FILED
SID J. WHITE
SEP 30 1994
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

MELVIN TROTTER, :

Appellant, :

vs. : Case No. 82,142

STATE OF FLORIDA, :

Appellee. :

_____ :

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR APPELLANT

SERVED 89 DAYS
LATE

TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The record on appeal consists of documents filed with the clerk of court numbered 000001 through 000589, followed by transcripts from motion hearings and the trial numbered 1 through 2195. References to the record filed with the clerk will be designated "R", followed by the appropriate page number. References to the transcripts will be designated "T", followed by the appropriate page number.

STATEMENT OF THE CASE

A Manatee County grand jury returned an indictment on June 20, 1986 charging Melvin Trotter, Appellant, with first degree murder in the stabbing death of Virgie Langford (R1-2). He was tried in 1987, found guilty and sentenced to death. On appeal to this Court, Trotter's conviction was affirmed but the sentence was vacated. Trotter v. State, 576 So. 2d 691 (Fla. 1990). A new penalty proceeding before a new jury was ordered because evidence of Appellant's status on community control at the time of the homicide was admitted and considered as an aggravating circumstance. 576 So. 2d at 694.

On remand to the circuit court, the parties agreed that the State Attorney for the Twelfth Judicial Circuit should be disqualified (R95). An amended order dated January 24, 1992, was entered to provide for disqualification and requesting appointment of a special prosecutor (R98-9). On January 31, 1992, Governor Chiles

issued Executive Order No. 92-30 which assigned the State Attorney for the Sixth Judicial Circuit to handle the prosecution (R100-02).

A hearing on pretrial motions was held before Circuit Judge Stephen Dakan on November 13, 1992 (T1-199). The first to be considered was Appellant's "Motion to Preclude Prior Convictions as Aggravators" (R214-24). After hearing testimony regarding Appellant's claim that his plea to a 1985 robbery had been involuntary, the court ruled that the two year time limitation contained within Fla. R. Crim. P. 3.850 barred any relief (T110-2).

Next, the court considered Appellant's "Motion to Prohibit Application of Florida Statute 921.141 (5)(a)" (R372-4). Counsel pointed out that since the Florida Supreme Court's decision vacating Trotter's death sentence, the Legislature amended the death penalty statute to provide that being on community control is sufficient to apply the "under sentence of imprisonment" aggravating circumstance (T117-9). If the amended statute were applied to Appellant, it would violate the state and federal constitutional provisions against ex post facto laws (T119-21, R372-4). It would also violate the principle of "law of the case" because this was the specific relief that Appellant obtained in his prior appeal (T121, R374). The court ruled that the State could rely upon the amended aggravating circumstance because penalty proceedings are governed by the "so-called clean slate rule" (T130).

Appellant also argued his "Motion to Prohibit Application of Fla. Stat. 921.141 (7)" (R244-7), and his "Motion to Exclude Evidence or Argument Designed to Create Sympathy for the Deceased"

(R225-43). The judge ruled that his decision on the ex post facto question involving community control as an aggravating circumstance was also applicable to allowing the State to present victim impact evidence under the newly enacted statute (T145). Although he noted "some problem of disadvantage", the judge again relied upon the "so-called clean slate" rule to deny Appellant's motion to bar all victim impact evidence (T145-6). The other motion was also denied with the observation that the trial judge would have the responsibility to ensure that the victim impact evidence and argument did not become unfairly prejudicial (T147-8).

Trial commenced on April 12, 1993, before Senior Circuit Judge E. L. Eastmoore (T203). During jury selection, the court denied Appellant's challenges for cause to prospective jurors Panico, Bunting, Flanders, and Nieves (T715-7, 721, 722, 1015). Defense counsel expended peremptory strikes in order to remove these prospective jurors (T729, 733, 1020). After exhausting his peremptory challenges, Appellant requested more; but the court denied his request (T1020-2). A juror who actually sat was identified as one who Appellant would have struck if granted an additional peremptory challenge (T1022-3).

In his "Motion in Limine to Exclude Statements Made by Defendant", Appellant argued that admission of his statements when questioned by law enforcement was improper in a penalty trial because he had already been adjudicated guilty (R413-4, T229-34). After the trial judge denied the motion in limine (T235), the prosecutor stated in opening argument that the jury would hear many untruthful

statements by Appellant to the police (T1058-9). Defense counsel moved for a mistrial on the ground that the State was essentially presenting the nonstatutory aggravating circumstance that Trotter had lied to the police (T1065). After the court denied the motion for mistrial, Appellant continued to object whenever Appellant's lack of truthfulness was brought into evidence (T1193, 1205, 1260, 1289-90).

During the penalty trial, Appellant again moved for mistrial when the prosecutor mentioned an accusation that Trotter had once assaulted someone with a 2x4 piece of lumber (T1580-1). In denying the motion for mistrial, the court ruled that defense counsel had opened the door (T1581). When defense witness Dr. Frank Wood wanted to present demonstrative evidence of what constituted "normal" PET scan results, the court ruled it inadmissible for lack of consensus by the scientific community (T1745-50). Defense counsel objected to the jury instruction on the heinous, atrocious or cruel aggravating factor (2018-9).

During the prosecutor's closing argument, Appellant moved for mistrial on numerous grounds (T2068-74). The court denied the motions for mistrial and declined to give any curative instruction (T2074, 2077). The jury returned a recommendation that Trotter be sentenced to death (T2123, R455).

Post-trial but prior to sentencing, Circuit Judge Dakan held a hearing on Appellant's "Amended Motion to Bar Death Penalty in Resentencing of Melvin Trotter Based Upon Arbitrary, Discriminatory and Impermissible Racial Grounds" (R462-77, 2129-48). Defense

counsel stated that he was seeking a full-fledged evidentiary hearing on racial discrimination in capital prosecutions by the State Attorney in Manatee County (T2138). The court ruled that the facts alleged in the motion were insufficient to warrant an evidentiary hearing under the test set forth in Foster v. State, 614 So. 2d 455 (Fla. 1992), cert. den., _ U.S. _, 114 S. Ct. 398, 126 L. Ed. 2d 346 (1993) (T2143).

Appellant's "Motion for New Sentencing Hearing" (R478-88) was denied without hearing on July 19, 1993 (T560).

A sentencing hearing was conducted before Judge Eastmoore on July 23, 1993 (T2150-94). After hearing argument from counsel, the court recessed briefly and returned with findings (T2188). In open court, the judge read his written sentencing order (T2188-93, R543-7). He found five aggravating circumstances: 1) under sentence of imprisonment or community control; 2) prior conviction for violent felony; 3) while engaged in the commission of a robbery; 4) "especially wicked, evil, atrocious and cruel"; 5) pecuniary gain (R543-5, see Appendix). In mitigation, the court found: 1) extreme mental and emotional disturbance; 2) substantially impaired capacity; 3) below average IQ, family and developmental problems; 4) frontal lobe brain disorder; 5) remorse; 6) "other nonstatutory factors presented by the Defendant" (R545-6. see Appendix). The court found that the aggravating circumstances outweighed the mitigating circumstances and imposed a sentence of death (R546-7, see Appendix).

Jurisdiction lies in this Court pursuant to Article V, section 3 (b)(1) of the Florida Constitution and Fla. R. App. P. 9.030 (a)(1)(A)(i).

STATEMENT OF THE FACTS

STATE'S EVIDENCE

In the mid-afternoon of June 16, 1986, emergency medical technicians responded to a call at Langford's Grocery in Palmetto (T1075-6). Lying behind the deli counter they found the proprietor, Virgie Langford, who had been stabbed several times (T1077-8). One of the wounds was an evisceration, which resulted in the victim's intestines protruding from her body (T1078).

The victim was conscious and responsive to questions (T1080). She identified her attacker as a short black man wearing a Tropicana employee badge (T1103). She related that she had been choked (T1128, 1165). Ms. Langford moaned and complained about being in a lot of pain (T1099).

Emergency Medical Technician, Frank Tona, described the treatment which he and the paramedics performed at the scene (T1101-2). The victim was transported to Manatee Memorial Hospital (T1102).

Dr. Henry Smoak was on duty in the emergency room when Ms. Langford was brought in (T1112). She arrived in a state of hypovolemic shock from loss of blood (T1113). The doctor described the treatment which he performed, including the return of the victim's intestines to the interior of her abdomen (T1114-6). He characterized the stab wounds as "brutal" and "unusual" (T1116-7). Dr. Smoak further testified that surgery was later performed on the victim by Dr. Ganey (T1118). Langford survived the operation, but

died later that night of cardiac arrest because her blood clotting system stopped functioning (T1118).

Dr. James Ganey, the cardiothoracic surgeon, also testified for the State (T1403-13). He said that during surgery, he extended the wound which had caused evisceration in order to get sufficient access to her abdomen (T1405-6). He noted that there were lacerations to the liver and the pancreas as well as the stomach (T1406-8). Dr. Ganey stated that patients in hypovolemic shock usually don't feel much pain; but initially the wounds cause extreme pain (T1411).

Former medical examiner, James Spencer, testified that he performed the autopsy on Virgie Langford (T1330). In addition to the eviscerating wound on the left side of her body, Dr. Spencer found six stab wounds on the right side (T1332-6). His examination of the neck area showed abrasions which appeared to be fingernail marks (T1341). There were also internal injuries to the neck consistent with an attempted manual strangulation (T1341-2). The witness was shown a knife which belonged to the victim; he agreed that it could have caused the stabbing injuries (T1343). The doctor's diagnosis of the cause of death was cardiac arrhythmia brought on by the injuries, blood loss, and stress (T1344).

Another medical examiner, Joan Wood, from the Sixth Judicial Circuit was called to testify (T1439-52). She reviewed the autopsy report and photos as well as the medical records and sworn testimony from the treating physicians (T1441). Disagreeing with Dr. Spencer, she testified that it would take "a severe amount of

force" to inflict the cutting wound on the abdomen (T1446). She also gave her opinion that it was "not reasonable" to suggest that the injury could have occurred by the victim's movement while the knife was held in place (T1447).

Elenora Oates testified that on the afternoon of June 16, 1986, she was at a friend's house when she saw Appellant running from the direction of the store (T1304-5). Appellant asked her if she knew where he could get a "slab" of rock cocaine and she went with him to buy some (T1306-7). They went to Appellant's mother's house to smoke it (T1307). She helped him count money and food stamps that Trotter had tied in a red bandanna (T1307). When she asked where he got the money and food stamps, he replied that he had done "a little job" (T1308). They continued to buy more crack cocaine that afternoon, spending around $100 total (T1309). Appellant asked her to say that they were both there all day watching TV (T1313).

Herbert Van Fleet, formerly a detective lieutenant with the Palmetto Police Department, testified that descriptions from the victim and a witness led him to the personnel department of Tropicana looking for a black male employee named Melvin (T1189). Around 2:00 p.m. the day after the homicide, Appellant was brought into Van Fleet's office for questioning (T1192).

Over objection, Van Fleet testified that Trotter initially denied ever being in Langford's Grocery (T1193, 1200, 1203). Subsequently, between 2:52 p.m. and midnight Appellant gave four tape-recorded statements (T1201, 1204). Over Appellant's objection,

each of the four tapes was played for the jury (T1212-9, 1226-38, 1244-57, 1261-71). During the course of the four statements, Trotter gradually admitted greater involvement; eventually he acknowledged that he had taken money from the cash register and got into a "scuffle" with Ms. Langford over the knife (T1268). Appellant didn't remember the details of the "scuffle", only that there was blood and he saw the victim's intestines hanging out (T1270-1).

In addition to the admissions, the State also presented evidence that Trotter's palmprints were found on the front side of the meat cooler in the grocery store (T1392-4). A T-shirt seized from Appellant's residence had blood stains which were consistent with Ms. Langford's blood type (T1169-70, 1420). A stipulation of the parties that Trotter had been convicted for robbery with a deadly weapon and the first-degree murder of Virgie Langford was published to the jury (T1402).

Probation and Parole Officer Kenneth Botbyl testified that Appellant was on his community control caseload on the date that the offense took place (T1425). Trotter had been placed on community control as punishment for conviction of robbery September 12, 1985 (T1425-6). The judgment for that robbery was also published to the jury (T1427).

In the nature of victim impact evidence, the State presented testimony from Timothy Matthews. the victim's grandson, and Charles McKnight, her son-in-law (T1280-1302, 1429-33). Ms. Langford had four children, ten grandchildren, and one or two great grandchildren (T1429-30). She had operated a grocery store at that location

for about thirty years (T1281). In September 1985, Ms. Langford had undergone open heart surgery and was still recuperating at the time of this incident (T1288, 1430-1). Despite her family's urging that she give up the grocery business after the heart surgery, she insisted upon reopening (T1295, 1431-2).

Both witnesses agreed that the victim had treated her customers very well (T1294, 1433). If they didn't have money to pay for their food, she would extend credit to them (T1301, 1433). She was well-liked and respected in the community of Palmetto (T1302).

DEFENSE EVIDENCE

Appellant presented evidence which related to the statutory mitigating circumstances of extreme mental or emotional disturbance and substantially impaired capacity [§§921.141 (6)(b) & (f)]. He also relied upon evidence establishing the nonstatutory mitigating circumstances of a) child of rape, b) fatherless, c) alcoholic mother, d) emotional deprivation, e) physical abuse from his mother, f) neglect from his mother, g) abusive unhealthy foster care, h) educationally deprived, i) violent death of his sister, j) remorse, k) borderline mentally retarded, l) organic brain defect, m) cocaine dependence, and n) good behavior while in custody (see R447, T2173-5).

§921.141 (6)(b), Fla. Stat.

Dr. Harry Krop, a clinical psychologist, testified that Appellant didn't have any major mental illness (T1545). He had a fron-

tal lobe disorder which Dr. Krop attributed to brain damage (T1545). Cocaine dependency and craving for the drug was another major factor in the homicide (T1545-6). Unlike most death row inmates, Trotter does not have antisocial personality disorder (T1546).

Dr. Frank Balch Wood, a neuropsychologist, gave his opinion that the cocaine craving Trotter suffered qualified as an extreme mental or emotional disturbance (T1778, 1817). Dr. Michael Maher, a psychiatrist, agreed that cocaine addiction is a mental and emotional disorder (T1843). He further explained that the abnormal functioning of the frontal lobes in Trotter's brain was a mental disorder (T1843). Trotter further suffered from "an emotional disorder related to the background of deprivation and abuse and of violence which he was exposed to" (T1843).

§921.141 (6)(f), Fla. Stat.

Dr. Krop gave his opinion that Trotter's capacity to appreciate the criminality of his conduct was substantially impaired at the time of the offense (T1602, 1604). He explained that Appellant is someone with limited intellectual ability, limited coping mechanisms, and impaired judgment (T1609). The need to get money to finance his cocaine habit distorted Trotter's perception of reality and caused him to overreact when confronted by the victim (T1609-10).

Dr. Wood agreed that Trotter had a lower inhibitory self-control capacity and stated that it might be hereditary (T1773-6).

He noted that Appellant's father was a rapist; indicating that the father also had an inhibitory self-control problem as well (T1773). The doctor also considered the lack of planning shown by the fact that Trotter entered the store unarmed and made no effort to conceal his identification badge (T1775-6). The brutality of the homicide led Dr. Wood to characterize the event as "an explosion of violence" (T1775).

