrocious and cruel. As for mitigation, the court rejected the statutory factors of extreme mental or emotional disturbance and age. (R 264-265) The court gave "some, but not a great deal of weight" to the statutory factor of impaired capacity, because she did not "not believe the evidence established substantial impairment." (R 264-265) With regard to nonstatutory mitigation, the court gave "substantial weight" to Bogle's family background, "little weight" to his alcohol and drug abuse, "some weight" to his good conduct during trial, "some, but not a great deal of weight" to his kindness to friends and kindness to his mother, and "no weight" to his involvement in an automobile accident. (R 265-266, T 1650)

Appellant, Brett Bogle, timely filed his notice of appeal to this Court on February 19, 1993. (R 270-271)

SUMMARY OF THE ARGUMENT

The State Attorney for the Thirteenth Judicial Circuit should have been disqualified from prosecuting Brett Bogle at his new penalty trial. The employment by the state attorney's office of Douglas Roberts, who was one of Bogle's two assistant public defenders at Bogle's first trial, coupled with Roberts' discussion of Bogle's case with one of the prosecutors, Nick Cox, raised at least the appearance of impropriety, which could only have been dispelled by the appointment of a special prosecutor.

The trial court improperly restricted Bogle's presentation of evidence at his new penalty trial. A major portion of the prosecution's evidence dealt with the fact that scratches were supposedly present on Bogle's forehead after Margaret Torres disappeared that were not there earlier. Defense witness Mary Shrader should have been allowed to testify that the injuries to Bogle's face were there after he was involved in a car accident several days prior to Torres's murder. Besides going to the "mental mitigators," this evidence was critical to negate the aggravators of HAC and committed during a sexual battery. The prosecutor made reference to the scratches in his argument to Bogle's jury, and the trial judge used them in support of her finding that the homicide was committed during a sexual battery.

Bogle's requested penalty phase jury instructions should have been given. The standard charges given to his jury did not allow it to give adequate consideration to the "mental mitigators," and improperly required Bogle to establish mitigating circumstances by

a particular standard of evidence before the jury could consider them.

The prior violent felony aggravating circumstance should not be applied in this case where it was for a technical burglary with assault or battery that occurred a few days before the instant homicide, and involved the homicide victim and her sister. This matter provides no meaningful insight into Brett Bogle's propensity for violence or lack thereof, in light of his continuing involvement with the parties that were allegedly assaulted or battered. And to use the September 1 incident at Katie Alfonso's trailer to not only secure a conviction for retaliation against a witness, but to support two aggravating factors (prior violent felony and avoid arrest) is a form of "double dipping" that may well violate double jeopardy principles.

The State failed to prove beyond a reasonable doubt that the homicide was committed during a sexual battery. Although Margaret Torres likely had one or more sexual encounters in the hours prior to her death, the medical examiner could not say whether any such encounter was consensual or by force, and the circumstances did not establish that Torres engaged in other than consensual sex.

The State did not produce the strong evidence necessary to show that Margaret Torres was killed because Brett Bogle sought to avoid prosecution for the September 1 burglary at Katie Alfonso's trailer by eliminating Torres as a witness to that offense. Another, equally likely, scenario is that Torres was killed because of the enmity between herself and Bogle, and the fact that Bogle

held her responsible for his being forced to leave the home he shared with the woman he loved.

The especially heinous, atrocious and cruel aggravating circumstance was not proven by the State. Margaret Torres died within seconds after the fatal blows were inflicted, and nothing in the evidence negated the hypothesis that all the blows to her were administered in quick succession. There was no suggestion that the perpetrator intended that Torres suffer; he used the concrete splash stones at hand merely as a weapon that was convenient. Furthermore, Torres had been drinking heavily, and her perception of pain may have been diminished. Also to be considered is Brett Bogle's mental condition due to his drinking and his background as it related to the acts committed against Torres.

The especially heinous, atrocious or cruel aggravating circumstance is unconstitutionally vague and, as applied, does not genuinely limit the class of persons eligible for the death penalty. This aggravator has not been interpreted in a rational and consistent manner by this Court, and so sentencing judges are provided with inadequate guidance to enable them to separate the murders which qualify as especially heinous, atrocious or cruel from those which do not. Furthermore, Bogle's jury was not given an instruction which would have enabled it to differentiate murders which qualify for the HAC aggravating factor from those which do not.

The death penalty is not proportionally warranted for Brett Bogle under the circumstances of this case. Even if one or more of

the aggravating circumstances was properly found, which Bogle disputes, it or they were overwhelmed by the weight of the mitigating evidence. The court did not even address some of the valid mitigation presented, most notably the fact that this killing arose out of a domestic situation and the ongoing trouble that existed between Bogle and Margaret Torres. Also weighing heavily against a death sentence for Bogle is his extremely abused childhood, which included not only physical abuse and extreme mental cruelty, but an introduction to alcohol and illegal drugs by his father at an early age.

ARGUMENT

ISSUE I

THE COURT BELOW SHOULD HAVE DISQUALIFIED THE OFFICE OF THE STATE ATTORNEY FOR THE THIRTEENTH JUDICIAL CIRCUIT FROM PROSECUTING BRETT BOGLE AFTER ONE OF BOGLE'S ATTORNEYS WENT TO WORK FOR THE PROSECUTION PRIOR TO BOGLE'S NEW PENALTY TRIAL.

At Appellant's jury trial on charges of first degree murder, burglary, retaliation against a witness, and robbery that took place on September 28 and 30 and October 1-2, 1992, Appellant, Brett Bogle, was represented by two assistant public defenders, Douglas Roberts and Paul Firmani. (T 1-878) On February 2, 1993, Bogle filed, through counsel, a "Notice of Potential Conflict and Request for Hearing on Recusal," which noted that Douglas Roberts had been hired by the State Attorney's Office for the Thirteenth Judicial Circuit in January of 1993, and his continued employment there during the pendency of Bogle's new penalty trial raised at least the appearance of impropriety. (R 226-228) The notice also mentioned that the state attorney's office had voluntarily recused itself in another case, State v. Michael J. Hicks, where the defendant's prior assistant public defender had subsequently become employed by the state attorney's office. (R 227)

A hearing on the matter was conducted before Judge Susan Bucklew on February 4, 1993. (T 932-951) At the outset, the court noted that she did not "see a whole lot of difference in this case and Michael Hicks." (T 934) Assistant State Attorney Karen Cox attempted to distinguish the two cases by saying that in the

instant case, only a new penalty trial was to be held, and Douglas Roberts had had no involvement in the penalty phase of Bogle's previous trial, but was only involved in the guilt phase. (T 934-935) Karen Cox did acknowledge, however, that the State would be presenting different evidence this time around, evidence that it did not have to present at the previous penalty phase. (T 935)

According to Douglas Roberts, he had one conversation with Assistant State Attorney Nick Cox (who was one of the two prosecutors, along with Karen Cox, at Bogle's trial) regarding this case. (T 937-938) Roberts testified that he "spoke to Mr. Cox one time in the hallway and asked him when it was set or whether it was over yet and that was the extent of our conversation." (T 938) Roberts denied speaking with any other member of the state attorney's office about this case. (T 938-939) Nick Cox remembered his conversation with Roberts in somewhat more detail. He testified as follows when Judge Bucklew asked him whether he had had any conversations with Roberts about this case since Bogle's former attorney went to work for the state attorney's office (T 944-945):

> Yes, Judge. I spoke to Mr. Roberts about approximately a week ago. We were on the third floor of the annex. The situation came up where I was discussing about how we had a second phase of this trial going again next week. Basically it was a very brief conversation. I can recall at one point Mr. Roberts just saying to me that he had had a good relationship with Mr. Bogle. We discussed phase one of the actual trial here and really there was nothing he brought up to me whatsoever that I didn't already know based on the discovery and the trial of this case. I had learned nothing at all from Mr. Roberts.

The court then asked, "You discussed phase one of the trial with him?" (T 945) Cox responded (T 945):

> Judge, I mean, specifically, I just said something to him about the closing arguments where the matter about how he had brought up in his closings about the clothes that were piled by the victim's body and I was--you know, I just told him that was an interesting point and that was all that was brought up. That's all that I recall, Judge, being brought up.

Later in his testimony, Cox added one additional detail, that Roberts had told him that Bogle's other lawyer, Assistant Public Defender Paul Firmani, also had a good relationship with Bogle. (T 947)

The court stated that she "obviously...would have preferred no conversation to have taken place...," but refused to disqualify the state attorney's office from proceeding, because she did not find that there had "been any prejudice to Mr. Bogle by sharing of information." (T 948-949) The court did admonish the two prosecutors and Roberts not to have any conversation about this case, and told Roberts not to discuss the case with any employee of the state attorney's office. (T 948-949)

Under the circumstances of this case, the Office of the State Attorney for the Thirteenth Judicial Circuit should have been prevented from prosecuting Bogle at his new penalty trial, and a different state attorney's office appointed for that purpose.

