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STATEMENT OF THE CASE

On March 10, 1992, Horace Melvin Pope was indicted for first degree murder (Section 782.04, Florida Statutes), robbery with a deadly weapon (Section 812.13, Florida Statutes); and kidnapping (Section 787.01, Florida Statutes).

Motions In Limine regarding the deceased's dying declarations and excited utterances, Williams rule evidence, and inflammatory photographs were denied after pretrial hearings. The Honorable Susan Roberts presided over Mr. Pope's trial on January 19 to February 4, 1993. (TR1) Mr. Pope was found guilty as charged of first degree murder and theft and not guilty of kidnapping. (TR769-771) After a penalty proceeding on March 15 to 18, 1993, the jury recommended death by a vote of eleven to one. (R2518) Mr. Pope was sentenced to death for the homicide and a consecutive life term for the robbery with a deadly weapon on April 22, 1993 and April 26, 1993 respectively. (TR1119-1121,1135-1137) The judge filed written findings of fact supporting imposition of the death penalty on April 22, 1993. (TR1122-1126)

Mr. Pope filed a timely Notice of Appeal, pursuant to Article V, Section 3(b)(1) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030 (a)(1)(A)(i), on May 4, 1993. (TR1140-1141) After the Public Defender's Motion to Withdraw Due to Conflict of Interest was granted, undersigned counsel was court-appointed on May 6, 1994 nunc pro tunc to May 3, 1994.

STATEMENT OF THE FACTS

Guilt Phase

Horace Pope (hereinafter Mr. Pope) and Alice Maheffey, the deceased, were lovers. They were involved in a domestic relationship for almost five months prior to the assault that led to the injuries in this case. (R1276-77,1287) On February 16, 1992, Alice received the injuries that indirectly resulted in her death. (R1927)

Mr. Pope drank heavily and was an alcoholic. (R2663-65,2675-76,2727,2730) Alice drank heavily and increased her alcohol consumption during the months prior to the assault. (R2663-65) Mr. Pope and Alice were known to drink and bicker when they were together. (R1287,1852,1813) Every time Marsha Pope saw Alice and Mr. Pope together they were drinking and she never saw Alice sober. (R1825)

On February 16, 1992, the day of the assault that resulted in Alice's death, Mr. Pope, Alice Maheffey, and Wayne Pope spent the day drinking beer. (R1333-36) Neither Mr. Pope nor Alice appeared to be angry. (R1338) Mr. Pope had been drinking for at least 9-10 hours prior to the assault. (R1335) Alice and Mr. Pope drank "pretty heavily" the night of the assault. Alice and Mr. Pope appeared to be drunk that night. (R1249-50,1901,1960,2145,2148,2176) Alice's blood alcohol level, which was decreasing at the time of the test after the assault, was .17. (R1245,1597-1598)

The events leading up to the assault are unclear. However,

Marsha Pope was a witness to the assault and she implicated Mr. Pope as the assailant. Marsha testified that Mr. Pope battered and stabbed Alice in the bathroom of her family's home. (R1846-47,1855-56,1927,2176-77) After the assault, Mr. Pope and Marsha left the house in Alice's car. (R1863,1868) After they left, Alice went to a neighbor, Mr. Tice's, house for help. Mr. Tice called the police at 11:30 p.m. (R1358-59,1382) The police and paramedics arrived later and Alice was transported to the hospital. (R1651-55,1674,1709-10)

Dr. James, the emergency room physician, and Dr. Speyerer, a general surgeon, determined Alice had multiple contusions to her face, body, and extremities, decreased breath sounds, and two stab wounds to her back. (R1218-22,1484-87) One wound appeared to be a superficial wound. (R1243) X-rays showed she had bleeding in her left chest which was treated with tube drainage. Her stab wounds were treated with gauze. (R1226) She was admitted to the hospital but she did not appear to be in severe distress. (R1228) It was later determined that she had a laceration through her diaphragm including the sac around the heart and a cut in her spleen. (R1229,1231) The heart itself was not damaged. (R1243) Dr. Cramer, a cardiologist, determined that Alice was stable before the surgery performed to repair the diaphragm and remove her spleen. (R1229,1246) It was not necessary to treat the sac around her heart. (R1233)

Alice was doing relatively well after the surgery. She was using a ventilator to help her breath and she was not responsive

to commands. (R1236) On February 19, 1992, Alice's condition was relatively the same except for low grade fevers. (R1239) Over the next several days, she had higher fevers. It was determined that her wounds had become infected with different bacteria and antibiotics were administered. Her fevers continued to increase. On February 25, 1992, her fever reached almost 107, her heart stopped, and she was unable to be resuscitated.

(R1239-41) Dr. Speyerer did not feel that he failed to perform any treatment to help her recover. (R1237,1241,1268) The removal of her spleen itself did not cause her death, the diaphragm was repaired and the stomach placed in its normal position, and the pericardium sac would repair itself. (R1249) However, Alice developed septicemia, an infection that involves the bloodstream. (R1249-50) The surgical wound and the stab wound had different bacteria. (R1251) The stab wound infection was discovered after the surgical wound infection was diagnosed. Dr. Speyerer indicated that once Alice developed the surgical infection, she was more likely to develop an infection in the stab wound. (R1252) Alice developed pneumonia and pulmonary thromboembolic, blood clots that go to the lungs, during her hospital stay. (R1253-54) Dr. Speyerer indicated that the septicemia, the pneumonia, and the blood clots all were the immediate cause of death with the infection being the primary cause. In his opinion, a person with stab wounds like Alice's has a good chance of living. (R1254-56)

Dr. Melamud, an expert in the field of forensic pathology,

performed an autopsy on Alice on February 25, 1992. (R1571-72) He found bruises on her forehead, left eye, back of neck, and abdomen, lacerations or abrasions of the upper and lower lips, and abrasions on the forearm and left hand. There was a stab wound on the back that penetrated or wounded the abdominal cavity, spleen, diaphragm, and pericardial sac. (R1578-79,1588) Dr. Melamud believed that the knife (19) could have caused the stab wound. (R1589) He determined that "the cause of death of Alice was a stab wound to the left aspect of the back, including spleen, diaphragm, pericardial sac, and possibly lower lobe of the left lung, causing external and internal hemorrhage. These injuries were complicated during hospital course with septicemia and bilateral bronchial pneumonia" and/or pulmonary thromboembolic or a blood clot that obstructed the pulmonary artery. (R1584-90) Dr. Melamud indicated that the septicemia came from the stab wounds, the pneumonia was a result of either a prolonged bed rest or a general infection or septicemia, and the blood clot resulted from the injuries, prolonged bed rest, and infection or the operation performed. The surgical wound could have caused the septicemia, as well. (R1597) A second stab wound caused a hemorrhage. The other injuries did not contribute to or cause Alice's death. (R1594) The person depicted in the autopsy photos (52A,B,C,G) is Alice Maheffey. (R1992)

On February 17, 1992 at approximately 2:00 a.m., officer Kennedy saw Mr. Pope driving Alice's car. (R949,953-54) Mr. Pope stopped when he was advised to do so and he obeyed Kennedy's

order to remain in his car until additional officers arrived.

(R955-56,1714-16) There was an open twelve-pack of beer on the back seat of the car. (R1686) There was no evidence of the presence of an ATM bank card, a purse, a wallet, money, or a knife in the car. (R1176-77,1793-95,1799,2155)

When Mr. Pope was arrested he was wearing jeans, no shirt, and cowboy boots. His pants had blood on them from the knees downward and his boots had blood all over them. (R1716,1865) He was handcuffed and placed in a patrol car. (R960) Kennedy and officer Wright could smell alcohol on either Mr. Pope's breath or body. The smell could be detected from two feet away.

(R961,971) Mr. Pope was cooperative, and he appeared not to know what was going on. (R970,1689) Gunnoe, Hicks, and Wright were discussing Alice's condition. After discussing charges of attempted murder, Gunnoe and Hicks heard Mr. Pope state, "I hope I didn't go through all that for nothing. I hope she's dead as a doornail." (R1456-57,1682-84) After Mr. Pope was arrested and placed in the patrol car, Wright heard him spontaneously state, "I hope I killed the bitch." (R1717-18) Earlier, Mr. Pope asked Wanda Pope for money and stated, "Well, I've killed a woman in your house, and your bathroom's in a mess." (R1819-20) Mr. Pope did not testify at trial.

Before Marsha and Mr. Pope left Marsha's home, Mr. Pope washed his hands in the kitchen, got a beer, and told Marsha to see if Alice was dead. Marsha went to the bathroom, asked Alice if she was dead, heard Alice make a noise and say not to let Mr.

Pope hurt her, and told Alice to "act like you are dead." Alice told Marsha she would be charged with battery. Marsha told Mr. Pope that she was dead, and they left in Alice's car.

(R1859,1864,1867,1928,1961) They did not summon help for Alice. Mr. Pope dropped Marsha off at a friend's house. (R1863)

Mr. Pope's main accuser was Marsha, his niece. She claimed that she was not an accomplice despite making many inculpatory statements. On February 16, 1992, at 9:00 p.m., Marsha went to her family's home at 110 Ninth Street because Donnie, her father, had told her they were moving back into the house that night.

(R1391-94,1844) However, she knew they didn't move in because there was no furniture in the house. (R1889) She was almost asleep when Mr. Pope and Alice arrived in Alice's car. (R1846-1847) When Alice went to place an opened twelve-pack of beer into the refrigerator, Mr. Pope told Marsha that he was going to kill Alice for her car and money. He never mentioned an ATM card. (R1848,1939,1951) Marsha told Mr. Pope he was drunk, and she did not believe he would do it. (R1849) Alice, Marsha, and Mr. Pope went into the bedroom and talked. Alice and Mr. Pope were drinking beer and "getting along good." (R1850-51) Marsha left with Alice to get beer and they returned to the house. (R1899,2176) Then Marsha went into the other bedroom and laid down on the carpet. (R1851)

Marsha woke up when she thought she heard Mr. Pope and Alice fighting in the bedroom. (R1852) Marsha looked into their bedroom and saw Mr. Pope and Alice naked engaging in sexual

intercourse. Alice was hollering "help me." (R1853) Marsha pushed Mr. Pope off Alice. Then Marsha realized "...nothing was going on. I misjudged it." Marsha returned to her room.

(R1854) Marsha's cousin, Wayne, and his friend stopped by for 10 minutes, drank beer, and left. (R1869-1870) Wayne asked Alice for \$10.00. She got upset and she left the house and returned a half hour later. Mr. Pope stayed in the house and drank. (1902-1903)

Later, Marsha heard them fighting in the bathroom. At trial, Marsha claimed that her pretrial statement was not true. She claimed Mr. Pope came to her bedroom door, told her to look in the bathroom because he was going to do something or kill her, walked her to the bathroom, and wasn't hitting Alice when she first looked into the bathroom. (R1904-06,1919,1961) Marsha denied that her father told her what to say on the witness stand.

Marsha saw Alice sitting on the toilet. Mr. Pope was hitting her face, holding her hair, and beating her head on the bathtub and wall. Alice said, "I love you Melvin" and "help me." Mr. Pope responded, "I love you, too." (R1872,2176) Marsha ran and Mr. Pope hit her head on the wall. Mr. Pope told Marsha to stay and watch or he would kill her. Mr. Pope continued to hit Alice. (R1855-56) Marsha saw him stomp on her head and back with his boots. (R1865) Alice did not resist or fight back. (R1872) She did not see where he got the knife, however, the bathroom cabinet was open. Marsha recognized the knife from the house. Marsha ran to the front door, Mr. Pope caught her, he

banged her head on the wall, he held the knife near her throat, and he told her he would kill her if she tried to get away.