Cocaine addiction was the primary factor, according to Dr. Maher, which caused Appellant's impaired capacity (T1843-4). Cocaine addicts "do the most horrible and outrageous things" because of the insidious effects of the drug itself (T1844). They lose their ability to conform their behavior to the requirements of law (T1844). In addition, Trotter's frontal lobe dysfunction and the history of violence in his family contributed to diminish "his capacity to appreciate that what he was doing was wrong" (T1845).

a) Child of Rape

During Dr. Krop's interview with Ola Mae Wright, Appellant's mother, he learned that she didn't know who fathered Appellant (T1494). She became pregnant when she was accosted while walking home from work, dragged into the woods, and raped (T1495). She never reported the rape (T1495). Her child, Appellant, has the same "gray catlike" eyes that the rapist had (T1495).

b) Fatherless

During Appellant's early years, his mother lived for a time with a Melvin Trotter, who fathered some of her other thirteen children (T1493, 1499). Appellant took his name from this man although he was not the biological father (T1499). When Appellant was about nine years old, HRS took the children away from Ms. Wright and they grew up in foster homes (T1503-4).

c) Alcoholic Mother

Dr. Krop testified that when he interviewed Appellant's mother, she appeared to have been drinking prior to his visit (T1494). Both the HRS records and the foster family with which Appellant was placed indicate that the mother was an alcoholic (T1499-1500). The records reported that Ms. Wright spent much of her time drinking in bars and, as a young child, Appellant would have to go looking in bars to find his mother when he wanted something to eat (T1500).

d) Emotional Deprivation

Dr. Maher testified that Trotter's background "could be summarized by saying that there was a horrendous and relentless exposure to chaos, deprivation, and violence by his biological family and by his foster family subsequently" (T1834). Trotter's home environment with his mother was so detrimental that HRS removed him and placed him in foster care at about age 9 (T1504). Because the foster care facility did not abide by the HRS rules, Appellant "did

not get the kind of attention that you are supposed to get in a foster environment (T1508).

e) Physical Abuse from his Mother

Both Appellant and his mother told Dr. Krop about incidents of physical abuse which took place while Appellant was a child (T1499). The mother's grandfather was described as "a very mean individual" who slapped the whole family around (T1499). Appellant also related that his mother had beat him with extension cords while he was growing up (T1499).

f) Neglect from his Mother

Ola Mae Wright told Dr. Krop that because she was working while Appellant was an infant, he was mostly taken care of by friends and other people (T1497-8). HRS records and the foster family indicated that Appellant was provided with very little food or clothing (T1498). Around age five and six, Appellant would frequently have to look for his mother in bars in order to get food (T1500). The mother's neglect was the reason Appellant was removed from his home by HRS and placed into foster care (T1498).

g) Abusive Unhealthy Foster Care

Priscilla Ridall, who had worked for the Manatee County Health Department, testified that she had been responsible for inspecting foster homes and similar facilities (T1621). Once a year she conducted an inspection of all the foster homes in the county and

reported the results to HRS (T1623-4). Her 1977 evaluation of the Ellington foster home (where Appellant resided) was put into evidence (T1624-5). The witness described a filthy, dangerous and unhealthy facility (T1625-30). Although Ms. Ridall "consistently" recommended to HRS that the foster care license be revoked, no action was taken (T1627, 1632).

In his investigation, Dr. Krop learned that Mr. Ellington, the foster father, was an alcoholic who had been arrested for violent offenses (T1505). Other people who had been in foster care at the Ellington residence reported physical abuse from Mr. Ellington (T1506-7). Leroy Chandler, who hung around with Appellant in those years, told Dr. Krop that Appellant would come to his house to hide from Mr. Ellington and that he had personally witnessed Mr. Ellington beating Trotter (T1505-6).

h) Educationally Deprived

Appellant did not start school until he was nine years old (T1498). Although his mother claimed that she didn't think he had to go, there was evidence that the real reason was Trotter didn't have clothes to wear to school (T1498). So, when he did attend school, the other children in his class were about three years younger than he (T1502). Academically, Trotter was well behind his younger classmates (T1502).

School records indicate that Appellant was not a behavior problem (T1508). However, he did fall asleep often in class

(T1508). Trotter quit school in the tenth grade after receiving almost all F's in his last year (T1532).

i) Violent Death of his Sister

After Trotter quit school, he also moved out of the Ellington foster home and went to live with his sister in Mississippi (T1533). She had been paralyzed from the waist down after being shot by her boyfriend (T1533). Shortly after Appellant arrived, the boyfriend beat her up and she died from internal injuries (T1533-4).

j) Remorse

The jury viewed a videotape which had been made by the Palmetto Police Department during Appellant's confession (T1459). Although the sound portion of the videotape was inaudible, the jury was able to view Trotter's demeanor (T1272, 1457). Captain Van Fleet had agreed that Trotter was crying while he gave his statement (T1276).

k) Borderline Mentally Retarded

When Appellant was thirteen (in the fifth grade), he was referred for special education testing (T1509). He scored 69 on the IQ test (T1509). About a year later, he scored 70 on another IQ test (T1510). Dr. Krop testified that these scores placed Trotter in the lowest two to three percent of the population (T1510). At age 14, Appellant was reading at a third grade level

(T1513). Based on these test results, Trotter was placed in a class for the educable mentally retarded (T1523).

Appellant did well in the special education classes and was again evaluated in April 1976 (T1525). This time he scored 88 on the same IQ test that he had earlier scored 70 (T1526). The examiner decided that Trotter's deficiencies in school were caused by a perceptual learning disorder rather than mental retardation (T1526-7). Appellant was returned to the regular classroom starting in the ninth grade (T1529). However, his grades then fell to mostly F's with a few D's (T1529, 1532).

Dr. Krop's own testing in 1986 resulted in an IQ score of 72 (T1530). This score places Trotter in the borderline range of mental retardation (T1530).

1) Organic Brain Defect

When Dr. Krop originally evaluated Trotter in 1986, he didn't think that a neuropsychological dysfunction was likely; consequently no testing was done (T1534-5). During his reevaluation in 1991, Dr. Krop became aware of other factors and decided that neuropsychological testing was indicated (T1535-6). This testing was done in June 1991 and showed impairment on two of the nine tests (T1536-7). Since both of these tests measured the frontal lobe function of the brain, Dr. Krop recommended that brain scans be performed (T1537-9).

Dr. Michael Maher evaluated Appellant in September 1992 and ordered an MRI scan (T1830-2). The MRI showed an "essentially nor-

mal" brain (T1832). However, a PET scan revealed definite abnormalities in the frontal lobe activity of Trotter's brain (T1833).

Dr. Frank Wood was consulted to interpret the PET scan (T1755-6, T1849-50). He observed that the abnormalities at the base of the frontal lobe were due to excessive glucose metabolic energy consumption in that area (T1764-5). Dr. Wood gave his opinion that the significance of this brain dysfunction was that Appellant would have more difficulty in maintaining self-control than the average person (T1765).

m) Cocaine Dependence

Trotter told Dr. Krop that he first used crack cocaine in September 1985 (T1542). His use of the drug escalated to the point that he was using it on a daily basis during the three to four months prior to the homicide (T1542). Dr. Krop testified that crack cocaine is extremely addictive (T1543).

Dr. Maher agreed that cocaine "is one of the worst drugs, in terms of its addictive potential" (T1824). He also agreed that Appellant was addicted to cocaine when this incident happened (T1838). He noted that the presentence investigation which he reviewed included the statement by Trotter's community control officer, "This offense is obviously drug induced" (T1903).

n) Good Behavior While in Custody

Dr. Krop testified that he reviewed the jail and prison records to determine what type of behavior Trotter had displayed while in custody (T1543-4). He found that Appellant has not been a management problem at all while incarcerated (T1544). Dr. Maher also predicted from his evaluation that Trotter's behavior in prison would be "reasonably cooperative" and nonviolent (T1846-7).

STATE'S REBUTTAL

Dr. Edward Eikman, medical director of St. Joseph's Positron Center, testified that his facility performed the PET scan on Trotter upon Dr. Maher's request (T1948-9). However, they were not requested to issue a report (T1949-50). Later, Dr. Eikman reviewed the PET scan result from Appellant; and he stated that it was within the range of normal (T1950).

Clinical psychologist Sidney Merin reviewed the tests performed by Dr. Krop (T1956). He found no significant brain damage or dysfunction (T1956). Dr. Merin criticized the way that Dr. Krop scored one of the psychological tests and his interpretation of another (T1960-5). He concluded that Trotter was a "slow thinker" in the borderline range between low average and mild retardation (T1965). Merin asserted that Trotter's "street-wise intelligence" was higher (T1966). Because Appellant showed purposeful behavior in stealing money from the cash register, the witness gave his opinion that the statutory mental mitigating factors were not established (T1968-70).

Detective Van Fleet returned to the witness stand to add to his previous testimony about the interview he conducted with Trotter the day after the homicide (T1978-93). Van Fleet recalled that when he asked Trotter why he killed Mrs. Langford instead of just leaving the store, Trotter replied, "She saw me,...she could identify me" (T1981). However, Van Fleet had to concede that this alleged statement was not on the tapes and he didn't take any notes about the interview (T1986-8).

SUMMARY OF THE ARGUMENT

This Court reversed Appellant's original death sentence because the trial court had considered Appellant's status on community control as an aggravating circumstance. Before the new penalty trial was held, the Florida Legislature amended the death penalty statute to add community control to the under sentence of imprisonment aggravating circumstance. However, application of this newly amended aggravating circumstance to Appellant violated both "law of the case" and the ex post facto clauses of the Florida and United States Constitution.

The victim impact provision of the capital sentencing statute, §921.141(7), Fla. Stat. (1993) is unconstitutional under Art. I, §17 of the Florida Constitution because it authorizes introduction of evidence of nonstatutory aggravating circumstances. Personal characteristics of the victim and emotional appeals to the jury have long been held irrelevant and prejudicial by this Court. The statute irreconcilably conflicts with the reasoned judgment required of juries and judges in Florida capital sentencing proceedings.

However, even if this Court finds the victim impact statute constitutional, it was an ex post facto violation to apply this statute to Trotter because his offense was committed in 1986. Appellant was substantially disadvantaged in his effort to achieve a jury life recommendation by the statute which permitted a eulogy to the victim to be factored into the weighing process.

In a pretrial motion, Appellant sought to vacate 1985 convictions resulting from a no contest plea. He alleged that his plea was unknowing and unintelligent. The trial judge did not reach the merits of Appellant's motion; he applied the two year limitation of Fla.R.Crim.P. 3.850 as a procedural bar. This was error because the Eighth Amendment requirement of reliability in capital sentencing does not allow use of a constitutionally infirm conviction as an aggravating circumstance. The merits of Appellant's motion must be decided.

Appellant requested an evidentiary hearing on his motion alleging racial bias in the State Attorney's decision to seek the death penalty in his case. In addition to statistical data, he showed specific instances of racial prejudice on the part of the victim's family which influenced the prosecution of this case. Therefore, he met the test previously established by both this Court and the United States Supreme Court for a hearing on his claim.

Three prospective jurors revealed during voir dire that they were so biased in favor of the death penalty that they could not be impartial jurors. Appellant's challenges for cause to these jurors should have been granted.

Another prospective juror said she doubted her ability to be impartial because of what she had learned from pretrial publicity. She also said that the nature of the evidence to be presented would interfere with her ability to follow the judge's instructions on

the law. Appellant's challenge for cause to this juror should have been granted.

Although Appellant's guilt or innocence was not in issue (his convictions for murder and robbery having been affirmed by this Court), the prosecution was allowed to put tapes of Trotter's statements to the police into evidence. These did not relate to any statutory aggravating circumstance, but were utilized heavily by the prosecutor to establish the nonstatutory aggravating circumstance that Trotter lied to the police. The prosecutor was also permitted to cross-examine a defense witness about a violent act allegedly committed by Trotter which was never charged, let alone proved.

The prosecutor's closing argument was a virtual encyclopedia of misconduct. He characterized the defense witnesses as a team who held paid reunions on behalf of convicted murderers. He remarked on Trotter's failure to testify or call character witnesses. He dehumanized Appellant by comparing him to a wolf. He argued that Appellant would pose a threat to the victim's family if ever released on parole. He recreated the homicide from the victim's perspective in front of the jury. Despite Appellant's motion for mistrial and request for curative instruction, the trial judge took no action.

The judge's sentencing order is defective because it improperly doubles the aggravating circumstances of robbery and pecuniary gain. The court's order also does not fully and unambiguously address the mitigating circumstances.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY ALLOWING THE STATE TO ADDUCE EVIDENCE OF TROTTER'S STATUS ON COMMUNITY CONTROL AS AN AGGRAVATING CIRCUMSTANCE IN VIOLATION OF A) LAW OF THE CASE; AND B) EX POST FACTO PROVISIONS OF THE STATE AND FEDERAL CONSTITUTIONS.

In Appellant's appeal from his conviction and original death sentence, this Court held in Trotter v. State, 576 So. 2d 691 (Fla. 1990) that the section 921.141(5)(a), Florida Statutes (1985) aggravating circumstance of under sentence of imprisonment did not encompass a defendant who was on community control at the time of the homicide. The Trotter majority wrote:

> Because the trial judge erroneously treated violation of community control as an aggravating circumstance in sentencing, and because there were four aggravating and four mitigating circumstances, we remand to a jury for resentencing.

576 So. 2d at 694. The opinion in Trotter was issued December 20, 1990, and rehearing denied April 4, 1991.

Evidently, the Florida Legislature disapproved of the result in Trotter because, pursuant to House Bill No. 2509, section 921.141(5)(a), Florida Statutes (1990 Supp.) was amended to read:

> (a) The capital felony was committed by a person under sentence of imprisonment or placed on community control.

Chapter 91-270, section 1, Laws of Florida (1991). The act became law on May 30, 1991.

Prior to resentencing in the trial court, Trotter moved to prohibit the State from relying on the amended statute as an aggravating circumstance in the new penalty trial (R372-4). Appellant argued that to do so would nullify this Court's holding and mandate in the prior appellate action (R374, T121). It would further violate the ex post facto provisions of the federal and state constitutions by being applied retrospectively to the 1986 offense (R372-4, T117-22,127-9). The trial judge denied Appellant's motion on the basis that penalty proceedings in Florida follow the "so-called clean state rule" (T130).

Subsequently, during the penalty trial, the State announced during opening argument that it would present evidence that Trotter was on community control at the time of the homicide (T1063). Defense counsel's motion for mistrial was denied (T1066-7). Appellant's community control officer, Kenneth Botbyl, testified about Trotter's status on community control the date of the homicide, June 16, 1986, over renewal of the pretrial motion (T1425-7).

A) "Law of the Case" Bars the Prosecution from Presenting Trotter's Status on Community Control as an Aggravating Factor

In Brunner Enterprises v. Dept. of Revenue, 452 So. 2d 550 (Fla. 1984), this Court wrote:

> It is the general rule in Florida that all questions of law which have been decided by the highest appellate court become the law of the case which, except in extraordinary circumstances, must be followed in subsequent proceedings, both in the lower and the appellate courts.

452 So. 2d at 552. Accord, Greene v. Massey, 384 So. 2d 24 (Fla. 1980). The doctrine requires adherence to the ruling on a question of law decided by the highest court "whether correct on general principles or not, so long as the facts on which the decision was predicated continue to be the facts in the case." Barry Hinnant Inc. v. Spottswood, 481 So. 2d 80 at 82 (Fla. 1st DCA 1986). An opinion in which the majority of the justices of the Florida Supreme Court joined "constitutes the law of the case." Greene v. Massey, 384 So. 2d 24 at 27 (Fla. 1980).

At bar, the trial judge simply ignored this Court's opinion remanding this case for resentencing without consideration of the section 921.141(5)(a) aggravating circumstance. Evidently, he considered the Legislature's subsequent revision of the aggravating circumstance as overruling this Court's decision. However, the separation of powers doctrine would forbid any such legislative encroachment on the power of the judiciary. The trial judge exceeded his authority when he declined to follow the holding of this Court. Cf., Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

It should be recognized that the State's argument at the pretrial hearing was based upon a misreading of this Court's decision in Hitchcock v. State, 578 So. 2d 685 (Fla. 1990), vacated on other grounds, 112 S. Ct. 3020, 120 L. Ed. 2d 892 (1992). While Hitchcock did argue an ex post facto violation on appeal from his resentencing because the judge found an aggravating circumstance previously rejected, the aggravator in Hitchcock had not been struck by this Court. In fact, this Court's opinion in Hitchcock

v. State, 413 So. 2d 741 (Fla. 1982) specifically pointed out that the sentencing judge "would have been justified in finding an additional aggravating circumstance." 413 So. 2d at 747, n.6. Indeed, the resentencing judge in Hitchcock followed the prior holding of this Court with respect to the aggravating circumstance when he found it. By contrast, the resentencing judge at bar dismissed this Court's prior rejection of the aggravating factor when he allowed it.

The decision most relevant to the situation at bar is that of Santos v. State, 629 So. 2d 838 (Fla. 1994). When this Court remanded the defendant for resentencing in Santos v. State, 591 So. 2d 160 (Fla. 1991), the opinion decided that the cold, calculated and premeditated aggravating circumstance had not been proved. Nonetheless, the trial court proceeded on resentencing to find the cold, calculated and premeditated factor applicable. This Court wrote:

> As we have stated elsewhere:
>
> > Once a trial court is apprised of error in a case that must be reversed..., the trial court is not free to commit the same error again on remand....
>
> Ellis v. State, 622 So. 2d 991, 1000 (Fla. 1993). Accordingly, the trial court plainly erred in ignoring the clear instructions of this Court's decision and opinion regarding the factor of cold, calculated premeditation.

