IN THE SUPREME COURT
OF FLORIDA

CASE NO.: 83,556

GERALD D. MURRAY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court
Duval County, Florida

INITIAL BRIEF OF APPELLANT

Fletcher N. Baldwin, Esquire
Georgia Bar No.: 034600
University of Florida
College of Law
P.O. Box 117625
Gainesville, Florida 32611
Phone: (904) 392-2260

Wm. J. Sheppard, Esquire
Florida Bar No.: 109154
Richard W. Smith, Esquire
Florida Bar No.: 013943
D. Gray Thomas, Esquire
Florida Bar No.: 956041
Sheppard and White, P.A.
215 Washington Street
Jacksonville, Florida 32202
Phone: (904) 356-9661

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

Statutes and Rules

United States Constitution

IN THE SUPREME COURT
OF FLORIDA

CASE NO.: 83,556

GERALD D. MURRAY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court
Duval County, Florida

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant, Gerald D. Murray, will be referred to herein by name, as "defendant" or as "appellant." Appellee, State of Florida, will be referred to herein as the "State" or "appellee." References to the Record on Appeal will be designated by reference to the relevant volume and page set forth in brackets. Example, [Vol. I, 1].

STATEMENT OF THE CASE AND FACTS

On September 15, 1990, the appellant/defendant, Gerald Murray, and his neighbor, James Fisher, picked up Steven Taylor and drove to the Corner Pocket on San Jose Boulevard in Jacksonville, Florida. [Vol. XXXIV, 1102-1105]. Afterwards, Mr. Fisher dropped off Mr. Murray and Mr. Taylor at the corner of Deeder and Herdon Streets, near Mr. Murray's home. [Vol. XXXIV, 1106-1108, 1110-1113].

On September 16, 1990, the Jacksonville Sheriff's Office was contacted after neighbors of Ms. Alice Vest had found her dead in her mobile home, which was uncharacteristically in disarray. [Vol. XXXV, 941-942, 946-947]. Jacksonville Sheriff's Office evidence technicians took photographs and collected physical evidence on September 16 and 18, 1990. [Vol. XXXV, 946-947]. At the scene of the alleged crime, pruning shears were found lying beneath cut telephone wires. [Vol. XXXV, 950-952, 978]. Ms. Vest was found lying on her bed with a wire or cord wrapped around her neck. [Vol. XXXV, 956-958]. She had slice wounds and puncture wounds about her upper body. [Vol. XXXV, 956-958]. Other evidence seized from Ms. Vest's bedroom included a metal bar, a broken bottle, a paring knife, a brass candelabra, and a pair of scissors. [Vol. XXXV, 954-958, 969, 998-999]. Two hairs were collected from the left leg and chest of Ms. Vest and sealed in an envelope. [Vol. XXXVI, 1017-1019].

Approximately five months later, on February 15, 1991, homicide detective T.C. O'Steen contacted Assistant State Attorney

Bernardo de la Rionda to obtain a search warrant regarding Mr. Murray. [Vol. XXX, 259-261]. Detective O'Steen's affidavit, in regard to Mr. Murray, stated that Mr. Murray with James Fisher picked up Steve Taylor at a house where a pendant and English gold coin were found buried in the backyard. [Vol. I, 119, 125]. The pendant and coin were alleged to have been missing from Ms. Vest's home. [Vol. I, 119, 125]. Also, Detective O'Steen stated in his affidavit that Mr. Murray and Steven Taylor left town a few days after Ms. Vest's death. [Vol. I, 119, 125]. Detective O'Steen requested approval to take blood and saliva samples of Mr. Murray. [Vol. I, 119, 126]. Circuit Judge Santora issued the search warrant permitting the taking of blood, saliva, and hair samples. [Vol. I, 119, 126].

Subsequently, on February 15, 1991, Mr. Murray, who was incarcerated at Montgomery Correctional Center on an unrelated offense, was transported to the Police Memorial Building where he was questioned by Jacksonville Sheriff's Office personnel. [Vol. XXX, 272-275]. Detective O'Steen stated he then requested Mr. Murray's consent for blood, saliva, and hair samples. [Vol. XXX, 272-275]. According to the detective, Mr. Murray acquiesced. [Vol. XXX, 272-275]. Mr. Murray was taken to the clinic of the Duval County Jail whereupon Mr. Murray learned that samples were to be taken. [Vol. XXX, 306-308]. Mr. Murray asked to see a search warrant which Detective O'Steen produced, at which point the samples were taken. [Vol. XXX, 306-308]. Blood, saliva and hair samples were all collected. [Vol. XXXVI, 1208-1209, 1210-1212].

Detective O'Steen later testified that he had received consent and a search warrant prior to collecting the samples. [Vol. XXXVI, 1212].

More than a year later, Mr. Murray was indicted on April 9, 1992, for murder in the first degree, burglary and sexual battery. [Vol. I, 1]. Mr. Murray's trial counsel were appointed on January 13, 1994. [Vol. I, 113]. Despite motions for continuance, [Vol. XXXII, 130; XXXIII, 430-446], trial commenced on February 28, 1994, less than two months after counsel was appointed. [Vol. XXXIII, 468]. A separate motion for continuance of the penalty phase also was denied. [Vol. LXIII, 2134-2136].

On January 28, 1994, Mr. Murray moved to suppress evidence of any test conducted from Mr. Murray's blood, saliva or hair based on a faulty search warrant. [Vol. I, 119]. Despite the fact that the supporting affidavit made no mention of Mr. Murray's hair or the desire to take hair samples, the issuing judge signed the search warrant directing that blood and saliva as well as hair be seized. [Vol. XXX, 266, 269]. This motion was denied. [Vol. XXXVIII, 1507]. Also, on February 7, 1994, Mr. Murray moved to suppress physical evidence on the basis that an identification card and a social security card were seized without a warrant and without probable cause. [Vol. I, 134]. The motion was denied. [Vol. II, 331; Vol. XXXV, 896].

Jury selection began on February 28, 1994. [Vol. XXXIII-XXXV]. During jury selection, Mr. Murray raised Neil objections because the State exercised its first three preemptory challenges

to excuse black males. [Vol. XXXV, 858]. The State interposed its reasons for its challenges and the trial court then overruled the objection, all before defense counsel could state further grounds for his objection. [Vol. XXXV, 858-859].

On March 2, 1994, Mr. Murray moved to exclude novel scientific evidence in the form of DNA testing on his hair samples. [Vol. III, 337]. The trial court denied this motion at trial on March 2, 1994. [Vol. XXXVII, 1330]. Mr. Murray also moved on March 2, 1994, to exclude the testimony of Joseph A. Dizinno, a hair and fiber examination expert, on the basis that his comparison of Mr. Murray's hairs to hairs found at the crime scene was irrelevant as it failed to determine any degree of probability or certainty. [Vol. II, 354]. The trial court likewise denied this motion. [Vol. XXXVII, 1331].