(R1857-58,2178) Mr. Pope had knocked the bathroom door off its hinges. (R1861) At some point, Marsha pushed Mr. Pope into the bathtub. Alice hit the bathtub when Mr. Pope pushed her next to it. (R1921) Marsha could not recall the sequence of events regarding Mr. Pope's beating and stabbing of Alice. She admitted that she "wonders" if she knows what happened, that she had trouble remembering what happened, and that she did not know if she made things up to "fill in the blanks" that she did not remember. (R1924-1925)

Mr. Pope told Marsha they were going to Missouri. He had "the knife and another knife." Marsha did not want to go with him but she did not feel that she had a choice. (R1860,2164) Mr. Pope told her to drive but she was shaking so Mr. Pope drove. There was a twelve pack of beer in the car and Mr. Pope drank one. (R1868) Mr. Pope stopped at a bridge and told Marsha he was going to kill her and throw her in the creek. Marsha asked him not to kill her. Mr. Pope told her he would never hurt her and asked her where she wanted to go. Marsha asked him to take her to a friend's house and he did. (R1395,1400,1414,1863) After Mr. Pope dropped Marsha off, she called 911 3-5 times and returned to either her trailer or the police station. Nancy Humes called 911, as well. (R1400,1407,1414,1819-20,1698-1700,1704,1873-74,1881,1883,2064,2138-39,2165)

Marsha made the following inculpatory statements and

discrepant statements which she later denied making. First, she told Calvin Pope, her uncle and pastor, that she was worried about being incriminated because Mr. Pope made her hand him the knife and her fingerprints were on it. (R1976,1993-94)

Second, Marsha told officer Wright Mr. Pope wanted Alice's car and her ATM bank card to get Alice's money from the bank; Mr. Pope forced Alice to have sex with him; Mr. Pope got a knife from the kitchen and he told Marsha that "he was going to do it now;" Mr. Pope went into the bathroom and "beat" Alice's head into the tub and wall; and Mr. Pope told Marsha that she would get the same thing if she did not watch. (R2164)

Third, Marsha told Smithkey that Mr. Pope stabbed Alice, Alice fell on the floor, and Marsha took Alice's keys from her pocket at Mr. Pope's direction; Mr. Pope put a twelve pack of beer in the refrigerator; Mr. Pope was going to kill Alice and use her bank card to get Alice's "thousands of dollars;" Marsha went into the bathroom during and after the stabbing; Mr. Pope "would be after [Marsha]" if he went to prison; Mr. Pope and Alice fell off the toilet and into the bathtub; Marsha was outside with Mr. Pope, he went back into the house to get his cigarettes, she "was going to go," and he was watching to make sure she did not leave; and Mr. Pope sent Marsha out to the car to move the beer to the front seat of the car. However, she never told him that she knocked Mr. Pope off Alice and knocked him into the bathtub. (R2145,2148-50,2153,2157-60) Marsha could not remember if she told Smithkey that Mr. Pope told her he was

going to kill Alice when she went to the bathroom, Mr. Pope was going to kill Alice for her car, thousands of dollars in a bank account, and her bank card, Mr. Pope and Alice started "messing around" in her presence so Marsha went into her bedroom crying, Mr. Pope started strangling Alice and they fell into the bathtub, Marsha got her dog before she tried to run away from Mr. Pope the second time, she took Alice's keys from her pocket, or Mr. Pope left her alone outside. (R1951-1956) Marsha gave conflicting testimony regarding whether she told Alice she was going to get help. (R1962-1963) Marsha admitted that she did not have any marks on her nor did she have blood in her hair after Mr. Pope banged her head. (R1936,1963,2166)

Fourth, Marsha told Deana Smith, a neighbor, that Mr. Pope knocked her head on the wall, she passed out, and when she awoke he make her watch him kill Alice. (R1972,2105) Deana Smith stated that Marsha had a reputation in the community for being untruthful and Marsha stole some of her clothes, as well. (R2101-2102)

Fifth, Marsha told her friends, Mr. Ellis and Trudy Eubanks, that Mr. Pope made her get a knife and hand it to him. Marsha repeatedly asked Nancy Humes, "Do you think I'll go to jail?" because she handed Mr. Pope the knife. (R1969,2022-24) Marsha's shirt was damp around the neck and her hair was wet. (R2001-03)

Sixth, Marsha told Nancy, Trudy, and Brandy Humes that Mr. Pope and Alice were arguing, he told Marsha to get a knife from the kitchen drawer, and she got the knife and gave it to Mr. Pope

in the living room; Alice was using the bathroom and Mr. Pope told Marsha to get a knife out of the bathroom drawer; Mr. Pope told her to get him a beer while he was stabbing Alice and Marsha did; Mr. Pope made Marsha stab Alice; she and Mr. Pope wrestled all the time and she was able to beat him; Marsha walked on the bathroom door over Alice, took a shower, and walked over the door again because the blood was deep; Marsha left the house where Alice was stabbed but returned to see what was happening; and Mr. Pope tried to drown Marsha. Trudy indicated that Marsha has lied to her. (R1931-1934,1938,1944-1945,1967-71,2006-10))

Seventh, Marsha told Brandy and Nancy Humes Mr. Pope killed and stabbed his girlfriend and he made Marsha get a knife out of the kitchen and bring it to him; Mr. Pope and Alice argued because he wanted her credit cards and the car; Mr. Pope told her to get a knife and a beer, she got the knife from under her bed, and he made her stab Alice (per Brandy); Mr. Pope told Marsha he was going to kill Alice, he beat Alice, he made Marsha get him a knife from the kitchen, and he made Marsha help him stab Alice while she was in the bathroom (per Nancy); Marsha got the knife from her bedroom, gave it to Mr. Pope, left the house, and returned because she was scared (per Nancy); the knife was in the bathroom, Mr. Pope stabbed Alice, the bathroom door fell on her, and Marsha walked over the door to take a shower (per Nancy and Brandy); Marsha was not afraid of Mr. Pope (per Nancy). (R1969-72,2033-35,2065-69,2075-76) Brandy testified that Marsha's reputation in the community was that she does not

tell the truth. (R2049)

Finally, Marsha told Kathy Justice¹, Alice's daughter, that Mr. Pope and Alice argued about beer and when Alice went to the bathroom, Mr. Pope stabbed her with a kitchen knife because she would not give him any money. (R2176)

Linda Allen owned Allen's Discount Beverage in Eloise until January 20, 1992. (R2077,2088) Marsha came into her store on the first of the month to cash her "government or AFDC" checks. (R2079-80,2093) Some time before the end of February 1992, Marsha came into the store with two \$100.00 bills. Linda was surprised because Marsha and her mom never had money. Linda told Deana Smith, a neighbor and friend of Marsha, Donnie, and Wanda and a former employee of Linda's about Marsha's money. (R2081,2083,2089-91) On February 17, 1992, the day Deana saw the crime unit and fire trucks outside the Pope house, Linda asked Deana about Marsha's two \$100.00 dollar bills. Deana assumed the money was from welfare because she knew Marsha lived on welfare and she had never seen her with almost \$200.00 except when she cashed her checks. (R2092-95,2107)

Two weeks before Mr. Pope's trial, Deana asked Marsha "Where did you get the money?" Marsha said "What money" and Donnie said he gave it to Marsha. Wanda asked Donnie "How can you tell them you gave them to her, Where'd you get the money from?" Marsha could not remember whether Donnie told her to say that he gave

¹The testimony of Kathy Justice was read to the jury in lieu of live testimony.

her the money she was seen with after the incident with Alice.

(R1828) When Marsha asked, "What am I going to tell them, " Donnie repeated that he would say he gave it to her. (R2103-04) Wanda denied that Donnie said that it was not uncommon for Marsha to carry \$500-600 at a time. (R1831) Ernestine Swallow's mother confirmed that she gave Alice two \$100.00 dollar bills on February 15, 1992. (R2666,2779)

On February 17, 1992, Jean Gardener, a crime scene technician collected evidence from in or around the crime scenes. (R1028-29) The home where the assault occurred was not completely furnished but there was a mattress and a nightstand in the master bedroom, dining chairs in the living room, and appliances and chairs in the kitchen. (R1023-24,1139-40) In addition to the two beer cans that she found in the house, she located an empty carton (12-pack) on the kitchen counter. (R1144-45) She did not find clothes in the closets or in the second bedroom, or a suitcase or an overnight bag. (R1141) She never found an ATM card in Alice's wallet. (R1143) Subsequently, she took photographs of Mr. Pope at the substation. (R1126-27) She did not find an ATM card in Mr. Pope's wallet. (R1144)

Mr. Yeshion, an expert in the field of forensic serology, found O-type blood on flip-flop shoes (18 & 6), a shirt (30), boots (31), shorts (27), and a knife (19)². Human blood of an

²Numbers listed by expert witnesses refer to State Exhibit numbers.

unknown type was found on a brassiere (34), blue jeans (35), and socks (36). (R1492,1494,1496-98,1500-05) Mr. Yeshion determined that Mr. Pope had A type blood and Alice had O type blood.

(R1504) He admitted that either type A or O blood occurred in 85% of the population, and that Marsha's blood type was not examined. (R1512-13)

Mr. Gunther, an expert in the field of latent print examination, examined the knife (19), but was not able to find any latent fingerprints on it. (R1524-25) Mr. Gunther was qualified, over defense objection as an expert in shoe print identification. (R1536) He examined a pair of thong-style sandals (6&18), a pair of cowboy boots (31), and negatives of shoe tracks from the crime scene. (R1538-41) Mr. Gunther concluded that two of the shoe tracks obtained from the scene were made by the right sandal (6 & 55c). (R1544) He indicated that one right boot probably made an impression at the scene but he could not reach a conclusion regarding the boot print. (56A) (R1553) He believed that the brownish-red substance was on the shoes, and the shoe left the colored deposit on the floor. (R1554-1555) Mr. Gunther did not compare any footwear designated as belonging to Marsha with the prints lifted from the scene. He did not know who owned the sandals. (R1562-63)

Evidence of a prior battery committed by Mr. Pope against Alice was admitted. First, on Labor Day, September 2, 1991, Lieutenant Young saw Mr. Pope sitting against a tree at Lake Shipp Park. A woman was sitting 12-15 from him. Her face was

bloody. (R1290,1292-93) Young stated that Mr. Pope and the woman were intoxicated and their faculties were impaired. (R1294-95)

Second, Officer Mary Dicks saw Alice walking out of the parking lot at Lake Shipp Park on Labor Day of 1991. There was blood running from her nose and lip and she was upset and crying. (R1301,1304,1307) She saw Mr. Pope in the same area. He had blood on his hand, skinned knuckles, and he was upset. (R1304-05) Dicks could smell alcohol on Mr. Pope and Alice's breath. She believed they were both intoxicated. (R1308-09) She did not have any personal knowledge regarding what occurred prior to her arrival. (R1309)

Third, Officer Barnes saw Alice at Lake Shipp Park on September 2, 1991. (R1416-17) Alice was sitting on the ground. She was crying and her lip was bleeding. Mr. Pope was sitting on the ground 5-7 feet away from Alice. Mr. Pope was speaking to Alice, and he appeared to be angry with her. (R1418-20) Alice and Mr. Pope were intoxicated. (R1420-21)

Fourth, Annie Lou Jones, Alice's friend since 1970, saw Alice and uniformed officers at Lake Shipp park. (R1211-12) Ernestine Swallows, Alice's friend, saw Alice possibly on Labor Day. (R1272-74,1284-87) Annie Lou Jones was with Alice. Alice's nose was swollen and her glasses were gone. (R1285) She was upset and crying. (R1286) Finally, Wanda Pope saw Mr. Pope hit Alice at Lake Shipp Park. (R1813)

Over defense counsel's objections, the state introduced hearsay statements made by Alice. First, Alice told Mr. Tice her

"boyfriend" beat her up. (R1379) She did not state that he stabbed her. (R1380)

Second, Alice told Officer Wright³ her boyfriend beat her up and kicked her in the head, he took her car keys and car, he left with a female relative of his, he left her for dead, and she had to kick down the bathroom door. (R1720-21) When he asked her what caused her bleeding, she indicated it was her head. (R1723) She never said she was stabbed or indicated she knew she was stabbed. She never said her boyfriend stabbed her. (R1724-25)

Third, Alice told Ms. Giger, an EMT, "that her boyfriend had beat her up, had kicked her with cowboy boots." When Ms. Giger found the stab wounds, she asked Alice how she got them, and Alice stated, "Oh, yeah, he stabbed me too." (R1657-58)

Penalty Phase

The state introduced evidence of Mr. Pope's prior felony of kidnapping against Theresa Cobb. In 1978, Theresa Cobb, formerly Theresa Milano, was 19 years old. On April 27, 1978, Theresa drove her car to the ABC liquor lounge. As she exited her car, Mr. Pope pushed her back into the car and threatened her with an open pocket knife. (R2578-81) Mr. Pope said, "Get inside or I will kill you." The knife was 5-6 inches from her stomach. Theresa was scared and she did not try to get away. Mr. Pope was drunk. (R2581-86)

Mr. Pope got in the drivers side, Theresa got into the

³Wright's deposition testimony was presented to the jury in lieu of his personal appearance.

passenger's side, and the person with Mr. Pope got into the back seat. (R2582) During the next two days, Theresa was driven to other places. (R2583) Mr. Pope and his friend talked about killing Theresa. Mr. Pope cut her hand and bruised her. After two days, Theresa talked Mr. Pope into letting her and another girl he picked up go. Theresa and the girl called the police. (R2584-85)

Detective Smithkey took a taped statement from Alice on February 18. (R2648) Alice told him that Mr. Pope "took the keys out of my pocket and was going to leave with my car." When Smithkey asked her if Mr. Pope took her car keys and her car, Alice stated, "I think he was headed out of town with it, I don't know." (R2650) Alice told Smithkey that Mr. Pope attacked her and Marsha was not involved in the attack.

The following mitigation evidence was presented by Independent Counsel⁴. Lester Pope, Mr. Pope's older brother, stated that Mr. Pope had a drinking habit. He drank "mostly Busch beer." (R2652) Mr. Pope started drinking daily at age 15. This drinking habit continued into Mr. Pope's twenties. (R2653) Mr. Pope drank whenever he could get alcohol, and he was an alcoholic. Mr. Pope's drinking habit was the same during the couple of months before his arrest when he was almost 45 years old. Mr. Pope was able to "do things normal people do even when

⁴ Independent Counsel was appointed by the court after Mr. Pope advised the court, through counsel, that he did not intend to present mitigation evidence although mitigation evidence was available.

he had been drinking" except when he was real drunk.