In State v. Fitzpatrick, 464 So. 2d 1185 (Fla. 1985), this Court held that the entire prosecutor's office need not necessarily be disqualified, as long as the former defender neither personally

assisted in the prosecution or provided prejudicial information regarding the case. However, several later cases are closer to the facts of the instant case. In Reaves v. State, 574 So. 2d 105 (Fla. 1991), this Court indicated that the entire state attorney's office may be disqualified if the individual prosecutor who formerly represented the defendant was not properly screened from direct or indirect participation in, or discussion of, the case. Here, Douglas Roberts and Nick Cox both admitted that they had discussed Brett Bogle's case after Roberts became an employee of the state attorney's office. Not only had they talked about argument that had occurred at Bogle's trial, but Roberts had disclosed possibly privileged information to Cox, namely, the type of relationship that existed between the defense attorneys and their client.

In Castro v. State, 597 So. 2d 259 (Fla. 1992), this Court vacated the sentence of death and remanded for a new penalty phase and resentencing because the public defender who represented Castro in his first trial became employed by the prosecutor's office prior to Castro's new penalty phase. The prosecutor called Castro's former defense attorney to discuss legal authorities to use in reply to motions filed in the case. The former defense lawyer testified that he supplied the prosecutor with case citations that he found while researching another case at the state attorney's office. 597 So. 2d at 260. This Court found that, because the former defense lawyer participated in some capacity in the case, the whole state attorney's office must be disqualified from

prosecuting, even in the absence of "the disclosure of confidential information or other affirmative showing of prejudice." 597 So. 2d at 260. The Court wrote: "Our judicial system is only effective when its integrity is above suspicion. Our system must not only refuse to tolerate impropriety, but even the appearance of impropriety as well." 597 So. 2d at 260 [emphasis supplied]. See also dissenting opinion of Justice Ehrlich, joined by Justice Shaw, in Fitzpatrick, 464 So. 2d at 1188-1189. In Bogle's case, the discussion held between the prosecutor and Bogle's former lawyer certainly created at least the appearance of impropriety. And the court below employed an incorrect legal standard with regard to this matter by refusing to disqualify the state attorney's office because she could find no actual prejudice to Bogle. As Castro indicates, Bogle did not need to show actual prejudice.

In Popejoy v. State, 597 So. 2d 335 (Fla. 3d DCA 1992), the court, relying on Castro, disqualified the entire state attorney's office from prosecuting the defendant because his former defense lawyer was employed by the state attorney's office. Although the State contended that the attorney was shielded from the case, the record contained evidence that he sat at the prosecution table during a hearing concerning the defendant. The state attorney's office was small and the two lawyers worked in the same courtroom. See also Young v. State, 177 So. 2d 345 (Fla. 2d DCA 1965) (when public defender representing defendant subsequently becomes

prosecutor in same case, defendant has been denied due process of law, and any conviction obtained must be reversed).[5]

Douglas Roberts' employment by the state attorney's office prior to Brett Bogle's new penalty phase, and his discussion with Assistant State Attorney Nick Cox regarding Bogle's case thereafter, created at least the appearance of impropriety. The Office of the State Attorney for the Thirteenth Judicial Circuit should have been disqualified from prosecuting Bogle. Because it was not, Bogle's death sentence must be vacated, and this cause remanded for a new penalty phase and resentencing.

ISSUE II

THE COURT BELOW ERRED IN PREVENTING BRETT BOGLE'S PENALTY PHASE JURY FROM CONSIDERING EVIDENCE THAT WAS CRITICAL TO HIS DEFENSE.

One of the important pieces of evidence the State relied upon below to establish its circumstantial case against Brett Bogle was the fact that after Margaret Torres disappeared, Bogle was seen with scratches on his forehead where none had been noticed earlier in the evening. At Bogle's new penalty trial, no less than four of the State's nine witnesses testified concerning scratches or injuries to Brett Bogle's head or face area. Jeffrey Trapp testified that he did not notice any scratches or bruises to

---

[5] Bogle's case is not a case such as Preston v. State, 528 So. 2d 896 (Fla. 1988), in which the defendant's former attorney who went to work for the state attorney's office had only represented the defendant on an unrelated misdemeanor charge several years prior to the charge in question.

Bogle's face or head area when he saw him on the night of September 12. (T 1221) Tammy Alfonso testified that she did not notice any injuries to Bogle's forehead or face inside Club 41, and Phillip Alfonso testified that he did not notice any injuries to his head inside the bar (T 1236, 1248), but Tammy Alfonso did see scratches on Bogle's forehead when he came up to their car later as she and her husband were leaving. (T 1239) And Detective Larry Lingo testified that when he encountered Brett Bogle at the mobile home of Guy Douglas on the night of September 13, and Bogle stepped out of the bathtub, Bogle appeared to have some fresh scratches across his forehead. (T 1275-1276)[6] During Lingo's testimony, three photographs of Bogle that were taken to "document the injuries that [Lingo] observed to his forehead" were admitted into evidence as State's Exhibits 20A, 20B and 20C. (R 296-298, T 1275-1276)[7]

One way Bogle attempted to counteract the prosecution's evidence regarding the scratches was through the testimony of Mary Shrader. She saw Bogle immediately after the car accident in which he was involved, and defense counsel sought to ask Shrader whether the injuries depicted in State's Exhibits 20A, 20B and 20C about which Lingo testified were the same injuries she had observed in

---

[6] At the guilt phase of Bogle's trial, Lingo had testified that he noticed the scratches not when Bogle stepped out of the shower, but later during his interview with Bogle at the sheriff's office. (T 363)

[7] On direct examination Lingo testified that these photographs were taken on the night Bogle was arrested (T 1276), but on cross-examination Lingo conceded that he was mistaken, the pictures had actually been taken a few days later, on September 17. (T 1291-1292)

the hospital. (T 1472-1474) At Bogle's first penalty phase, he proffered the testimony of Shrader, who testified that indeed the injuries depicted in the three photographs were consistent with the injuries she observed at the hospital. (T 681) The court sustained the State's objection to this testimony. (T 1473-1474) This was error.

The sentencer in a capital case may not be precluded from considering, and may not refuse to consider, any relevant evidence which the defense offers as a reason for imposing a sentence less than death. Parker v. Dugger, 498 U.S. 308, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991); McCleskey v. Kemp, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987); Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). This Court has held that "[T]he only limitation on introducing mitigating evidence is that it be relevant to the case at hand . . . ." King v. State, 514 So. 2d 354, 358 (Fla. 1987) (emphasis added). See also O'Callaghan v. State, 542 So. 2d 1324 (Fla. 1989) and Harvard v. State, 486 So. 2d 537 (Fla. 1986).

The evidence Bogle sought to introduce was relevant for several reasons. It went directly to mitigating evidence concerning Bogle's state of mind prior to the homicide. The fact that he suffered this car accident at a time when he had finally attained full-time gainful employment and was acting responsibly for a change, and that it rendered him unable to work, went to the stress he was under at the time of the offense, and the extent of Bogle's

injuries was part of this. Moreover, the proffered evidence would have served to impeach State witnesses Jeffrey Trapp and Tammy and Phillip Alfonso on the matter of when the injuries to Bogle's forehead occurred. If they happened in the car accident of September 6, this would have negated the prosecution's theory that Bogle suffered the scratches in the course of killing Margaret Torres on September 12 or early on September 13, an issue directly related to the aggravating circumstances of especially heinous, atrocious and cruel and committed during a sexual battery. The prosecutor considered the scratches significant in the context of whether Torres had engaged in a consensual sexual encounter. In arguing to the jury that there was no consensual intercourse, the prosecutor below told Bogle's jury to "[c]onsider the scratches to Brett Bogle's head. As Detective Lingo describes them to you, they were fresh that night. Consider the blood under Margaret Torres' fingernails. And this is consensual?" (T 1580) The trial judge agreed with the State that the evidence concerning scratches was important; she cited the scratches on Bogle's forehead in support of her finding that the homicide was committed during a sexual battery (R 262), and then used her conclusion that Torres had been raped in support of her finding that the homicide was especially heinous, atrocious and cruel. (R 263) The jury should have been allowed to hear the evidence Bogle proffered in his defense. The trial court's failure to allow the jury to have the benefit of this evidence deprived Brett Bogle of due process of law and exposed him to cruel and unusual punishment, in violation of the Eighth and

Fourteenth Amendments to the Constitution of the United States, and Article I, Sections 9 and 17 of the Constitution of the State of Florida.

ISSUE III

THE TRIAL COURT ERRED IN REFUSING TO GIVE BRETT BOGLE'S REQUESTED PENALTY PHASE JURY INSTRUCTIONS, AS THE INSTRUCTIONS WHICH WERE GIVEN IMPROPERLY LIMITED THE JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES, DENYING BOGLE DUE PROCESS, A FAIR JURY TRIAL AND RELIABLE SENTENCING RECOMMENDATION 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.

The trial court has a fundamental responsibility to give the jury full, fair, complete and accurate instructions on the law. Foster v. State, 603 So. 2d 1312 (Fla. 1st DCA 1992). This obligation is not necessarily met by merely reading the Florida Standard Jury Instructions to the jurors; while the standard charges are presumed to be accurate, they are not always so. See Yohn v. State, 476 So. 2d 123 (Fla. 1985) (standard jury instruction on law of insanity incorrect); Sochor v. Florida, 504 U.S. ___, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992) (standard instruction defining statutory aggravating circumstance in terms of "especially wicked, evil, atrocious or cruel" unconstitutionally vague).