At trial, during the State's presentation of its case, Dr. Bonafacio Floro testified as an expert that Ms. Vest's death was a homicide caused by ligature strangulation and multiple stab wounds. [Vol. XXXVI, 1053-1054, 1088-1089]. Dr. Floro testified that Ms. Vest had bruising and abrasions on her breast and stab wounds on her chest, abdomen, back and thigh. [Vol. XXXVI, 1071-1073]. Dr. Floro stated that, in his opinion, the stab wounds were inflicted before the strangulation. [Vol. XXXVI, 1077]. Ms. Vest had a lacerated and broken jaw consistent with being hit with a broken bottle neck. [Vol. XXXVI, 1079-1080]. Dr. Floro, upon being given a hypothetical by the State, also stated that the evidence was consistent with Ms. Vest having been strangled with three objects;

a web belt, a leather belt and a cord. [Vol. XXXVI, 1088-1089]. Mr. Murray's defense counsel objected to the hypothetical but was overruled. [Vol. XXXVI, 1088]. Upon cross-examination, Dr. Floro was unsure as to how many individuals participated in the strangling. [Vol. XXXVI, 1090]. Dr. Floro also testified that Ms. Vest suffered no defensive wounds, and that the medical evidence was consistent with her having been unconscious from near the outset of the attack on her. [Vol. XXXVI, 1090-1092].

John Wilson, a crime laboratory analyst with FDLE, testified that no identifiable fingerprints were found of Mr. Murray on any of the evidence seized. [Vol. XXXV, 1185-1187].

The State also called Diane Hanson, a forensic serologist with the Florida Department of Law Enforcement. [Vol. XXXVII, 1231]. She stated that seminal stains found on the victim's blouse and bed comforter were consistent with Steven Taylor but not with Mr. Murray. [Vol. XXXVII, 1252-1254]. Indeed, Mr. Murray was eliminated as a donor of all blood and semen samplings found by Ms. Hanson. [Vol. XXXVII, 1260].

Joseph Dizinno, a hair and fiber expert for the FBI, testified, over the objection of Mr. Murray's defense counsel, that caucasian pubic hair found on the left leg and chest of the victim had the same microscopic characteristics as the pubic hair of Mr. Murray. [Vol. XXXVII, 1366-1368]. Defense counsel had objected on the basis that Mr. Dizinno had found more than two hairs in the evidence slide although the evidence technician who had seized the hairs had only obtained two. [Vol. XXXVII, 1359-1363]. The trial

court overruled the evidence tampering objection. [Vol. XXXVII, 1363]. Upon cross-examination, Mr. Dizinno stated that the comparison of hair did not reveal an absolute positive identification. [Vol. XXXVII, 1377-1378]. Mr. Dizinno could not discount the possibility that the hair from the crime scene could have come from someone other than Mr. Murray. [Vol. XXXVII, 1383-1385].

Next, the State called Daniel Nippes, Chief Criminologist at the Regional Criminal Laboratory of the FBI. [Vol. XXXVII, 1387-1388]. Mr. Nippes stated, after comparing hairs found at the scene and the hair samples taken from Mr. Murray, that one of Mr. Murray's hairs had the same DNA type as the hair found at the scene. [Vol. XXXVIII, 1404-1405]. According to Mr. Nippes, 8.2 percent of the population has that same DNA genotype as the crime sample. [Vol. XXXVIII, 1405-1406].

At trial, again over the objection of defense counsel, Ricky Proctor, an inmate in the Duval County Jail, testified that Mr. Murray, while in custody, referred to Steven Taylor as his partner in a murder. [Vol. XXXVIII, 1520-1521]. Mr. Proctor also stated that Mr. Murray had revealed to him that he and Mr. Taylor had broken into a woman's home, beat her up, tied her up, had sexual intercourse with her, and then killed her. [Vol. XXXVIII, 1524-1525, 1559-1561]. For his "truthful" testimony, Mr. Proctor was to get a 4-year cap instead of possibly ten years as a habitual offender. [Vol. XXXVIII, 1542-1546]. Mr. Proctor had told Michael Brown, an inmate at Union Correctional Institution, that he would

do anything to get his sentence reduced and expressed concern regarding his habitual offender status. [Vol. XXXIX, 1745-1748]. Likewise, Mr. Charles Torak, a convicted felon, testified that Mr. Murray had stated while in the Duval County Jail that he was present when his best friend stabbed a woman whose house they had burglarized. [Vol. XXXVIII, 1573, 1575]. Mr. Torak, at that time, was a confidential informant for the Jacksonville Sheriff's Office who between 1988 and 1992 was paid $15,000.00. [Vol. XXXVIII, 1576-1579].

Anthony Smith, an inmate in the Duval County Jail who escaped with Mr. Murray on November 22, 1992, testified for the State that Mr. Murray had stated that he and a friend went to rob a house, had sexual intercourse with the female occupant, stabbed and strangled the woman, and then gathered some valuables and left. [Vol. XXXIX, 1654, 1657]. Mr. Smith pled guilty to first degree murder and was sentenced to life imprisonment with a minimum-mandatory of 25 years. [Vol. XXXIX, 1559-1560].

Following the State's presentation of its case, Mr. Murray through defense counsel, moved for a judgment of acquittal. [Vol. XXXIX, 1736]. The motion was denied and the defense began its case. [Vol. XXXIX, 1736-1739].

The defense called Michael Brown, an inmate at Union Correctional Institution, to testify as an explanation of why Mr. Murray escaped from the Duval County Jail. [Vol. XXXIX, 1745, 1749-1753]. The trial court sustained the State's objection to Mr. Brown's testimony on the grounds that it was hearsay without Mr.

Murray testifying himself. [Vol. XXXIX, 1749-1753]. Defense counsel, out of the jury's presence, proffered Mr. Brown's testimony as well as the testimony of Thomas Morton Williams, Paul Pinkham and William L. Drew. [Vol. XXXIX, 1753, 1790, 1795; Vol. LX, 1897]. William Drew and Thomas Williams, both previous cellmates of Mr. Murray, never heard Mr. Murray say anything directly about his case. [Vol. LX, 1809-1811; 1839-1841].

Dr. David Goldman, a lab chief at the National Institute of Health in Bethesda, Maryland, stated that whenever DNA samples are taken, any individual who could have deposited a sample onto the victim should have been tested. [Vol. LX, 1888-1889].

On March 4, 1994, after resting, defense counsel again moved for judgment of acquittal, which was denied. [Vol. LX, 1916]. The State and defense counsel made their closing arguments regarding the guilt phase. [Vol. LX, 1932-2000; Vol. LXI, 2004-2059]. During the State's closing arguments, the prosecution directed the jury that it had the right to be angered by photographs depicting a senseless, brutal murder. [Vol. LXI, 2058-2059]. The trial judge sustained defense counsel's objection, gave a curative instruction , but denied defense counsel's motion for mistrial. [Vol. LXI, 2059]. The trial judge instructed the jury. [Vol. II, 357; Vol. LXI, 2062-2095]. On March 8, 1994, the jury found Mr. Murray guilty of murder in the first degree, burglary, and sexual battery. [Vol. LXI, 2102].