629 So. 2d at 840.

As in Santos, the resentencing judge at bar ignored the clear instructions of this Court's decision and opinion in Trotter's

prior appeal by allowing community control to be used again as an aggravating circumstance.

B. Application of the Revised Statute to Appellant Violated Ex Post Facto Provisions of the State and Federal Constitutions

Article I, section 10 of the Florida Constitution expressly prohibits certain laws:

> No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.

The United States Constitution, Article I, section 10 similarly prohibits the states from passing ex post facto laws.

One of the recognized reasons for the constitutional ban on ex post facto legislation is to "restrict[] governmental power by restraining arbitrary and potentially vindictive legislation." Weaver v. Graham, 450 U.S. 24 at 29 (1981); Waldrup v. Dugger, 562 So. 2d 687 at 691 (Fla. 1990). It also serves to "uphold[] the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law." Weaver v. Graham, 450 U.S. at 29, n.10.

From the outset, it is clear that application of Ch. 91-270, s. 1, Laws of Fla. (1991) to Appellant in this case is vindictive in that it denies him the relief he gained in his prior appeal to this Court (resentencing before a new jury where evidence of his status on community control on the date of the homicide would be inadmissible as a sentencing consideration). Application of the amended aggravating circumstance is retrospective not only because

it applies to a crime committed in 1986; but also because it affects relief granted to Trotter by this Court in his prior appeal.

This Court has held that the state constitutional provision against ex post facto laws applies if a law "(a) . . . is retrospective in effect; and (b) . . . diminishes a substantial substantive right the party would have enjoyed under the law existing at the time of the alleged offense." Dugger v. Williams, 593 So. 2d 180 at 181 (Fla. 1991). Under this analysis, it was error to deny a prisoner the advantage of the mandatory recommendation for executive clemency by the Department of Corrections upon meeting the requirements existing under the statute when his crime took place. Id.

Applying this formulation to the facts at bar, we have already noted the retrospective nature of applying the 1991 revised aggravating circumstance to Trotter. The revised statute also "diminishes a substantial substantive[1] right" which Trotter had under the prior law. This right was a better opportunity to win a life recommendation from his new penalty jury by precluding the State from introducing evidence of his status on community control and barring consideration of the section 921.141(5)(a) aggravating circumstance.

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[1] There is no doubt that aggravating circumstances are substantive law. They "actually define those crimes. . . in which the death penalty is applicable." State v. Dixon, 283 So. 2d 1 at 9 (Fla. 1973).

Why then has this Court always rejected ex post facto arguments where aggravating circumstances were applied to capital defendants whose offense predated the enactment of the aggravating circumstance?[2] See, e.g., Combs v. State, 403 So. 2d 418 (Fla. 1981), cert.den., 456 U.S. 984 (1982); Valle v. State, 581 So. 2d 40 (Fla.), cert.den., 112 S. Ct. 597, 116 L. Ed. 2d 621 (1991); Ziegler v. State, 580 So. 2d 127 (Fla.), cert.den., 112 S. Ct. 390, 116 L. Ed. 2d 340 (1991); Jackson v. State, 19 Fla. L. Weekly at S 218 (Fla. 1994). This Court has expressed the rationale that the cold, calculated and premeditated aggravating circumstance can be retroactively applied because "the statute only reiterated an element already present in the crime of premeditated murder." Zeigler, 580 So. 2d at 130. Likewise, the aggravating factor of law enforcement officer engaged in official duties "is not an entirely new factor" because of the longstanding aggravating factors of murder to prevent lawful arrest and murder to hinder enforcement of laws. §§ 921.141(5)(e)(g)(j); Valle, 581 So. 2d at 47. Consequently, none of the capital defendants to whom newly enacted aggravating circumstances were applied suffered any disadvantage in this Court's view.

The same cannot be said of Trotter. Appellant's case is distinguished by the fact that the revised aggravating circumstance allowed Trotter's jury to hear evidence (status on community control) that was inadmissible as irrelevant under this Court's inter-

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[2] Justice Kogan has expressed his opinion that this issue has been wrongly decided. Ellis v. State, 622 So. 2d 991 (Fla. 1993) (concurring opinion at 1002).

pretation of the prior section 921.141(5)(a) aggravating factor. By comparison, the evidence before the penalty jury was not altered in any way by retroactive applications of the sections 921.141(5)-(i) and (j) aggravating factors considered in this Court's prior ex post factor decisions. Another distinguishing characteristic is that none of the other defendants (Combs, Valle, Ziegler, Jackson, etc.) had this Court render a decision finding the aggravating circumstance invalid in his or her case only to have the Legislature amend the statute to make the aggravating circumstance applicable. Indeed, ch. 91-270, s. 1, Law of Florida (1991) as applied to Appellant is plausibly a bill of attainder as well as ex post facto legislation.

Under an analysis of the U.S. Constitution's ex post facto provision, the State cannot merely argue that the potential punishment for Appellant remained the same. Cf., Dobbert v. Florida, 432 U.S. 282 (1977). As Miller v. Florida, 482 U.S. 423 (1987) points out, a substantial disadvantage in achieving a lesser sentence is sufficient to meet the "more onerous" punishment prong of ex post facto analysis. See also, Lindsey v. Washington, 301 U.S. 397 (1937). Because Appellant had evidence of his status on community control admitted against him as well as consideration by the jury and judge of the aggravating circumstance previously held inapplicable, he was "'substantially disadvantaged' by the change in sentencing laws." 482 U.S. at 432. Consequently, a federal constitutional ex post facto violation has occurred as well.

In conclusion, this Court should recognize that the "so-called clean slate rule" on resentencing is inapplicable here. The revised statute allows an entirely new factor (status on community control) to be admitted as evidence and form the predicate for a death sentence. Consequently, the revision is an ex post facto law when applied to anyone who committed a capital felony prior to May 30, 1991.

Appellant in particular has been uniquely disadvantaged because the trial court's ruling allowing application of the revised aggravating circumstance deprived him of the benefit he gained from this Court in his prior appeal. Accordingly, Appellant should now be granted a resentencing proceeding before a new jury with neither admission into evidence of his status on community control nor consideration of the section 921.141(5)(a) aggravating factor in sentencing.

ISSUE II

SECTION 921.141(7), FLORIDA STATUTES (1993) IS UNCONSTITUTIONAL UNDER ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AMENDMENT, UNITED STATES CONSTITUTION.

In Payne v. Tennessee, 501 U.S. ___, 111 S.Ct. 2597, 115 L. Ed. 2d 720 (1991), the United States Supreme Court overruled prior precedent[3] to hold that the Eighth Amendment, United States Constitution poses no bar to a State determination that victim impact evidence should be a capital sentencing consideration. The concurring opinion of Justice O'Connor explains:

> We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, "the Eighth Amendment erects no per se bar."

115 L. Ed. 2d at 739-40. Conversely, it should be recognized that Payne does not hold that all victim impact evidence is admissible. Also the Eighth Amendment might bar a state statute allowing victim impact evidence if the statute as a whole made capital sentencing unreliable.

Responding to the Payne decision, the Florida Legislature enacted Chapter 92-81, Laws of Florida (1992), creating a new subsection of the capital sentencing statute; section 921.141(7), Fla. Stat. (1993), which provides:

> (7) VICTIM IMPACT EVIDENCE. -- Once the prosecution has provided evidence of the

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[3] Booth v. Maryland, 482 U.S. 496 (1987) and South Carolina v. Gathers, 490 U.S. 805 (1989).

> existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

The Legislature's action flew in the face of longstanding precedent in Florida making such evidence irrelevant. It also jeopardizes the structure of the Florida capital sentencing scheme by adding an open-ended nonstatutory aggravating circumstance to be weighed by the penalty jury. Hence, even though victim impact evidence does not per se violate the Eighth Amendment, this particular statute does. Even more clearly, it violates the "unusual" punishment provision of the Florida Constitution, Article I, section 17.

A. This Court Has Interpreted the State "Cruel or Unusual Punishment" Constitutional Provision More Broadly Than Its Federal Counterpart.

In Hale v. State, 630 So. 2d 521 (Fla. 1993), this Court wrote:

> The federal constitution protects against sentences that are both cruel and unusual. The Florida Constitution, arguably a broader constitutional provision, protects against sentences that are either cruel or unusual.

630 So. 2d at 526. While declining to further delineate the scope of the state constitutional guarantee, the Hale court quashed the district court's holding that neither the federal nor the state

constitution guarantees proportionality review of noncapital sentencing.

Previously, this Court held in Tillman v. State, 591 So. 2d 167 (Fla. 1991) that the Florida Constitution, Article I, section 17 provision requires the Court to conduct proportionality review in capital cases. Avoiding "unusual" punishment requires that a sentence of death not be imposed under circumstances similar to those in cases where death was previously held improper. Tillman, 591 So. 2d at 169. By contrast, the United States Supreme Court has held that the Eighth Amendment does not require the States to conduct proportionality review of capital sentences. Pulley v. Harris, 465 U.S. 37 (1984).

Another example of how this Court has construed the cruel or unusual punishment provision of the Florida constitution more broadly than the Eighth Amendment is the decision of Allen v. State, 636 So. 2d 494 (Fla. 1994). In Allen this Court categorically prohibited imposition of the death penalty on anyone under sixteen years of age when the offense is committed. The Allen court compared the Eighth Amendment standard in a footnote:

> We also note the decision in Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988). While Thompson was a plurality opinion, it is clear that a majority of the Court there found the execution of young juveniles a highly questionable practice under the United States Constitution.

636 So. 2d at 498, fn. 7. With respect to the similar issue of whether mentally retarded defendants can be executed, several members of this Court have issued dissenting opinions which would

hold that Art. I, §17, Fla. Const. prohibits death sentences for the mentally retarded. See, Woods v. State, 531 So. 2d 79 (Fla. 1988) (Shaw, J. dissenting) (Barkett, J. dissenting); Hall v. State, 614 So. 2d 473 (Fla. 1993) (Barkett, J. dissenting). Cf., Penry v. Lynaugh, 492 U.S. 302 (1989) (Eighth Amendment does not bar states from executing the mentally retarded).

As a final and most important contrast between the minimum guarantee required under the Eighth Amendment and Florida capital sentencing standards, Appellant points out the analysis set forth in Barclay v. Florida, 463 U.S. 939 (1983) (Stevens, J. concurring):

> The Florida rule that statutory aggravating factors must be exclusive affords greater protection than the Federal Constitution requires. Although a death sentence may not rest **solely** on a nonstatutory aggravating factor, (citation omitted) the Constitution does not prohibit consideration at the sentencing phase of information not directly related to either statutory aggravating or statutory mitigating factors, as long as that information is relevant to the character of the defendant or the circumstances of the crime.

463 U.S. at 966-7. Section 921.141(7), Florida Statutes (1993) does not create a new statutory aggravating circumstance; rather it unconstitutionally authorizes introduction of a whole class of evidence which is bound to contain one or more nonstatutory aggravating factors. Therefore, it directly clashes with the above U.S. Supreme Court analysis in Barclay as well as this Court's long-standing holding that neither the capital sentencing jury nor the judge may consider nonstatutory aggravating circumstances. See

e.g., Purdy v. State, 343 So. 2d 4 at 6 (Fla. 1977); Grossman v. State, 525 So. 2d 833 at 842 (Fla. 1988)("victim impact is a non-statutory aggravating circumstance").

B. Evidence Concerning a Crime Victim's Character and Any Loss to the Community Has Never Been a Permissible Factor in Florida Capital Sentencing.

The Florida courts have long frowned upon interjection of the victim's personal characteristics into criminal trials. In the 1906 decision of Melbourne v. State, 51 Fla. 69, 40 So. 189 (1906), this Court found reversible error where the prosecutor elicited testimony before the jury that the homicide victim had a wife. The Melbourne Court wrote:

> The fact that the deceased did nor did not have a wife had no sort of relevancy or pertinency to any issue in the case; . . . . [it] could have no other effect than to prejudice the defendant with the jury.

40 So. at 190. Similarly, a question eliciting the size of the deceased's family in Rowe v. State, 120 Fla. 649, 163 So. 22 (1935) was termed "wholly immaterial, irrelevant, and impertinent to any issue in the case." 163 So. at 23. More recently, in King v. State, 623 So. 2d 486 (Fla. 1993), the State conceded that the prosecutor's references to the victim as a mother were error. 623 So. 2d at 488, n.1.

Thus, victim impact type evidence has been traditionally excluded by the decisions of the Florida courts. When the United States Supreme Court held that victim impact evidence in capital sentencing violated the Eighth Amendment, Booth v. Maryland, 482

U.S. 496 (1987), no substantial change occurred in Florida because Booth was essentially in accord with Florida precedent. Rather than relying on a state constitutional basis, however, this Court has employed the rationale that victim impact evidence is either a) irrelevant, or b) its probative value is greatly outweighed by the prejudicial effect. Cf., section 90.403, Florida Evidence Code.

For example, in Trawick v. State, 473 So. 2d 1235 (Fla. 1985), reversible error occurred when the jury was allowed to hear testimony about the injuries which a surviving victim suffered. In granting a new penalty trial, this Court wrote:

> because the jury heard evidence and argument that did not properly relate to any statutory aggravating circumstance the jury recommendation is tainted.

473 So. 2d at 1241. Similarly, in Burns v. State, 609 So. 2d 600 (Fla. 1992), evidence about the homicide victim (a law enforcement officer) relating to his background and character was held irrelevant. The Burns decision is particularly significant because Burns argued on appeal that his Eighth Amendment right had been violated by admission of what was essentially victim impact evidence. This Court rejected the Eighth Amendment argument, pointing out that the United States Supreme Court had overruled Booth v. Maryland in Payne v. Tennessee, 501 U.S. ___, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991). Nevertheless, this Court found the testimony about the victim's character and background "not relevant to any material fact in issue." 609 So. 2d at 605. While the error was harmless as to the conviction, the Burns court found it justified a new penalty proceeding:

> The prosecutor described the defendant as an evil supplier of drugs and contrasted him with the deceased. These emotional issues may have improperly influenced the jury in their recommendation.

609 So. 2d at 607.

When victim impact evidence has been presented only to the sentencing judge and not the penalty jury, this Court has reached differing results. In Davis v. State, 586 So. 2d 1038 (Fla. 1991), the victim's daughter read a statement to the sentencing judge after the jury had returned a death recommendation. In finding the error harmless, the Davis court noted both that the jury had not been exposed to the statement and that the sentencing judge did not rely on the daughter's statement when he prepared his written findings. By contrast, when the judge appeared to rely upon testimony from the victim's niece at the sentencing hearing where he imposed a death sentence in Patterson v. State, 513 So. 2d 1257 (Fla. 1987), this Court remanded for resentencing. The Patterson court cautioned the trial judge "not to utilize lack of remorse or the emotional distress of the victim's family in the weighing process." 513 So. 2d at 1263 (e.s.).

It should be recognized that this Court has also rebuked defendants who interjected emotional issues or arguments relying upon the character of the victim into the capital sentencing process. In Porter v. State, 429 So. 2d 193 (Fla. 1983), this Court affirmed a death sentence imposed over a jury life recommendation. The Porter Court relied in part upon defense counsel's emotional description of an electrocution which "might well have . . .

swayed" the penalty jury. Again, in Coleman v. State, 610 So. 2d 1283 (Fla. 1992), a jury override death sentence was affirmed despite the defendant's argument that the victims' background was sufficient nonstatutory mitigation to support the jury's life recommendation. Accord, Marshall v. State, 604 So. 2d 799 at 806 (Fla. 1992) ("defense counsel's argument composed largely of a negative characterization of the victim does not provide a reasonable basis for the jury's life recommendation").

This Court squarely confronted the issue of whether the homicide victim's bad character or conduct should be a sentencing consideration in Thomas v. State, 618 So. 2d 155 (Fla. 1993). There, the victim stopped his car in an area known for drug sales and waved a wad of money out the window. The defendant attempted a robbery; the victim resisted and was shot to death. Both in the trial court and on appeal, Thomas argued that the victim's conduct should be weighed as a nonstatutory mitigating circumstance of the offense. This Court flatly rejected the argument, stating:

> The victim's efforts to buy cocaine are irrelevant to Thomas's culpability.