> While the standard jury instructions are intended to assist the trial court in its responsibility to charge the jury on the applicable law, the instructions are intended

> only as a guide, and can in no wise relieve the trial court of its responsibility to charge the jury correctly in each case.

Steele v. State, 561 So. 2d 638, 645 (Fla. 1st DCA 1990).

Brett Bogle, through counsel, asked the court below to modify several of the standard jury instructions at penalty phase, which the court refused to do. (R 131-139, T 764-774, 1547) Under the facts and circumstances of this case, certain of these modifications were needed to enable Bogle's jury properly to evaluate the evidence in mitigation, and should have been given.

Bogle's requested penalty phase instruction number two asked the court to strike the word "substantially" from the sixth enumerated mitigating circumstance (R 132), and his requested penalty phase instruction number three asked the court to strike the word "extreme" from the second enumerated mitigating circumstance. (R 133) Instead, with regard to the section 921.141(6)(b) and (f) mitigating circumstances, the court instructed Bogle's jury that they could consider the following, if established by the evidence (T 1616):

> 1. The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.
> 2. The capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired.[8]

[8] The court also instructed on the mitigators of the defendant's age and "[a]ny other aspect of the defendant's character, record or background, and any other circumstance of the offense." (T 1617)

The problem with the standard instructions given below is that they unduly limited the jury's consideration of the evidence Bogle presented as to the "mental mitigators." A sentencer cannot be precluded from considering, and may not refuse to consider, valid mitigating evidence. Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). In Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990), this Court made it clear that, in order for capital sentencing statutes to pass constitutional muster, "...any emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say." [Emphasis in original.] It is also essential that the jury be instructed in such a way as to give effect to the mitigating evidence presented--the jury must know that it can consider mental mitigation that does not necessarily rise to the level of the statutory mitigating circumstances. See Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987); Eddings.

Brett Bogle's expert witness on his mental and emotional condition, Dr. Arturo Gonzalez, a psychiatrist, stated at Bogle's penalty trial that Bogle was under "some type of influence of emotional mental disturbance" at the time of the offense (T 1403, 1427), and, because of Bogle's upbringing and the alcohol he consumed, his ability to conform his conduct to the requirements of law was impaired to some extent. (T 1427) In his remarks to

Bogle's jury, the prosecutor below argued that, while the evidence might have shown that Bogle came from a dysfunctional family, and was drinking on the night in question, it did not rise to the level of the statutory mitigating circumstances of "an extreme emotional situation" and "a substantial inability to conform his acts to that of the law" upon which the jury would be instructed. (T 1566-1573)[9] Furthermore, the prosecutor impugned Dr. Gonzalez by asking rhetorically, "[W]hat's he trying to pull here?" (T 1571-1572)[10] Under these circumstances, it was crucial that Bogle's jury be given instructions which would permit it to consider the mitigating evidence presented in the proper light, and to be aware that it could constitute nonstatutory mitigation.

Bogle would also note that the trial court refused his requested penalty phase instruction number five, which asked the court to strike from the standard instructions the following language: "If you are reasonably convinced that a mitigating circumstance exists, you may consider it established." (T 134)

---

[9] At Bogle's first penalty trial, defense counsel explained that he had deliberately avoided couching his questions to Bogle's mental health expert in terms of the statutory language of "extreme" mental and emotional disturbance and a "substantially" impaired ability to appreciate criminality or conform conduct to the requirements of law, as for the expert to render opinions in these terms would invade the province of the jury (T 768), and reiterated this position at the hearing on November 24, 1992 on Bogle's Motion for New Trial. (T 904-905) Defense counsel's reasoning was consistent with this Court's opinion in Stewart v. State, 558 So. 2d 416 (Fla. 1990).

[10] See also the trial court's sentencing order, in which she rejected the mitigating circumstance of mental or emotional disturbance, because the testimony did not establish that Bogle's disturbance was "extreme." (R 264)

The problem with this language is that it imposed a particular burden of proof upon Bogle with regard to the mitigating circumstances, in derogation of the principles expressed in the Supreme Court cases cited above, which forbid such restrictions on the evidence that may be considered in mitigation.

In Penry the Supreme Court held the petitioner's death sentence to be constitutionally infirm where the standard jury instructions failed to apprise Penry's jury that it could consider evidence of his mental retardation and abused background as mitigating circumstances. The court stated:

> In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response to that evidence in rendering its sentencing decision. Our reasoning in Lockett and Eddings thus compels a remand for resentencing so that we do not "risk that the death penalty may be imposed in spite of factors which may call for a less severe penalty." Lockett, 438 US, at 605, 57 L Ed 2d 973, 98 S Ct 2954, 9 Ohio Ops 3d 26; Eddings, 455 US, at 119, 71 L Ed 2d 1, 102 S Ct 869 (O'Connor, J., concurring). "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett, 438 US, at 605, 57 L Ed 2d 973, 98 S Ct 2954, 9 Ohio Ops 3d 26.

106 L. Ed. 2d at 284. The essence of Bogle's case in mitigation dealt with his background and his dysfunctional family, and the testimony of his mental health expert was an important part of this presentation. But, as in Penry, the standard jury instructions in this case did not sufficiently apprise Bogle's jury to consider his

mental state, which may not have risen to the level of the statutory mitigating circumstances, as a nonstatutory mitigating factor. The jury's death recommendation thus is unreliable, and Bogle's death sentence has been imposed in violation of the United States and Florida Constitutions. Art. I, §§9, 16, 17 and 22, Fla. Const.; Amends. V, VI, VIII and XIV, U.S. Const. His death sentence must be vacated.[11]

ISSUE IV

THE COURT BELOW ERRED IN INSTRUCTING BRETT BOGLE'S JURY ON, AND FINDING THE EXISTENCE OF, INAPPLICABLE AGGRAVATING CIRCUMSTANCES.

A. Prior violent felony[12]

The court below instructed Brett Bogle's jury, over objection, that one of the aggravating circumstances it could consider, if established by the evidence, was the following (T 738-739, 1547, 1615):

> The defendant has been previously convicted of another capital offense, or of a felony involving the use or threat of violence to some person. The crime of Burglary of a Dwelling With an Assault or Battery is a

---

[11] Bogle is aware that in Stewart this Court found no error in the trial court's refusal to modify the standard instructions regarding the section 921.141(6)(b) and (f) mitigating circumstances by deleting the qualifiers "extreme" and "substantially," but feels that this issue must be revisited in the context of his case, and, of course, must raise the issue here in order to preserve it for possible later review in another forum.

[12] With regard to this aggravating circumstance, in addition to the arguments made below, please see arguments made by Bogle under Issue VI in this brief, which are incorporated herein by reference.

> felony involving the use or threat of violence to another person.

The court also found this aggravating circumstance to exist in her sentencing order, where she wrote (R 261-262):

> The defendant has been previously convicted of a felony involving the use of or threat of violence to some person.
>
> On October 1, 1992, the same jury who convicted Brett Bogle of First Degree Murder also convicted him of burglary of a dwelling with an assault or battery. The burglary of a dwelling with an assault or battery occurred twelve days prior to the murder of Margaret Torres and the victims of the burglary were Margaret Torres and Katie Alphonso. The evidence at trial was that the defendant broke into the house of Katie Alphonso and battered both Katie Alphonso and Margaret Torres. Because the burglary of a dwelling with an assault or battery occurred on a date different than that of the murder (12 days earlier) and included a victim (Katie Alphonso) other than the murder victim, the court believes it can properly be considered as an aggravator under Pardo v. State, 563 So.2d 78 [sic] (Fla. 1990) and is distinguishable from Bruno v. State, 574 So.2d [sic] (Fla. 1991). This aggravating circumstance was proven beyond a reasonable doubt.

In Wasko v. State, 505 So. 2d 1314 (Fla. 1987), this Court held that the section 921.141(5)(b) aggravating circumstance is not to be applied to additional, contemporaneous violent felonies perpetrated against the murder victim. Wasko has been applied in subsequent cases such as Patterson v. State, 513 So. 2d 1257 (Fla. 1987), Perry v. State, 522 So. 2d 817 (Fla. 1988), Schafer v. State, 537 So. 2d 988 (Fla. 1989) and Bruno v. State, 574 So. 2d 76

(Fla. 1991). In Pardo v. State, 563 So. 2d 77, 80 (Fla. 1990), the case upon which the trial court relied in finding the aggravating circumstance in question, this Court wrote that it has "consistently held that the contemporaneous conviction of a violent felony may qualify as an aggravating circumstance, so long as the two crimes involved multiple victims or separate episodes. [Citing Wasko.]" While Brett Bogle's case may not technically fit within the limits of Wasko so as to bar a finding of the prior violent felony aggravator, the principle of Wasko should be expanded to fit the instant situation. The homicide of Margaret Torres clearly was the culmination of a long period of difficulties between Torres and Bogle that predated even the September 1 episode at the mobile home which resulted in Bogle's burglary conviction. The period between the incident of September 1 and the homicide must be considered, in effect, a continuing episode for purposes of this aggravating circumstance. With regard to the matter of their being two victims, Katie Alfonso and Margaret Torres, if Alfonso was a victim of the burglary of September 1, she was merely an incidental one. Bogle's quarrel all along was with her sister.