(R1152,2655) Alice and Mr. Pope would drink when they were together. (R2656) The night of the assault, Mr. Pope and Alice drank beer while at Lester's house. (R2657) Lester indicated that Mr. Pope was left handed. (R2778)

Ronnie Pope, Lester Pope's son, saw Mr. Pope, Wayne, and Alice at Lester and his home the night of the assault on Alice. They were drinking heavily, and Wayne talked to Mr. Pope about getting drugs. They left at 9 p.m. (R2660-61) The next morning, at approximately 1:00 a.m., Wayne tried to sell food stamps to Ronnie's family. (R2662)

Ernestine Swallows and Mr. Pope dated for 6 months "off and on." On an average day, he drank a couple of six packs, but she saw him drink 24 beers in a day. Ernestine saw him drink this amount until they stopped seeing each other 6-7 months before his arrest for the attempted murder of Alice. Alice drank beer, as well. (R2663-65) On February 15, 1992, or the day before the assault on Alice, Ernestine's mother, Irene Otto, gave Alice two \$100.00 bills for rent. Mrs. Otto confirmed this payment. (R2666,2779)

Calvin Pope, Mr. Pope's younger brother, stated Mr. Pope began drinking at 14-15 years old. Mr. Pope drank a lot, and he was drinking heavily during the months before the assault on Alice. (R2675-76) Donnie Pope, Mr. Pope's brother, Wayne and Dennis Pope, Mr. Pope's nephews, and Mr. Pope's dad had drinking problems. Mr. Pope's dad was an alcoholic who drank to "a point

where he was an invalid before he would recover." (R2677-78)
Mr. Pope's dad was hospitalized a couple of times because of his
alcoholism. (R2670)

Wayne Pope saw Mr. Pope at Lester's house in the afternoon
before the assault on Alice. Mr. Pope, Alice, and Wayne were
drinking beer at Lester's. They left at 8:30 p.m. (R2791-92)
Later, Wayne saw Alice and Mr. Pope at Donnie's house on Ninth
Street. (R2793) They all drank beer. (R2794) Wayne and
"Buckwheat" returned to Donnie's house about 11:00 p.m. Mr.
Pope, Alice, and Marsha were there. Mr. Pope and Alice were
drinking beer. Wayne tried to sell food stamps to them. (R2795-
96) Wayne never heard Mr. Pope say he wanted to hurt Alice.
(R2797) Later, Alice drove Wayne and Buckwheat to Allen's
Discount when she went to the store to buy beer; however, the
store was closed. (R2799) Wayne drank all day and used "rock"
cocaine. (R2800)

Dr. Krop, an expert in the field of clinical and forensic
psychology, familiarized himself with the facts of Mr. Pope's
case and matters relating to Mr. Pope's alcohol abuse.
(R2718,2724-26) Dr. Krop classified Mr. Pope as an alcoholic
according to the criteria in the DSM-III-R (diagnostic manual.)
(R2727,2730) Dr. Krop indicated that one is likely to see brain
dysfunction in an alcoholic and thereby personality disturbance,
poor impulse control, or impaired judgment. (R2744) Alcoholics
frequently exhibit decreased motor coordination, increased
aggressive behavior, decreased memory function, mood swings and

emotional changes. (R2732-35) He testified that there is a higher incidence of alcohol use in domestic violence situations.

(R2746) Dr. Krop could not render a definitive opinion on Mr. Pope's mental state, psychology, or impairment at the time of the assault on Alice because the facts he had access to were not clear and he was not allowed to perform an evaluation on Mr.

Pope. (R2748-49) However, Dr. Krop indicated, if it was assumed that Mr. Pope was intoxicated at the time of the assault, it was possible that Mr. Pope's ability to conform his conduct to the requirements of the law was substantially impaired. (R2749)

SUMMARY OF THE ARGUMENT

ISSUE I The court erred in admitting Alice's hearsay statements in the form of excited utterances and dying declarations. With regard to the excited utterances, the state failed to prove the absence of reflection by Alice before the statements, that she was still under the mental stress at the time of the comments, or that she made the comments shortly after the startling event. Alice's other statements were not dying declarations in that she did not believe that her death was imminent as evidenced by her actions and her comment that charges of battery would be brought against Marsha. The admission of these statements were not harmless because they corroborated Marsha's inconsistent and untrustworthy testimony.

ISSUE II The admission of bloody and gruesome photographs and other evidence was erroneous in that most of the evidence was not relevant to prove any material issue and it was unduly prejudicial. The harmful error transformed the case from a domestic dispute involving an unintended killing to a case where the jurors passions and bias was inflamed from the mere existence of blood and gore.

ISSUE III The court erroneously admitted collateral crime evidence (prior battery on Alice) to prove motive and premeditation. First, there were no significant similarities between the crimes. The fact that an illegal touching occurred between the same parties is not sufficient to prove motive. Second, the prior battery occurred five months before the killing

and was not an integral part of the killing. There was no evidence of a causal connection between the battery or incarceration therefrom and the killing. Because the state attempted to prove that Mr. Pope was motivated by a desire for financial gain, not revenge or ill will, the collateral crime evidence was irrelevant. This error was exacerbated by other comments which disparaged Mr. Pope's character. The state cannot prove that the error did not contribute to the verdict.

ISSUE IV The court erred by refusing to give instructions that directly related to the defense offered at trial (Marsha was an accomplice) and by failing to give an instruction on the lesser included offense of third degree murder premised on an underlying aggravated battery. The court's refusal took a factual question regarding motive and Marsha's credibility from the jury treating them as issues of law for the court.

ISSUE V The prosecutor's comments during voir dire were more than "fairly susceptible of being interpreted as comments on silence" because the comments related to "admissions" and "guilt" of witnesses. Witnesses other than Mr. Pope would not be in a position to "admit" facts or have their "guilt" determined by the jury. The comments on Mr. Pope's right to remain silent were harmful because only he could state how much he drank the day of the assault or contradict the state's sole eyewitness's recitation of the facts. The trial court recognized that it was a comment on silence and that there was no appropriate curative instruction.

ISSUE VI The court committed reversible error when it infringed upon Mr. Pope's right to challenge or accept jurors by moving veniremen. This error was exacerbated by the court's viewing of and comment on the verdict forms prior to the end of deliberations.

ISSUE VII The court erred by refusing to consider three nonstatutory mitigating factors established by the evidence: (1) Mr. Pope did not know that Alice was alive when he left the scene, (2) Alice died from complications during recovery from the surgery necessitated by the assault, and (3) persons treated for Alice's type of wounds generally recover. These factors were extenuating circumstances and they reduced the degree of moral culpability of Mr. Pope's crime. The evidence in factor one related to aspects of Mr. Pope's character. The evidence in factors two and three describe circumstances beyond Mr. Pope's control and mitigate his moral culpability.

ISSUE VIII The sentence of death was disproportionate compared to other cases involving domestic disputes and the type of mitigation found to exist in this case. The facts of this case prove that an argument between Mr. Pope and Alice preceded the assault that ended in her demise. Specifically, the fight was over financial matters and/or sex. Mr. Pope's alcoholism and intoxication, his extreme mental and emotional disturbance, and his substantially impaired ability to conform his conduct to the requirements of the law place the facts of this case in line with those where the court remands for the imposition of a life

sentence.

The aggravating factor of "pecuniary gain" was supported only by one witness whose credibility was under severe attack and it is not clear that the primary motive for the killing was monetary. The second aggravating factor of a "prior felony" does not remove this case from the line of cases in which life was imposed because the harm to the prior victim, a stranger, was minimal. Finally, this court should not allow the death sentence to stand because there is a great chance that the sentence was premised on two factors that should not have been considered. First, the jury may have considered the fact that Mr. Pope refused to allow his attorneys to represent his interests during the penalty phase and concluded that he wanted the death penalty. Second, Alice died eight days after the assault from complications from the surgery necessitated by the assault and from circumstances beyond Mr. Pope's control.

ISSUE IX Florida's sentencing statute is unconstitutional because (1) there are inconsistencies in the manner in which the aggravating and mitigating factors are weighed leading to arbitrary results and (2) the failure to require a special penalty verdict creates the risk that invalid or inapplicable aggravating factors will be considered and weighed leading to arbitrary results.

ARGUMENT

ISSUE I

THE COURT ERRED IN ADMITTING EXCITED UTTERANCES AND DYING DECLARATIONS OF THE DECEASED

Appellant filed a written Motion in Limine and orally moved to exclude evidence of or references to statements made by Alice regarding the stabbing. (TR115-116) After the court ruled that statements made to Annie Lou Jones, Witcher, Giger, and Smithkey were not dying declarations, the State indicated that the statements to Witcher and Giger were admissible as "excited utterances." (TR265,269,444) At a subsequent hearing, the judge changed her mind and ruled the statements to Witcher and Giger inadmissible as excited utterances, the statements to Giger admissible as dying declarations, and the statements to Witcher, Jones, Swallows, and Smithkey⁵ inadmissible as dying declarations. At a later hearing, the court reversed her prior ruling and held that the statements to Witcher were admissible as dying declarations. (TR456-458,566-568,572-573) The court erroneously admitted trial testimony of Giger (dying declarations) and Mr. Tice and Wright (excited utterances) over counsel's objection. (R1375-80,1610) The State reiterated the statements during closing argument. (R2294-2298)

A. Excited Utterances

The essential elements necessary to fall within the excited

⁵At a subsequent hearing, the court wavered regarding the ruling on Smithkey. (R459)

utterance exception are that (1) there must be an event startling enough to cause nervous excitement; (2) the statement must have been made before there was time to contrive or misrepresent, and (3) the statement must be made while the person is under the stress of excitement caused by the event. State v. Jano, 524 So. 2d 660, 661 (Fla. 1988) (Child abuse victim's statements to babysitter and sitter's friend, defendant's mother, and child protection team (CPT) counselor inadmissible where the evidence fails to establish the timing of the statements and that the declarant was under the stress of the excitement at the time of the statement); section 90.803(2), Florida Statutes (1991). The factors which are considered to determine the presence of "stress" are declarant's age, physical and mental condition, the character of the event, and the subject matter of the statement. Id. The timing of the statement remains the most critical factor. Where the time interval between the startling event and the statement allows reflective thought, the statement will be excluded in the absence of proof by the state that the declarant did not engage in reflective thought. It is an exceptional case where a statement made more than several hours after the event is admissible. State v. Jano, 524 So. 2d at 662-63.

In the case at bar, the following statements were admitted over defense counsel's objection. First, Mr. Tice testified that Alice told him her "boyfriend" beat her up. Second, officer Wright testified that Alice told him her "boyfriend" beat her up and kicked her in the head, he took her car keys and car, he left

with a female relative of his, he left Alice for dead, and she had to kick down the bathroom door.

There was conflicting evidence presented regarding the timing of the statements. Mr. Tice said Alice arrived at 11:30 p.m., the police arrived 2-3 minutes later, and the paramedics arrived 10-15 minutes later; paramedics Giger and Witcher stated they arrived at 1:46 a.m.; Wright arrived at 1:38 a.m.; and Wanda stated that Mr. Pope was at her trailer telling her about the stabbing at 1:00 a.m. The testimony suggests that the stabbing occurred well before 1:00 a.m. since Mr. Pope had to drive Marsha to the creek where he threatened her, she had to talk him into letting her go, he had to drive her to a friend's house (16 1/2 miles), and Mr. Pope had to drive back to Wanda's house (11 1/2 miles). The 911 calls from the friend's house were made at approximately 2:00 a.m. (R1360,1384,1395,1400,1414,1709-10,1766,1769-71) The fact that there is conflicting and confusing evidence regarding the timing of the stabbing is indicative of the state's failure to prove the admissibility of the statement.

Furthermore, the State did not prove that there was an absence of reflection between the stabbing/startling event and the statement, and the evidence allows the inference that Alice engaged in reflective thought. Alice had time to break the bathroom door to escape, decide to go to the Tice residency across the street even though there were two houses next to the Pope residence that were much closer, and to drag herself 100

feet across the street after the stabbing/beating. (R1380) Not only did the state fail to prove that Alice did not engage in reflective thought before her statement to Mr. Tice but it also failed to prove that Alice was still under stress at time of the statements.

Although, Alice's body was physically ailing from the stabbing, it is not clear that she was still mentally stressed from the stabbing. Her mental condition was described as coherent (Mr. Tice), alert (Giger), and alert and oriented (Witcher). Earlier, Alice warned Marsha that she would be prosecuted for battery. She asked Mr. Tice to call her son indicating she was concentrating on things other than the startling event. Alice's wounds were not the type that would normally cause death, and it can not be presumed that she would have thought otherwise. The fact that Alice mentioned a simple battery as opposed to a homicide to Marsha and that Alice was able to choose which house she wanted to go to for help is indicative of the absence of both her belief in her immediate death and the lack of mental excitement from the event. In Carver v. State, 344 So. 2d 1328, 1331 (Fla. 1st DCA 1977), the court stressed the importance of the absence of evidence that the victim was dazed, excited, hysterical, bruised, or disheveled. Clearly, if the statements made to Mr. Tice were erroneously admitted, the subsequent statements to Wright would be inadmissible.