618 So. 2d at 157.

From these examples, we can conclude that the evidence which section 921.141(7) authorizes, i.e. evidence "designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death," has been heretofore held irrelevant in Florida capital sentencing and its admission has resulted in reversible error when weighed by either the jury or judge.

C. Section 921.141(7), Florida Statutes (1993) Establishes an Open-Ended Category of Nonstatutory Aggravation Which Invites an Emotional Response From the Jury Contrary to the Reasoned Judgment Which this Court Has Found Imperative in Capital Sentencing.

Perusal of the aggravating circumstances contained in section 921.141(5), Florida Statutes (1993) shows that the sentencing jury and judge must decide that either "yes, the circumstance applies" or "No, it doesn't." Proper instruction or knowledge of applicable caselaw may be essential in order to decide, for instance, whether "the capital felony was committed for the purpose of avoiding or preventing a lawful arrest." However, in the end, the sentencer must decide which aggravating factors apply before weighing them. When this Court conducts appellate review, a key question is whether the aggravating circumstances found by the sentencing judge were properly applied. This Court does not, however, interfere with the weight given to properly found aggravating and mitigating circumstances except in jury override cases or where a death sentence is disproportionate. Compare, Hudson v. State, 538 So. 2d 829 at 831 (Fla. 1989) with Santos v. State, 629 So. 2d 838 at 840 (Fla. 1994).

Allowing victim impact evidence into the mix upsets this balanced structure. It is clearly unsatisfactory to declare that victim impact evidence "is neither aggravating nor mitigating [but] . . . other evidence." State v. Maxwell, 19 Fla. L. Weekly D1706 (Fla. 4th DCA August 10, 1994). The sole purpose of the penalty phase proceeding is to determine whether the defendant convicted of

a capital crime shall be sentenced to death or life imprisonment. Victim impact evidence under section 921.141(7) can only be introduced by the prosecution and argued by the prosecution. It is unlikely that the prosecution would choose to introduce victim impact evidence if it would have only a neutral rather than aggravating effect on the jury. Provision for argument, by definition, contemplates that the prosecution will utilize victim impact evidence in order to make a jury death recommendation more likely. As Grossman said, victim impact is simply nonstatutory aggravation.

Actually, victim impact evidence is really a misnomer for what amounts to victim eulogy. The prosecution is permitted to present witnesses who "demonstrate the victim's uniqueness as a human being and the resultant loss to the community's members by the victim's death." This is usually what takes place at a funeral. While the defendant could possibly choose to cross-examine these witnesses; the statute certainly does not permit a defendant to present derogatory evidence such as a victim's criminal record to show that the community might have gained by the victim's death.

Another aspect of the constitutional problem created by section 921.141(7) is that no provision has been made to instruct the jury on how they should consider victim impact evidence. Subsection (2) of the capital sentencing statute describes the penalty jury's function:

> (2) ADVISORY SENTENCE BY THE JURY. -- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

The standard jury instructions reflect this three part process. It should be emphasized that the exclusive considerations under the statute are the statutory aggravating circumstances weighed against any existing mitigating circumstances. See, State v. Dixon, 283 So. 2d 1 at 8 (Fla. 1973) ("aggravating and mitigating circumstances . . . must be determinative of the sentence imposed").

How then is the penalty jury going to weigh victim impact evidence? It cannot be doubted that the prosecution's presentation of the victim's character and worth to the community will somehow influence the weighing process. Victim impact evidence truly calls for an emotional response to the eulogy of the victim. Without any guidance on the criteria by which this evidence should be judged, an arbitrary and capricious death recommendation may be returned contrary to the Eighth Amendment and the Florida Constitution, Article I, section 17.[4]

Since Espinosa v. Florida, 505 U.S. ___, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), it has been clearly recognized that the capital sentencing function in Florida is divided between the jury and the judge. Because the judge must give great weight to the jury's penalty recommendation, he indirectly weighs all factors considered

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[4] See Gardner v. Florida, 430 U.S. 349 at 358 (1977). ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion").

by the jury. Therefore, Espinosa held that a sentence of death violates the Eighth Amendment where the penalty jury considered an invalid aggravating circumstance even though the sentencing judge did not weigh the invalid factor.

Applying the logic of Espinosa to the effect of the victim impact statute, we can see that the penalty jury may consider a host of emotionally charged factors unrelated to the statutory aggravating circumstances. The victim impact evidence may well determine the penalty recommendation; yet its role will remain undetected because a Florida penalty jury does not return a verdict with specific findings, only a recommended sentence. Adding to the likelihood that the eulogy of the victim will influence the penalty recommendation is the fact that jury unanimity on sentencing is not required; a death recommendation may be returned by a bare majority. Even where a bare majority of the jury recommends death, the sentencing judge must give great weight to the recommendation. Espinosa; Grossman. Thus, the sentencing judge will indirectly weigh what could amount to only an emotional response on the part of one juror which skewed the penalty recommendation from life to death.

In short, section 921.141(7), Florida Statutes (1993) simply adds a thumb on the scale in favor or death to the weighing process. It abandons the guided discretion and reasoned judgment standards which this Court has always found essential in capital sentencing. Instead, it invites a sentencing decision based upon emotion. Appellant contends that the victim impact provision

renders the entire Florida capital sentencing procedure unconstitutional under the Eighth and Fourteenth Amendments, United States Constitution. However, this Court has ample authority to reach the more limited result that section 921.141(7), Florida Statutes (1993) is unconstitutional under the Florida Constitution's cruel or unusual punishment provision of Article I, Section 17. Surely, sentencing a defendant to death because the prosecutor delivered a compelling eulogy of the victim constitutes "unusual" punishment.

ISSUE III

ALLOWING VICTIM IMPACT EVIDENCE WAS ERROR BECAUSE APPLICATION OF SECTION 921.141(7), FLORIDA STATUTES (1993) TO APPELLANT IS AN IMPERMISSIBLE EX POST FACTO VIOLATION.

Even if this Court rejects Appellant's contention that the statute permitting victim impact evidence in a capital proceeding violates Article I, Section 17 of the Florida Constitution, the statute still should not have been applied in his resentencing proceeding. Section 921.141(7), Florida Statute (1993) was created by Chapter 92-81, section 1, Laws of Florida (1992) with an effective date of July 1, 1992. Thus, the statute was not effective until over six years after the homicide took place.

Trotter's pretrial "Motion to Prohibit Application of Fla. Stat. 921.141(7)" relied upon both the federal and state constitutional ex post facto provisions (R244-7). The trial judge denied the motion on the same theory that he allowed the State to use the amended aggravating circumstance (see Issue I) (T145). Although the judge noted "some problem of disadvantage," he concluded that the ex post facto cases don't apply because of this Court's "so-called clean slate cases" (T145-6).

Based upon this ruling, the State was able to present testimony from Timothy Matthews, the victim's grandson, about how Ms. Langford had been in the grocery business for 50 years, 30 years at the same location (T1280-1). He detailed the long hours she worked by herself (T1282-3); that she had undergone open heart surgery nine months prior to the incident (T1288); and that she never acted

aggressively towards people who robbed her (T1289). Over Appellant's objection, the witness identified a photograph of the victim taken some time before this incident and it was receive into evidence (T1293-4). Over further objection, the witness testified that Ms. Langford treated her customers very well (T1294-5); that she had a good relationship with them (T1301); and that she gave credit to people who couldn't afford food for their families (T1301). The victim's grandson agreed to the prosecutor's suggestion that she was "well-liked and well-respected in the Palmetto community" (T1302).

Further victim impact evidence came in by way of eulogy from Charles McKnight, Ms. Langford's son-in-law (T1429-33). He testified that Ms. Langford had four children, ten grandchildren and one or two great grandchildren (T1429-30). He described in detail her recovery from open heart surgery (T1430-1). He characterized her as "a loving, tender, kind, giving, doing type person" (R1431). McKnight also testified to Ms. Langford's "tremendous relationship" with her customers and how she would give credit to those who couldn't afford to pay (T1431-3).

The prosecutor followed up this testimony in his closing argument by urging the jury "to consider some evidence about the victim in the weighing process" (T2078). He reiterated the victim's positive characteristics as recounted in her relatives' eulogies (T2079). He contrasted the photograph of her alive with the photograph showing her stab wounds (T2079).

It is incontestable that none of this victim impact evidence could have been presented before the effective date of Section 921.141(7), Florida Statutes (1993). When this Court considered the holding of Booth v. Maryland, 482 U.S. 496 (1987) in Grossman v. State, 525 So. 2d 833 (Fla. 1988), it wrote:

> victim impact is a non-statutory aggravating circumstance which would not be an appropriate circumstance on which to base a death sentence.

525 So. 2d at 842. After Payne v. Tennessee, 111 S. Ct. 2597 (1991) overruled Booth, this Court adhered to the view that testimony about characteristics of the victim was irrelevant and inadmissible in capital proceedings. Burns v. State, 609 So. 2d 600 (Fla. 1992). Thus, prior to the enactment of Chapter 92-81, Laws of Florida (1992), it is clear that victim impact evidence was considered irrelevant to capital sentencing by this Court, and its admission could create reversible error.

For example, in Jackson v. State, 498 So. 2d 906 (Fla. 1986), this Court called a list of factors cited by the judge in his sentencing order "patently improper":

> These factors included the fact that the victim was married; ran the store alone; had led an honest and good life; would be missed by the community; . . . and was a kind and likeable man.

498 So. 2d at 910. These factors are essentially the same ones that were introduced as victim impact evidence in the case at bar. Accordingly, this Court's precedent in Jackson would require a similar finding of reversible error at bar unless the new statute can be applied to Trotter.

This Court has held that the Article I, section 10, Florida constitutional provision against ex post facto laws applies where a law "is retrospective in effect; and (b) . . . diminishes a substantive right the party would have enjoyed under the law existing at the time of the alleged offense." Dugger v. Williams, 593 So. 2d 180 at 181 (Fla. 1991). At bar, under the law existing at the time of the homicide, the eulogistic testimony about the victim, Ms. Langford, would have been excluded as irrelevant. Trotter's ability to obtain a life recommendation from his new penalty jury was diminished because the effect of Section 921.141(7), Florida Statutes (1993) is, in the prosecutor's words, to allow the jury "to consider some evidence about the victim in the weighing process" (T2078). Certainly, evidence which is factored into the weighing process is substantive in nature.[5]

Viewing the issue within the federal ex post facto analysis set forth in Miller v. Florida, 482 U.S. 423 (1987), Trotter was "'substantially disadvantaged' by the change in sentencing laws." 482 U.S. at 432. The change, which allowed the jury and judge to weigh victim impact evidence when imposing sentence, made it less likely that Appellant could obtain a life sentence. Although the victim impact statute does not create a new aggravating circumstance (cf. Issue I), it still allows evidence previously barred to be weighed in aggravation by the sentencer.

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[5] Alternatively, if this Court were to hold §921.141(7), Fla. Stat. (1993) to be merely procedural, Appellant's argument in the trial court that the statute was invalid as a legislative encroachment upon the judicial rulemaking power would have merit. Art. V, §2, Fla. Const.; see (T136,147).

This Court should consider by way of analogy, the decision of State v. Luff, 85 Ohio App. 3d 785, 621 N.E.2d 493 (6th App. Dist. 1993). The Ohio legislature had narrowed the definition of insanity and a new jury instruction on insanity wa drawn to fit the revised definition. The Luff court held that it was error to give the new instruction at a trial where the criminal conduct occurred prior to the statute's enactment and the defendant relied on an insanity defense. Because the statute changed the evidentiary standard of insanity in a manner which disadvantaged the defendant, it was an ex post facto violation to require him to meet the new standard.

Similarly, at bar, the Florida Legislature's addition of Section 921.141(7), Florida Statutes (1993) allowed different evidence to be used against Trotter to prove the State's case that death was the proper penalty. Trotter was clearly disadvantaged by having victim impact evidence weighed against him. Accordingly, a new penalty proceeding before a new jury should be conducted with only the evidence permissible at the date of the offense allowed.

ISSUE IV

THE TRIAL COURT ERRED BY RULING THAT RULE 3.850'S TWO YEAR LIMITATION BARRED HIM FROM CONSIDERING THE CONSTITUTIONAL VALIDITY OF APPELLANT'S PRIOR CONVICTION FOR ROBBERY.

In Johnson v. Mississippi, 486 U.S. 578 (1988), the United States Supreme Court held that a death sentence based in part on the aggravating circumstance of a conviction that was later vacated was violative of the Eighth Amendment requirement of reliability in capital sentencing. The Johnson Court wrote:

> Although we have acknowledged that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death,'" we also made it clear that such decisions cannot be predicated on mere "caprice" or on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process."

486 U.S. at 584-5, quoting from Zant v. Stephens, 462 U.S. 862 (1983). At bar, the question presented boils down to whether a defendant in a capital sentencing proceeding may be precluded from challenging the constitutional validity of a prior conviction for a violent felony which the state intends to present as an aggravating circumstance.

Appellant filed a "Motion to Preclude Prior Convictions as Aggravators" (R214-24), which essentially alleged a violation of Fifth, Sixth, and Fourteenth Amendment rights stemming from entry of an unknowing and intelligent plea of no contest to counts of burglary and robbery on September 12, 1985. See Boykin v. Alabama, 395 U.S. 238 (1969). The trial judge held a hearing on November

13, 1992, where testimony was taken from Dr. Harry Krop and Henry E. Lee (T7-85). Dr. Krop testified primarily with regard to Trotter's ability to comprehend the words on the waiver of rights form he signed (T9-31). Mr. Lee had been one of Trotter's court-appointed attorneys on these charges (T53-5). He testified about meeting with Trotter in the Manatee County Jail on September 10, 1985, and explaining the plea offer to him (T58-64). However, in the end, the trial court did not rule on the merits of Appellant's motion. Instead, he accepted the State's contention that the time limitation contained in Fla. R. Crim. P. 3.850(b) was a procedural bar to Appellant's motion (T110-2). The judge cited as authority for his ruling Bannister v. State, 606 So. 2d 1247 (Fla. 5th DCA 1992) (barring collateral attack on 1976 conviction used to enhance current non-capital sentence).

Although Bannister has been followed by the Fourth District [see Jones v. State, 617 So. 2d 332 (Fla. 4th DCA 1993)], its holding is nevertheless suspect even when applied to non-capital sentencing. The general rule is that a prisoner in custody by virtue of a sentence which was enhanced by a prior conviction has standing to challenge that prior conviction. In Shell v. State, 501 So. 2d 1332 (Fla. 2d DCA 1987), the court wrote:

> A prisoner is in custody for the purposes of rule 3.850 if the conviction attacked was used to enhance a current sentence.

501 So. 2d at 1333. Accord, McArthur v. State, 597 So. 2d 406 (Fla. 1st DCA 1992); Wall v. State, 525 So. 2d 486 (Fla. 1st DCA 1988).

The United States Supreme Court in Parke v. Raley, 506 U.S. ___, 113 S.Ct. ___, 121 L. Ed. 2d 391 (1992) observed:

> In recent years state courts have permitted various challenges to prior convictions and have allocated proof burdens differently.

121 L. Ed. 2d at 406. The Raley Court specifically declined to address the issue of whether the Due Process Clause of the federal constitution requires states to allow challenges to guilty pleas used to enhance subsequent sentences. Raley merely holds that when a defendant challenges a prior conviction obtained pursuant to an uninformed plea invalid under Boykin, a state can impose the initial burden of production on the defendant.

At bar, Appellant was able to produce the transcript of the September 12, 1985 plea colloquy where he was adjudicated guilty of burglary and robbery (R219-21). A perusal of the colloquy shows its woeful inadequacy under the requirements announced by this Court in Koenig v. State, 597 So. 2d 256 (Fla. 1992). It is also inadequate under the federal constitutional standard of Boykin v. Alabama. The only constitutional right mentioned by the court and waived by Appellant was the "right to a trial by jury" (R220-1). Absolutely no factual basis was established; there was not even a stipulation that a factual basis existed. A fair reading of the colloquy supports the conclusion that Trotter pled no contest primarily to "be released from jail today" (R220).