On March 17, 1994, Mr. Murray filed a motion for new trial. [Vol. III, 405]. That motion was denied. [Vol. LXIV, 2385-2387].

On March 24, 1994, the penalty phase of this case began. [Vol. LXIII-LXV].

Mr. Murray filed objections to the standard "heinous, atrocious and cruel" jury instruction and proposed alternative instructions regarding that issue. [Vol. III, 414, 419]. He also challenged the constitutionality of Florida's death penalty. [Vol. I, 113, 209, 216]. He further challenged the legality of application of a newly amended statutory provision to his case, [Vol. I, 230], and moved to prohibit comments by the State misleading the jury as to its advisory role in the penalty phase. [Vol. I, 139]. These motions and objections were denied. [Vol. XXX, 211-242]. The State presented evidence and argument, over Mr. Murray's objections, of his prior felony record and argued other aggravating factors. [Vol. LXIII, 2137-2167; LXIV, 2294-2325]. Mr. Murray presented evidence in mitigation. [Vol. LXIV, 2170-2283]. The jury voted 11-1 to recommend a sentence of death. [Vol. LXIV, 2366]. On April 14, 1994, Mr. Murray moved for a new penalty phase, and the motion was denied. [Vol. III, 444]. On April 15, 1994, the trial court sentenced Mr. Murray to death for murder in the first degree, and to two consecutive sentences of life imprisonment for burglary of a dwelling with assault and sexual battery with the use of physical force likely to cause serious personal injury. [Vol. LXI, 2408-2416]. Mr. Murray timely filed his notice of appeal on April 15, 1994. [Vol. III, 501]. Undersigned appellate counsel was appointed on May 11, 1995. This appeal follows.

POINTS ON APPEAL

I.

THE TRIAL COURT ERRED IN FAILING TO SUSTAIN THE DEFENDANT'S OBJECTIONS TO THE STATE'S DISCRIMINATORY PEREMPTORY CHALLENGES OF THREE PROSPECTIVE JURORS.

II.

THE SEARCH WARRANT WAS ISSUED IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. I, SEC. 12 OF THE FLORIDA CONSTITUTION AS WELL AS UNITED STATES V. LEON'S EXCEPTIONS TO THE GOOD FAITH RULE, IN THAT THE AFFIDAVIT DID NOT INCLUDE A MAJOR INGREDIENT NOR DID IT FOCUS UPON THE REAL AND INTENDED MATTER SUBJECT TO SEARCH AND SEIZURE: HAIR.

III.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION IN LIMINE TO EXCLUDE NOVEL SCIENTIFIC EVIDENCE.

IV.

THE TRIAL COURT ERRED BY PERMITTING THE ADMISSION OF HAIR EVIDENCE DESPITE INDICATIONS OF PROBABLE TAMPERING OR ALTERING.

V.

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENSE COUNSEL'S MOTIONS FOR CONTINUANCE OF THE TRIAL AND THE PENALTY PHASE.

VI.

THE COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE STATE TO INTRODUCE EVIDENCE REGARDING MR. MURRAY'S COLLATERAL CRIMES TO SHOW BAD CHARACTER OR PROPENSITY TO COMMIT BAD ACTS.

VII.

THE TRIAL COURT ERRED IN EXCLUDING THE APPELLANT'S STATEMENTS TO OTHERS AS TO HIS STATE OF MIND REGARDING HIS ESCAPE.

VIII.

THE STATE'S COMMENT DURING CLOSING ARGUMENT CONSTITUTE REVERSIBLE ERROR BECAUSE THE PROSECUTOR INTENTIONALLY EVOKED AN EMOTIONAL RESPONSE FORM JURORS.

IX.

THE EVIDENCE WAS INSUFFICIENT TO CONVICT GERALD MURRAY OF THE OFFENSES CHARGED.

X.

THE TRIAL COURT ERRED IN FINDING THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE.

XI.

THE TRIAL COURT ERRED IN OVERRULING MR. MURRAY'S OBJECTIONS TO THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE INSTRUCTION AND DENYING HIS ADDITIONAL PROPOSED INSTRUCTIONS REGARDING THAT AGGRAVATING FACTOR.

XII.

THE TRIAL COURT ERRED IN REJECTING STATUTORY AND NON-STATUTORY MITIGATING CIRCUMSTANCES.

XIII.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND MAKING FINDINGS OF TWO AGGRAVATING CIRCUMSTANCES THAT MERGE.

XIV.

THE PECUNIARY GAIN AGGRAVATING FACTOR DOES NOT APPLY TO THE FACTS OF THIS CASE.

XV.

THE TRIAL COURT ERRED IN DENYING ALL BUT UNOPPOSED OBJECTIONS OF MR. MURRAY'S PRIOR VIOLENT FELONIES.

XVI.

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO ARGUE IMPROPERLY IN THE PENALTY PHASE.

XVII.

FLORIDA'S STATUTORY PROVISION ALLOWING PRESENTATION OF VICTIM IMPACT EVIDENCE IN A CAPITAL SENTENCING PROCEEDING IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE.

XVIII.

THE SENTENCING COURT ERRED BY IMPOSING MULTIPLE PUNISHMENTS FOR SINGLE CONVICTIONS.

XIX.

THE TRIAL COURT IMPROPERLY FAILED TO ADVISE THE JURY OF THE GRAVITY OF ITS SENTENCING RECOMMENDATION.

XX.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A DEATH SENTENCE.

XXI.

FLORIDA'S DEATH PENALTY IS UNCONSTITUTIONAL BECAUSE ELECTROCUTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

XXII.

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

XXIII.

THE SENTENCING COURT ERRED IN SENTENCING GERALD MURRAY TO TWO CONSECUTIVE LIFE SENTENCES WHEN HIS SENTENCE ON ONE COUNT HAD BEEN ENHANCED UNDER THE HABITUAL OFFENDER STATUTE.

SUMMARY OF THE ARGUMENT

1. The trial judge permitted, over the defendant's objections, the State to employ peremptory challenges to choose three jurors based on both race and gender and failed to apply the required legal analysis to that issue which was raised by the accused. The trial judge erred in finding that the State advanced race-neutral reasons for exercising its peremptory challenges in not making any determination of whether the State exercised its peremptory challenges to exclude prospective jurors on the basis of gender.

2. The search warrant issued for the taking of hair samples of the defendant was not based on probable cause as the supporting affidavit did not even mention the need for the hair. The trial judge's denial of the defendant's motion to suppress evidence

seized as a result of the invalid search warrant constituted reversible error.