In Salter v. State, 500 So. 2d 185, 186 (Fla. 1st DCA 1986),

the court held that the statements made by a child victim regarding sexual abuse to a CPT counselor were inadmissible as an "excited utterance" because the statements were made several hours after the startling event, the state failed to prove the victims "excited" state of mind, and the state failed to prove the absence of time to reflect or deliberate. Both Salter, and State v. Jano involved child sexual abuse cases where the courts more liberally apply the evidentiary rule regarding admission of hearsay statements. State v. Jano, 524 So. 2d at 662.

Statements made "possibly as much as an hour after the altercation," or 2½ hours later are inadmissible. State v. Smith, 579 So. 2d 906, 907 (Fla 5th DCA 1991); Hamilton v. State, 547 So. 2d 630 (Fla. 1989) (Harmless error to admit statement made 2 1/2 hours after shooting where the statement may have been influenced by comments made by others at the scene); Preston v. State, 470 So. 2d 886 (Fla. 2d DCA 1985) (Statements made 1-2 hours after sexual battery are inadmissible); White v. Ill., 502 U.S. 346, 116 L. Ed. 2d 848, 112 S. Ct. 736 (1992).

In this case, there was evidence from Marsha that after the altercation Mr. Pope washed his hands in the kitchen, Mr. Pope got a beer, Marsha and Mr. Pope left the house, Marsha returned and spoke to Alice, and Alice told her she would be charged with battery. Then Alice still had to break the bathroom door and walk across the street before she spoke to Mr. Tice. Alice's comments and actions show deliberate thought processes unrelated to the stabbing.

The admission of this testimony was not harmless error in that it corroborated Marsha's crucial and sole eyewitness testimony. This testimony was filled with inconsistencies and Marsha's admission that she was "making things up." It also corroborated Marsha's testimony in which she denied the statements she made to defense witnesses regarding her participation in the crime. The latter was a major defense theory. Without this testimony, the only testimony regarding the stabbing would have come from Marsha, and therefore the testimony was highly prejudicial. See Preston at 837; McCrae v. State, 383 So. 2d 289 (Fla. 2d DCA 1980). It can be inferred that the jury disbelieved Marsha's testimony regarding the kidnapping because it was unsupported by other evidence and impeached by defense witnesses. The state cannot prove that the excited utterances which corroborated Marsha's testimony did not contribute to the guilty verdict.

Furthermore, this evidence became a feature of the trial because four separate witnesses testified to Alice's statements and the state referred to the evidence at closing. It is important to note that Alice only offered information about her stab wounds, the only wounds that eventually and indirectly caused her death, after she was told that she had been stabbed. Her rational and deliberate response was a retrospective description of a past event prompted by outside influences, not an excited response to a startling event. The error produced by admission of this testimony was exacerbated due to the fact that

the court made conflicting decisions regarding its admission and hampered defense counsel's preparation of its defense.

B. Dying Declarations

The court erroneously admitted over defense counsel's objection the dying declarations of Alice through emergency medical technician Giger. (R1657) Specifically, Giger stated that Alice said her "boyfriend" beat her up, kicked her with his cowboy boots, and stabbed her.

Prior to admission of a "dying declaration," Florida law requires the court to determine from the "totality of the circumstances that the victim knew and appreciated his condition as being that of an approach to certain and immediate death." The predicate for admission of the dying declaration is a mixed question of law and fact. The trial court's decision will not be disturbed unless it is clearly error. Henry v. State, 613 So. 2d 429, 431 (Fla. 1992), cert. denied, 114 S. Ct. 699, 126 L. Ed. 2d 665 (1992). Alice's physical condition did not warrant a feeling that she was going to die and her actions, as noted infra in Issue I(a), show that she understood her condition. This case is not like the cases wherein the victim's injuries were much more serious and the Florida courts admit the hearsay. Price v. State, 538 So. 2d 486, (Fla. 3d DCA 1989), appeal after remand, 602 So. 2d 994 (Fla. 3d DCA 1992) (Victim received three gunshots including one to the heart and he was bleeding profusely.); Mills v. State, 264 So. 2d 71 (Fla. 1st DCA 1972) (Victim's throat was slashed from ear to ear.) Teffeteller v. State, 439

So. 2d 840 (Fla. 1983), cert. denied, 104 S. Ct. 1430, 465 U.S. 1074, 79 L. Ed. 2d 754, appeal after remand, 495 So. 2d 744 (Fla. 1986) (Doctor indicated that due to the nature of the severe abdominal wound and victim's lucidity, he knew that death was imminent). Torres Arboledo v. State, 524 So. 2d 403 (Fla.), cert. denied, 109 S. Ct. 250, 498 U.S. 901, 102 L. Ed. 2d 239 (Statement made immediately after the victim was shot.) Alice's actions as described in Issue Ia infra indicate that she did not believe her death was imminent.

The most important factor is that the state did not prove that Alice knew that she had been stabbed until she was asked who stabbed her. She actually told Wright that she thought the origin of the blood was her head. Certainly she would have divulged this information to the treating EMT if she thought her life was in danger. Giger indicated that Alice never said she was going to die whereas Witcher stated that Alice said she was going to die. The EMTs did not tell Alice the status of her condition. (R223-24,233-24) Alice told Marsha she would be charged with battery, not murder or even attempted murder. Alice went for help at the Tice residence instead of one of the houses that was closer to the scene.

The doctors indicated that Alice's wounds were the type that normally do not cause death. The cause of Alice's death eight days after the assault was not directly from the stab wounds but from the complications caused by the surgery necessitated by the wounds. The totality of the circumstances indicate that Alice

knew that her death was not imminent. The admission of this evidence was not harmless because it corroborated Marsha's crucial testimony which was filled with inconsistencies. (See Issue Ia infra.)

The erroneous admission of the excited utterances and the dying declarations denied Mr. Pope his due process rights and his right to confront witnesses pursuant to Article I, Section 9 and 16 of the Florida Constitution, and under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

ISSUE II

THE COURT ERRED IN ADMITTING INFLAMMATORY PHOTOGRAPHS AND OTHER EVIDENCE

The state sought to introduce numerous photographs at a pretrial hearing. The court denied in part and granted in part defense counsel's objections and written motion in limine regarding the photographs and physical evidence. The objections were based upon the unduly prejudicial effect of the photographs, the relevance of the photographs to material issues or testimony, the cumulative nature of the photographs, and the gruesome nature of the photographs. (TR113,471-596;R989-94,998,1001,1429,1545-46,1550,1554,1581-85,1755) The court erred in admitting the objectionable photographs.

Relevant photographs are properly admitted unless their relevance is outweighed by their prejudicial effect. Jones v. State, 19 Fla. L. Weekly S577, 581 (Fla. November 10, 1994); Haliburton v. State, 561 So. 2d 248 (Fla. 1990). Autopsy photographs are admissible where it is relevant to show the condition and location of the body when discovered or to assist the medical examiner in explaining conditions of the victim's clothing or nature of his injuries and cause of death. Id; See also Czubak v. State, 570 So. 2d 925 (1990). Pictures depicting bloody clothes are admissible to explain how murders occurred. Hannon v. State, 19 Fla. L. Weekly S447 (Fla. June 2, 1994).

In this case, the court admitted gruesome and inflammatory pictures that were not relevant and served to inflame the jury and prejudice Mr. Pope. In particular, state's exhibits 5WW,

5XX, 5YY (8 x 10 color photos of Alice's clothes covered in blood), 5ZZ (8 x 10 color photo of the blood stained contents of Alice's wallet), 5FFF, 5GGG, 5III, 5S-5U, (4 x 6 color photos of the bathtub covered in blood, bathroom floor covered in pools of blood including clotted blood and the bloody knife, bloody toilet and sink including pools of clotted blood) were extremely inflammatory and cumulative to testimony of trial witnesses describing the scene of the crime. These pictures depicting pools of blood did not prove any material fact in issue. The defense never produced evidence or testimony to counter the State's testimonial evidence that Alice was stabbed in the bathroom nor was identity an issue. The state proved the stabbing by introducing Marsha's eyewitness testimony, testimony of medical personnel and a medical examiner regarding her wounds and cause of death, and the actual evidence depicted in the pictures including Alice's clothes and the knife. The pictures were not relevant to show the condition or location of Alice's body since she had already left the scene on her own. The state would not have been forced to try the case in a vacuum if the photographs had been excluded. Numerous witnesses testified regarding the enormous amount of blood at the scene. (R1329-32,1439,1444-48,1713) The gruesome pictures of the blood in the bathroom served no purpose other than to inflame the passions of the jury.

Although photographs of homicide scenes are often bloody, the pictures in the case at bar contained puddles of blood,

smearred blood, and clotted blood in an amount that most jurors, unaccustomed to such scenes, would find gruesome and horrifying. The trial court remarked, "I tend to agree with defense counsel. These are horrible." The prosecutor replied, "No question they are..." (R473) Furthermore, the majority of the gruesome pictures in this case were enlarged to 8 x 10 and extreme close-up shots were depicted in the photographs. It is important to note that the photographs presented to the trial court at the pretrial hearing were not enlarged. Therefore, the court's decision to admit the photographs was made after viewing less graphic evidence. The state did not use the photographs to prove how the murders occurred, as is often done through blood spatter evidence. Hannon, 19 Fla. L. Weekly at S447. The court abused its discretion by allowing the submission of the inflammatory pictures to the jury. The admission of Alice's blood soaked clothes could only serve to further inflame the jury's passions. Again, there was no dispute regarding the fact that Alice was stabbed and bleeding. Therefore, the prejudicial effect of the admission of the ripped bloody clothes clearly outweighed any perceived probative value. The shorts were blood soaked yet the stabbing occurred on Alice's upper back making the condition of the shorts non-relevant and the EMTs had cut the shirt to treat Alice.

The court admitted eight color 8 x 10 autopsy photographs. Although, some of the photographs may have been probative in that the medical examiner referred to them during his testimony, the

admission of all of the photographs was unduly prejudicial. Further, the prejudicial impact outweighed the probative value because the medical examiner merely mentioned the existence of bruises when he showed the jury four of the five admitted photographs. There was ample testimonial evidence regarding Alice's bruises, and the state's witness conceded that these bruises did not contribute to or cause death. Exhibits 52A, 52B, 52C, 52F, and 52H all depicted bruises, not the stab wounds. These pictures were not relevant to prove cause of death, identity, or premeditation and the court abused its discretion in admitting five non-relevant inflammatory photographs, including close-ups. The court should have admitted one photograph, 5G, which depicted the stab wounds and some bruises. See Mordenti v. State, 630 So. 2d 1080, 1084 (Fla. 1994). Again, since there was no dispute regarding the existence of two stab wounds and bruises, nor any claim that the photographs were necessary to prove any particular issue, the pictures were not relevant. See Maret v. State, 605 So. 2d 949, 950 (Fla. 3d DCA 1992).

The admission of the photographs and physical evidence listed herein and objected to at trial was not harmless error. These gruesome and extremely bloody pictures turned this case from a domestic dispute involving an unintended death to one where the juror's passions became inflamed from the mere existence of enormous amounts of blood. See State v. DiGuilio, 493 So. 2d 1129 (Fla. 1986). As defense counsel stated when the court admitted the bloody gruesome photographs, "... its end of

the case." (TR596-98)

This case involved severe bruises and two stab wounds, without defensive wounds. The words "I love you" were spoken by Alice and Mr. Pope during the assault. Clearly this was a case involving heightened passions which the state tried to transform into a cold, calculated murder by inflaming the juries passions with blood and gore. The bruises and two knife wounds pale in comparison to the depiction of blood lost with respect to emotional effect on the jury. The state cannot prove that the harmful effect of the blood and gore did not contribute to the verdict. Even the state and the court, persons who have seen these type of pictures many times before, admitted their highly prejudicial and horrifying nature. Even in cases where the photographs are relevant, when the gruesomeness is so inflammatory as to create an undue prejudice in the jury's mind and distract them from a fair and unimpassioned consideration of the facts, the harmful photographs are not admissible. Czubak, 570 So. 2d at 928.

This error denied Mr. Pope his rights to due process and a fair trial under Article I, Section 9 and 16 of the Florida Constitution, and under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

ISSUE III

THE COURT ERRED IN ADMITTING EVIDENCE OF OTHER CRIMES AND BY NOT GIVING ANY JURY INSTRUCTION ON MOTIVE

Mr. Pope filed a Motion to exclude Williams⁶ rule evidence pursuant to the State's notice of intent to use Williams rule evidence to prove motive and premeditation. (TR21,69,118) The court ruled that the evidence regarding a prior battery charge against Alice by Mr. Pope was admissible. (R487) Six witnesses testified about the incident over defense counsel's objection. (R1183,1215,1811) The admission of this evidence as Williams rule evidence and to prove motive was erroneous.