Appellant must concede that there is a question as to whether his motion was premature. Caselaw indicates that it is the imposition of an enhanced sentence which establishes the custody require-

ment needed for jurisdiction to attack a prior conviction whose sentence had expired. Shell, supra; Maleng v. Cook, 490 U.S. 488 (1989). Theoretically at least, it would seem that Appellant should wait until a new death sentence is imposed before he attacks the prior conviction used as an aggravating circumstance. As a practical matter, however, such a course of action only delays resolution of the question and may result in a new resentencing proceeding many years later. Rather than invite the total waste of time and judicial resources attendant upon allowing a penalty trial to proceed with an invalid aggravating circumstance presented to the jury, it would seem wiser to decide the validity of the prior violent felony conviction via a pretrial motion such as that at bar. This consideration is particularly apt where, as here, the challenged conviction was obtained in the same court.

The recent decision by the United States Supreme Court in Custis v. United States, No. 93-5209, 62 U.S.L.W. 4346 (1994) does not alter this conclusion. The Court held that a defendant being sentenced in federal court under the Armed Career Criminal Act has no right of collateral attack on the validity of prior state convictions used to enhance his sentence (unless obtained in violation of the right to counsel). However, the Custis court specifically noted that the defendant had other avenues open to challenge the validity of his prior convictions such as the courts in the state where the conviction was obtained and federal habeas review. See also Nichols v. United States, No. 92-8556, 62 U.S.L.W. 4421 (1994) (opinion of Justice Ginsburg) ("issue [in Custis] was where, not

whether, the defendant could attack a prior conviction for constitutional infirmity"). The Custis majority concluded that "§924(e) does not permit Custis to use the federal sentencing forum to gain review of his state convictions."

To summarize: 1) State and federal due process require that a defendant whose present sentence is enhanced by a prior conviction be allowed to challenge the validity of that conviction; 2) where a death sentence is imposed, the Eighth Amendment's special requirement of reliability in capital sentencing precludes a time bar to challenge of a constitutionally invalid prior conviction used as an aggravating circumstance; 3) as a matter of state constitutional law, "death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties." Art. I, §9, Fla. Const.; Tillman v. State, 591 So. 2d 167 at 169 (Fla. 1991).

Accordingly, this Court should either remand this case for a determination on the merits by the trial court or simply order Trotter's prior conviction vacated on the basis of the defective plea colloquy contained in the record. Vacating the prior conviction mandates a new resentencing before a new jury. See, Long v. State, 529 So. 2d 286 (Fla. 1988).

ISSUE V

THE TRIAL COURT ERRED BY FAILING TO CONDUCT AN EVIDENTIARY HEARING ON APPELLANT'S MOTION ALLEGING THAT RACIAL BIAS PLAYED A ROLE IN THE STATE ATTORNEY'S DECISION TO SEEK A DEATH PENALTY IN THIS CASE.

When the hearing on Appellant's pretrial motions was held on November 13, 1992, one of the motions sought to bar imposition of a death sentence on Trotter because racial discrimination played a role in his prosecution. On the State's request for a continuance, the court ruled that the motion could be heard after the penalty trial before the jury was conducted (T185-6). Consequently, Appellant's "Amended Motion to Bar Death Penalty in Resentencing of Melvin Trotter Based upon Arbitrary, Discriminatory and Impermissible Racial Grounds" (R462-77) was heard July 12, 1993 (T2129-48).

At this hearing, defense counsel stated that he was seeking the right to conduct a full-fledged evidentiary hearing on the role of racial bias in capital prosecutions conducted in Manatee County (T2138). Exhibit A of the motion detailed statistics on all first degree murder charges in Manatee County from 1977 until May 1993 (R468-71). These statistics show that a death sentence was never imposed where the homicide victim was black (T2141,R464). Exhibit B was an excerpt from the deposition of Gene Matthews, a member of the victim's family in this case (R472-4). It shows that this family member referred to Appellant as "Van Fleet's nigger" on two occasions (R465,473-4). Exhibit C attached to the motion is an excerpt from a 1987 hearing where Trotter's former defense attorney

in this case set forth his efforts to negotiate a plea bargain (R475-7). Mr. Dubensky (the attorney) stated that in discussions with Mr. Langford of the victim's family, he was told that the family would agree to a life sentence for Trotter (R465,476). The next day, Mr. Langford phoned Dubensky and stated that after consultation with the other family members; their position was, "They wanted to see the nigger fry" (R465,476-7).

The trial court considered whether these allegations were sufficient to warrant an evidentiary hearing (R2147). Purporting to apply the test of Foster v. State, 614 So. 2d 455 (Fla. 1992), cert.den., ___U.S.___, 114 S.Ct. 398, 126 L. Ed. 2d 346 (1993), the court ruled that the allegations failed to show "this was really truly racial bias that was applied to this case and not some sort of overall pattern generally" (T2147-8). The judge further noted that in this Court's previous review of the case, one aggravating circumstance had been specifically upheld (T2148).

The trial court did not apply Foster correctly to the facts at bar. This Court's majority opinion in Foster rejected the request for an evidentiary hearing because the defendant "offered nothing to suggest that the state attorney's office acted with the purposeful discrimination in seeking the death penalty in his case."[6] 614 So. 2d at 463. By contrast, Appellant's motion set forth specific instances where members of the victim's family applied the racially derogatory term "nigger" to Trotter. It was shown that

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[6] This is also the test under the Equal Protection Clause, Fourteenth Amendment, United States Constitution. See, McCleskey v. Kemp, 481 U.S. 279 at 292 (1987).

Trotter's race was a likely reason why the victim's family urged the prosecution to seek the death penalty.

Appellant alleged that he could also prove at an evidentiary hearing that the Manatee County State Attorney's Office gives great weight to the desire of the victim's family when determining whether to seek the death penalty in any first degree murder prosecution. Consequently, the racial bias shown by the victim's family in this case could have played an integral role in the decision to seek the death penalty for Trotter. Combined with the statistical information, Appellant met his burden under Foster and the corresponding federal equal protection constitutional burden set forth in McCleskey. He should now be granted an evidentiary hearing on his claim that racial discrimination played a role in this prosecution.

Alternatively, Appellant requests this Court to revisit the Foster decision which divided this Court 4-3. Former Chief Justice Barkett's dissenting opinion in Foster gives compelling reasons why the Equal Protection provision of the Florida Constitution, Article I, section 2, should be interpreted to provide a different standard for inquiry into racial discrimination in death penalty decision making than the almost impossible federal standard established in McCleskey v. Kemp, 481 U.S. 279 (1987). As Justice Thomas of the United States Supreme Court recently observed, capital sentencing in the United States historically showed the influence of racial prejudice. Graham v. Collins, 506 U.S. ___, ___S.Ct.___, 122 L. Ed. 2d 269 (1993). Borrowing Justice Thomas's phrasing, this

"paradigmatic capricious and irrational sentencing factor" should play no covert role in capital prosecution decision making in Florida. 122 L. Ed. 2d at 280.

Accordingly, Appellant requests this Court to remand this case to the trial court with orders to conduct an evidentiary hearing on his claim that racial bias played a role in the State's decision to seek the death penalty.

ISSUE VI

THE TRIAL COURT ERRED BY DENYING APPELLANT'S CHALLENGES FOR CAUSE TO PROSPECTIVE JURORS WHO ADMITTED THAT THEY WOULD VOTE TO IMPOSE A DEATH SENTENCE REGARDLESS OF MITIGATING EVIDENCE.

In Morgan v. Illinois, 504 U.S. ___, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992), the Court held that the Due Process Clause of the Fourteenth Amendment is violated when a capital defendant is not permitted to challenge for cause jurors who would automatically vote to impose a sentence of death on anyone convicted of first degree murder. The Morgan court specifically observed that a prospective juror's mere affirmative response to questioning whether he could be impartial and follow the law was insufficient to satisfy the Sixth and Fourteenth Amendment guarantee of trial by an impartial jury:

> It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so.

119 L. Ed. 2d at 507.

This Court has long reversed death sentences where the trial court rejected a defendant's challenge for cause to prospective jurors who were biased in favor of the death penalty. In Thomas v. State, 403 So. 2d 371 (Fla. 1981), this Court held that a prospective juror's unwillingness to consider a sentence of life was equivalent to bias against the defendant. Consequently, the impartial jury requirements of the Sixth Amendment, United States Constitu-

tion and Article I, section 16 of the Florida Constitution were implicated. Accord, O'Connell v. State, 480 So. 2d 1284 (Fla. 1985).

Again, in Hill v. State, 477 So. 2d 553 (Fla. 1985), the defendant was forced to exhaust his peremptory challenges because the trial judge denied his challenge for cause to a prospective juror who was "inclined toward the death penalty." This Court reversed for a new penalty proceeding. More recently, in Bryant v. State, 601 So. 2d 529 (Fla. 1992), the denial of Bryant's cause challenges to eleven prospective jurors who agreed that they would "pretty much automatically" vote for death in all cases of premeditated murder resulted in reversal.

At bar, Appellant challenged three prospective jurors (Bunting, Flanders, and Nieves) for cause because of their inclination to vote for a death sentence regardless of the evidence which would be presented (T721,722,1012-3). The trial judge denied all three challenges for cause (T721,722,1015). Consequently, defense counsel used peremptory strikes to excuse these three prospective jurors (T729,733,1020) and exhausted his peremptory strikes (T1020-1). His request for additional peremptories was denied (T1021-2). In accord with Trotter v. State, 576 So. 2d 691 (Fla. 1991), Appellant preserved this issue for appeal by identifying juror Johnston as an objectionable juror who he would strike if granted an additional peremptory challenge (T1022-3). It should be further noted that two other jurors who actually sat on the jury (McBride and

Thompson) had been challenged for cause on other reasons by Appellant (T727-8,1012).

A. Prospective Juror Bunting

The prosecutor inquired of prospective juror Bunting whether he had thought about the death penalty and the following colloquy ensued:

> PROSPECTIVE JUROR BUNTING: Oh, lots of times. I'm very much in favor or it.
>
> MR. SCHAUB: Okay. Would you be able to -- do you realize that not all first degree murders are cases that deserve or warrant the penalty of death?
>
> PROSPECTIVE JUROR BUNTING: Oh, well, to me, the only one that wouldn't would be in self-defense, and that's my own personal belief; an eye for an eye.
>
> MR. SCHAUB: On that spectrum that Mr. Slater talked about -- very in favor of death, moderate about it, and opposed to death penalty -- where would you fall on that spectrum?
>
> PROSPECTIVE JUROR BUNTING: Probably at the top.
>
> MR. SCHAUB: Okay. Mr. Crow talked about aggravating circumstances and mitigating circumstances and those type of factors. Would your view concerning the death penalty, the fact that you are in favor of it -- and that's no problem, the fact that anyone's in favor of it -- but would you be able to consider the alternative, life imprisonment without the possibility of parole for 25 years, if you found, based upon the law, that that was the penalty that was warranted?
>
> PROSPECTIVE JUROR BUNTING: In this -- well, the court system, I don't believe that there is any, you know, life without parole because they are being paroled in six years,

> in some cases maybe seven or eight years. I mean, they are back out on the street.
>
> And the victim has no right to an appeal or no right to a second chance or anything like that. And I feel that if a person took another person's life, then they have to pay the ultimate unless they are self-defense, you know.

(T515-6).

Later in the voir dire, the prosecutor returned to prospective juror Bunting's attitude toward the death penalty:

> MR. SCHAUB: Mr. Bunting, back to you for a second. You had a similar view as far as you were in favor of the death penalty, but I don't think I asked you an important question. And that is, despite your feelings about the death penalty, despite those personal views that you have, could you follow the law and the instructions that the Judge gives you?
>
> PROSPECTIVE JUROR BUNTING: Sure.

(T571-2).

Although the State may argue that Mr. Bunting's reply of "Sure" was sufficient rehabilitation, it does not pass muster under the analysis in Morgan v. Illinois, supra. Prospective juror Bunting may well have believed that there was no conflict between the law and his position that death was the proper penalty for all homicides except those committed in self-defense. He never showed any ability to weigh any type of mitigating evidence except self-defense.

This Court has recognized that a prospective juror's rote assurance that he can follow the law does not determine competency. In Singer v. State, 109 So. 2d 7 at 24 (Fla. 1959), this Court wrote:

> . . . a juror's statement that he can and will return a verdict according to the evidence submitted and the law announced at the trial is not determinative of his competence, if it appears from other statements made by him or from other evidence that he is not possessed of a state of mind which will enable him to do so.

Prospective juror Bunting acknowledged that he maintained a strong belief in the death penalty which he termed "probably at the top" of the spectrum (R515).[7] While being a proponent of capital punishment does not disqualify a juror, Mr. Bunting's admitted extremism in favor of the death penalty suggests that he might not be an impartial juror. This partiality toward the death penalty was further revealed in his comments about the alternative of life imprisonment ("back out on the street;" "victim has no right to an appeal").

Prospective juror Bunting's state of mind was further explored during defense counsel's voir dire:

> MR. BLOUNT: Mr. Bunting, I'd like to go back to you, sir. Is there any type of first degree murder case, other than what you said before about self-defense, which you think warrants a life sentence?
>
> PROSPECTIVE JUROR BUNTING: I don't -- I'm not sure how to respond --
>
> MR. BLOUNT: I believe you'd indicated before that you said you were in favor of the death penalty except in cases of self-defense. Did I understand you correctly, sir?
>
> PROSPECTIVE JUROR BUNTING: Yeah, right. Okay.

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[7] Compare, Robinson v. State, 487 So. 2d 1040 at 1042 (Fla. 1986) (no error to excuse for cause prospective jurors who put themselves "in the end zone with the death penalty opponents").

> MR. BLOUNT: Are there any other types of murder cases that you feel the death penalty would not apply to?
>
> PROSPECTIVE JUROR BUNTING: I can't -- right at this second, I can't think of any. I'd have to deliberate on that for a long time, but --

(T643-4). A prospective juror who "can't think of any" circumstances under which life imprisonment would be the appropriate penalty is not an impartial juror. As the Morgan court wrote:

> Any juror who would impose death regardless of the facts and circumstances of conviction cannot follow the dictates of law.

119 L. Ed. 2d at 506. Appellant's challenge for cause to prospective juror Bunting should have been granted.

B. **Prospective Juror Flanders**

Prospective juror Flanders also put himself "on the top" in terms of favoring the death penalty (T615). The follow-up colloquy tended to show initially that Mr. Flanders might be an impartial juror:

> MR. SCHAUB: Do you recognize that not all first degree murder cases warrant the imposition of death?
>
> PROSPECTIVE JUROR FLANDERS: Yes.
>
> MR. SCHAUB: Would you be able in this case to listen to the Judge clearly and listen to all the facts in the case; and when the Judge instructs you on the law, apply the law to the facts that you hear?
>
> PROSPECTIVE JUROR FLANDERS: Yes.
>
> MR. SCHAUB: And weigh the various circumstances?

PROSPECTIVE JUROR FLANDERS: Yes.

* * *

MR. SCHAUB: What about the nature of the facts and circumstances of the crime and the nature of the injuries and things of that nature, would they disturb you in such a manner where you would not be able to listen to the Judge's instructions on the law?

PROSPECTIVE JUROR FLANDERS: No.

(T615). However, when defense counsel questioned Mr. Flanders, the prospective juror's bias was revealed:

MR. BLOUNT: How strongly do you hold your opinions on the death penalty?

PROSPECTIVE JUROR FLANDERS: Strong.

MR. BLOUNT: Strong? Okay. Is there any kind of murder case that you could vote for life as a penalty on?

PROSPECTIVE JUROR FLANDERS: I'd have to know what type of case.

MR. BLOUNT: What would you want to know?

PROSPECTIVE JUROR FLANDERS: On the murder case?

MR. BLOUNT: Yes, sir?

PROSPECTIVE JUROR FLANDERS: Well, let me explain this. If somebody molested a child and that parent shot the molester, I'd give them a medal. That's my feeling.

If anybody murdered or shot a police officer, sheriff or anybody in the justice department, I'd vote for the death penalty; no question.

I'm strong. That's what's going on around here. There's too much -- everybody's getting away with it. You've got to make a stand someplace. That's my feelings.

MR. BLOUNT: I appreciate your candor.

PROSPECTIVE JUROR FLANDERS: I'm disgusted with it. Rape, I can go two ways with that.

(T683-4). The trial judge then intervened to control the boisterous prospective juror:

THE COURT: You've gone far enough in it. You've answered his question.

(T684) The voir dire examination then continued:

MR. BLOUNT: . . . Do you feel that you could be fair and impartial and could vote for a life sentence for Melvin Trotter, or are your feelings so strongly held that you couldn't vote for a life recommendation?

PROSPECTIVE JUROR FLANDERS: I'm strong on that, murder. An eye for an eye. I could listen to the evidence, whatever the Judge presents.