3. The trial court erred in denying the defendant's motion in limine to exclude DNA evidence as it is novel scientific evidence not generally accepted by the relevant scientific community.

4. The trial court committed reversible error when it admitted hair collected at the crime scene and results of testing of such hair despite conflicting testimony which demonstrated probable tampering or altering of the hair.

5. The trial court abused its discretion in denying defense counsel's motion for a continuance based on the short time period counsel had for trial preparation, the resulting prejudice to the defendant's case, and the nature and complexity of the case.

6. The trial court erred in permitting the State, over defense objection, to introduce evidence and elicit testimony regarding the defendant's collateral crimes or bad acts solely for the reason to establish the defendant's propensity of committing such acts.

7. It was error for the trial court not to permit defense counsel to introduce into evidence the testimony of several individuals regarding the defendant's statements regarding his then existing state of mind at the time of his escape, which is an exception to the hearsay rule, especially after the State was permitted to introduce evidence regarding the defendant's escape.

8. The State's comment to the jury that it had a right to be angered by photographs of the victim was reversible error as it was made to intentionally invoke an emotional response from the jury.

9. The State failed to present sufficient evidence to establish a prima facie case of the offenses charged as the only evidence presented connecting the defendant to the crime scene should have been suppressed or was incredible.

10. The trial court erred in finding the heinous, atrocious or cruel aggravating circumstance applicable where the victim may have been unconscious or semi-conscious and where the evidence did not show the defendant intended to cause the victim unnecessary or prolonged suffering.

11. The trial court erred in failing to instruct the jury as to the proper limit of its discretion in deciding which offenses qualify for the heinous, atrocious, or cruel aggravating factor and erred in giving an unconstitutional heinous, atrocious or cruel instruction.

12. The trial court erred in the legal standard it applied to mitigating evidence presented by the defendant and erred in finding that the matters presented by the defendant did not constitute mitigating factors.

13. The trial court, by failing to properly instruct the jury, erred in permitting the jury to double the aggravators of burglary and crime for financial gain which should have been merged based on the circumstances of the case.

14. The pecuniary gain aggravating factor was improperly found in this case. The record fails to support the trial court's conclusion that the motive for murder was financial gain.

15. The trial court erred in denying defense objections regarding the defendant's prior violent felonies. As a result, the defendant was required to defend against numerous factual allegations far in excess of those necessary to establish that he had previously been convicted of felonies involving the use or threat of violence to a person.

16. The trial court erred in enhancing the defendant's sentence as a habitual offender and ordering that he serve his life sentences consecutively.

17. The trial court erred in permitting the State, over defense objection, to argue that the defendant is an evil person and that the evidence presented as mitigation was an attempt to get sympathy.

18. The Victim Impact Statute allows for arbitrary and capricious imposition of the death penalty; is vague, overbroad, and violates the Equal Protection Clause; infringes upon this Court's exclusive right to regulate practice and procedure; and violates the ex post facto clause.

19. The trial court violated the defendant's rights against double jeopardy by sentencing the defendant to burglary with an assault and then by using that same offense as an aggravator to impose the death penalty.

20. The trial court erred by failing to inform the jury that its sentencing recommendation would carry great weight. Absent such an instruction, the trial court would not properly evaluate the jury's recommended sentence.

21. The evidence presented by the State during the penalty phase was insufficient to sustain the death penalty imposed.

22. Electrocution, because of its torturous inherent nature and the availability of less cruel but equally effective methods of execution, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 12, of the Florida Constitution.

23. Based on the available mitigating factors, it was error for the trial court to impose the death penalty where the aggravating circumstances were substantially fewer or carried little weight.

ARGUMENT

I.

THE TRIAL COURT ERRED IN FAILING TO SUSTAIN THE DEFENDANT'S OBJECTIONS TO THE STATE'S DISCRIMINATORY PEREMPTORY CHALLENGES OF THREE PROSPECTIVE JURORS.

This Court should reverse the conviction below because the trial court permitted the State to employ peremptory challenges to excuse three jurors based on both race and gender and failed to apply the required legal analysis to that issue which was raised by appellant. [Vol. XXXV, 858-859] Mr. Murray met the burden placed on the party objecting to the peremptory challenge by demonstrating that the State exercised these three peremptory challenges based on the race and gender of the prospective jurors. State v. Johans, 613 So.2d 1319 (Fla. 1993)(holding that a showing of a strong likelihood is not necessary to require a neutral justification by the challenger); State v. Neil, 457 So.2d 481, 486 (Fla. 1984).

Yet, the trial judge erred (1) in finding that the State advanced race-neutral reasons for exercising its peremptory challenges and (2) in not making any determination of whether the State exercised its peremptory challenges to exclude prospective jurors on the basis of gender. Accordingly, this Court should reverse the conviction below.

A. The Trial Court Failed to Apply the Proper Legal Standard.

This Court should find that the court below erred in allowing the State to exercise its peremptory challenges to exclude African-American males, because the purported justifications given by the

State for those challenges were factually and legally insufficient for the challenges to be sustained. The trial court further erred by merely accepting the State's reasons at face value and by failing to engage in an analysis of whether "the proffered reasons are, first, neutral and reasonable and, second, not a pretext." State v. Slappy, 522 So.2d 18, 22 (Fla. 1988) (emphasis in original); Jones v. State, 640 So.2d 1161, 1163 (Fla. 1st DCA 1994) (citations omitted). Accordingly, Mr. Murray's conviction should be reversed.

During jury selection, Mr. Murray raised his Neil and Abshire objections by demonstrating that the State's first three peremptory challenges were exercised to excuse "black males". [Vol. XXXV, 858]. See Neil, supra, Abshire v. State, 642 So.2d 542 (Fla. 1994). Before Mr. Murray had the opportunity to more fully set forth the basis for his objections, the State interposed its purported justifications for the three challenges. [Vol. XXXV, 858-859]. The trial court noted that the State offered its explanations prior to being required to do so but further found that the court did "require [the explanation] for the Neil purposes." [Vol. XXXV, 859]. As a result, Mr. Murray met his initial burden of supporting his Neil objections based on both race and gender. Yet, the trial court merely accepted at face value the State's proffered justifications and denied Mr. Murray's Neil challenges. [Vol. XXXV, 859]. The trial court erred as a matter of law, and the conviction below accordingly should be reversed.

Peremptory challenges are uniquely suited to mask discriminatory motives because they may permit dismissal of potential jurors based merely on "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another," inconsistent with the requirements of the Florida and United States constitutions. State v. Slappy, 522 So.2d 18, 20 (Fla. 1988), quoting, 4 W. Blackstone, Commentaries, 853 (1807), and citing Batson v. Kentucky, 476 U.S. 79, 96 (1986).