Section 90.404(2), Florida Statutes (1989) expresses the general rule that the prosecution may not offer testimony during its case-in-chief of the accused's past character to prove that the accused committed the crime in question. In particular, similar fact evidence that the accused committed a collateral offense is inherently prejudicial because the introduction of this evidence creates the risk that a conviction will be based on the accused' bad character or propensity to commit crimes. Williams at 662. Where the cases involve significant dissimilarities between the collateral crime and the crime charged, the evidence tends to prove propensity and bad character and is inadmissible. Gore v. State, 599 So. 2d 978 (Fla. 1992). However, "[E]vidence of collateral crimes may be admissible to establish the entire context out of which the alleged criminal

⁶Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S. Ct. 102, 4 L. Ed. 2d 86 (1959).

conduct arose." State v. Richardson, 621 So. 2d 752, 755-757 (Fla. 5th DCA 1993) (citations omitted). The latter cases focus on the time frame in which the offenses occurred and the causal connection between the offenses. Whereas, the focal point of analysis for the admission of Williams rule evidence that has been determined to be relevant to a material issue of either motive, plan, knowledge, identity, or absence of mistake or accident is whether there is actually any striking similarity between the alleged misconduct and the crime. Garron v. State, 528 So. 2d 353 (Fla. 1988).

In Garron, the court admitted evidence of sexual misconduct against appellant's stepdaughters two years before the killings of the stepdaughter and Appellant's wife. Prior to the killings, the wife and Appellant argued because the stepdaughter said Appellant just touched her thigh and made an obscene remark. This Court found this evidence was not relevant to prove motive for the killings, was too remote in time, and was too tenuously connected to the killings. In this cause, the evidence regarding the prior battery was inadmissible for the same reasons.

First, there was no evidence that the prior argument proved or tended to prove Mr. Pope's motive for the killings, and it was not relevant. The state admitted that it could not prove that Mr. Pope formed the intent to kill during his incarceration for the battery. Although the letters written by Mr. Pope to Alice during his incarceration were not admitted as evidence to the

jury, the state argued pretrial that these letters proved that, as a result of his incarceration, Mr. Pope harbored ill will, hatred, and bad feelings toward Alice and had a reason to harm Alice.⁷ (TR300-3011,316) The fact that Mr. Pope was incarcerated did not prove any material issue in that the state did not prove any link between it and the killing. In fact, the state argued at trial that Mr. Pope's motive for the killings was for pecuniary gain, not for vengeance for the incarceration. None of the details of the battery prove advance planning to kill Alice or any common scheme. Furthermore, motive is not an element of the crime and its only relevance is that it tends to be probative of identity which was not at issue in Mr. Pope's case.

Second, the battery was too remote in time in comparison to the killings, to wit: almost five months apart⁸. (TR272) See Barwicks v. State, 82 So. 2d 356 (Fla. 1955); Hutchinson v. State, 102 So. 2d 44 (Fla. 2d DCA 1958). Third, the battery was not similar to the killings. The state's evidence showed that the battery involved an argument whereas the state argued that no argument preceded the killings. Clearly, the killing was not an integral part of the battery which occurred five months earlier.

⁷ The trial expressed its concern about allowing the evidence to prove motive but not to prove a prior bad act by Mr. Pope. (R1197)

⁸ The fact that the killings occurred less than two months after Mr. Pope's release is not relevant absent proof of his evil intent forming during incarceration which the state admitted it could not prove.

The trial court erroneously admitted this evidence. As in Garron, this court should not have allowed the evidence to prove motive. The battery and the killing did not share unique characteristics which set them apart from other offenses and the collateral evidence was inadmissible on this ground, as well. Turtle v. State, 600 So. 2d 1214, 1217 (Fla. 1st DCA 1992).

In this case, the similarities between the battery and the killing are the same parties and an unlawful touching. These similarities are not "strikingly similar" as is required for the admission of collateral crime evidence. Edmond v. State, 521 So. 2d 269 (Fla. 2d DCA 1988); Thompson v. State, 494 So. 2d 203 (Fla. 1986); Fulton v. State, 523 So. 2d 1197 (Fla. 2d DCA 1988); Turtle. In fact, there were no witnesses that could provide details of the circumstances surrounding the battery. See Selver v. State, 568 So. 2d 1331, 1333 (Fla. 4th DCA 1990). There was no logical connection between the battery and the killing and the battery was irrelevant to prove motive.

The collateral evidence became a feature of the trial. Six witnesses testified about the battery. The testimony inflamed the passions of the jury because it painted a picture of Mr. Pope as a chronic domestic abuser. The testimony confused the issues by inferring that Mr. Pope's motive was revenge for his incarceration. Even when Williams rule evidence is admissible, the evidence cannot become a feature of the trial either quantitatively or qualitatively. As stated above, the collateral evidence in Mr. Pope's case violated this rule.

"Our justice system requires that in every criminal case the elements of the offense must be established beyond a reasonable doubt without resorting to the character of the defendant or to the fact that the defendant may have a propensity to commit the particular type of offense. The admission of improper collateral crime evidence is 'presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged.'" Peek v. State, 488 So. 2d 52, 56 (Fla. 1986).

In Smith v. State, 344 So. 2d 915, 918 (Fla. 1st DCA 1977), disapproved in part, Ruffin v. State, 397 So. 2d 277 (Fla. 1977), the court reversed because the extensive testimony concerning the cover-up of the murder became a feature of the case. The court looked at three factors in making its determination: (1) to what extent is the objectionable evidence relevant; (2) the necessity of the testimony; and (3) the "quality" of the testimony, i.e., whether it was related to material issues or more inclined to demonstrate bad character of the accused.

In Mr. Pope's case, (1) the evidence of the battery was not relevant to prove motive and the state theorized that the motive was greed, not vengeance or ill will related to the battery; (2) the testimony was not necessary because it was unrelated to the facts surrounding the killing; and (3) the evidence was of poor quality because it was remote in time and merely portrayed Mr. Pope as chronic abuser. As in Smith, the collateral bad act evidence should have been excluded.

The admission of the evidence of the battery was not harmless and its probative value was outweighed by the unfair prejudice it created. Section 90.403(2), Florida Statutes (1989). The evidence tended to show that Mr. Pope routinely engaged in domestic violence, and thereby he had a bad character and a propensity to commit crimes. As indicated above, the state failed to prove that Mr. Pope's motive for the killing was connected to the battery. This theory was only proposed at the pretrial hearing in which the evidence was found admissible. The state's theory at trial was Mr. Pope was motivated to kill by a desire for Alice's car and money - - greed not vengeance. The effect of the collateral evidence was to portray Mr. Pope as a chronic abuser, a scenario which inflames the passions of a jury because of the large amount of publicity surrounding domestic violence. This evidence was not cumulative to any other evidence and was presented through the testimony of six separate witnesses.

Marsha's credibility was under considerable attack, including all of her testimony regarding Mr. Pope's motive. In fact, her testimony was the only direct evidence regarding motive. Clearly, the jury did not accept all of her testimony and entered a verdict of not guilty regarding kidnapping. The collateral crime evidence was presented by witnesses whose credibility was not under attack but who provided the jury with a reason to distrust and dislike Mr. Pope on the basis of bad character or propensity to commit crimes. Any relevance was

substantially outweighed by prejudice and confusion. Williams rule evidence is presumed to infect the entire proceeding with unfair prejudice and is presumed harmful. The state cannot prove beyond a reasonable doubt that this error did not contribute to the guilty verdict. State v. DiGuilio; Silver; Peek, 488 So. 2d at 56.

Additionally, it is likely that the collateral crime evidence affected the penalty phase. Although the prosecutor could not tell the jury about Mr. Pope's prior nonviolent misdemeanors or bad acts in the penalty phase, the evidence was already before the jury because of its admission in the guilt phase. The jury may have reached a verdict for life if the evidence had not been admitted to show Mr. Pope was a chronic abuser.

The above error was exacerbated by other inherently prejudicial comments which disparaged Mr. Pope's character. First, a officer testified that Mr. Pope was taken into "custody" at Lake Shipp park. The trial court admitted that evidence that Mr. Pope was arrested at the park was "too prejudicial" and inadmissible. The court reserved its ruling on a motion for mistrial indicating that the comment was only that Mr. Pope was taken into "custody". However, the court admitted, "I don't know how it would come up, that he might take him into custody other than he had arrested him." (R1294-1300,1310-1313,1323)

Subsequently, Lester Pope, was asked by the state whether he was aware that Mr. Pope was arrested and taken into custody to which

he replied, "Yeah. But for her being beat up, is that what you're talking about." (R1333) Defense counsel renewed the motion for mistrial and the court denied it noting that the motions for mistrial were cumulative. (R1468) Statements about a prior jail sentence are always prejudicial. References to a defendant's past contacts with law enforcement have been deemed error in numerous cases. See Henderson v. State, 463 So. 2d 196 (Fla. 1985) (defendant wanted by other states); Loftin v. State, 273 So. 2d 70 (Fla. 1973) (reference to mug shots).

Second, counsel's objection and motion for mistrial was denied after a police officer described Mr. Pope as "... a person that [another officer] had arrested --." (R951-952,973-974) These references to a prior arrest were harmful, damaged Mr. Pope's character, and proved nothing. Id.

Finally, the court denied defense counsel's motion to strike Marsha's comment that she was afraid to go to the police station because she was afraid of Mr. Pope and defense counsel's objection to the state eliciting the same testimony from an officer. (R2141-2143) The court had ruled earlier that the state could not present this evidence. (R1435-1438) The comments regarding the prior arrest and Mr. Pope being someone to be feared were improper and inflammatory. See Jackson v. State, 598 So. 2d 303 (Fla. 3d DCA 1992); Stone v. State, 626 So. 2d 295 (Fla. 5th DCA 1993). The cumulative effect of these three errors and the admission of the collateral crime evidence was to deny Mr. Pope a fair trial on the issues.

Although defense counsel did not request a jury instruction as to the relevance of the collateral crime evidence solely to prove motive and not to supplant proof of the crime charged, it was fundamental error not to give such an instruction. See section 90.402(2)(b)2, Florida Statutes (1991). The prejudice of the evidence was aggravated by this omission. Without the instruction, there was an impermissible risk that the jury based its verdict on evidence that Mr. Pope had a bad character and/or was a chronic domestic abuser.

Mr. Pope's conviction denied him his right to due process, confrontation of witnesses, and a fair trial under Article I, Sections 9 and 16 of the Florida Constitution and the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution.

ISSUE IV

THE COURT ERRED IN FAILING TO GIVE DEFENSE COUNSEL'S REQUESTED INSTRUCTIONS ON THIRD DEGREE MURDER, ACCOMPLICES, AND OTHER LESSORS

The trial court denied defense counsel's request to instruct the jury regarding third degree murder, accomplices, and the receipt of preferential treatment or benefit by a witness.

(R2212-2213,2231,2236) The court erred in refusing to give instructions that directly related to the defense offered at trial and by failing to give an instruction for a lesser included offense supported by the facts.

A. Lesser of Third Degree Murder

It is erroneous in a first degree murder case for the court to refuse to give an instruction for third degree murder where there is evidence that the killing was done during the commission of one of the underlying felonies of third degree murder regardless of the allegations in the supporting documents.

Herrington v. State, 538 So. 2d 850 (1989); Peterson v. State, 19 Fla. L. Weekly D1815 (Fla. 2d DCA August 26, 1994); Fletcher v. State, 19 Fla. L. Weekly D1705 (Fla. 4th DCA October 10, 1994).

In Herrington, the defendant was charged with and convicted of second degree murder. Herrington claimed that the victim threatened him, Herrington pointed a gun at the victim, and the gun accidentally misfired. This court held that the facts supported an instruction of third degree murder premised on the underlying felony of aggravated assault and the error was not

harmless. Similarly, other courts have held that it is reversible error to refuse to give a third degree murder instruction based upon the underlying felony of aggravated battery. See Elkin v. State, 636 So. 2d 570 (Fla. 3rd DCA 1994); Garcia v. State, 574 So. 2d 240 (Fla. 1st DCA 1991).

As in Garcia, Mr. Pope did not beat Alice to death, one stab wound was superficial, and the other stab wound only indirectly caused Alice's death eight days after the assault. There was ample proof of Mr. Pope's intoxication and the proof of premeditation was from one untrustworthy source, Marsha. A likely scenario is that the stabbing was done without a premeditated intent to kill in that Mr. Pope was extremely intoxicated. Furthermore, the state argued that the death occurred as a result of Mr. Pope's commission of theft of Alice's car. This scenario would support the third degree murder instruction if the jury believed that the theft and the assault were not one continuous series of events and thereby not a robbery. There is ample evidence to support this. Marsha heard Mr. Pope and Alice fighting while they were engaging in sexual intercourse and in the bathroom afterwards. Marsha intervened because she thought the sex was not consensual. (R1852,1904-1906) These facts support the premise that Mr. Pope and Alice were fighting over sex, not the use of a car. The court's sentencing order stated, "There was testimony that they had what, at least, concluded as consensual sex and that the Victim had retired to the bathroom to clean herself shortly before the attack began."