The main problem with applying the prior violent felony aggravator in this context is what this Court must have implicitly recognized in Wasko: Bogle's conviction for the burglary simply gives no reliable insight into whether he has a general propensity for violence, in light of his ongoing relationship with the parties involved.

Furthermore, the State's theory below was that Bogle killed Margaret Torres so that she could not be a witness against him concerning the burglary at the trailer on September 1. To allow the State to use this concept not only to secure a conviction against Bogle for retaliation against a witness, but to obtain a jury instruction on, and a finding by the trial court on not one, but two, aggravating circumstances (prior violent felony and avoid arrest) at least smacks of the kind of "double-dipping" this Court has condemned in such cases as Richardson v. State, 437 So. 2d 1091 (Fla. 1983), Vaught v. State, 410 So. 2d 147 (Fla. 1982) and Provence v. State, 337 So. 2d 783 (Fla. 1976), if it does not constitute an outright violation of double jeopardy principles. Art. I, §9, Fla. Const.; Amend. V, U.S. Const.

B. During a sexual battery

The court below instructed Brett Bogle's jury, over objection, that one of the aggravating circumstances it could consider, if established by the evidence, was the following (T 739-740, 1547, 1615):

> The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of or attempted commission of the crime of sexual battery.
>
> Sexual battery is defined as the nonconsensual penetration or union of the victim's anus or vagina by the defendant's sexual organ by the use of physical force or violence.

The court also found this aggravating circumstance to exist in her sentencing order, where she wrote (R 261-262):

> The capital felony was committed while the defendant was engaged in the commission of a sexual battery.
>
> > Although the defendant was not charged with or convicted of sexual battery by the jury, the evidence at trial and penalty phase was that the victim, Margaret Torres, was found nude. She had semen in her vagina and trauma to her anus consistent with sexual activity. Dr. Vernard [sic] Adams, the medical examiner, testified the injuries to the anus were consistent with intercourse and the most reasonable possibility was that they were inflicted before death. The DNA extracted from the semen found in the victim was consistent, although proof was not positive, with the defendant's DNA. (12.5% of caucasian males could have contributed the semen). Further, a pubic hair found on the defendant's pants, in the crotch area, was consistent with the pubic hair of the victim. Defendant was at the scene, exiting the bar immediately after the victim and later that evening was seen by a witness in the immediate area of the murder his pants covered with dirt and mud, the crotch of his pants wet, and scratches on his forehead. This aggravating circumstance was proven beyond a reasonable doubt.

As the court noted in her sentencing order, Brett Bogle was neither charged with, nor convicted of, sexual battery or an attempt to commit sexual battery. The most noticeable feature of the court's finding quoted above is that it cites no evidence that any sexual activity in which Margaret Torres engaged was nonconsensual. While the court writes of "trauma" and "injuries" to the anus, it must be noted that any such injuries were superficial. (T 222, 1350) There was no way for the medical examiner, Dr. Vernon

Adams, to tell whether any intercourse in which Torres engaged was consensual or by force. (T 247-248) She could have sustained the injuries to her anal area which Adams observed through consensual sex, if the "intercourse was rough and unlubricated." (T 1362) Lending further support to the possibility of a consensual sexual encounter is the fact that Torres's clothing and sneakers were not strewn all over the ground, as they likely would have been if she had been raped; her clothes were stacked right next to her body, and her sneakers were placed together. (R 286, T 1281) The clothes did not appear to be ripped in any fashion. (T 1281) Also, the pubic hair recovered from the pants that Bogle supposedly had been wearing which was consistent with the pubic hair of Margaret Torres had been naturally shed, as opposed to forcibly removed, thus suggesting an absence of violence in the encounter. (T 317-318, 1312) Another very important fact to consider is that the FBI's serology expert, Robert Grispino, detected semen stains on Torres's panties, and yet she was found nude. (T 193-194, 396-397) This suggests that she may have engaged in intercourse not immediately prior to her death, but earlier in the evening, and then gotten dressed, resulting in the stains on her underwear. [Dr. Adams testified that the injury to the anus could have occurred up to three hours prior to Torres's death. (T 1362-1363)] And, finally, Torres had a blood alcohol level of .26 percent, or .29 percent when measured in the fluid from the eye. (T 245, 1354-1355) Such a high concentration of alcohol in the body obviously would tend to

lower one's inhibitions and make one more receptive to an offer of consensual sex.

Where, as here, the facts that are known are susceptible to other conclusions than that an aggravating factor exists, that factor will not be upheld. Peavy v. State, 442 So. 2d 200 (Fla. 1983). It is impossible to know the circumstances that led up to Margaret Torres's sexual encounter(s) on the night of the homicide, and Brett Bogle is entitled to the benefit of the doubt inherent in this uncertainty. See McArthur v. State, 351 So. 2d 972 (Fla. 1977) and Mayo v. State, 71 So. 2d 899 (Fla. 1954).

One final aspect of this aggravating circumstance deserves mention. We cannot know whether Brett Bogle's jury convicted him of first degree murder on a theory of premeditation or felony murder, as the trial court denied Bogle's request for a special verdict form. (T 500-501) If he was convicted of murder on a felony murder theory, it would be unconstitutional to use the underlying felony also to support his sentence of death. In State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), the Tennessee Supreme Court held that when a defendant is convicted of first degree murder on the basis of felony murder, the felony murder aggravating circumstance does not narrow the class of death-eligible murderers sufficiently to satisfy the Eighth Amendment. The Supreme Court of the United States has granted certiorari in the case, 123 L. Ed. 2d 466 (1993), and the matter is now pending in the highest Court of the land.

C. Avoid arrest[13]

The court below instructed Brett Bogle's jury, over objection, that one of the aggravating circumstances it could consider, if established by the evidence, was the following (T 740-746, 1547, 1615):

> The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

The court also found this aggravating circumstance to exist in her sentencing order, where she wrote (R 263):

> The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest.
>
> The defendant was charged and convicted of retaliation against a witness. The evidence shows that the defendant broke into the home of Katie Alphonso on September 1, 1991 and committed an assault and/or battery on Katie Alphonso and Margaret Torres. As Margaret Torres attempted to telephone the police, the defendant ripped the phone from the wall. He warned the victim that if she reported the crime she would not live to tell about it. Some days later, the defendant called Katie Alphonso and told her to tell the victim, Margaret Torres, to keep her mouth shut or it would be worse for her and later threatened that if she continued with the prosecution of the burglary she would not live to tell about it. The court finds that this aggravating circumstance has been proven beyond a reasonable doubt.

---

[13] With regard to this aggravating circumstance, in addition to the arguments made below, please see arguments made by Bogle in Issue VI of this brief, which are incorporated herein by reference.

In order to establish the aggravating circumstance in question where, as here, the victim was not a law enforcement officer, proof of the requisite intent to avoid arrest and detection must be very strong. Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Bates v. State, 465 So. 2d 490 (Fla. 1985); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Foster v. State, 436 So. 2d 56 (Fla. 1983); Riley v. State, 366 So. 2d 19 (Fla. 1978); Menendez v. State, 368 So. 2d 1278 (Fla. 1979). In fact, there must be proof beyond a reasonable doubt that the dominant or only motive for the killing was the elimination of a witness. Rogers v. State, 511 So. 2d 526 (Fla. 1987); Doyle v. State, 460 So. 2d 353 (Fla. 1984); Oats v. State, 446 So. 2d 90 (Fla. 1984); Herzog v. State, 439 So. 2d 1372 (Fla. 1983); Perry v. State, 522 So. 2d 817 (Fla. 1988); Floyd v. State, 497 So. 2d 1211 (Fla. 1986); Davis v. State, 604 So. 2d 794 (Fla. 1992); Geralds v. State, 601 So. 2d 1157 (Fla. 1992). That proof was not forthcoming during Brett Bogle's trial. Although the court below accepted the State's theory that Margaret Torres was killed so that she would not press charges against Bogle for the alleged burglary that occurred on September 1, the proof did not show that this was the motive for the homicide. It is significant to note that when Bogle expressed concern to Katie Alfonso about being prosecuted as a result of the September 1 incident, she attempted to assure him that charges would not be pressed. (T 277-278) There is nothing in the record to show that Bogle knew that a deputy had come to Alfonso's trailer on September 1 after Bogle left. Bogle apparently thought that Torres had not gotten through to the police

when she placed the 911 call, as the threat that he allegedly made when he left the premises was couched in terms of "if" Torres called the police, she would not live to tell about it. (T 275) [And, in fact, Torres did not actually talk to anyone when she dialed 911. The call was disconnected, but a deputy responded anyway, because the address was revealed on the computer screen. (T 254-255, 275)]

Especially significant in the context of this aggravating factor is the last telephone conversation Brett Bogle had with Katie Alfonso before he was arrested for the instant homicide. During that September 12 conversation, he said nothing about a fear of being prosecuted, but only expressed his love for Katie and his desire to get back together with her. (T 281, 1186-1187) Perhaps by that time, as he had not been arrested in connection with the events that occurred at the trailer on September 1, Bogle thought the matter was closed, and he no longer had to be concerned about any charges being pursued.