MR. BLOUNT: Do you still feel that you -- would you be fair, say -- do you think you'd be fair?

PROSPECTIVE JUROR FLANDERS: I'd try to be fair.

MR. BLOUNT: You still believe in that eye for an eye?

PROSPECTIVE JUROR FLANDERS: Yes.

MR. BLOUNT: Okay.

PROSPECTIVE JUROR FLANDERS: I don't believe in murder.

(T685). This colloquy shows that Mr. Flanders had a highly emotional reaction to the death penalty. He seemed to equate recommending a life sentence with "believing in murder." He could not promise to be impartial; only that he'd "try to be fair."

Another significant factor about prospective juror Flanders is that he had read about the case prior to trial. During individual

voir dire on exposure to publicity, Mr. Flanders was asked about his response to the newspaper article which appeared on the Saturday prior to trial:

> . . . Did you get some sort of feeling or impression or question in your mind?
>
> PROSPECTIVE JUROR FLETCHER: No. I think it was more -- I have a hard time dealing with the idea of somebody killing an older lady and I think that's the only impression I got.

(T713). Clearly, prospective juror Flanders had not only an abstract opinion favoring the death penalty, but personal bias based upon what he knew about the facts of this case.

When Appellant challenged prospective juror Flanders for cause, the trial judge remarked that "he [Flanders] was a diehard death penalty advocate" (T722). The court denied the challenge for cause however, because "under questioning, he [Flanders] said he could follow the law" (T722). The Court then denied Appellant's request for renewed individual voir dire of prospective juror Flanders (T726). Defense counsel's observation of Flanders' "volatile nature and strong position" was not contested (T726).

The test for when a prospective juror should be removed for cause on account of his or her attitude toward capital punishment "is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Ross v. Oklahoma, 487 U.S. 81 at 85 (1988), quoting from Wainwright v. Witt, 469 U.S. 412 at 424 (1985). Accord, Bryant v. State, 601 So. 2d 529 at 532 (Fla. 1992). When considered in total, the voir dire of prospective

juror Flanders shows that his vehement preference for the death penalty would "substantially impair" his ability to consider the alternative penalty of life imprisonment.

The facts at bar are quite comparable to those in Ross v. Oklahoma, supra, where the prospective juror "initially indicated that he could vote to recommend a life sentence if the circumstances were appropriate." 487 U.S. at 83. Further questioning revealed that the prospective juror in Ross would vote for a death sentence in all cases of first-degree murder. The United States Supreme Court opinion notes that the Oklahoma court "found . . . and the State concedes . . . that [the prospective juror] should have been excused for cause." 487 U.S. at 85.

The same reasoning applies to prospective juror Flanders at bar. This Court should recall its analysis of the removal of a prospective juror for cause in Trotter I.[8] There, this Court wrote that an affirmative response to a question regarding the juror's "ability to follow the law as instructed does not eliminate the necessity to consider the record as a whole." 576 So. 2d at 694. At bar, the trial judge erred by focusing only on prospective juror Flanders' initial affirmation that he could weigh the circumstances and follow the court's instructions. When the entire colloquy with prospective juror Flanders is considered, both his statements and demeanor demonstrate his lack of impartiality.

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[8] 576 So. 2d 691 (Fla. 1990).

C. Prospective Juror Nieves

Mr. Nieves was another prospective juror who placed himself "on the top" in terms of favoring the death penalty (T792). He replied, "That's correct" to the prosecutor's initial questioning about whether he could weigh aggravating against mitigating factors and vote to recommend life in an appropriate case (T792-3). However, further questioning revealed definite partiality toward a sentence of death.

The prosecutor asked prospective juror Nieves if he would consider photos of the victim's injuries when recommending the appropriate sentence. Mr. Nieves replied:

> Yes, sir. If I see a picture of a lady which one leg is over there and the arm is over there and the head is someplace else, definitely that individual would have to be fried no matter what. I mean, you know.

(T794).

Later, prospective juror Nieves described himself as a "mean" person (T843). When defense counsel asked him whether his strong position in favor of the death penalty would cause him to vote for death "no matter what," Mr. Nieves responded:

> Well, in a way, it don't matter what you say. I probably will just go for it, yeah.

(T925). The colloquy continued:

> MR. SLATER: Okay, and that's what I need to know.
>
> Basically, what you're telling me: No matter what I do, if they prove Melvin over here killed another individual, 70-some year old lady, you're going to find him for death; aren't you?

PROSPECTIVE JUROR NIEVES: As long as I heard his side of the story.

But you ain't going to soften my heart, that's for sure.

I mean, you're going to have to try hard. You're going to have to be on a specific conclusion and, you know, everything that -- evidence and all, that kind of issues. But it's going to be tough.

MR. SLATER: Do you think it's going to be so tough that no matter what I'm going to put forward, if you figure that he took the life of somebody else and he's guilty of first degree murder, that he should be sentenced to death?

PROSPECTIVE JUROR NIEVES: Once I hear his side of the story, I'm given an opportunity to listen to it -- once I listen to it, it will be my decision.

So whatever decision I make is strictly confidential as far as I'm concerned.

MR. SLATER: I appreciate it. And I'm not asking you, obviously, to commit yourself.

I guess what I'm afraid of is, you're going to listen to what I say and listen to what's presented and say, "Well now, I heard it and I'm going to do what I wanted to do in the beginning anyway," and that's sentence him to death.

* * *

MR. SLATER: I will repeat, what I said there is: You're going to hear the first part, and you're going to give me a chance to talk and you're going to listen to me, but you're still going to do what you wanted to do in the beginning, and that's sentence him to death since he's guilty of first degree murder; is that correct?

PROSPECTIVE JUROR NIEVES: That's correct.

(R925-7).

The colloquy with prospective juror Nieves at bar is comparable to that presented in State v. Ross, 623 So. 2d 643 (La. 1993).

In both cases, the prospective juror indicated that he would give consideration to both possible sentences (life and death), but would actually vote for death. At the least, prospective juror Nieves' statements that defense counsel was "going to have to try hard" and that "it's going to be tough" reveals a juror with a presumption that death is the proper penalty. In Hill v. State, supra, this Court wrote:

> It is exceedingly important for the trial court to ensure that a prospective juror who may be required to make a recommendation concerning the imposition of the death penalty does not possess a preconceived opinion or presumption concerning the appropriate punishment for the defendant in the particular case. A juror is not impartial when one side must overcome a preconceived opinion in order to prevail. When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause.

477 So. 2d at 556. Because prospective juror Nieves was not impartial and the trial judge denied Appellant's challenge for cause, a new sentencing proceeding before a new jury should now be ordered.

ISSUE VII

THE TRIAL COURT ERRED BY DENYING APPELLANT'S CHALLENGE FOR CAUSE TO A PROSPECTIVE JUROR WHO DOUBTED HER ABILITY TO BE FAIR AND IMPARTIAL BASED UPON HER EXPOSURE TO PRETRIAL PUBLICITY AND THE GRAPHIC NATURE OF EVIDENCE TO BE PRESENTED.

Prospective juror Panico said that she remembered reading about the case when it happened (T519,601-2,676,702-9). She had formed "some opinions about it when it happened" (T519,602,676). However, she did not form any opinion on whether Appellant should be sentenced to death (T676-7,709).

The prospective juror said that she remembered this case as being "front-page news almost every day for awhile" (T704). The victim, Mrs. Langford, "was a very well-known person in Palmetto" (T704). Prospective juror Panico described herself as "aghast" about the homicide (T705). She explained:

> . . . it's hard for me to understand why anyone would murder someone, and especially when the newspapers were depicting this person as a really good person that helped people, that had helped a lot of people in Palmetto.

(T705).

Another area of concern for Ms. Panico was the prospect of having to view photographs of the victim's injuries. The prosecutor inquired:

> MR. SCHAUB: Now, as far as the nature of the -- the facts and circumstances of this case or the nature of the injuries that you might hear about, or if you do see photographs, the photographs that you might see, would that in any way disturb you in such a manner that you would be unable to listen to

the Judge's instructions and follow those instructions and listen to the facts that are presented?

PROSPECTIVE JUROR PANICO: I believe it would, yes.

(T601). The prospective juror continued:

And just the idea of having to see these pictures of handling the weapon or any of those things are repugnant to me, and I think it would upset me very much. I'm not sure if I would be able to be impartial if I saw that kind of evidence.

(T602). The following colloquy ensued:

MR. SCHAUB: Based upon the knowledge that you've come into this room with today, based upon what you've read, and based upon what you might see, those views that you have, would you be able to put them aside and follow the law that the Judge would instruct you on?

PROSPECTIVE JUROR PANICO: I'm not sure.

MR. SCHAUB: Would you try?

PROSPECTIVE JUROR PANICO: I could try, yes. I would try, but I;m not sure that I would be -- that I could be certain I'd be able to set that aside. I -- I don't know.

(T602).

Later during voir dire, prospective juror Panico expressed more doubts as to her ability to be impartial:

PROSPECTIVE JUROR PANICO: My only fear is seeing this -- what evidence I might see as far as graphic pictures or graphic descriptions of that sort, that I may not be able to put that out of my mind; that that may -- you know, that I may somehow relate that to something that's happened, like the feeling of violation that I had when my business was burglarized. And it was a pretty traumatic thing for me.

And I'm not sure, you know -- I know that there's a lot of difference between a burglary

> and a murder, but I'm just not sure that if I saw that kind of graphicness, that I'd be able to put it out of my mind and be fair to Mr. Trotter, and I would want to be fair to him.

(T677). At one point, the prosecutor got prospective juror Panico to agree that she could probably set aside what she had previously read about the case:

> MR. SCHAUB: What you might have read back in 1986 in the Bradenton Herald, could you put that aside and decide on your decision, if you're chosen as a juror, based upon what you hear in this courtroom and based upon the instructions the Judge gives you?
>
> PROSPECTIVE JUROR PANICO: I believe I could, yes.
>
> MR. SCHAUB: Would you be able to, notwithstanding what you may have read or may remember from that article, be able to follow the instructions that the Court gives you on the law?
>
> PROSPECTIVE JUROR PANICO: Yes. Yes.

(T703) However, she later expressed more doubts about her ability to set aside what she had read about the case:

> Like I said, I would -- I definitely would want to be fair to Mr. Trotter. I feel that I would. I would weigh out all of the information before I would make any decision about his sentencing.
>
> MR. BLOUNT: Do you feel, though, that it would be difficult?
>
> PROSPECTIVE JUROR PANICO: Oh, yes, it will be difficult.
>
> MR. BLOUNT: Difficult because of what you already know?
>
> PROSPECTIVE JUROR PANICO: It would be difficult for me irregardless of if I knew anything of not. It would be hard for me.

> MR. BLOUNT: But does it make it more difficult because of what you do know already about the whole case?
>
> PROSPECTIVE JUROR PANICO: I -- I don't know.
>
> MR. BLOUNT: You can't say it would or you can't say it wouldn't?
>
> PROSPECTIVE JUROR PANICO: I really -- I really don't know. I'd like to think that I could be fair and impartial. I'd like to think that.
>
> MR. BLOUNT: Do you think you come into this courtroom with a clean slate about this case, or do you think --
>
> PROSPECTIVE JUROR PANICO: No.

(R707-8).

Appellant's challenge for cause to prospective juror Panico was denied by the court (T715-7). He used a peremptory strike to excuse Ms. Panico (T733). As detailed in Issue V. supra, Appellant took the appropriate measures to preserve denial of this cause challenge for appellate review.

This Court has long followed the proposition expressed in Singer v. State, 109 So. 2d 7 at 23-4 (Fla. 1959) and reaffirmed in Hill v. State, 477 So. 2d 553 at 555 (Fla. 1985):

> [I]f there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial [,] he should be excused on motion of a party, or by the court on its own motion.

The Fourth District has commented; "close cases should be resolved in favor of excusing the juror rather than leaving a doubt as to

his or her impartiality." Sydleman v. Benson, 463 So. 2d 533 (Fla. 4th DCA 1985).

At bar, prospective juror Panico was never able to say unequivocally that she could be an impartial juror. Her comments that she "would try" to "be fair" to Appellant are equivalent to other juror's responses which have caused many reversals in Florida courts. For instance, in Salazar v. State, 564 So. 2d 1245 (Fla. 3d DCA 1990), the Third District reversed a conviction because the defendant's challenge for cause to a prospective juror who said, "I would hope I could be fair" (but expressed some doubt) was denied. Indeed, the State "properly conceded" in Salazar that it was error not to excuse the prospective juror for cause "where a reasonable doubt existed as to her ability to be impartial." 564 So. 2d at 1246. Other district appellate court decisions finding reversible error where a juror could not unequivocally assert his or her ability to be impartial include Smith v. State, 516 So. 2d 43 (Fla. 3d DCA 1987) ["I think I could" (e.o.)]; Gilbert v. State, 593 So. 2d 597 (Fla. 3d DCA 1992) ("might not be able to judge this case fairly"); Robinson v. State, 506 So. 2d 1070 at 1072 (Fla. 5th DCA 1987) ("unsure of their ability to be impartial, they would certainly try"); Blye v. State, 566 So. 2d 877 (Fla. 3d DCA 1990) (State conceded that juror's assertion that he "would try to be objective" was insufficient); Longshore v. Fronrath Chevrolet, Inc., 527 So. 2d 922 at 924 (Fla. 4th DCA 1988) (juror's "initial statement that she would 'try' to be impartial [was] not overcome by her subsequent statements that she could be fair").

A reasonable doubt to a juror's impartiality is created when the juror cannot "unequivocally assert that [he or] she could be a fair and impartial juror and disregard any preconceived opinions and prejudices." Auriemme v. State, 501 So. 2d 41 at 44 (Fla. 5th DCA 1986), rev.den., 506 So. 2d 1043 (Fla. 1987). Furthermore, in Tenon v. State, 545 So. 2d 382 (Fla. 1st DCA 1989), the court rejected the notion that a prospective juror who first admits bias can be rehabilitated by a later assertion that he or she could follow the law. The Tenon court wrote that such a conversion

> . . . seems to us as much the product of an understandable ability to admit incapacity to judge fairly and impartially as it is of some bias-cleansing change of heart or mind.

545 So. 2d at 382.

Prospective juror Panico identified two areas which could impair her ability to be impartial: exposure to prior news articles and viewing photographs of the victim's injuries or handling the murder weapon. Regarding the newspaper publicity, she compared her attention to this homicide with the "Ted Bundy case" (T706). Although Ms. Panico responded affirmatively to the prosecutor's question of whether she would "be able to follow the instructions that the Court gives you on the law" (T703); she also acknowledged that she didn't have "a clean slate about this case" (T708). Her situation is basically identical to that of the prospective juror in Smith v. State, 463 So. 2d 542 (Fla. 5th DCA 1985) who said she would try to be fair but admitted that news articles "might affect her view of the evidence." 463 So. 2d at 545. Like Smith, the case at bar should also be reversed because of the denial of a

challenge for cause to a prospective juror whose prior exposure to news articles would color her view of the evidence.

Even more compelling as a basis for reversal is prospective juror Panico's repugnance to seeing photographic evidence of the homicide and handling the murder weapon (T602). Ms. Panico maintained throughout the voir dire that she was "not sure" that she could be impartial or follow the law if confronted with that type evidence (T601,602,677). Accordingly, the case at bar is squarely on point with Florida decisions reversing on account of a prospective juror's bias against certain evidence or factual scenarios. See, Garcia v. State, 570 So. 2d 1082 (Fla. 3d DCA 1990). (bias against firearms); Chapman v. State, 593 So. 2d 605 (Fla. 4th DCA 1992) (bias against weapons); White v. State, 579 So. 2d 784 (Fla. 3d DCA 1991) (bias against charged crime). Compare, Moore v. State, 525 So. 2d 870 (Fla. 1988) (bias against insanity defense); Watson v. State, 19 Fla. Law Weekly S 144 (Fla. 1994) (bias against non-testifying defendant).

As held in the foregoing decisions, Appellant should now receive a new trial (as to penalty) before a new jury.

ISSUE VIII

THE TRIAL COURT ERRED BY ALLOWING THE STATE TO INTRODUCE EVIDENCE OF NONSTATUTORY AGGRAVATING CIRCUMSTANCES WHICH TAINTED THE JURY'S PENALTY RECOMMENDATION.