Mr. Pope had been seen in Alice's car on numerous occasions and may have presumed he had permission to use the car in his intoxicated and passionate state. There was evidence that Marsha removed the car keys from Alice's pocket, not Mr. Pope. Mr. Pope may have formed the intent to steal the car after the beating to avoid an arrest. See Garcia v. State, 614 So. 2d 568 (Fla. 2d DCA 1993).

The court's refusal to instruct the jury took a factual question from the jury, treating it as an issue of law for the court. The jury may have determined that Mr. Pope committed the crime of aggravated battery or grand theft, and thereby third degree murder if it had been instructed on this. Although third degree felony murder is a permissive (category 2) offense, the failure to give the instruction in this case was not harmless error because it was supported by the facts stated above.

B. Lessers of Aggravated Battery and Battery

The above error was exacerbated by the court's failure to give the instruction on aggravated battery and battery. In cases where there is an issue for the trier of fact as to whether the death was caused by the defendant's act or some other cause, the defendant is entitled to non-homicide lesser included offense instructions. Rossi v. State, 602 So. 2d 614 (Fla. 4th DCA 1992).

In Rossi, the court determined that the defendant was entitled to instructions on aggravated battery and battery where the victim died after a bar brawl with the defendant and there

was evidence of one other blow from another person. Similarly, as stated above, there was evidence presented that Marsha stabbed Alice. Even if the jury believed that Mr. Pope also stabbed Alice, only one of the stab wounds created the need for the surgery that ultimately and indirectly caused her death. Because the jury did not receive either the accomplice or the aggravated battery instructions, they were not able to decide the factual issue of Marsha's involvement.

C. Accomplice Instruction

The court's refusal to give the instruction relating to accomplices (2.04(b)) was error in that it directly related to the defense offered at trial, to wit: that Marsha was lying about the assault to hide her involvement. The accomplice instruction "is intended to be used when the state presents the testimony of an accomplice whose motivation for testifying against his colleague and cooperation with the state may be substantially influenced by his own self interest." Robinson v. State, 589 So. 2d 437 (Fla. 3d DCA 1991). A defendant is entitled to the instruction if there is evidence to support it. See Robinson v. State, 574 So. 2d 108 (Fla. 1991).

There were numerous witnesses that described Marsha's involvement in the crime. Their testimony was that Marsha admitted she handed the knife to Mr. Pope, she stabbed Alice, and she took the car keys. Although she stated that Mr. Pope made her do these things, Marsha told the witnesses she was able to beat Mr. Pope during wrestling, a witness thought she was only

"acting" hysterical after the assault on Alice, witnesses indicated that she had a reputation for being untruthful, witnesses saw Marsha with the likely proceeds of the assault on the day after, Marsha's testimony was inconsistent, and she admitted to making things up. The fact that the state did not pursue any charges against Marsha and presented her as an unwilling participant in the killing would not preclude the jury from determining otherwise. The jury did not believe Marsha's testimony regarding the kidnapping. It is plausible that the verdict would have been different if the instruction had been given and the jury considered this issue.

Based upon the cumulative effect of the trial court's refusal to give each of the requested jury instructions, Mr. Pope's right to a fair trial and due process of law was denied. See Garron, 528 So. 2d at 359 (cumulative prosecutorial misconduct overstepped the bounds of zealous advocacy).

This error violated Appellant's rights to due process and his right to a fair trial under Article I, Sections 9 and 16, of the Florida Constitution, and under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

ISSUE V

THE PROSECUTORS'S COMMENTS ON MR. POPE'S RIGHT TO REMAIN SILENT WERE REVERSIBLE ERROR UNDER THE STATE AND FEDERAL CONSTITUTIONS

During voir dire, the prosecutor made the following comments,

But your feelings concerning the use of alcohol wouldn't be so strong that you would -- *assuming someone takes the stand and they're testifying and they admit to using alcohol and maybe using alot of alcohol, or there's testimony about someone having used alcohol, would you just sort of automatically become prejudiced towards that person to the point that you would form an opinion about their truthfulness or their *guilt* or anything of that nature?(emphasis added)* (R394)

Counsel moved for a mistrial based upon the prosecutor's comment on Mr. Pope's right to remain silent. (R395-396,402) The court acknowledged the error, noted that only the defendant "admits" facts when testifying, and denied the motion stating, "I'm going to take it as it needs to be at this point, I think it's harmless because of the way you asked. If you get close again, I'm going to have to grant it. Forget the word 'admits'". (R396-397) The court's denial of the motion for mistrial denied Mr. Pope of his right to a fair trial and due process.

Florida has a very liberal rule for determining whether a comment constitutes a comment on silence: "any comment which is fairly susceptible of being interpreted as a comment on silence will be treated as such." State v. DiGuilio, 493 So. 2d at 1135. The state must prove beyond a reasonable doubt that the error did

not contribute to the verdict or there is no reasonable possibility the error affected the verdict. Id; King v. State, 623 So. 2d 486 (Fla. 1993). The state's comment in this cause clearly was a comment on the right to remain silent. The state clearly talked about two type of witnesses: those that take the stand and "admit" facts and those that take the stand and testify "about someone" else doing something. Only Mr. Pope was in the position of having to admit or deny facts relating to his intoxication and guilt. See Abreu v. State, 511 So. 2d 1111 (Fla. 2d DCA 1987). The state was aware that Mr. Pope's counsel considered raising the defense of intoxication. The state prefaced its remark with the statement, "assuming someone takes the stand" because it was aware that Mr. Pope may not take the stand. In fact, considering Mr. Pope's declaration not to present mitigation evidence and his attempt to restrict defense counsel's cross examination of witnesses during the guilt phase, it was reasonable to assume that he would not take the stand. In addition, the state specifically asked the venire whether they would judge a person's "guilt." It was the state's duty to refrain from making such blatant and improper remarks which would tend to affect the fairness and impartiality of the jury.

The court erred in determining that the comment was harmless error. Mr. Pope alone had the information to contradict Marsha's testimony. Only Mr. Pope could describe the effect of the alcohol he consumed on the day of the assault. This was not a comment on a possible defense of intoxication. This comment

highlighted Mr. Pope's decision not to either testify or attempt to rebut Marsha's testimony. The trial court admitted that there was no "appropriate" curative instruction. See Stone v. State, 548 So. 2d 307 (Fla. 2d DCA 1984); Marshall v. State, 473 So. 2d 688 (Fla. 4th DCA 1984), quashed 476 So. 2d 150 (Fla. 1985); Abreu; State v. DiGuilio.

This error violated Appellant's rights to due process and a fair trial under Article I, Sections 9 and 16, of the Florida Constitution, and under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

ISSUE VI

THE COURT COMMITTED REVERSIBLE ERROR WHEN IT CHANGED THE ORDER OF THE VENIRE AND EXAMINED THE VERDICTS BEFORE THE JURY DELIBERATIONS WERE COMPLETED

The court violated Mr. Pope's right to a fair and impartial jury. During selection of alternate jurors, the court moved three jurors from the beginning of the list of available jurors to the end of the list after they had been questioned by the attorneys. Defense counsel objected to the court's procedure and requested that the three jurors be replaced. Defense counsel specifically requested to use one of the jurors (#302) that the court was removing from consideration. The court stated, "I don't want you to take 302. I think you're going to queer the trial and we're going to wind of [sic] doing it over again. You objected to that person twice last night." Counsel correctly stated that he had exercised a preemptory challenge on #302 during selection of the main jury panel, but withdrew the challenge when all parties determined they had 12 not 11 jurors. After a recess, the court indicated that counsel could choose one of the three jurors she had removed. Counsel objected again.

(R750)

"A trial court has no authority to infringe upon a party's right to challenge any juror, either peremptorily or for cause, prior to the time the jury is sworn." Gilliam v. State, 514 So. 2d 1098 (Fla. 1987); Price v. State, 538 So. 2d 486 (Fla. 3d DCA 1989); Fla. R. Crim. Proc. 3.310. The denial of this right is per se reversible error. Gilliam. In Gilliam, the defendant was

acting pro se with standby counsel. He did not challenge any jurors until, after the state's jury selections, he sought to strike the entire panel as a whole or as many as he could peremptorily challenge. The trial court's refusal to allow the defendant to challenge the jurors was held to be reversible error. In Mr. Pope's case, the effect of the trial court's actions was to abridge his right to challenge and to accept particular jurors before the jury panel was sworn. Counsel repeatedly objected and specified which juror he would accept if the court did not change the order of the venire. Although defense counsel originally struck #302 during selection of the main jury panel, he withdrew that strike when defense counsel, the state, and the court recognized that they already had 12 jurors, not 11. The court could not require counsel to strike #302 when alternates were being chosen nor did the court articulate any reason to strike for cause any of the three jurors that she removed. The court's unilateral removal of the three jurors without legal cause was error and was not supported on the record. See Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990).

This error was exacerbated by another error in which the court failed to exhibit an absence of bias. Specifically, during an overnight recess in the deliberations, the court looked at and commented on the verdict forms. In fact, it was fairly clear that the only verdict form that had not been completed was the one for the kidnapping charge. The trial court's statement combined with the jury's immediately preceding question whether

it had to determine whether the homicide was premeditated or felony murder amounted to an illegal announcement of the verdicts in the absence of the jury and prior to the end of deliberations. Fla. R. Crim. Proc. 3.440. Through these cumulative errors, the trial court overstepped the boundary between the province of the court and the province of the jury. The errors warrant a reversal for a new trial.

The above errors violated Mr. Pope's right to a fair and impartial jury under Article I, Sections 9 and 16 of the Florida Constitution and the Sixth and Fourteenth Amendments to the U.S. Constitution.

ISSUE VII

THE TRIAL COURT ERRED BY NOT FINDING THAT THREE NONSTATUTORY MITIGATORS EXISTED AND BY REFUSING TO CONSIDER THE MITIGATORS IN DETERMINING THE SENTENCE

Independent counsel indicated that three nonstatutory mitigators had been established by the evidence: (1) that Mr. Pope did not know that Alice was alive when he left the scene, (2) that the victim died from complications during recovery from the surgery required by the wounds inflicted by Mr. Pope, and (3) that persons treated for Alice's type of knife wounds generally recover. The trial court described evidence supporting these mitigators in its sentencing order but stated, "The court does not consider this evidence to constitute a mitigating factor." (TR1125) The court's dismissal of mitigating factors was improper; the court should have determined the weight to be given to these factors because they had been established by a preponderance of the evidence.

It is within the trial court's discretion to decide whether mitigating circumstances are proven. However, the Supreme Court is not bound to accept the lower court's findings when they are based upon a misconception of undisputed facts and a misapprehension of the law. Pardo v. State, 563 So. 2d 77, 80 (Fla. 1990). After determining that the facts alleged in mitigation are "reasonably established by the greater weight of the evidence," the court must decide if the facts are of a kind capable of mitigating the defendant's punishment. For example, "factors that, in fairness or in the totality of the defendant's

life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed" or any aspect of the defendant's character or record and any of the circumstances of the offense. A trial court may reject a defendant's claim that a mitigating circumstance has been proved, provided that the record contains "competent substantial evidence to support the trial court's rejection of the mitigating circumstance. Cheshire v. State, 568 So. 2d 908, 910 (Fla. 1990); Nibert v. State, 574 So. 2d 1059, 1061-62 (Fla. 1990); Cambell v. State, 571 So. 2d 415, 419 (Fla. 1990). On the other hand, the court may not assign no weight to a proven mitigator by excluding such evidence from its consideration. Cambell; Eddings v. Oklahoma, 455 U.S. 104, 114-15, 102 S. Ct. 869, 876-77, 71 L. Ed. 2d 1 (1982). Factors which this court has concluded it was error to exclude from consideration include child abuse experienced by the defendant Santos v. State, 591 So. 2d 160, 165 (Fla. 1991), appeal after remand, 629 So. 2d 838 (Fla. 1994)) (Kogan, J. concurring in part and dissenting in part with opinion) and Nibert; defendant's remorse and rehabilitation Nibert; defendant's poor reasoning skills and third grade reading level Cambell; and defendant's age, ability to function well in a controlled prison environment, ability to be a responsible employee, family background, and participation in Bible studies. Lowe v. State, 19 Fla. L. Weekly S621, 623-24 (Fla. November 23, 1994).

In Mr. Pope's case, the court recognized the uncontroverted

testimony regarding the nonstatutory mitigators raised. First, Marsha stated that she was instructed by Mr. Pope to check to see whether Alice was dead and she advised Mr. Pope that she was dead. No evidence was produced to prove Mr. Pope's motivation for this particular action. However, he apparently believed Marsha because he told Wanda that Alice was dead. One interpretation of the evidence could be that Mr. Pope thought she was dead and wanted to know because he did not want Alice to suffer. Another interpretation is that he did not intend to kill her but was unsure as to the result of the assault. In either case, the evidence relates to aspects of Mr. Pope's character and the circumstances of the case. In the first scenario, Mr. Pope may have had a humanitarian motive to relieve suffering. In the second scenario, Mr. Pope's deluded and passionate mental state transformed a domestic situation into one with unintended consequences. The trial court should not have determined that this was not a mitigating circumstance.