A discriminatory strike of even one juror violates the Constitution because Batson, Neil and their progeny require elimination, not mere minimization, of discrimination in jury selection. United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986). Finally, even if the jury ultimately seated includes one or more members of the racial or gender group in question, such a factor is of no assistance to the State. Slappy, 522 So.2d at 21, 24 (citations omitted); David, 803 F.2d at 1571.

Upon determination of the trial judge that a party's Neil objection is proper and not frivolous, the burden of proof shifts to the proponent of the challenge to demonstrate legitimate reasons for the peremptory challenge that are clear, reasonably specific and non-discriminatory. Slappy, 522 So.2d at 22 (citation omitted). The reasons set forth by the State "cannot be accepted merely at face value by the trial court." Jones v. State, 640 So.2d 1161, 1163 (Fla. 1st DCA 1994). The trial court must analyze two separate aspects of the reasons proffered, that the "reasons are,

first, neutral and reasonable and, second, not a pretext." Id. (emphasis in original) (citations omitted).

In this case, Mr. Murray objected to three of the State's peremptory challenges on two separate grounds, both race and gender. In the objection, counsel for Mr. Murray noted "that the State's first three strikes are all black males." [Vol. XXXV, 858]. The State proceeded to proffer reasons for its challenges, and the trial court ruled on the matter, before defense counsel could state further grounds for his objections. [Vol. XXXV, 858-859]. In full, the trial court ruled as follows:

> All right. It does not appear to me that those are racially-motivated challenges. The State has explained them without the court requiring it, but will require for the Neil purposes and will deny the challenge.

[Vol. XXXV, 859].

The trial court erred in a number of ways. While holding the peremptory challenges "not...racially-motivated," [Vol. XXXV, 859], the court failed to apply and make conclusions of the mandatory factors "that the proffered reasons are, first, neutral and reasonable and, second, not a pretext." Slappy, 522 So.2d at 22; Jones, 640 So.2d at 1163; Stephens v. State, 559 So.2d 687, 689-90 (Fla. 1st DCA 1990), aff'd., 572 So.2d 1387 (Fla. 1991). The trial court made no inquiry or findings whatsoever with respect to the gender issue.

With regard to the present case, prospective juror Bates stated during voir dire that, in his opinion, the law of premeditation should require that an individual charged with

premeditated murder have sufficient time "to think about what you're doing" in order for premeditation to be established. [Vol. XXXIV, 605]. However, Mr. Bates further stated that he understood that the law does not require any certain specific minimum amount of time for reflection in order to establish premeditation. [Vol. XXXIV, 604-606]. Mr. Bates never stated that he would be unable to follow the law as given by the court, or even have any difficulty following the court's instructions in that regard, only that he believed that the law should provide for a certain minimum specific amount of time for reflection in order to establish premeditation. [Vol. XXXIV, 607]. As a result, the sole reason proffered by the State for its peremptory challenge of Mr. Bates fails to withstand any scrutiny whatsoever as to being neutral and reasonable, as well as not pretextual. Accordingly, the conviction below should be reversed.

The State moved that Mr. Bates be stricken for cause. [Vol. XXXV, 849]. Though the State represented that Mr. Bates had responded upon inquiry that he could not follow the law with regard to premeditation, the court, on defense objection, determined that Mr. Bates' response was that he could follow the law on premeditation and disallowed the challenge for cause. [Vol. XXXV, 849-850]. As a result, the State was not able to justify its peremptory challenge of Mr. Bates with a neutral or reasonable justification. The only possible explanation is that the State's peremptory challenge was pretextual, based on Mr. Bates' race,

gender or both. Accordingly, the conviction below should be reversed.

The State further exercised peremptory challenges to exclude prospective jurors Lewis Parker and Robert Smith. [Vol. XXXV, 858]. Following the Neil/Abshire objections of the defendant, the State proffered as grounds that Mr. Parker had entered a plea of no contest to a battery charge, for which adjudication was withheld, and that Mr. Smith had been adjudicated guilty of trespass. [Vol. XXXV, 858-859]. Nowhere in the record, however, is there any indication that these two prospective jurors had indicated any inability to be fair and impartial to the State, even in light of their prior encounters with the criminal justice system. The record is devoid of any indication that the State questioned Mr. Parker and Mr. Smith during voir dire as to their abilities to be fair and impartial.

In contrast to Mr. Parker and Mr. Smith, prospective juror Caldwell had a prior arrest for theft and stated that he could be fair to the State. [Vol. XXXIII, 539-540]. The State never moved to challenge Mr. Caldwell for cause or to strike him by using a peremptory challenge. Similarly, prospective juror Sandlin stated that he had gone to court on a concealed firearm charge, which charge was dropped, but that that circumstance would not interfere with his being able to serve as a fair juror. [Vol. XXXIII, 540]. Subsequently, the State's motion to excuse Mr. Sandlin for cause was granted solely on the basis of his stated opposition to the death penalty. [Vol. XXXV, 847-849]. The fact that the State did

not seek to exercise a peremptory challenge of Mr. Caldwell, and moved to strike Mr. Sandlin for cause only on the basis of his opposition to the death penalty, demonstrates that the State's peremptory challenges of Mr. Parker and Mr. Smith were pretextual, motivated either by their race or by their gender, or both.

Clearly, the trial court made no finding as to whether the State's proffered reasons were reasonable. Additionally, the trial court's conclusion is, at best, ambiguous as to whether any finding was made as to whether the proffered reasons were neutral and non-pretextual. Apparently, the only determination made by the trial court was a finding that the peremptory challenges were not racially "motivated." [Vol. XXXV, 859]. Because the trial court failed to make required conclusions of neutrality, reasonableness and lack of pretext, the conviction below should be reversed.

B. The Trial Court Failed to Consider the Issue of Gender Discrimination.

This Court should reverse the conviction because the trial judge failed to consider defense counsel's objection to the State's peremptory challenges based on gender discrimination. At the very most, the trial court only considered Mr. Murray's objections to the challenges as being based on the race of the jurors and engaged in absolutely no analysis of whether the State's peremptory challenges were unlawfully based on the gender of the three prospective jurors in question. While accepting the State's proffered justifications regard race-based discrimination, the trial court utterly failed to address the issue of gender.

At the moment defense counsel objected to the State's peremptory challenges as discriminatory, the burden shifted to the State to proffer reasonable, non-pretextual, neutral reasons for the challenges. While a peremptory strike will be deemed valid unless an objection is made that the challenge is being used in a discriminatory manner, upon such objection, the trial judge must conduct a Neil inquiry." State v. Johans 613 So.2d 1319, 1322 (Fla. 1993). Once again, as with racial discrimination, the state's proffered justification "cannot merely be accepted at face value by the trial court." Jones v. State, 640 So.2d 1161, 1163 Fla. 1st. DCA 1994). Because the trial court did not require the State to meet the burden prescribed under Neil, Johans and Jones, the trial court erred and the conviction should be reversed.