It must be remembered that Brett Bogle's problems with Margaret Torres began long before the September 1 incident. They did not get along from the beginning. Their constant bickering and arguing is what prompted Katie Alfonso to ask Bogle to move out of her residence, and Bogle blamed Torres for the fact that he and Alfonso were not together any more. (T 266-267) It is at least as likely that the motive for the killing of Margaret Torres was resentment because of her role in the breakup of Bogle's relationship with Alfonso as it is that Torres was killed to prevent her

from prosecuting Bogle for what occurred on September 1, or to retaliate against her for calling the police, especially when there is no evidence to show that Bogle knew that Torres had called the police. Under these circumstances, where there is more than one possible explanation for the homicide, the aggravator of witness elimination has not been proven beyond a reasonable doubt, and cannot be allowed to stand. Jackson v. State, 502 So. 2d 411 (Fla. 1986).[14]

D. HAC

The court below instructed Brett Bogle's jury, over objection, that one of the aggravating circumstances it could consider, if established by the evidence, was the following (T 746-755, 1547, 1615-1616):

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

---

[14] Bogle asks the Court to consider his argument as to this aggravating circumstance also as an argument that the trial court should have granted his motion for a judgment of acquittal as to Count Three of the indictment (the count alleging retaliation against a witness).

The court also found this aggravating circumstance to exist in her sentencing order, where she wrote (R 263):

> The capital felony was especially heinous, atrocious and cruel.
> The evidence at trial was that the defendant followed the victim out of the bar and attacked her in a secluded area beyond a closed Beverage Barn. He stripped her, raped her anally and vaginally and then bludgeoned her to death with a cement splash stone. He struck her a total of seven times with such force that her head was so far impressed into a hollow in the ground that the initial impression of the officers at the scene was that the head had been flattened to a considerable degree. The medical examiner testified that the victim was alive at the time of the infliction of most of the wounds but could not testify as to how long she survived, "four breaths, several seconds, or a few minutes." In his opinion, the last blows were those inflicted to the side of her head-the blows which caused her death. The murder was extremely wicked and vile and inflicted a high degree of pain and suffering on the victim, Margaret Torres. The defendant acted with complete indifference to the victim's suffering. This aggravating circumstance was proven beyond a reasonable doubt.

In Cannady v. State, 620 So. 2d 165, 169 (Fla. 1993), this Court explained, quoting Williams v. State, 574 So. 2d 136, 138 (Fla. 1991), that the section 921.141(5)(h) aggravating circumstance "'is permissible only in torturous murders--those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.'" It is not applicable where the perpetrator did nothing to increase or prolong the victim's suffering. Hallman v. State, 560 So. 2d 223, 225 (Fla. 1990). The capital felony must be "accompanied by additional acts

as to set the crime apart from the norm of capital felonies..." in order for this circumstance to be found. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). The homicide of Margaret Torres does not qualify under these principles.

With regard to the rape referred to by the court in support of her finding of this aggravator, as discussed above, the evidence was insufficient to show that Torres was sexually battered. Furthermore, to include this facet of the case in support of HAC while also finding as a separate aggravator that the homicide was committed during the course of a sexual battery violates the prohibition against double consideration of a single aspect of the case. Richardson v. State, 437 So. 2d 1091 (Fla. 1983); Vaught v. State, 410 So. 2d 147 (Fla. 1982); Provence v. State, 337 So. 2d 783 (Fla. 1976).

There is nothing about the manner of the killing itself that would qualify it for application of this aggravating circumstance. It was possible that the first blow to Torres could have rendered her unconscious, and that she died several seconds later. (T 246, 248) Either of the blows to the left side of her head would have rendered Torres unconscious almost immediately, and she would have died in a matter of seconds after receiving the fatal injuries. (T 1364-1365, 1368) The medical examiner, Dr. Adams, found nothing to contradict the hypothesis that all the blows were struck in rapid succession. (T 1363-1364) The circumstances of the homicide indicate that Torres did not remain conscious or even alive for very long after she was attacked, and so she "was incapable of

suffering to the extent contemplated by this aggravating circumstance." Jackson v. State, 451 So. 2d 458, 463 (Fla. 1984). Although being struck by the concrete splash stones was undoubtedly painful, nothing in the record suggests that the perpetrator deliberately chose this method of killing in order "to cause unnecessary and prolonged suffering to the victim." Clark v. State, 609 So. 2d 513, 514 (Fla. 1993). Rather, he obviously did not plan the killing in advance so as to have a weapon available, and merely used the splash stones that were at hand as a weapon of convenience. As in Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990), the "record is consistent with the hypothesis that [this] was a crime of passion, not a crime that was meant to be deliberately and extraordinarily painful. [Emphasis in original.]"

Rembert v. State, 445 So. 2d 337 (Fla. 1984) is particularly relevant here. Rembert was convicted of first-degree felony murder and robbery and sentenced to death. After drinking for part of the day, Rembert entered the elderly victim's bait and tackle shop, hit him in the head with a club, and took money from his cash drawer. The victim was found by a neighbor shortly thereafter, bleeding from the head, and died of severe injury to the brain several hours later. Although the opinion refers to Rembert having hit the victim "once or twice," it also notes that the medical examiner testified that the victim could have been hit as many as seven times or as few as one time. 445 So. 2d at 338-339. [In Brett Bogle's case, the medical examiner opined that Margaret Torres was struck seven times. (T 237)] This Court rejected the trial court's

finding of HAC, writing that while the crime was "reprehensible," it "simply [did] not meet the test set out in State v. Dixon..." 445 So. 2d at 340. There is no principled way to distinguish Rembert from the case presently before this Court.

Another aspect of this case that was ignored by the trial judge, but which deserves attention, is the level of intoxication of the victim. Margaret Torres had alcohol in her blood of .26 percent. (T 245, 1354) More reliable was the higher reading obtained from the ocular fluid of .29 percent. (T 1354, 1361) These levels of alcohol could have had an effect on Torres's ability to feel pain on the night of the homicide (T 1362), as well as on her ability to be aware of what was happening. See Herzog v. State, 439 So. 2d 1372 (Fla. 1983), in which this Court considered the fact that the victim was under the influence of a drug in finding the heinous, atrocious or cruel aggravating factor inapplicable, and Rhodes v. State, 547 So. 2d 1201 (Fla. 1989), in which this Court indicated that where there is an evidentiary question as to the victim's ability to experience pain when she is killed, the question must be resolved in favor of the defendant, and the aggravator in question cannot be applied. See also DeAngelo v. State, 616 So. 2d 440 (Fla. 1993) (presence of a substantial amount of marijuana in victim's system was one fact which supported trial court's legitimate rejection of HAC in a strangulation killing).

Finally, the court below failed to consider Brett Bogle's mental and/or psychological condition at the time of the offense as

it related to the HAC aggravating factor. This Court has frequently recognized the interrelationship between a defendant's mental condition and the commission of acts which might be considered especially heinous, atrocious or cruel if perpetrated by a person of sound mind. E.g., Amazon v. State, 487 So. 2d 8 (Fla. 1986); Mann v. State, 420 So. 2d 578 (Fla. 1982); Miller v. State, 373 So. 2d 882 (Fla. 1979); Huckaby v. State, 343 So. 2d 29 (Fla. 1977). The evidence showed that Brett Bogle had been to at least two bars, Red Gables and Club 41, in the hours leading up to the homicide, and had consumed a number of beers. (T 374-376, 410-411, 434, 1234-1235, 1247, 1402-1404, 1422) He was under "some type of influence of emotional mental disturbance" at the time of the homicide, and, because of his horrendous upbringing and the alcohol he had consumed, Bogle's ability to conform his conduct to the requirements of law was impaired to some extent. (T 1427) Although the court did consider these factors in her discussion of mitigation in the sentencing order, (R 264-266), she did not explicitly recognize in her discussion of aggravating circumstances the link between Bogle's alcohol consumption and family background and behavior which may be considered especially heinous, atrocious or cruel.

Conclusion

As none of the aggravating circumstances found in this case is valid, there is no basis upon which Brett Bogle's sentence of death can stand. Amoros v. State, 531 So. 2d 1256 (Fla. 1988). In the

alternative, if this Court concludes that some, but not all, of the aggravating circumstances may have been proper, then this matter must be remanded for a new penalty trial, as the jury's death recommendation is unreliable due to the submission to Bogle's jury of inapplicable aggravating factors for its consideration. Espinosa v. Florida, 505 U.S. ____, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992); Omelus v. State, 584 So. 2d 563 (Fla. 1991).