A. Evidence That Trotter Lied to the Police During Interrogation

This Court has said, "A resentencing is not a retrial of the defendant's guilt or innocence." Chandler v. State, 534 So. 2d 701 at 703 (Fla. 1988). On the other hand, this Court allows presentation of evidence which helps the resentencing jury to understand the facts of the case. Teffeteller v. State, 495 So. 2d 744 (Fla. 1986). The trial court has discretion to admit evidence which it deems relevant. Chandler; Muehleman v. State, 503 So. 2d 310 (Fla.), cert.den., 484 U.S. 882 (1987).

At bar, Appellant filed a pretrial motion in limine to exclude his taped statements to law enforcement from the penalty retrial (R413-4). His guilt for the murder and robbery had already been established in the original trial and affirmed by this Court on appeal. Defense counsel argued that Trotter's statements were not relevant to prove any statutory aggravating circumstances, but could be used by the State to show dishonesty during the police interrogation (T229-31, 233-4). There were four taped statements taken from Trotter, but only the last one amounted to a confession (T233-4). The trial judge denied the motion in limine (T235).

Based upon this ruling, the prosecutor stated in his opening argument that the jury would hear about the police questioning of

Trotter over a nine hour period (T1058-9). The prosecutor said that Appellant "finally admitted" to taking money and food stamps; but told police that the homicide victim had confronted him with the knife and was killed inadvertently during a struggle (T1059). After the opening statement, defense counsel moved unsuccessfully for a mistrial because the State revealed that "their purpose for playing the confessions would show that his [Trotter's] statements are not true, which is to call the defendant a liar, which is not a statutory aggravating circumstance" (T1065).

Additional objection was made during the testimony of State's witness Captain Van Fleet, prior to testimony about Trotter's interrogation (T1193). While overruling Appellant's objection (T1194), the judge went on to declare, "[A]s far as I'm concerned, anything that incurred [sic] in the guilt phase is relevant here." (T1200). The State was given blanket permission to introduce anything that had been admitted in the prior trial.

The trial court abused its discretion by this sweeping admission of evidence without regard to whether its relevance (if any) was outweighed by the prejudice caused to Appellant in this particular penalty proceeding. It is important to note at the outset that this Court's decision of Hitchcock v. State, 578 So. 2d 685 (Fla. 1990), is readily distinguishable from the case at bar. The State, in Hitchcock, was allowed to introduce the defendant's original confession into the resentencing proceeding to impeach his claim that he did not commit the homicide. 578 So. 2d at 691. At

bar, however, Trotter never contested the fact that he was guilty of first degree murder and robbery.

As a consequence of the trial court's failure to weigh whatever probative value each of Appellant's four taped statements might have against the unfair prejudice, the State was permitted to portray Trotter as a deceptive, evasive and dishonest individual. Although Trotter did not testify at the resentencing proceeding, the State was allowed to maintain that he still claimed that the victim started the incident by threatening him with a knife. For example, the prosecutor asked state witness Tim Matthews:

> Q. (By Mr. Crow) Considering your mother's physical health, her prior practices, and your knowledge of her character and nature, do you think it possible that she would have attacked or approached the defendant wielding the knife as we've just heard in the statement?

(T1289). After defense counsel's objection was overruled, the witness answered, "Absolutely not. She wouldn't have had a chance." (T1290)

What the State accomplished by introducing Trotter's taped statements before the jury was setting up a defense (the victim attacked me), which Trotter never claimed in this resentencing proceeding. In effect, Appellant was compelled to testify because the jury heard his prior statements although he did not take the stand. Needless to say, the only reason for putting Trotter's taped statements into evidence was to rebut them and portray Trotter as a liar.

The prosecutor further exploited the taped statements when cross-examining defense witnesses. For example, Dr. Krop was extensively questioned about statements made by Trotter during the police interrogation with such comments as:

> That was a lie, wasn't it? (R1555)
> And that was a lie, wasn't it? (R1555)
> He misdirected the police. (R1555)
> That whole story was a fabrication, was it not? (R1555)
> And that was a lie, wasn't it . . . . (R1556)

Finally, Dr. Krop provided the prosecutor with the desired response, "Everything he told me could be a lie, yes." (R1556)

The prosecutor's closing argument also featured comments to establish Appellant's "lies" as a nonstatutory aggravating circumstance. The prosecutor commented:

> And Melvin Trotter, in his statements to the police, in his statements to his own experts, has lied and denied recollections.

(T2040) And later:

> You've got him crying at the time that the police get the goods on him, after he lied for 8 to 10 hours, and he was still lying through his teeth when he was supposedly showing remorse.

(T2065). These are improper remarks. See, Ryan v. State, 457 So. 2d 1084 at 1091 (Fla. 4th DCA 1984), rev.den., 462 So. 2d 1108 (Fla. 1985) (Constantly referring to appellant as "lying" will be construed as comment on failure to testify.)

In conclusion, Trotter's taped statements did not provide anything substantial concerning the circumstances of the offense which was not already provided from the physical evidence and the victim's statements to Frank Tona (T1099-1103), Detective Schue

(T1128), and Detective LaGasse (T1165-6). The prejudice caused by their admission greatly outweighed any relevance which they may have had in the resentencing proceeding. Indeed, the constant emphasis on Trotter's so-called "lies" invited the jury to recommend a death sentence by weighing this nonstatutory aggravating circumstance. A new penalty trial should be ordered.

B. Evidence of a Violent Act Which Never Resulted in Criminal Charges

This Court has long held that it is error to consider "mere arrests or accusations as factors in aggravation." Provence v. State, 337 So. 2d 783 at 786 (Fla. 1976), cert.den., 431 U.S. 969 (1977). Accord, Perry v. State, 395 So. 2d 170 (Fla. 1980) (error to allow prosecutor to present evidence of pending criminal charges); Odom v. State, 403 So. 2d 936 (Fla. 1981) (numerous arrests and charges not resulting in conviction erroneously considered).

At bar, during the prosecutor's cross-examination of Dr. Krop, the following transpired:

> Q. (By Mr. Crow) I think you mentioned on direct examination that one of the results, and you were talking generally at the time, of neglect or an abusive childhood is that people carry a lot of anger and rage around inside them.
>
> A. That's possible.
>
> Q. Did you ever find any indication that Melvin Trotter is carrying that kind of baggage?
>
> A. The only violent act to the degree that we're talking about that that rage apparently

> came out was on the night or the day of this offense. I have no other significant history of that type of baggage being carried around.
>
> Q. Well, you know he's committed a prior robbery.
>
> A. I'm aware of that.
>
> Q. Okay. And you know he was involved in at least one violent domestic incident.
>
> A. I'm aware of that.
>
> Q. And you're aware that there was at least an accusation that he assaulted someone with a two by four.
>
> MR. SLATER: Objection. May we approach the bench?

(T1580-1). The trial court denied Appellant's motions to strike and for mistrial, ruling that the defense had "opened the door" (T1581).

In the first place, it was error to rule that the door had been opened. Dr. Krop never asserted that Trotter was entirely nonviolent except for the incident at bar. He merely said that he found no other evidence of the type of excessive anger and rage sometimes produced by an abusive childhood. However, even if this Court decides that Appellant did put his character for nonviolent behavior in issue, it was still error for the prosecutor to refer to the unproven allegation that Trotter "assaulted someone with a two by four."

In Hildwin v. State, 531 So. 2d 124 (Fla. 1988), aff'd, 490 U.S. 638 (1989), a state witness was allowed to testify during a penalty trial that the defendant had committed a sexual battery on her, although she never pressed charges. On appeal, this Court

noted that (unlike Trotter) the defendant introduced evidence of his nonviolent character. The Hildwin court held that evidence of a defendant's nonviolent nature could be rebutted by "direct evidence of specific acts of violence committed by the defendant." 531 So. 2d at 128 (e.s.).

At bar, there was no direct evidence presented with regard to any assault with a 2 x 4; only the prosecutor's bare accusation. Therefore, this is the same type of error which this Court found reversible in Robinson v. State, 487 So. 2d 1040 at 1042 (Fla. 1986) ("Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial"), and Garron v. State, 528 So. 2d 353 (Fla. 1988) (Allegation that defendant had previously killed someone in Greece or Turkey). Another relevant decision is that of Dragovich v. State, 492 So. 2d 350 (Fla. 1986) because Appellant at bar could no more fairly rebut the alleged assault with a 2 x 4 than Dragovich could have rebutted his alleged reputation as an arsonist. Accordingly, this Court should order that a new penalty trial be held.

ISSUE IX

THE TRIAL COURT ERRED BY FAILING TO DECLARE A MISTRIAL OR EVEN GIVE A CURATIVE INSTRUCTION WITH REGARD TO THE PROSECUTOR'S CLOSING ARGUMENT WHICH WAS LACED WITH IMPROPER REMARKS IN VIOLATION OF TROTTER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

During the prosecutor's closing argument, defense counsel interrupted and moved for mistrial on numerous grounds (T2068-77). Alternatively, he requested the court to attempt to mitigate the unfair prejudice by giving the jury a curative instruction (T2069, 2072,2074). The trial judge denied any relief (T2074,2077).

Appellant asserts that each of the following five categories of remarks is a sufficient ground for reversal. Even if this Court disagrees, it must also consider "the cumulative effect of the improper remarks in the absence of curative instructions." Rhodes v. State, 547 So. 2d 1201 at 1206 (Fla. 1989), See also, Garron v. State, 528 So. 2d 353 at 358 (Fla. 1988).

A. Comments that Only "People that were Paid to Do So" Testified as Defense Witnesses

While still in the introductory stage of his closing argument, the prosecutor stated:

> And we'll talk a little bit later about how no person that knew Melvin Trotter prior to this murder took the witness stand. The people who took the witness stand were paid to do so , ...

(T2033). He then amplified on this theme and commented on Trotter's failure to testify on his own behalf:

> These people were all here Monday, the experts had their little confab, but they didn't bring him in[9] so you could assess the truthfulness or the credibility or the accuracy. Everything was filtered through the lenses of paid experts.

(T2044). The prosecutor continued to belittle the mental health professionals who testified:

> You know, sometimes don't you just want to maybe see one of those experts, see a brain scan of one of them and check the blood flow to that part of their brain that holds, that controls their common sense?

(T2046). Finally, the prosecutor accused the experts of holding a "reunion," noting that they had previously testified on behalf of another "convicted murderer":

> Well, you know, I'm from Pinellas County, and I never heard of Danny Wortham until last week, but you heard his name an awful lot, didn't you? And who is he? He's a convicted murderer. Don't you think that if he's telling you "I relied on this information," he should have shared that with you?
>
> As a matter of fact, this was kind of a reunion week. All the guys from the Danny Wortham case got to come back to Manatee County and have another get-together, the same team. Just a coincidence, I guess.

(T2053).

> Again, the whole reunion of the guys from the Danny Wortham case just happen to get together on Melvin Trotter's.

(T2057).

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[9] (e.s.). Clearly a reference to the defendant.

The inescapable message of the prosecutor's remarks considered together is that the doctors who testified as defense experts should be viewed as a traveling carnival trying to bamboozle jurors at taxpayer expense for the benefit of convicted murderers. This is exactly the type of offensive and irrelevant argument which this Court found reversible error in Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990) and Garron v. State, 528 So. 2d 353 (Fla. 1988). Although mental mitigation rather than the insanity defense was involved in the case at bar, the prosecutor maligned psychiatry and mental health professionals in similar fashion to the unethical arguments in Nowitzke and Garron.

B. Comments About Failure to Call Witnesses

As a corollary to his attack on Trotter's "paid" witnesses, the prosecutor commented extensively on Appellant's failure to call other witnesses on his behalf. The Fourth District, in Romero v. State, 435 So. 2d 318 (Fla. 4th DCA 1983), rev.den., 447 So. 2d 888 (Fla. 1984), explained that reference to a criminal defendant's failure to call witnesses impinges on the constitutional right to remain silent. This Court observed in Jackson v. State, 575 So. 2d 181 (Fla. 1991) that state comment on failure to produce defense witnesses could lead the jury to shift the burden of proof. The Jackson court agreed that such comment "also may implicate a defendant's constitutional privilege against compelled self-incrimination." 575 So. 2d at 188, n.4.

In this Court's seminal opinion on the Florida capital sentencing statute, State v. Dixon, 283 So. 2d 1 (Fla. 1973), it held that both the Florida Constitution, Art. I, §9 and the United States Constitution, Amendment V protected the defendant against self-incrimination during the penalty phase of capital proceedings. 283 So. 2d at 7-8. As in a guilt or innocence trial, comment by the prosecutor on a defendant's failure to testify or produce witnesses should be reversible error.

In Part A of this issue, a prosecutorial comment on Trotter's failure to testify was noted. In addition, the following extensive comments by the prosecutor violated Trotter's constitutional rights:

> Melvin Trotter is 32 years old, he was 25 at the time of the crime. And of everybody in the world, every foster parent, every friend, every acquaintance, every criminal compatriot, every jail guard, every prison guard that knew Melvin Trotter before and after the offense, not one, not one took the stand firsthand for you to assess their credibility and hear what they had to say, ...

(T2043-4).

> We know these people were there on Monday, the mother, the sister, the friend. We know the Ellingtons previously testified,[10] testified that they loved Melvin, tried to nourish him, nurture him. And Melvin felt that, too. But none of that was presented.

(T2052)

> As a matter of fact, you know, again, no teachers were called, and the teachers had said some positive things about Trotter and

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[10] This is a reference to the trial in 1987.

> Trotter's abilities, you know that from the cross-examination.

(T2059).

> But there is a, and I think one of the reasons you may not have heard any witnesses testify is, there is an attempt to portray Melvin as never having had anything in life. You know that he testified[11] that he was loved and loved the Ellingtons. You know they testified the same way. You know that teachers made comments about him and concern for his welfare and did evaluations. You know they tried to give him help. You know that he had been through the criminal system, and efforts at reform had failed there. But you didn't hear any of that.

(R2065-6).

> not a single witness has taken the stand to tell you of a single positive thing this man has ever done in his adult life. He helped this person, he did that, he was kind to this person. Not a single solitary witness. Now, there were witnesses around on Monday at least, but why was that, nothing in that regard presented?

(T2066).

From the tenor of the prosecutor's argument, a reasonable juror could conclude that Trotter never did "a single positive thing" in his life. A juror might also suppose that no witnesses were called because they would only join the prosecutor's appeal to recommend a death sentence. This invitation to the jury to speculate why defense character witnesses were not called not only violated Trotter's constitutional rights against self-incrimination; it also denied him a fair trial and due process of law under the Sixth and Fourteenth Amendments. Because the prosecutor's argument

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[11] Ibid.

undercut the reliability of the jury's death recommendation, the resulting sentence of death also violates the Eighth Amendment.

C. Comment Comparing Appellant to a "Wolf Following a Herd of Caribou."

The prosecutor further remarked during closing argument:

> This is a man who, like a wolf following a herd of caribou, has selected probably the most vulnerable victim in Palmetto.

(T2055). This is the same type of improper remark as one found to be error in Rhodes v. State, 547 So. 2d 1201 at 1206 (Fla. 1989) ("prosecutor insisted that Rhodes acted like a vampire"). As this Court found in Rhodes, the record does not fairly support the prosecutor's implication that Trotter was stalking the community in search of a helpless victim.

Moreover, creating an analogy between a savage animal (wolf) and the defendant is especially improper when the defendant is an African-American, being tried by an all-white jury.[12] It is reminiscent of the prosecutor's repeated reference to the defendant as an "animal" in Darden v. Wainwright, 477 U.S. 168 (1986). Although the Darden court by a 5-4 majority held that the prosecutor's argument did not deny the defendant due process of law, it wrote:

> That argument deserves the condemnation it has received from every court to review it . . . .

477 U.S. at 179. Unlike defense counsel in Darden, counsel at bar objected to the prosecutor's characterization of Appellant as a

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[12] See T2028.

"wolf" (T2071). Therefore, the improper remark is preserved for review and need not reach the level of fundamental error.

D. Comment that if Trotter Were Given A Life Sentence, the Family Would Have to Be Vigilant Lest He be Released.

During the prosecutor's argument that a life sentence with a 25 year mandatory minimum was insufficient punishment for Trotter, he remarked:

> And it's not sufficient that when those 25 or those 18 years, counting the seven he's been in custody, come up, that the State and the family must be vigilant for the rest of his life to argue and cajole with bureaucrats to keep him in prison.

(T2068). The remark is improper because it suggests that unless the family remains vigilant, Trotter would be released on parole and come after them.