Johans dealt with the discriminatory use of peremptory challenges on the basis of race. Johans, supra. In Johans, the defendant was charged with burglary and attempted sexual battery. Id. During voir dire, the State challenged the only African-American among the initial pool of potential jurors. Id. The defense objected to the challenge of the African-American, arguing that the State was discriminating with its peremptory challenges. Id. Without requiring the State to proffer race-neutral reasons for its challenge as mandated by Neil, the trial court found that one challenge of an African-American, following the challenges of three Caucasians, did not trigger the Neil inquiry. Johans, 613 So.2d at 1320.

This Court reversed the conviction of the defendant, holding that "a Neil inquiry is required when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner." Id. at 1321 [emphasis added]. This Court receded from its former holding in Neil to the extent that Neil required the objecting party to show a "strong likelihood that those individuals have been challenged solely because of their race." Id. (citing Neil, 457 So.2d at 486).

Clearly, the improper use of peremptory challenges to exclude members of a certain gender from the jury in any case is as much a violation of the Florida and Federal constitutional rights of jurors and the defendant as is race-based discrimination. See, e.g., J.E.B. v. Alabama, ___ U.S. ___, 128 L.Ed.2d 89 (1994); Abshire v. State, 642 So.2d 542 (Fla. 1994).

Therefore, the burden shifting of Johans applies in the present case, where defense counsel objected to the State's use of peremptory challenges by stating for the record that the State had challenged "three African-American males." [Vol. XXXV, 858]. In this situation, Johans mandates that the trial judge require the State to show that its use of peremptory challenges to exclude African-American men from the jury was not gender-based. This principle applies with even greater force in a case where a male defendant is charged with having committed sexual battery on a female victim.

In the present case, Mr. Murray was charged in Count Three of the Indictment with sexual battery on the female victim. [Vol.I,

1]. This was a violent crime committed against a female. Traditionally, peremptory challenges are exercised to remove potential jurors whose viewpoints will be detrimental to the case of the challenging party. For reasons that are not relevant to the determination of the validity of peremptory challenges, the State clearly determined that its case would be better served without certain men on the jury. Additionally it is of no help to the State that men were ultimately seated on the panel. Slappy, 522 So.2d at 21, 24; United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986). One act of discrimination on the basis of gender is enough to disallow a challenge and cause reversal of a conviction. Johans, 613 So.2d at 1320; David, supra, at 1571.

When defense counsel objected to the dismissal of three of the jurors, the State interrupted, proffering reasons to illustrate that the challenges were race-neutral. As stated above, the trial judge erroneously found that these reasons met the Neil inquiry as to race-based discrimination. Yet, even if the reasons showed that the challenges were not "racially motivated", the trial judge never requested the State proffer reasons that the challenges were not gender-based, and the State offered no such proffer. The fact that the trial court failed to evaluate, in any manner, the issue of gender discrimination by the State in its exercise of peremptory challenges mandates reversal in this case. Accordingly, Mr. Murray's conviction should be reversed.

II.

THE SEARCH WARRANT WAS ISSUED IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. I, SEC. 12 OF THE FLORIDA CONSTITUTION AS WELL AS UNITED STATES V. LEON'S EXCEPTIONS TO THE GOOD FAITH RULE, IN THAT THE AFFIDAVIT DID NOT INCLUDE A MAJOR INGREDIENT NOR DID IT FOCUS UPON THE REAL AND INTENDED MATTER SUBJECT TO SEARCH AND SEIZURE: HAIR.

A. No Probable Cause Existed to Seize Hair Samples.

> The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one particularly describing the place to be searched and the persons or things to be seized. The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.

Maryland v. Garrison, 480 U.S. 79, 84 (1987) (emphasis added).

In the instant case, hair samples of Gerald Murray were taken in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Art. I, §12 of the Florida Constitution. To search and seize hair samples, the State must first establish probable cause. See, United States v. Beale, 921 F.2d 1412, 1432 n.19 (11th Cir. 1991); see also Schmerber v. California, 384 U.S. 757 (1966) (searches beyond the body surfaces, such as the hair root as in the instant case, require a heightened standard of probable cause). As the State wanted to test Mr. Murray's DNA, he was required to give hair samples, including the root area of the

hair below the surface of the skin. [Vol. XXXVII, 1396-1398]. Accordingly, the State had the burden of establishing probable cause to satisfy constitutional requirements.

Detective O'Steen executed a search warrant, which was facially invalid because it specified an item to be seized (i.e., hair) that was not listed on the affidavit, which constituted the "justifications" for the warrant. In order to determine if the warrant was valid with the additional language, this Court must "determine whether the magistrate had a substantial basis to support an independent judgment that probable cause existed." St. John v. Justmann, 771 F.2d 445 (10th Cir. 1985), citing, Whiteley v. Warden, 401 U.S. 560, 564 (1971).

The facts in the present case do not support a finding that the issuing judge could have had an independent judgment of probable cause to authorize the hair search and seizure at issue. Detective O'Steen testified that the affidavit, was prepared under the direction of Assistant State Attorney de la Rionda. [Vol. XXX, 260, 262]. Detective O'Steen reviewed that affidavit which requested blood to determine blood type and saliva to determine if Mr. Murray was a secretor. [Vol. XXX, 264] Detective O'Steen testified that he put the information he had to link Mr. Murray to the crime into the affidavit. [Vol. XXX, 269-270]. There was no mention of hair in the affidavit. [Vol. XXX, 266]. The affidavit was presented to Judge Santora with no other representations, written or oral, made to the judge by either Detective O'Steen or Mr. de la Rionda. [Vol. XXX, 263-267]. Detective O'Steen signed

the affidavit in the presence of the judge who then signed the warrant, which directed that blood, saliva and hair be seized. [Vol. XXX, 269]. There was no probable cause to seize the hair as it would not yield an answer as to blood type or to the secretor issue and was not sought in the affidavit. [Vol. XXX, 264-265].

While the judge's determination of probable cause merits deference, the determination should be reversed when there is no substantial basis to support an independent finding of probable cause. Whiteley, supra, at 564. Because there were no oral communications with the judge regarding the particular facts of this case, the judge's sphere of knowledge was limited to the information in the affidavit. [Vol. XXX, 266]. He, therefore, had no information upon which to form a basis for an independent finding. There was nothing in the affidavit seeking a hair sample or proving the judge had probable cause to issue a warrant for the seizure of hair, as the hair could not be used to determine blood type or status as a secretor. [Vol. XXX, 264-265]. As a result, the search warrant was invalid and the fruits of the search should be suppressed.