ISSUE V

BRETT BOGLE'S DEATH SENTENCE VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AS WELL AS ARTICLE I, SECTIONS 9 AND 17 OF THE CONSTITUTION OF THE STATE OF FLORIDA, BECAUSE THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE IS VAGUE, IS APPLIED ARBITRARILY AND CAPRICIOUSLY, AND DOES NOT GENUINELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY. FURTHERMORE, THIS AGGRAVATING FACTOR WAS SUBMITTED TO BOGLE'S JURY UPON AN IMPROPER AND INADEQUATE INSTRUCTION.

Prior to his jury trial, Brett Bogle, through counsel, filed a Motion to Declare Section 921.141(5)(h) Florida Statutes, Unconstitutional. (R 47-56) The motion argued that the statutory provision in question "is unconstitutionally vague, overbroad, arbitrary and capricious on its face and as applied in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution." (R 47) The motion was heard by the Honorable Susan Bucklew on February 7, 1992, and denied. (R 3, T 1657-1660) The court thereafter instructed Bogle's penalty phase jury, over

defense objection, on the aggravating circumstance of "especially heinous, atrocious and cruel" (T 186, R 1615-1616), and found the circumstance to be applicable to Bogle's case in her sentencing order. (R 263)

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

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

Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235, 249-250 (1983) (footnote omitted). See also Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980). As it has been applied, however, Florida's especially heinous, atrocious or cruel aggravating factor has not passed constitutional muster under the above-stated principles, as it has not genuinely limited the

class of persons eligible for the ultimate penalty. This fact is evidenced by the inconsistent manner in which this Court has applied the aggravator in question, resulting in a lack of guidance to judges who are called upon to consider its application in specific factual settings. The standard of review has vacillated. For instance, in Hitchcock v. State, 578 So. 2d 685 (Fla. 1990), this Court stated that application of the HAC statutory aggravating factor "pertains more to the victim's perception of the circumstances than to the perpetrator's," 578 So.2d at 692, whereas in Mills v. State, 476 So. 2d 172, 178 (Fla. 1985), the analysis concerned the perpetrator's intent: "The intent and method employed by the wrong-doers is what needs to be examined."

As this Court stated in Smalley v. State, 546 So. 2d 720 (Fla. 1989), the Supreme Court of the United States upheld the facial validity of the HAC factor in Proffitt against a vagueness challenge because of the narrowing construction this Court set forth in State v. Dixon, 283 So. 2d 1 (Fla. 1973). However, in Sochor v. Florida, 504 U.S. ___, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992), the Supreme Court strongly suggested that this Court has not adhered to the limitations purportedly imposed upon HAC in Dixon:

> In State v Dixon, 283 So 2d 1 (1973), cert denied, 416 US 943, 40 L Ed 2d 295, 94 S Ct 1950 (1974), the Supreme Court of Florida construed the statutory definition of the heinousness factor:
>
> "It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others.

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless of pitiless crime which is unnecessarily torturous to the victim." 283 So 2d, at 9.
>
> Understanding the factor, as defined in Dixon, to apply only to a "conscienceless or pitiless crime which is unnecessarily torturous to the victim," we held in Proffitt v Florida, 428 US 242, 49 L Ed 2d 913, 96 S Ct 2960 (1976), that the sentencer had adequate guidance. See id., at 255-256, 49 L Ed 2d 913, 96 S Ct 2960 (opinion of Stewart, Powell, and Stevens, JJ.).
>
> Sochor contends, however, that the State Supreme Court's post-Proffitt cases have not adhered to Dixon's limitation as stated in Proffitt, but instead evince inconsistent and overbroad constructions that leave a trial court without sufficient guidance. And we may well agree with him that the Supreme Court of Florida has not confined its discussions on the matter to the Dixon language we approved in Proffitt, but has on occasion continued to invoke the entire Dixon statement quoted above, perhaps thinking that Proffitt approved it all. [Citations omitted.]

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

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

Deaths by stabbing provide but one of many specific examples which could be cited of the Court's failure to apply the section 921.141(5)(h) aggravating circumstance in a rational and consistent

manner. In cases such as Nibert v. State, 574 So. 2d 1059 (Fla. 1990), Mason v. State, 438 So. 2d 374 (Fla. 1983), and Morgan v. State, 415 So. 2d 6 (Fla. 1982), the Court has approved findings of especially heinous, atrocious, or cruel where the deaths resulted from stabbings. In Wilson v. State, 436 So. 2d 908 (Fla. 1983), however, a killing that resulted from a single stab wound to the chest was held not to be especially heinous, atrocious or cruel. In Demps v. State, 395 So. 2d 501 (Fla. 1981) the victim was held down on his prison bed and knifed. Even though he was apparently stabbed more than once (the opinion refers to "stab wounds" (plural) 395 So. 2d at 503), and lingered long enough to be taken to three hospitals before he expired, this Court nevertheless found the killing not to be "so conscienceless or pitiless' and thus not apart from the norm of capital felonies' as to render it especially heinous, atrocious, or cruel' [citations omitted]." 395 So. 2d at 506. See also opinion of Justice McDonald concurring in part and concurring in the result in Peavy v. State, 442 So. 2d 200 (Fla. 1983) simple stabbing death without more not especially cruel, atrocious, and heinous). [For other examples of how various aggravating circumstances have been applied inconsistently, please see MELLO, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller, XIII Stetson L. Rev. 523 (1983-84).] The result of the illogical manner in which the section 921.141(5)(h) aggravator has been applied is that sentencing courts have no legitimate guidelines for ascertaining whether it applies. Any killing may

qualify, and so the class of death-eligible cases had not been truly limited.

The inconsistent rulings by this Court applying or rejecting the HAC factor under the same or substantially similar factual scenarios show that the factor remains prone to arbitrary and capricious application. These infirmities render the HAC circumstance violative of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, sections 9 and 17 of the Constitution of the State of Florida. (Please see Hale v. State, 18 Fla. L. Weekly S535 (Fla. Oct. 14, 1993), in which this Court recently noted that Florida's constitution may arguably provide greater sentencing protection than the federal constitution, as Article I, section 17 of the state constitution prohibits cruel or unusual punishment, whereas the Eighth Amendment to the United States Constitution addresses cruel and unusual punishments.) Brett Bogle's sentence of death imposed in reliance on this unconstitutional factor must be vacated.

Bogle's jury also was given an improper and inadequate instruction on the especially heinous, atrocious, or cruel aggravating circumstance. Bogle's counsel objected to this factor being submitted to the jury. (T 746-755, 1547) However, the court instructed the jury on this circumstance as follows (R 186, T 1615-1616):

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

The above was similar to the modified standard instruction approved by this Court in In re Standard Jury Instructions Criminal Cases--No. 90-1, 579 So. 2d 75 (Fla. 1990), which read:

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

The definitions of "heinous," "atrocious," and "cruel" were formulated by this Court in State v. Dixon, 283 So. 2d 1 (Fla.

1973), and were included in a former jury instruction on HAC, but were subsequently eliminated, apparently because the definition of "cruel" improperly invited the jury to consider evidence of lack of remorse in aggravation, Pope v. State, 441 So. 2d 1073 (Fla. 1983), only to be reinstated by this Court's opinion in In re Standard Jury Instructions Criminal Cases--No. 90-1. The former jury instruction on the section 921.141(5)(h) aggravating circumstance, which defined it in terms of "especially wicked, evil, atrocious or cruel," was held by the Supreme Court of the United States in Espinosa v. Florida, 505 U.S. _____, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992) not to pass muster under the Eighth Amendment, as it was too vague to afford sufficient guidance to the jury for determining the presence or absence of the factor. Although the court below attempted to provide Brett Bogle's jury with more guidance than what the former standard jury instruction afforded, the charge given was still deficient. As noted above, the Supreme Court made it clear in Sochor v. Florida that it had not approved the complete language in Dixon upon which this Court based its approval of the new standard jury instruction in In re Standard Jury Instructions Criminal Cases--No. 90-1; specifically, the Court did not approve the Dixon definitions of "heinous," "atrocious" and "cruel." Furthermore, in Shell v. Mississippi, the Supreme Court held that a limiting instruction used by the trial court to define the "especially heinous, atrocious, or cruel" factor was not constitutionally sufficient; the concurring opinion in Shell v. Mississippi

explains why limiting constructions such as that attempted in Dixon are not up to constitutional standards:

> The basis for this conclusion [that the limiting construction used by the Mississippi Supreme court was deficient] is not difficult to discern. Obviously, a limiting instruction can be used to give content to a statutory factor that "is itself too vague to provide any guidance to the sentencer" only if the limiting instruction itself "provide[s] some guidance to the sentencer." Walton v. Arizona, 497 US ___, ___, 111 L Ed 2d 511, 110 S Ct 3047 (1990). The trial court's definitions of "heinous" and "atrocious" in this case (and in Maynard [v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988)] clearly fail this test; like "heinous" and "atrocious" themselves, the phrases "extremely wicked or shockingly evil" and "outrageously wicked and vile" could be used by " [a] person of ordinary sensibility [to] fairly characterize almost every murder.'" Maynard v. Cartwright, supra, at 363, 100 L Ed 2d 372, 108 S Ct 1853 (quoting Godfrey v. Georgia, 446 US 420, 428-429, 64 L Ed 2d 398, 100 S Ct 1759 (1980) (plurality opinion) (emphasis added).