Other references to the possibility of future dangerousness have been previously held to be reversible error by this Court. In Teffeteller v. State, 439 So. 2d 840 (Fla. 1983), the prosecutor gave a more dramatic argument on the same theme:

> And you better believe that he will be considered for parole, given the condition of the parole releases in this State.
>
> You look at that. This Defendant released on parole. What do you think is going to happen? He's going to kill again. You better believe he's going to kill again.
>
> He will go after Donny Poteet. He will go after Rick Kuykendall. Does he have to kill again before you think it's the proper case?

439 So. 2d at 844. This Court reversed for a new penalty trial in Teffeteller, commenting that counsel's improper argument "squan-

dered" the "material and human resources of the state." 439 So. 2d at 845.

A similar argument was held to be reversible error despite the lack of objection in Grant v. State, 194 So. 2d 612 at 613 (Fla. 1967) ("Do you want to give this man less than first-degree murder and the electric chair and have him get out and come back and kill somebody else, maybe you?"). At bar, defense counsel immediately objected after the offensive remark and moved for a mistrial or curative instruction (T2068).

E. Argument Designed to Put Jury in the Victim's Place and Re-enactment of the Stabbing by the Prosecutor

In Bertolotti v. State, 476 So. 2d 130 at 133 (Fla. 1985), this Court stated that it was "deeply disturbed" by prosecutorial misconduct which included the prosecutor's remark to the penalty jury, "Can anyone imagine more pain and any more anguish than this woman must have gone through in the last few minutes of her life?" 476 So. 2d at 133, n.2. Later, in Rhodes v. State, 547 So. 2d 1201 (Fla. 1989), this Court condemned a closing argument which asked the jury "to try to place themselves in the hotel during the victim's murder." 547 So. 2d at 1205.

At bar, the prosecutor's dramatization of the homicide for the jury went far beyond the misconduct in Bertolotti and Rhodes. First, the prosecutor stated that the victim couldn't tell the jury what happened (T2040). He then proceeded to recreate "the assault upon her that led to her death" (T2040):

Miss Langford's face-to-face with her assailant who would eventually murder her, staring into his eyes as he tried to take her breath away, tried to restrict the flow of blood to her brain, tried to overpower her.

And as the fear had to mount, as the terror had to continue in her mind, the assault continued with brutal force. She's taken around to where this knife is, her necklace and glasses knocked off, fingernail marks, if you will recall, on the right side of her neck. Bruising, more bruising on the right, but bruising on both sides in the muscles and the mucosal lining of the tissues underneath. And as Melvin Trotter had his right hand on her throat, he took this knife and stabbed her again and again and again and again and again. Knife wound penetrating into her liver, through her stomach, and into her pancreas. And what was probably a final coup de grace, a slashing injury opening her abdomen, and her intestines flowing out.

Unnecessarily torturous to the victim? A terrified victim knowing she has no avenue of escape, trying to survive suffocation, and then repeatedly stabbed with a brutal, severe, horrendous stab wound.

And then she was left for dead. Whether she lay five minutes or ten minutes, I don't know that anyone can say exactly. We know that she was there at least 25 minutes moaning in pain while the paramedics attempted to save her life. And as she lay, words are really inadequate to describe what she experienced. And I certainly do not pretend to possess enough eloquence to recreate that feeling, what she went through. But there is one piece of evidence you have, there is one photograph, and it's a terrible thing to look at. But that's what Mrs. Langford experienced. That gives you one snapshot, one instant of the ordeal she suffered. But it has to be multiplied, because she wasn't suffering for an instant. But for second after second, into minute after minute, while she was conscious, not given pain medication in an attempt to save her life, she lay on the floor of the store where she had worked for fifty years.

(T2040-2). As though this was not bad enough, the prosecutor later brandished the knife and demonstrated to the jury in grisly detail, his theory of how the stabbing attack occurred:

> Well, it suggests, I believe, that as he sat there and stabbed her (demonstrating), taking the knife into her midsection at an angle consistent with a left-handed person, facing his victim, stabbing her again and again as she collapsed, the wounds to the rib cage, as she fell down, the knife stuck higher, five or six inches higher on the body, because it did not penetrate the ribs, and as she lay on her right side behind the counter he took the knife and did this (demonstrating), in a sawing motion, as Dr. Wood described, sawing through the cartilage of her rib, made that eviscerating wound to the other side of the body.
>
> Melvin Trotter walked out of that store with two or three spots of blood on his shirt, none on his shoes. And how did he do that? There was no struggle over the knife. He stabbed a helpless victim, and then after she was on the ground, cut her abdomen open (demonstrating).
>
> Now, this isn't something I have to prove, I believe the evidence suggests to you overwhelmingly that that is what happened. But again, have they reasonably convinced you that that's not exactly what happened back on June 16th, 1986?[13]
>
> Now, this wasn't an injury -- Of course we know how far the knife went in, you've got the picture right here, almost to the hilt, perhaps to the hilt. And we know the clothes, as the knife is drawn out, are going to wipe off some of the blood. The knife wasn't flaying (sic) around like this (demonstrating), casting blood off here or blood off here. It was purposefully, efficiently used, in and out again and again and again (demonstrating), and then in a sawing motion to open up her midsection.

(T2050-1)(e.s.).

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[13] This comment suggests that the defense bears the burden to disprove aggravating circumstances.

Defense counsel properly objected to this argument and dramatization in his motion for mistrial (T2075-6). The trial judge's failure to grant a mistrial or even attempt a curative instruction to the jury mandates reversal for a new penalty trial before a new jury.

ISSUE X

THE SENTENCING JUDGE ERRED BY A) IMPROPERLY DOUBLING THE AGGRAVATING CIRCUMSTANCES OF ROBBERY AND PECUNIARY GAIN, AND B) RECITING THAT HE "CONSIDERED THE OTHER NONSTATUTORY FACTORS" (MITIGATING) WITHOUT CLARIFYING WHETHER HE FOUND ANY OR GAVE THEM ANY WEIGHT.

A) Improper Doubling

In his written sentencing order the judge found as aggravating circumstances:

* * *

> (3) The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of a robbery. The Defendant went to Virgie Langford's store for the purpose of theft or robbery, and in fact committed a robbery, which resulted in the death of Virgie Langford.
>
> * * *
>
> (5) The capital felony was committed for pecuniary gain.

(R544-5, see Appendix). This Court has long held that "it is improper to double the consideration of the aggravating circumstances of robbery and pecuniary gain when both aggravating circumstances refer[] 'to the same aspect of the defendant's crime.'" Robertson v. State, 611 So. 2d 1228 at 1233 (Fla. 1993), quoting from Provence v. State, 337 So. 2d 783 at 786 (Fla. 1976), cert. den., 431 U.S. 969 (1977). At bar, the evidence showed no broader purpose than stealing money and food stamps from the grocery store. Consequently, the two aggravating circumstances should have been considered as only one.

After the judge had read his written sentencing order in open court, the prosecutor inquired about the possibility of improper doubling of aggravating circumstances:

> MR. CROW: Judge, I may have missed it in your order, but one of the instructions the jury was given was particularly on the robbery and pecuniary gain; that while both were proven, they should consider just one. And I didn't notice if your order dealt with that fact or not. If it did --
>
> THE COURT: It did.
>
> MR. CROW: Okay, because I think the record should reflect whether you considered that as one.
>
> THE COURT: I only considered it as one.

(T2193-4). Appellant maintains that the written sentencing order does not in any way reflect that the robbery and pecuniary gain aggravating circumstances were "only considered . . . as one."

The remaining question is whether the sentencing court's after-the-fact oral declaration that he only considered the two factors as one cures the defect in the written sentencing order. In the seminal opinion of State v. Dixon, 283 So. 2d 1 (Fla. 1973), this Court noted the importance of the written sentencing order "to provide the opportunity for meaningful review by this Court." 283 So. 2d at 8. The Dixon Court continued:

> Not only is the sentence then open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of rules provided by the statute.

283 So. 2d at 8. In Grossman v. State, 525 So. 2d 833 (Fla. 1988), this Court reaffirmed the importance of the written sentencing

order by requiring that it be filed contemporaneously with the oral pronouncement of sentence.

Because of the primacy of the written sentencing order as a reflection of the sentencing judge's reasoning and conduct of the weighing process, a defect in the written order should be treated by this Court as error. Analogy can be made to the parol evidence rule of Section 672.202, Florida Statutes (1991) which does not permit a writing to be contradicted by any "contemporaneous oral agreement." This Court should now order the trial court to reweigh only the proper aggravating circumstances against the established mitigating evidence.

B) The Sentencing Judge Did Not Follow the Correct Procedure in Evaluating the Mitigating Evidence

This Court set forth in Campbell v. State, 571 So. 2d 415 (Fla. 1990), the requisite procedure which sentencing judges must follow when addressing mitigating circumstances. Since the sentencing at bar took place July 23, 1993, the court was required to comply fully with Campbell. See, Gilliam v. State, 582 So. 2d 610 (Fla. 1991).

In his order sentencing Trotter to death, the sentencing judge identified five statutory and nonstatutory mitigating circumstances which he found and weighed (R545-6, see Appendix). He then added:

> (6) The Court has considered the other nonstatutory factors presented by the Defendant.

(R546, see Appendix). This language is ambiguous because it doesn't tell us whether the court found any of the other nonstatu-

tory factors presented or whether he gave then any weight. Perhaps the sentencing judge was simply lumping the rest of the mitigating evidence together and giving it only slight weight. However, after Campbell, this is no longer an acceptable approach.

The first step which the sentencing court must perform under Campbell is to

> expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature.

571 So. 2d at 419. At bar, Appellant proposed thirteen nonstatutory mitigating circumstances for consideration (R447). The sentencing judge seems to have addressed several of them in his finding:

> (3) The Defendant has a below average I.Q. and has had both family problems (abuse and neglect) and developmental problems. He obviously had a disadvantaged background.

(R545, see Appendix). However, the judge did not fully comply with Campbell's first requirement that each and every nonstatutory mitigating factor be expressly evaluated.

The second requirement of Campbell is that the sentencing judge must "find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence." 571 So. 2d at 419. At bar, the judge's catch-all statement that he "considered the other nonstatutory factors" falls short of his duty to specify which, if any, of the unmentioned factors he found.

Finally, Campbell requires the sentencing judge to give some weight to each mitigating factor found. The sentencing order at bar is ambiguous in this regard because one cannot tell for sure whether weight was given to the sixth catch-all factor listed under "Mitigating Circumstances" (R546, see Appendix).

This Court has long held that sentencing orders in capital cases "should be of unmistakable clarity so that we can properly review them and not speculate as to what [was] found." Mann v. State, 420 So. 2d 578 at 581 (Fla. 1982). Accord, Lucas v. State, 568 So. 2d 18 (Fla. 1990). Because the sentencing order at bar does not meet this standard, this Court should remand this case to the trial court for reweighing.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Appellant, Melvin Trotter, respectfully requests this Court to grant him relief as follows:

Reversal for a new penalty proceeding before a new jury (Issues I-III, VI-IX).

Remand for an evidentiary hearing and ruling on the merits (Issues IV and V).

Remand for reweighing by the sentencing judge (Issue X).

Respectfully submitted,

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APPENDIX

IN THE CIRCUIT COURT IN AND FOR MANATEE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs. CASE NO. 86-1225-F; [redacted]F

MELVIN TROTTER,

Defendant.

_____/

JUL 23 2 19 PM '93

SENTENCE -- FIRST DEGREE MURDER

FINDINGS

This case was tried in 1986. The Judge pronounced the Defendant guilty of the charge of First Degree Murder and sentenced him to death. On appeal the Supreme Court affirmed the conviction, but remanded the case for a new sentencing hearing (Trotter v. State, 576 So. 2d 691, Fla. 1990). The undersigned was designated by Assignment Order #93R-252 to conduct the proceeding. On April 21, 1993, the jury returned its advisory sentence and recommended death by a vote of 11 to 1.

Counsel raised the question of victim impact evidence. Victim impact was not allowed to become a focal point in the sentencing proceeding nor has it influenced the Court in reaching its decision.

The Court finds the following aggravating factors have been proved beyond a reasonable doubt:

FILED IN OPEN COURT
THIS 23 DAY OF July 19 93
R.B SHORE, CLERK
BY L.R. Fuller DC

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(1) The crime for which the Defendant is to be sentenced was committed while the Defendant was on community control. This the factor which required reversal of the sentence on the original appeal. The statute was subsequently amended to include community control (FS 921.141, 1991). Although the State was permitted to introduce evidence of this factor, this Court would have reached the same conclusion without this evidence.

(2) The Defendant has previously been convicted of a felony involving the use or threat of violence to some person. It has been demonstrated that the Defendant was previously convicted of robbery. The Defendant apparently held an old man down while the Defendant's cohort robbed the man. There can be no question but that Defendant participated in a crime of violence. See Simmons v. State, 419 So. 2d 3116 (Fla. 1982).

(3) The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of a robbery. The Defendant went to Virgie Langford's store for the purpose of theft or robbery, and in fact committed a robbery, which resulted in the death of Virgie Langford.

(4) The crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious and cruel. Virgie Langford was killed in the store which she owned and ran for many years. As with every such proprietor, her store was undoubtely her second home. She was stabbed seven times and, in fact, was disemboweled. As she was removed to the hospital for treatment she was conscious and was holding her intestines. She was alive for a considerable

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time after the attack and was aware of her terrible condition. The victim was seventy years old and met her death at the hands of a healthy, muscular young man, who obviously could have subdued his victim with little effort. The number and force of the stabbings greatly exceeded that needed to subdue the robbery victim. The Defendant was clearly "utterly indifferent to the suffering" of Virgie Langford.

(5) The capital felony was committed for pecuniary gain.

MITIGATING CIRCUMSTANCES

The Court finds the following mitigating circumstances have been demonstrated:

(1) The capital felony was committed while the Defendant was under the influence of extreme mental and emotional disturbance.

(2) The capacity of the Defendant to conform his conduct to the requirements of law was substantially impaired. The Defendant was addicted to crack cocaine and this addiction affected his mental processes and his ability to control his actions. It did not, however, render him insane or unable to control his actions, or to keep him from understanding that his actions were wrong.

(3) The Defendant has a below average I.Q. and has had both family problems (abuse and neglect) and developmental problems. He obviously had a disadvantaged background.

(4) The Defendant may have suffered from a frontal lobe brain disorder which slowed down his reaction times.

(5) The Defendant is remorseful to some degree; it is

A3

difficult, however, to separate his true remorse for the killing of Virgie Langford from his self pity over his own predicament.

(6) The Court has considered the other nonstatutory factors presented by the Defendant.

WEIGHING THE CIRCUMSTANCES

The Court finds the aggravating circumstances outweigh the mitigating circumstances. While the statutory criteria for mental or emotional disturbance were met, they amount to "less than insanity but more than the emotions of the average man, however inflamed." See, State v. Dixon, 283 So. 2d 1 (Fla. 1973). Defendant's inability to conform his conduct to the law is a circumstance, "...provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state." State v. Dixon, supra, at page 10. The range of activities encompassed in these circumstances is necessarily broad. In some cases cocaine addiction or a frontal lobe brain disorders might give rise to a mental disturbance such as to outweigh any aggravating factors. This is not one of those cases.

The Defendant was observed viewing the store before entering it. There is no evidence that he was under the influence of any drug or acting in a bizarre manner. He was stable enough to wait until the store was empty before entering and was stable enough to ask his girlfriend to provide an alibi for him. He was obviously aware of the wrongful nature of his act.

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The Defendant was a cocaine addict and was affected by his addiction. The Court finds, however, that while the Defendant robbed the store to get money to buy cocaine, his addiction and not a "mental illness" was the motivating factor in the robbery and murder. In sum, the Defendant's use or abuse of cocaine does not excuse the particularly shocking nature of this murder or outweigh the aggravating factors proven.

SENTENCE

In accordance with these findings it is **ORDERED AND ADJUDGED** that the Defendant, Melvin Trotter, be committed to the custody of the Department of Corrections of the State of Florida and that he be executed and put to death in accordance with provisions of the Laws of Florida

DONE AND ORDERED this 23rd day of July, 1993.

E. L. EASTMOORE, Senior Judge

Copies to:

Douglas E. Crow, Esquire
Frederick L. Schaub, Esquire
James Slater, Esquire

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CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 28th day of September, 1994.

Respectfully submitted,

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