The two remaining circumstances that the trial court dismissed relate to the issue of whether the existence of an "intervening cause" of death should be considered in the penalty phase. The uncontroverted evidence showed that one of the two stab wounds was superficial and was healed at the time of death; the contusions and bruises did not contribute to or cause the death; Alice was not in severe distress when admitted to the hospital; Alice's physical condition was stable before surgery; Alice died from septicemia, pneumonia, and blood clots; the

source of the infection was the surgical wound and the primary cause of death was the septicemia; the pneumonia and blood clots were the result of complications from the prolonged hospital stay, infection, or surgery; and a person with stab wounds like Alice's has a good chance of living. Although these intervening events do not protect Mr. Pope from the charge and conviction of homicide, this does not exclude these events as mitigating circumstances.

In Hallman v. State, 371 so.2d 482, 486 (Fla. 1979), abrogated on other grounds, 591 So. 2d 911 (Fla. 1991), this Court declined to reopen the penalty trial for new evidence on the issue of malpractice because, given the presence of such evidence, the trial court would not have been precluded from entering a sentence of death. In this divided case, the majority inferred and the concurring opinions stated that the evidence of malpractice could be presented in mitigation. Although malpractice was not established in Mr. Pope's case, it is relevant that the cause of death was from the actions of medical personnel in their albeit proper treatment and management of Alice and not from injuries inflicted by Mr. Pope. It is important to note that defense counsel moved for appointment of a pathologist to assist the defense in determining the cause of death and to prepare for depositions. The trial court determined that defense counsel could consult with the pathologist after but not before the depositions. (TR122-133) The medical complications that were beyond Mr. Pope's control and that

allowed Alice to die are significant alone to require the imposition of a life sentence.

The disregard for the nonstatutory evidence in determining a sentence was error under Article I, Sections 2, 9, 16, and 17 of the Florida Constitution, and under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

ISSUE VIII

THE SENTENCE OF DEATH IS DISPROPORTIONATE COMPARED WITH OTHER CAPITAL PENALTY DECISIONS OF THIS COURT

A sentence of death is reserved for only the most aggravated and least mitigated of first degree murders. State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). This court has traditionally found the death penalty inapplicable to murders which are domestic in nature or committed as a result of "passionate obsession." Cheshire v. State, 568 So. 2d 908 (Fla. 1990); Douglas v. State, 575 So. 2d 165 (Fla. 1991); Santos v. State, 591 So. 2d 160 (Fla. 1991), appeal after remand, 629 So. 2d 838 (Fla. 1994); Fead v. State, 512 So. 2d 176 (Fla. 1989); Farinas v. State, 569 So. 2d 425 (Fla. 1990); Ross v. State, 474 So. 2d 1170 (Fla. 1985) (reversed for imposition of life sentence where there was evidence of alcohol use and the killing was the result of an angry domestic dispute); Wilson v. State, 493 So. 2d 1019 (Fla. 1986); Padilla v. State, 618 So. 2d 165 (Fla. 1993); Penn v. State, 574 So. 2d 1079 (Fla. 1991); White v. State, 616 So. 2d 21 (Fla. 1993). This case involving a domestic situation does not fit into the narrow category of the worst murders delineated in Dixon even though the jury recommended death.

The trial court must express more concise and particular reasons, based on evidence which cannot be reasonably interpreted to favor mitigation, to overrule a jury's advisory opinion of life imprisonment and enter a sentence of death than to overrule an advisory opinion recommending death and enter a sentence of life imprisonment. Dixon.

Another factor which must be considered is the weight and the strength of the mitigating factors found by the court in this case: (1) extreme mental or emotional disturbance at the time of the homicide; (2) substantially impaired ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law; (3) intoxication at the time of the offense; (4) the violence occurred subsequent to a disagreement between boyfriend and girlfriend; and (5) influence of mental or emotional disturbance caused by alcohol consumption. The court weighed these mitigating factors against the following aggravating factors: (1) prior felony involving the use or threat of violence and (2) homicide committed for pecuniary gain. The court rejected the aggravating factor of "committed while in the commission of or in an attempt to commit robbery." The court determined that three nonstatutory mitigators raised by Independent counsel did not constitute mitigating factors: (1) Mr. Pope did not know that Alice was alive when he left the scene, (2) the victim died from complications during recovery from the surgery required by the wounds inflicted by Mr. Pope, and (3) persons treated for Alice's type of knife wounds generally recover. (R1123-1125)

The first factor to be considered in proportionality review in this case is the existence of a domestic situation. In numerous cases like this one, this Court has reduced the sentence from death to life based on the fact that the homicide resulted from a domestic dispute. In Cheshire, 568 So. 2d at 910-12,

for example, this Court determined that the trial court's override of the jury's recommendation of life was improper. The trial court found that there was a prior felony (contemporaneous killing of estranged wife's lover), the homicide was committed during a burglary, the crime was heinous, atrocious, and cruel (HAC), and there was no mitigation. This Court characterized the killing of the estranged wife and lover as the tragic result of a longstanding lovers quarrel, noted that there was some evidence that the defendant had been drinking, and stated that the jury could have decided that the defendant was not in control of his full faculties.

In Mr. Pope's case, there were only two aggravating factors in comparison to the three in Cheshire. The prior felony in Mr. Pope's case involved a cut on the hand in comparison to the death in Cheshire. Mr. Pope's case contains uncontroverted evidence regarding his use of a large amount of alcohol before and during the assault and a history of alcoholism in comparison to the statement that "some" alcohol was involved in Cheshire. Most importantly, both cases involve a lovers quarrel. Marsha's testimony at trial and her statements to other witnesses was she heard Mr. Pope and Alice fighting in the bedroom; Alice was yelling "help me" during sexual intercourse with Mr. Pope; Mr. Pope forced Alice to have sex with him; Marsha heard Mr. Pope and Alice fighting in the bathroom although she later stated she made this up; both Alice and Mr. Pope expressed their love for one another during the assault; and Alice and Mr. Pope fought

about beer and Alice's refusal to give him money before the assault. The mitigation in Mr. Pope's case was clearly greater both in quantity and quality in comparison to that in Cheshire.

The fact that the jury recommended death for Mr. Pope is not definitive when the issue of proportionality is raised. However, it is not the mere existence of a domestic relationship that makes this a mitigating factor in Mr. Pope's case. It is the existence of heightened passions in the midst of intoxication, quarrelling, and unexplainable professions of love during violence that makes this a mitigating factor deserving of great weight. The trial court incorrectly stated that "There was no testimony that [Mr. Pope and Alice] bickered or had any disagreement for several hours prior to the attack. There appear to have been no strong passions at work here." The court's incorrect assessment of the evidence, reliance on Marsha's inconsistent statements regarding the primary motive being pecuniary gain, and decision to afford this mitigator "little weight" was improper.

In White, the jury recommended death as in Mr. Pope's case. Nevertheless, this Court reduced the sentence to life upon a proportionality review stating:

While we have found that the death sentence may be imposed in cases involving domestic disputes, in which the defendant had previously committed violent felonies, those cases did not involve defendants whose mental mitigating factors were as extensive as those presented in the record in this cause.

616 So. 2d at 25-26 (citations omitted).

The trial court found White had prior felonies (burglary, assault, and aggravated battery committed three days before the homicide when he entered his girlfriend/victim's home and hit his girlfriend's male companion with a crowbar) and the crime was cold, calculated, and premeditated (CCP) in aggravation. In mitigation, the court found that the defendant was high on cocaine, "questionably" under the influence of extreme mental or emotional disturbance, his capacity to appreciate the criminality of his conduct was "questionably" impaired, he had a personality change due to a drug problem, and he was upset and jealous because of the severed relationship with the victim. This court struck the factor of CCP leaving one aggravating factor. This case dictates the same result for Mr. Pope.

Mr. Pope's prior felony is not as egregious as that in White in that it involved less violence and a stranger. Admittedly, a second aggravating factor exists. However, as stated herein, the evidence supporting the second aggravating factor rests solely on Marsha's highly unreliable testimony and the evidence failed to prove that pecuniary gain was the primary motive.

Mr. Pope's case contains the same statutory mitigators and many of the same nonstatutory mitigators as in White. There was evidence that his alcoholism caused an affective disorder, his intoxication caused physical and mental changes, and alcoholics experience personality disturbances. Mr. Pope's alcohol abuse during the months before the assault was severe just as White's drug abuse was severe in the days before the homicide. Both Mr.

Pope and White told someone of their intent to kill prior to the killings and made spontaneous comments regarding the killings soon thereafter. As in White, the jury recommended death by a 11-1 vote and the court sentenced him to death. In Mr. Pope's case, the trial court recognized that the mental mitigators were clearly proven unlike the trial court's appraisal of White's mental condition as "questionable." Thus, Mr. Pope is even more deserving of a life sentence than was White. This court should remand to the trial court for the imposition of a life sentence based upon White and the other cases cited herein.

In Farinas, 569 So. 2d at 431, this court remanded for a life sentence where the evidence proved the homicide was HAC and committed during a kidnapping, and the defendant was under extreme emotional or mental disturbance. The court noted the relevance of the fact that the death was the result of a heated, domestic confrontation. Similarly, Mr. Pope's case contained two aggravating factors and the same mitigation. However, Mr. Pope's case contains additional mitigation which the court recognized, including the inability to conform his conduct to the requirements of the law. Furthermore, this case undermines the state's argument that this Court addresses the factor of a domestic relation only to negate the factors of HAC and CCP: this Court found in Farinas that a life sentence was required in a domestic case even though there was proof that the crime was HAC.

In Douglas, 575 So. 2d at 166, this Court found the trial

court's override of the jury recommendation of life was improper where the evidence showed the homicide was HAC, the jury may have questioned witness credibility and considered the domestic relationship, and the trial court found the defendant wasn't violent and had a good record on death row. An emotional triangle existed between Douglas, the victim, and the victim's wife (Helen), Douglas' ex-girlfriend. Douglas helped Helen when she was homeless and pregnant. After the birth of Helen's child, she left Douglas and returned to her husband. Eleven days later, Douglas kidnapped Helen and her husband, forced them to have sex in his presence, and battered and shot the husband in the head. In Douglas, this Court recognized the importance of the existence of a domestic relationship combined with questionable witness credibility.

In this case, Mr. Pope's defense was that Marsha, the main witness was not credible and that her motive for her contrivances was to cover up her participation in the crime and financial benefit therefrom. The jury disbelieved Marsha regarding her kidnapping and found Mr. Pope not guilty of that crime. Marsha's testimony regarding Mr. Pope's motive for commission of this crime does not negate either the existence of the mitigating factor of the domestic relation or the heavy weight this mitigator should carry in a review of proportionality.

In Penn, 574 So. 2d at 1083, this Court remanded for the imposition of a life sentence where the crime was HAC, the defendant had no significant criminal history, and the defendant

suffered from extreme mental and emotional disturbance. Penn killed his mother after his wife told him that his mother stood in the way of their reconciliation. Penn stole property from his mother, ripped out the phone lines, bludgeoned his mother with a hammer, and washed his hands after the killing. The only evidence of defendant's drug use came from his own confession. He possessed average intelligence and did not suffer from brain damage or any mental disorder.

Although Mr. Pope's case involves a second aggravating factor including a prior felony, there were more mitigating factors in his case including: impairment of his ability to appreciate the criminality of his conduct and conform his conduct to the law; strong evidence of intoxication at the time of the offense resulting in decreased impulse control; decreased motor coordination and increased aggression with rapid mood swings for no observable reason; personal and familial alcoholism; an affective disorder resulting in a general memory deficit, disorientation, inability to recognize the affect of his behavior and impaired judgment meaning an inability to think rationally; inability to delay gratification; and reduced ability to tolerate frustration. Mr. Pope grew up in a dysfunctional family with an alcoholic father who became violent when drunk. His father, brother, and sister or aunt were diagnosed as schizophrenics. (R2751-52) In addition, the three nonstatutory mitigators that the trial court refused to consider (Issue VII supra), along with those mentioned above make this case one where

the death sentence is proportionally unwarranted.

In Fead, 512 So.2d 176, this Court held that a jury override of a life sentence was improper while upholding two aggravating factors. Fead had a prior felony for killing a woman and was under a sentence of parole at the time of the offense. These aggravating factors were weighed against the mitigating factors that, at the time of the offense, the defendant was under the influence of alcohol, under the influence of extreme mental or emotional disturbance due to alcohol use and jealousy of his girlfriend/victim, and he was a good father, provider, husband, prisoner, and parolee. Again, Mr. Pope's prior felony was not as serious as that in Fead whereas the mitigation, including the existence of a domestic relationship, was just as clear. See also Wilson, 493 So. 2d at 1023. (Death penalty not warranted where the homicide of stepmother was HAC and defendant had a prior felony and no mitigation except a domestic confrontation); Padilla, 618 So. 2d at 170. (Reversed for resentencing where the trial court erred in finding CCP leaving the aggravating factors of a prior violent felony and under sentence of imprisonment and the mitigating factors of extreme mental or emotional disturbance in a domestic confrontation).