112 L.Ed.2d at 5. In Atwater v. State, 18 Fla. L. Weekly S496 (Fla. Sept. 16, 1993), this Court itself recently recognized that an instruction providing only the Dixon definitions of terms discussed above would be inadequate. Thus, the court below read to Brett Bogle's jury definitions which have not been sanctioned by the Supreme Court, but have been held invalid to pass constitutional muster.

The remaining portion of the charge given to the jury, telling them that "[t]he kind of crime intended to be included as heinous or cruel is one accompanied by additional facts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim[,]" failed to cure the constitutional

infirmities inherent in the instruction. Although similar language from Dixon was approved as a constitutional limitation on HAC in Proffitt, its inclusion did not cure the vagueness and overbreadth of the whole instruction, which still focused on the meaningless definitions condemned in Shell. This language merely followed those definitions as an example of the type of crime the circumstance is intended to cover, but left the jury with discretion to follow the first, disapproved portion of the instruction. Even assuming this language could be interpreted as a limit on the jury's discretion, the disjunctive wording would allow the jury to find HAC if the crime was "conscienceless" even though not "unnecessarily torturous;" the word "or" could be interpreted to separate "conscienceless" and "pitiless and was unnecessarily torturous." The wording in Dixon, however, is actually different and less ambiguous, as it reads: "conscienceless or pitiless crime which is unnecessarily torturous to the victim." 283 So. 2d at 9 [emphasis supplied]. Furthermore, the terms "conscienceless," "pitiless" and "unnecessarily torturous" are also vague and subject to overbroad interpretation; a jury could easily erroneously conclude that any homicide which was not instantaneous would qualify for the HAC circumstance. Also, this Court indicated in Pope that an instruction which invites the jury to consider if the crime was "conscienceless" or "pitiless" improperly allows the jury to consider lack of remorse in aggravation.

The Supreme Court emphasized the importance of suitable jury instructions in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976):

> The idea that a jury should be given guidance in its decision making is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. [Footnote and citation omitted.] When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

49 L.Ed.2d at 885-886. Bogle's jury was not "carefully and adequately guided" in its deliberations; the inadequate jury instruction on HAC tainted the jury's penalty recommendation and rendered it unreliable. In Florida, the "capital sentencing jury's recommendation is an integral part of the death sentencing process," Riley v. Wainwright, 517 So. 2d 656, 657 (Fla. 1987), and the trial court is required to give the jury's penalty recommendation great weight. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). See also Herzog v. State, 439 So. 2d 1372 (Fla. 1983); Riley. Thus, not only did the trial court directly weigh the invalid aggravating circumstance of HAC in her sentencing order, in according the tainted recommendation of Bogle's sentencing jury the weight she was required to give it under the law, the trial court also necessarily indirectly weighed the invalid aggravating circumstances in the sentencing process, in violation

of the constitutional principles expressed in Espinosa, in which the Supreme Court noted that when a weighing state such as Florida "decides to place capital-sentencing authority in two actors rather than one [that is, in both the jury and the judge], neither actor must be permitted to weigh invalid aggravating circumstances." 120 L. Ed. 2d at 859. For these reasons, Brett Bogle's sentence of death cannot be permitted to stand.

ISSUE VI

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

The Eighth and Fourteenth Amendments require that capital punishment be imposed fairly, and with reasonable consistency, or not at all. Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S. Ct. 869, 71 L. Ed. 2d 1, 9 (1982). This Court's independent appellate review of death sentences is crucial to ensure that the death penalty is not imposed arbitrarily or irrationally. Parker v. Dugger, 498 U.S. 308, 111 S. Ct. 731, 112 L. Ed. 2d 812, 826 (1991). This requires an individualized determination of the appropriate sentence on the basis of the character of the defendant and the circumstances of the offense. Id.

The death penalty is so different from other punishments "in its absolute renunciation of all that is embodied in our concept of humanity," Furman v. Georgia, 408 U.S. 238, 306, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Stewart, J., concurring), that application of

the death penalty must be reserved for only the most aggravated and least mitigated of most serious crimes. DeAngelo v. State, 616 So. 2d 440 (Fla. 1993); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989); Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988); State v. Dixon, 283 So.2d 1, 7 (Fla. 1973). Brett Bogle's cause does not qualify for the death penalty under these principles.

As discussed in Issue IV above, the aggravating circumstances found by the trial court should not have been found, and so there is no basis on which Bogle's sentence of death can stand. Amoros v. State, 531 So. 2d 1256 (Fla. 1988). Even if one or more of the aggravators is valid, in light of the weakness of some of these factors, and the strength of the mitigating evidence, the death penalty is not warranted in this case. The first aggravating circumstance found by the trial court--that Bogle was previously convicted of a violent felony by virtue of his conviction in this case for burglary with an assault or battery--is very weak, as it involved an entry into a mobile home formerly occupied by Bogle, and an incident that was not particularly violent, that occurred less than two weeks before the instant homicide, and one of the alleged victims was the same as the homicide victim. If there was a burglary at all, it was only a technical burglary, and it is highly questionable whether the level of violence would qualify the burglary for the type of "life-threatening" crime contemplated in the section 921.141(5)(b) aggravating circumstance. Lewis v. State, 398 So. 2d 432, 438 (Fla. 1981). (The alleged victims only suffered some "red marks" on their persons; nothing in the record

indicates that they required any type of medical treatment.) And, as discussed in Issue IV.A. above, this episode provides no insight into Bogle's general propensity for violence, or lack thereof.

The second aggravator found by the court below--that the capital felony occurred during the course of another felony (sexual battery) is also particularly weak, as the section 921.141(5)(d) aggravating circumstance is inherent in every felony-murder prosecution, and so does little to set the crime apart from others that do not merit the ultimate sanction. This Court has implicitly recognized this in Rembert v. State, 445 So. 2d 337, 340-341 (Fla. 1984), wherein the Court reduced a death sentence to life imprisonment where the underlying felony was the only aggravator, even though there were no mitigating circumstances and the jury recommended death. This Court has consistently reduced to life in cases where the underlying felony is the only aggravating circumstance even though the jury recommended death. Proffitt v. State, 510 So. 2d 896 (Fla. 1987); Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Menendez v. State, 419 So. 2d 312 (Fla. 1982).

As for mitigating circumstances, it is not evident from the court's sentencing order that she employed the correct legal standard in analyzing Bogle's evidence regarding the "mental mitigators." She wrote the following with regard to the statutory mitigating circumstance of extreme mental or emotional disturbance (R 264):

> Dr. Arturo Gonzalez, a psychiatrist, testified for the defendant. However, neither Dr. Gonzalez nor any other witnesses who testified stated that the murder was committed while the

> defendant was under the influence of extreme mental or emotional disturbance. Dr. Gonzalez testified Brett Bogle had a personality disorder and suffered from some mental disturbance. However, Dr. Gonzalez conducted no tests other than one two-hour interview with Brett Bogle. There was also a suggestion that an automobile accident might have resulted in some emotional disturbance. This mitigating factor was not proven by the evidence and the court does not find that it exists. In making this finding, the court is aware this circumstance does not require the establishment of insanity.

The main problem with this finding is that the court did not consider Bogle's mental or emotional disturbance in the context of nonstatutory mitigation. Although the disturbance may not have risen to the level of "extreme" so as to qualify it for the mitigating factor enumerated in section 921.141(6)(b) of the Florida Statutes, in Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990), this Court made it clear that, in order for capital sentencing statutes to pass constitutional muster, "...any emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say." [Emphasis in original.] Therefore, the court should have weighed Bogle's emotional or mental disturbance in the balance, even if she did not find it to be "extreme." [Compare the court's finding as to the impaired capacity mitigator. She apparently gave this factor some weight, even though she did not find that Bogle's capacity to appreciate the criminality of his conduct or the conform his conduct to the requirements of law was substantially impaired. (R 264-265)]

There was other mitigation which the court ignored altogether. The court failed even to mention Bogle's artistic talent, an example of which can be found in the record at R 337, and his capacity for gainful employment (he was working full time at Tampa Roofing before his car accident), which is a recognized nonstatutory mitigating factor. See Buckrem v. State, 355 So. 2d 111 (Fla. 1978); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Proffitt v. State, 510 So. 2d 896 (Fla. 1987); Fead v. State, 512 So. 2d 176 (Fla. 1987); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982); Holsworth v. State, 522 So. 2d 348 (Fla. 1988).