It is axiomatic that a search warrant must remain within the confines of an accompanying affidavit, especially where no corrective communication occurs between the officer and the court. Whiteley v. Warden, 401 U.S. 560 (1971); see also C. Slobogin, Criminal Procedure, Regulation of Police Investigation 533 (1994) (Indeed, under the Federal Rules of Criminal Procedure, affidavits must be self-sufficient in that manner, or oral testimony recorded

verbatim, so the reviewing court is better able to determine if constitutional requirements have been properly met, and a reviewing court is not hampered by fading, confused or forgetful memories of affidavits. Fed.R.Crim.P. 41(c)). When flaws are detected, it is the duty of defense counsel to challenge an affidavit which is insufficient on its face. Franks v. Delaware, 438 U.S. 154 (1978). The record in the present case supports the conclusion that the motion to suppress on behalf of appellant Mr. Murray should have been granted. [Vol. I, 119].

In the present case the record reflects a fatal flaw in the factual conclusion of the affidavit. The flaw is that the affidavit fails to specify an area of search under investigation, to wit, the hair of appellant. To ignore one specific when other specifics are included and then to defend on the ground that the specific was covered by the general language of an affidavit is fatal. United States v. Leon, 468 U.S. 897 (1984); see, United States v. LeBron, 729 F.2d 533 (8th Cir. 1984).

In the present case, the only fact stated by the affiant relating to a showing of probable cause as to Mr. Murray whatsoever was that Mr. Murray went with Steve Taylor and James Fisher on the night of the murder to the Corner Pocket Pool Hall and that Mr. Murray left town a few days later. [Vol. I, 124, 125]. These tenuous facts in no way constitute probable cause to justify any search of Mr. Murray. The United States Supreme Court has specifically recognized that:

> The interest in human dignity and privacy which the Fourth Amendment protects forbid any

> such intrusion [beyond the body surface] on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risks that such evidence may disappear unless there is an immediate search.

Scherber, at 770 (emphasis added). Accordingly, this Court should reverse the trial court's denial of Mr. Murray's Motion to Suppress Evidence as the search warrant was issued without any factual basis to support a clear indication that evidence of a crime was likely to be obtained by issuance of the warrant. See, Dorman v. State, 492 So.2d 1160 (Fla. 1st DCA 1986) (officer's belief based on observations and experience failed to provide objective facts for finding probable cause for search); Jones v. State, 343 So.2d 921 (Fla. 3d DCA 1977) (absence of factual allegations showing that evidence sought would be found).

Additionally, the search warrant was faulty in that it authorized the seizure of hair from Mr. Murray despite the fact that there is no reference to hair in the supporting affidavit. To determine the sufficiency of a search warrant, inquiry is limited solely to an examination of the search warrant itself and the supporting affidavit. Carlton v. State, 449 So.2d 259 (Fla. 1984); Sims v. State, 483 So.2d 81 (Fla. 1st DCA 1980). In the affidavit, the affiant requests blood samples of Mr. Murray as semen found at the crime scene was tested which revealed that it belonged to a person with "A" type blood. [Vol. I, 125]. The affiant also wanted a saliva sample as the tested semen revealed that the source was a secretor. [Vol. 125].

However, the affiant did not request any hair sample. Likewise, there is no factual basis in the affidavit to support the need for hair samples. In fact, the only time hair is ever mentioned in the affidavit is in the description of the color of Mr. Murray's hair. [Vol. I, 124]. Accordingly, the search warrant was issued without probable cause, and the trial court erred in denying the Motion to Suppress Evidence.

Furthermore, any examination of the affidavit in this case must be based upon a heightened probable cause standard. In Schmerber v. California, 384 U.S. 757, 768-70 (1966), the United States Supreme Court required that a heightened standard of probable cause must be met in order to justify a search beyond the body surface. No facts were presented in the affidavit in the instant case which satisfied the normal standard of probable cause, let alone the heightened showing required by Schmerber.

As a result of the facially invalid search warrant, this Court should reverse the trial court's denial of Mr. Murray's Motion to Suppress Evidence. Any evidence seized as a result of the search warrant and any tests conducted on any such evidence should have been excluded. Wong Sun v. United States, 371 U.S. 471 (1963).

Likewise, Mr. Murray did not give valid consent to the search of his body for samples of blood, saliva and hair. Rather, at most, he submitted to apparent lawful authority. State v. Hall, 537 So.2d 171 (Fla. 1st DCA 1989); Lockwood v. State, 470 So.2d 822 (Fla. 2d DCA 1985). "A mere submission to the apparent authority

of a law enforcement officer does not render an action voluntary in the constitutional sense." Hall, supra, at 172.

It is important to keep in mind that the evidence offered at the suppression hearing of February 14, 1994, demonstrated that Mr. Murray was in custody in the Montgomery Correctional Center for offenses unrelated to the instant case. [Vol. XXX, 272-275]. After Mr. Murray was transported to the Police Memorial Building and interrogated in regard to the death of Ms. Alice Vest, Detective O'Steen requested Mr. Murray's consent for blood, saliva and hair samples. [Vol. XXX, 272-275]. At the medical clinic at the Duval County Jail, where the samples were to be taken, Mr. Murray asked to see a search warrant, and the invalid warrant at issue, was presented. [Vol. XXX, 306-308]. Cf., Powell v. State, 332 So.2d 105 (Fla. 1st DCA 1976) (consent to search was merely submission to apparent lawful authority where officers informed citizen that they could obtain a search warrant). Thereupon, the samples were collected although there is no mention of Mr. Murray giving consent to the taking of the samples. [Vol. XXX, 290-293].

Based on the totality of the circumstances, Mr. Murray merely submitted to the apparent authority of Detective O'Steen and the invalid search warrant. Mere submission to the apparent authority of a law enforcement officer does not render an action voluntary in the constitutional sense. Hall, supra, at 172. As a result, the trial court was clearly erroneous when it found that Mr. Murray had consented to the search of his body. Accordingly, the trial

court's denial of Mr. Murray's Motion to Suppress Evidence should be reversed.

B. The Good-Faith Exception is Not Applicable.

In United States v. Leon, 468 U.S. 897 (1984), the Court modified the exclusionary rule by adopting an objective good-faith rule exception. The operative term is objective good-faith. The majority reasoned that since the exclusionary rule is intended to be a remedy, rather than an individual right, the critical policy concern is, therefore, deterrence. The exclusion of evidence is still justified under Leon where such exclusion will serve as a deterrent effect on errant law enforcement. Under Leon, exclusion is appropriate where the warrant is facially deficient, hence the executing officer cannot reasonably conclude it to be valid as to the item seized, such as where the item to be seized is not listed in the affidavit in support of the warrant.

The record in this case supports exclusion under this doctrine. The key fact is that the probable cause standard of the Fourth Amendment is lacking as to hair. Since hair is ignored in the affidavit, there is no probable cause to support a search and seizure of hair. An attempt to create probable cause after the issuance of the warrant ignores the admonitions of Leon.