In numerous other cases this court has reversed the sentence of death where, as in the case at bar, the mitigation outweighed the aggravating factors. In Nibert v. State, 574 So. 2d 1059 (Fla. 1990), for example, the trial court followed the jury's recommendation of death in a case where the trial court found the

crime was HAC and there was no mitigation except possible child abuse. This Court reversed for a life sentence indicating that although the crime was HAC, there was evidence of other mitigation including testimony regarding the defendant's extreme mental and emotional disturbance, impaired capacity to control his behavior, remorse, potential for rehabilitation, intake of alcohol on the day of the homicide, and a possibility of a below average I.Q.

In Nibert, the defendant killed his intoxicated drinking buddy a few days after he told a friend that he was going to rob the victim. There was evidence that Mr. Pope and Alice drank together and bickered frequently. Medical personnel determined Alice's blood alcohol level was .17 and it was decreasing indicating that it was higher at the time of the domestic dispute.

As in Nibert, evidence that Mr. Pope had a serious alcohol problem beginning in his teens was unrebutted. As the clinical psychologist noted, if it is assumed that Mr. Pope was intoxicated at the time of the assault, it was possible that his ability to conform his conduct to the requirements of the law was substantially impaired.

The trial court correctly assessed the uncontroverted evidence that Mr. Pope drank extensively the night of the assault and had a personal and family history of alcoholism and gave the factors of "mental and emotional disturbance" and "inability to appreciate criminality of conduct and conform his conduct" weight

in its consideration. Mr. Pope came from a dysfunctional family where alcohol abuse and mental problems were common. As in Nibert and the cases cited in this issue, this Court should reverse for the imposition of a life sentence in light of the overwhelming mental mitigation in addition to the mitigation of a domestic relationship.

The second factor to be considered in proportionality review in this case involves the prior felony. Counsel concedes that sufficient evidence was presented to prove a prior felony involving the use of threat of violence to another person.⁹ However, this prior conviction is not as egregious as those where this Court has upheld a death sentence involving a domestic killing and the circumstance of a prior violent felony. The bruise and cut incurred by Cobb, the kidnapping victim, did not cause significant physical injury and required no treatment. The kidnapping occurred almost fourteen years before this killing. See Lemon v. State, 465 So. 2d 885 (Fla. 1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1233, 84 L. Ed. 2d 370 (1985); Wilson, 493 So. 2d at 1023. This case is more analogous to the cases discussed in this issue involving prior violent felonies.

The third factor to be considered in proportionality review involves the evidence that the crime was committed for pecuniary gain. Section 921.141(4)(d), Florida Statutes (1991). This factor was proven through the arguably untrustworthy and

⁹ Counsel does not concede that Mr. Pope's trial counsel in the prior kidnapping provided effective assistance of counsel. This issue was raised by Independent Counsel.

contradictory testimony of Marsha. The court's order stated that Marsha claimed that Mr. Pope told her before and during the assault that he wanted Alice's car. The testimony showed only that Mr. Pope expressed his desire for Alice's car and money hours before and not during the assault. Furthermore, there was an abundance of evidence which cast serious doubt on the veracity and reliability of Marsha's testimony. Marsha admitted she lied on the witness stand, she had trouble remembering what happened, and she wasn't sure whether she made things up. Testimony showed that she had a reputation in the community for being untruthful. She told police that Mr. Pope wanted Alice's ATM card and that she took Alice's keys from Alice's pocket but later denied both statements. When Mr. Pope was arrested, he had no wallet, money, or ATM card. However, Marsha was seen the next day with an unusually large amount of cash in the same amount and denomination that witnesses stated was given to Alice the day before the assault. This evidence tied Marsha to the likely proceeds of the assault and provides an explanation for her factual contrivances. Although the state proved that Mr. Pope took Alice's car, it was not shown beyond a reasonable doubt that the primary motive for killing Alice was for pecuniary gain. In fact, the evidence is much more compatible with the defense theory -- that Mr. Pope attacked Alice in the midst of, and as a result of, a domestic dispute over sex.

It is possible that Alice's car was taken to facilitate an escape rather than as a means of improving Mr. Pope's financial

worth. See Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988). In Scull, the only evidence showing consent to take the victim's car came from the Appellant who claimed he was involved in a drug deal with the victims but did not kill them.

The evidence in Mr. Pope's case allows the inference that Mr. Pope was in an alcohol induced stupor and his use of the car was done without any illegal intent. Marsha testified that Mr. Pope stated that they were going to Missouri. Mr. Pope left the house without any of his or Alice's personal belongings. He was not even wearing a shirt. He told Marsha to drive the car and only took over when she indicated that she could not drive. There was conflicting evidence whether Mr. Pope or Marsha took Alice's keys. Considering that this case involves a domestic situation and witnesses testified that Mr. Pope and Alice were frequently seen using her car, it is possible that Mr. Pope had previously used her car with her consent and thought he was still authorized to use the car given his deluded and passionate state. This court may consider, in determining proportionality, whether Mr. Pope had the specific intent to steal, or only the general intent to take the car. See Daniels v. State, 587 So. 2d 460 (Fla. 1991); Douglas, 575 So. 2d at 167.

Even if the trial court did not err in finding the aggravating factor of pecuniary gain, little weight should be given to such circumstance because proof of motivation to obtain pecuniary gain, if any, was not a major motive for the assault that eventually caused Alice's death. Two scenarios are

reasonably likely from this case. If Mr. Pope's took Alice's car due to their intoxication which resulted in a heated domestic dispute, then pecuniary gain was not a major motivation. On the other hand, if Mr. Pope assaulted Alice to steal her car but he did not intend her death, little weight should be given to the pecuniary gain circumstance since it would have been this aspect which transformed a non-intended killing into a first degree murder via the felony murder rule. Again, the only evidence suggesting either a preconceived thought to kill Alice or a financial motive for the assault came from Marsha's questionable testimony. Moreover, the facts belie planning.

Mr. Pope left Alice, the weapon, and his belongings, including his wallet, at the scene, his brother's home. Marsha, an eyewitness, was not eliminated or told to remain silent. Marsha and Alice left the house for beer and returned after Mr. Pope reportedly told Marsha that he intended to kill Alice. And most importantly, Mr. Pope was extremely intoxicated, under extreme mental and emotional disturbance, unable to conform his conduct to the law, and unable to appreciate the criminality of his behavior. Whether pecuniary gain was a primary motive and whether Alice's death was premeditated remains a question in this case. Therefore, the circumstance of pecuniary gain should have been given little or no weight by the trial court.

The third factor that should be considered in proportionality review is that the trial court correctly determined that this homicide was not committed while in the

commission of or in an attempt to commit a robbery.

Nevertheless, the jury was instructed regarding this factor and may have mistakenly found this to be an aggravating circumstance rather than that the crime was committed for pecuniary gain. The erroneous decision to give this instruction prejudiced Mr. Pope's ability to receive a fair determination of his sentence by the jury. (See Issue IX.B.)

The final factor to be considered in proportionality review is the mitigation evidence. Ample evidence was presented to support each factor and much of it was undisputed. Mr. Pope's case exhibits two of the "weightiest mitigating factors" - those establishing substantial mental imbalance and loss of psychological control. See Santos, 629 So. 2d at 838. The court acknowledged the existence of (1) extreme mental or emotional disturbance at the time of the homicide; (2) substantially impaired ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law; (3) intoxication at the time of the offense; (4) the violence occurred subsequent to a disagreement between boyfriend and girlfriend; and (5) influence of mental or emotional disturbance caused by alcohol consumption. As stated above, the existence of these factors make this case analogous to those where this Court reverses for imposition of a life sentence. In addition, as stated in Issue VII, there were additional mitigating factors supported by the record that the trial court failed to consider in determining its sentence. For these reasons, Mr. Pope

requests this Court to remand for the imposition of a life sentence.

The imposition of a death sentence in Mr. Pope's case violated the Eight Amendment to the United States Constitution and was an arbitrary and capricious application of Florida's capital punishment statute. Mr. Pope and Alice were lovers at the time she received the injuries that resulted in her death eight days after the assault. They were both heavy drinkers and they bickered when they were drunk as on the night of the assault. The events leading up to the assault are unclear because Mr. Pope's main accuser gave numerous conflicting statements regarding the assault. Nevertheless, it is clear that a domestic dispute preceded the assault. It is also clear that Mr. Pope was extremely disturbed at the time of the assault and his ability to conform his conduct to the requirements of the law or appreciate the criminality of his conduct were substantially impaired. Although Alice died, a person with stab wounds like hers has a good chance of survival. Medical complications, which Mr. Pope could not control, directly lead to her death. The facts of this case warrant a reversal for imposition of a life sentence.

ISSUE IX

THE FLORIDA CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL

A. Failure to Assign Weights to Aggravating and Mitigating Circumstances.

The United States Supreme Court has upheld the constitutionality of Florida's capital punishment statute based on a finding that it was not applied in an arbitrary and capricious fashion and that it, therefore, resulted in a fair and consistent application of the death penalty. Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972); Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). However, doubt has arisen as to the consistency with which the aggravating and mitigating circumstances are weighed even when applied to the same factual situation. This disparate outcome is particularly evident when, on identical facts, one jury recommends life or this Court vacates the death sentence while another jury recommends death and the trial court and this Court refuse to override that decision. Even more specifically, the statute is invalid to the extent that individuals jurors can assign different weights to each aggravating and mitigating circumstance, so that there is no majority as to the basis on which a death sentence is recommended. Compare Grossman v. State, 525 So. 2d 833, 846 (1988) (Shaw, J., concurring specially). (TR352-57)

B. Failure to Require Special Penalty Verdict.

The trial court erred by failing to require a special verdict as to penalty. Capital sentencing schemes have been

upheld only when there are statutory procedures designed to eliminate arbitrariness. Therefore, it is unreasonable to allow a jury to return a general verdict as to penalty and the court to enter an uninformed, unguided sentence which could easily be in conflict with the jury's finding as to applicable circumstances. See Enmund v. Florida, 458 U.S. 782 (1982); Tison v. Arizona, 481 U.S. 137 (1987); and Cabana v. Bullock, 474 U.S. 376 (1986). See also Haliburton v. State, 561 So. 2d 248, 252 (Fla. 1990). ("[D]eath penalty review would be easier and more complete with the information contained in such a special verdict.") (Barkett, J., concurring specially).

In Schad v. Arizona, ___ U.S. ___, ___ S. Ct. ___, 115 L. Ed. 2d 555 (1991), the U.S. Supreme Court held by a bare 5-to-4 majority that a special verdict was not required as to guilt due to the unique historical treatment of felony murder and premeditated murder as the same. However, that analysis does not apply to aggravating and mitigating circumstances used to impose a death sentence. This is particularly true in Mr. Pope's case where the jury was instructed regarding the aggravating factor of "commission during a robbery or an attempt to commit robbery" and the trial court found that this aggravating factor was inapplicable. The weighing of an invalid aggravating circumstance violates the Eighth Amendment to the United States Constitution. Espinosa v. Florida, 505 U.S. ___, 112 S. Ct. 2926, 120 L. Ed. 2d 854, 858 (1992) When the jury is instructed that it may consider an aggravating circumstance, it must be presumed

that the jury found and weighed an invalid circumstance. 120 L. Ed. 2d at 858-59. Because the sentencing judge is required to give great weight to the jury's sentencing recommendation, the court then indirectly weighs the invalid circumstance. 120 L. Ed. 2d at 859. Mr. Pope's death sentence is unreliable because the jury was incorrectly instructed. Thus his constitutional rights under the Eighth and Fourteenth Amendments were violated. If the death sentence, based in part on the tainted jury recommendation, is affirmed, the holding will render the death sentence arbitrary and capricious. See Espinosa v. Florida, 120 L. Ed. 2d 854.

C. Section 921.141 is Unconstitutional.

Appellant filed motions challenging the constitutionality of Section 921.141, Florida Statutes (1989) on a number of bases. (TR340-42,345-57) Appellant incorporates by reference the arguments set forth in the motions for purposes of this appeal.

These errors violated Mr. Pope's rights under Article I, Sections 2, 9, 16 and 17, of the Florida Constitutions, and under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

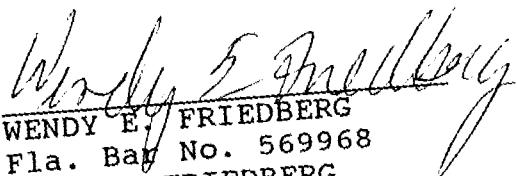
CONCLUSION

For the foregoing reasons, this Court should reverse the convictions and remand for a new trial without the possibility of a death sentence. If the case is not remanded for a new trial, this Court should vacate Mr. Pope's death sentence and remand for the imposition of a life sentence. Alternatively, this Court should reverse and remand for a new penalty phase proceeding with a new jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Initial Brief of Appellant has been mailed to Office of the Attorney General, 2002 N. Lois Ave., Suite 202, Tampa, FL, 33607, (813) 873-4730 on this 26th day of January, 1994.

Respectfully submitted,


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