Perhaps the most distressing problem with the sentencing weighing process in which the court below engaged is her failure to come to grips with the fact that this homicide occurred as a result of the romantic relationship that existed between Brett Bogle and Katie Alfonso. Although the State struggled mightily to couch the killing solely in terms of a witness-elimination, that scenario simply does not wash when one considers the record as a whole. The primary problem between Bogle and the victim herein, Margaret Torres, was not that Bogle feared that she would turn him in to the police for breaking into the trailer on September 1, but that, as Bogle specifically told Katie Alfonso, he blamed Torres for the breakup of his relationship with the woman he loved. (T 278-279) It was, after all, the constant bickering between Bogle and Torres which led to Bogle being ousted from the home he shared with Alfonso. (T 266-267, 1174-1178) On those few occasions when Bogle did express some concern to Alfonso about charges being pressed

against him, she attempted to reassure him that that was not going to happen. (T 277-278, 1184) Nothing in the record shows that Bogle knew that the police had been called to trailer on September 1, or that he had any basis for fearing prosecution. If Bogle really was concerned about the possibility of being arrested for the September 1 incident, it seems unlikely that he would have approached Margaret Torres at Club 41 on September 12, and thus revealed his whereabouts. No, Bogle seemed more concerned with getting back together with Alfonso, and he called her constantly wanting to do so. (T 268, 1186) Significantly, the last telephone conversation Bogle had with Alfonso before Torres disappeared dealt not with his worry that he might go to jail, once again, his desire to get back together with Alfonso. (T 280-281, 1186-1187) Even after his arrest for killing Alfonso's sister, Bogle called Alfonso from jail, to ask if they could get back together again if Bogle "got proved innocent of all this..." (T 284) Thus, Brett Bogle's case falls within that line of cases in which this Court has reversed death sentences where killings have occurred as a result of domestic disputes or lovers' quarrels. Halliwell v. State, 323 So.2d 557 (Fla. 1975); Chambers v. State, 339 So.2d 204 (Fla. 1976); Ross v. State, 474 So. 2d 1170 (Fla. 1985); Blakely v. State, 561 So. 2d 560 (Fla. 1990) [all of which, like the instant case, involved deaths by beating or bludgeoning]; Kampff v. State, 371 So.2d 1007 (Fla. 1979); Herzog v. State, 439 So. 2d 1372 (Fla. 1983); Irizzarry v. State, 496 So. 2d 822 (Fla. 1986); Wilson v. State, 493 So. 2d 1019 (Fla. 1986); Douglas v. State; 575 So. 2d

165 (Fla. 1991); Garron v. State; 528 So. 2d 353 (Fla. 1988); Blair v. State, 406 So. 2d 1103 (Fla. 1981); Wright v. State, 586 So.2d 1024 (Fla. 1991); Fead v. State, 512 So.2d 176 (Fla. 1987). See also Amoros. DeAngelo v. State, 616 So. 2d 441 (Fla. 1993) is also particularly relevant to Bogle's case. As here, "[t]here were continuous conflicts and arguments between" the female victim and the male defendant, who lived in the same trailer, which resulted in the victim being strangled to death. 616 So. 2d at 441. Although the Court did not cite the line of cases cited above regarding domestic homicides, the Court did reduce the appellant's death sentence to life on proportionality grounds. In so doing, the Court wrote: "[T]here was substantial evidence of an ongoing quarrel between Price [the victim] and DeAngelo, which ultimately culminated in the killing. This history of conflict is relevant mitigation." 616 So. 2d at 443 (emphasis supplied). Here the pre-existing enmity that existed between Torres and Bogle was relevant mitigation that should have been taken into consideration by the trial judge.

Compelling mitigation was also presented in the form of the testimony about Brett Bogle's horrendous upbringing, which formed the cornerstone of the defense case at penalty phase. The rejection Bogle must have felt when he was kicked out of Katie Alfonso's trailer must have been especially painful in light of the rejection Bogle suffered at the hands of his father. When William Bogle was not neglecting his children, he was beating them, or telling them how worthless they were, or turning them on to alcohol

and illegal drugs. A troubled background and family life has been recognized by this Court as mitigating in many cases. For example, Neary v. State, 384 So. 2d 881 (Fla. 1980); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982); Livingston v. State, 565 So. 2d 1288 (Fla. 1988); Clark v. State, 609 So. 2d 513 (Fla. 1993). Brett Bogle's background was about as bad as one can imagine. He came from the ultimate dysfunctional family, and endured brutalization that Dr. Gonzalez characterized as "more than child abuse" and "incredible." (T 1402) What this Court observed in Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990) upon vacating a death sentence that was imposed in accordance with a death recommendation is applicable to Brett Bogle's cause:

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

One of the most poignant moments in the defense presentation at penalty phase has to have been when Bogle's mother read to his jury the letter from Brett's twin brother, Brian, who wrote (T 1540-1544):

> To whom it may concern: I hope that what I have to say will be considered in these proceedings being alleged against my brother, Brett Bogle. I must first start out by saying that the children of the Bogle family have not had an easy life, from the time of early adolescence to the present.
>
> My entire family, including my mother, suffered systematic, almost daily abuse. While not only severe physical, but harmful

mental anguish being suffered at the hands of my father, William H. Bogle. He was neither forgiving nor friendly at the times we were in need, myself included.

The abuse started early. Ever since I can remember we were always told that were worthless. And we were called names like stupid and good-for-nothing, and that we were heathens. He introduced us to drugs in the physical abuse [sic]. Beatings were severe as we got older, and just at the times most parents get lenient, instead of grounding us or taking privileges away, he started using more severe beatings. And he no longer used a belt; he used his fist.

Once Brett was about twelve or thirteen years of age, he was made to eat lima beans. Once that my father knew that Brett could not stomach them, he threatened him into eating the beans. And when he vomitted [sic] up the beans, he was hit in the head with a broom handle. As my father's addiction to cocaine increased, so did the torture. He would taunt you to get you to defend yourself, to try to fight him. He repeatedly was punching my brothers and sisters in the face.

One time he tried to kick my sister down the hallway and missed, and broke his toe on the end table. We all laughed at him, including mom, in private, of course.

Brett was thrown out of the house at seventeen and lived with friends for awhile, and had to move because he was being accused of stealing from our house. He got a job in South Florida with a friend and his dad. It seemed as if he was finally going to get it together when he lost his job. There wasn't enough work for him to do. This set a pattern for him. His life was being lived day to day, not knowing where he was going to stay or where he was going to get food. This dreadful pattern has led us to today. Getting work, losing work, and having to survive on his own through whatever means necessary.

His last job was a good one. It was hard work, but I think it taught himself worth, something he had never seen before. I was proud of him. He was doing it on his own. He had worked for several months straight. He learned to discipline himself in the routine of getting up five days a week and going to work with the rest of us.

Then he was dealt what I consider the final blow to his well-being. He was involved in another accident on his way to work. He said to me later that he thought Lady Luck was shining on him. But, in fact, because he was hospitalized a few days before the murder, he was not at work where he would have been.

Again, he had no work because of his punctured lung. He was again left to survive on his own. He also had no means to pay rent, buy food, or anything. Perhaps he is just unlucky.

Although you've probably heard all of the bad things he has ever done, you were not told why. I purposely put the blame on my father for his omnipotent influence on the outcome of the lives of the Bogle family's children because of the bad things he does. No one ever focuses on the good. He's never gotten credit for his good deeds.

He used to be a good athlete, decent in school, and would do anything for anyone who asked. If you look at him now, you can see his crying out for help, only there is no one who cares. Only ones who are there to judge him and take his self esteem away again, just as it has been his entire life.

I thought many times why I had turned out okay and all the rest have not. Maybe heredity. My father's whole side is, or has been in trouble. My mother was left at her grandmother's to be raised, or was it because of instincts? The way we were all thrown out on the streets in a harsh uncaring--unloving world of people who only care when it affects their own lives.

And finally, was it because of physical abuse inflicted on them by my father and the mental abuse by him and the rest of the world? I'm still unsure. I'm only glad that I stayed active in sports and determined to make my life and the life of my children different from mine.

It's too bad that I had to learn failure from my brothers and sister. Our lives have truly been a shame. Don't turn your back on him, as the rest of the world has. Give him a chance at life.

Finally, a brief word needs to be said about the death recommendation returned by Brett Bogle's <u>first</u> penalty phase jury.

Even after hearing damaging evidence that was later ruled inadmissible, five of the twelve members of the jury voted to spare Bogle's life. If the State had not allowed to present the improper testimony, the jury might well have come back with a life recommendation, and there might not have been any need for this appeal.

Proportionality analysis is not based on the number of aggravating and mitigating factors, but on the quality of the circumstances presented. See Fitzpatrick and Livingston. This Court's analysis of Brett Bogle's cause must lead it to conclude that the quality of Bogle's evidence in mitigation is much more compelling than what was presented in aggravation. The death penalty is not warranted for this Appellant and this crime, and it cannot stand without violating the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 9 and 17 of the Constitution of the State of Florida. Bogle's death sentence must be replaced by one of life imprisonment.

CONCLUSION

Based upon the foregoing facts, arguments and citations of authority, your Appellant, Brett A. Bogle, prays this Honorable Court to vacate his sentence of death and remand for imposition of a life sentence. In the alternative, Bogle requests vacation of his death sentence and remand for a new penalty trial, or, if that is not forthcoming, for resentencing by the court. Bogle also asks the Court to vacate his conviction and sentence for retaliation against a witness, and for such other and further relief as this Court may deem appropriate.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 16th day of January, 1994.

Respectfully submitted,

Robert F. Moeller

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

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

RFM/ddv