In the instant case, Detective O'Steen's execution of a facially invalid warrant cannot be excused under the good faith exception to the exclusionary rule announced in Leon, supra. Under Leon, the court will not suppress evidence seized pursuant to an

invalid warrant if the "executing officers' reliance upon the warrant is objectively reasonable." United States v. Skorniak, 59 F.3d 750, 754 (8th Cir. 1995), citing, United States v. Frangenberg, 15 F.3d 100, 102 (8th Cir.), cert. denied, ___ U.S. ___, 115 S.Ct. 161, 130 L.Ed.2d 99 (1994). However, in this case, the facts show that Detective O'Steen's reliance on the warrant could not possibly have been objectively reasonable.

In the present case, the officer who executed the affidavit was present when the warrant was filled out and signed by Judge Santora. [Vol. XXX, 262]. Detective O'Steen knew that there were only two items specifically listed in the affidavit: blood and saliva. Detective O'Steen also knew the specific reasons for needing the blood and saliva. [Vol. XXX, 264]. Yet, the detective did not question the inclusion of hair in the warrant, in spite of his knowledge that there was no probable cause for the judge to include hair in the warrant. Instead, Detective O'Steen seized the hair with the knowledge that (1) it was omitted in the affidavit and (2) the judge had no independent basis of knowledge to include hair. [Vol. XXX, 265-266].

While Detective O'Steen may have relied on the warrant as it was written, this reliance was not objectively reasonable. "[I]t is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." Leon, supra, at 922-23. A reasonably well-trained officer, who knew both that the warrant specified more items than were listed on the supporting affidavit and that the judge had no

more information than was given him in the affidavit, would know that the warrant was suspect. Id. at 923, n.3. Therefore, the State cannot invoke the Leon good-faith exception because Detective O'Steen could not have reasonably relied upon the warrant.

C. The Error Was Harmful.

There can be no contention that the error made by the trial court was harmless. Harmless error occurs when there is no reasonable possibility that the error contributed to the conviction. See, State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). In the present case, testimony pertaining to hair seized, although not sought in the affidavit in support of the search warrant, was anything but harmless error.

The blood and saliva requested in the affidavit were tested and found not to match Mr. Murray. Therefore, the State was unable to present testimony regarding DNA testing because there was no potential for a match. Yet, because the police took hair samples, without establishing the probable cause in the affidavit, the State was able to test the hair and then present testimony regarding statistics and probabilities that the hair at the scene matched the hair of Mr. Murray. By allowing evidence of hair taken without a valid search warrant, the trial court erred, resulting in the presentation of highly prejudicial evidence -- the only physical evidence connecting Mr. Murray to the crime scene or to the events surrounding the victim's death, sexual battery and burglary. By no

stretch of the imagination can the error of failing to suppress this critical evidence be deemed harmless.

In summary, the affidavit of Jacksonville Sheriff's Office Detective O'Steen, in support of his application for a search warrant, failed to meet the prerequisite probable cause standard for the issuance of the February 15, 1991 search warrant authorizing seizure of hair samples from Mr. Murray. [Vol. I, 122]. The affidavit fails to set forth any factual basis sufficient to justify a finding of probable cause to believe that evidence of a felony would be found in Mr. Murray's blood, saliva or hair, in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Sec. 12 of the Florida Constitution. The warrant further authorized an unreasonable search and seizure in violation of those constitutional provisions, and the error of denying the motion to suppress cannot be found harmless. Accordingly, this Court must reverse the conviction of appellant Murray and grant him a new trial.

III.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION IN LIMINE TO EXCLUDE NOVEL SCIENTIFIC EVIDENCE.

Appellant Murray filed his Motion in Limine to exclude scientific evidence on March 2, 1994. [Vol. II, 337]. The appellant challenged whether the application of polymerase chain reaction (PCR) DNA testing to the forensic setting was generally accepted by

the relevant scientific community for use at trial. [Vol. II, 338].[1] The appellant also challenged whether the probability calculations generated by the State regarding its PCR testing were generally accepted by the relevant scientific community. [Vol. II, 338]. The appellant supported his motion with three scientific articles which addressed concerns within the scientific community concerning probability calculations.

The State opposed Mr. Murray's motion by presenting the testimony of Mr. Dan Nippes, a Chief Criminologist with a Regional Crime Laboratory in Fort Pierce, Florida. [Vol. XXXVII, 1273]. Mr. Nippes testified that he performed the PCR testing which produced the results at issue in this case. [Vol. XXXVII, 1274]. He testified that PCR DNA profiling is generally accepted within the scientific community as being reliable. [Vol. XXXVII, 1276-1277. The State's witness also testified that subsequent to the testing in Mr. Murray's case that four Florida crime laboratories had compiled their own database for making PCR calculations. [Vol. XXXVII, 1277-1278, 1290]. He stated that the Florida databases had been "accepted." [Vol. XXXVII, 1278].

Mr. Nippes testified that his probability calculations were based on the Hellmith Study Manual which was published by the Cetus Corporation in 1989 or 1990. [Vol. XXXVII, 1279-1280]. In making his calculations for Mr. Murray's case Nippes used the Hellmith Study's finding of a 8.2 percent frequency for the DQ alpha

---

[1]A detailed explanation of PCR testing like that employed in this case may be found in State v. Carter, 524 N.W. 2d 763, 775-77 (Neb. 1994).

genotype. [XXXVII, 1282]. The Florida data base shows a frequency 8.5 percent for the DQ alpha genotype. [Vol. XXXVII, 1292-1293]. In contrast the FBI's databases shows a frequency of 4 percent for the DQ alpha genotype. [Vol. XXXVII, 1292]. Mr. Nippes' own lab data in 1991 showed a DQ alpha genotype frequency of 11.4 percent. [Vol. XXXVII, 1309].

Mr. Nippes contended that the National Research Council of the National Academy of Sciences' report DNA Technology in Forensic Science, National Academy Press (1992), hereinafter "NRC Report," did not address the probability calculations which he applied to his PCR testing. The following exchanged occurred at the hearing on appellant's Motion in Limine:

> Q The biggest criticism of the National Research Council is on the use of how persons like yourself use the statistics?
>
> A No, not persons like myself because we're not talking about RFLP. The National Academy of Science has addressed the ceiling principle with [sic] relative RFLP.

[Vol. XXXVII, 1284]. When asked if there was a conflict among scientists concerning DNA profiling Nippes replied, "Not forensic scientists and not the majority of scientists." [Vol. XXXVII, 1288].

Mr. Nippes, while conceding he had no knowledge of how the Hellmith Study database was assembled, contended that database was in Hardy-Weinberg equilibrium. [Vol. XXXVII, 1302]. Nippes defined the Hardy-Weinberg equilibrium as, "A mechanism for determining whether or not there is an independent inheritance; whether the

data is viable as far as statistics are concerned." [Vol. XXXVII, 1292].

The State's witness opined that the difference between the FBI's 4 percent genotype frequency and the Florida databases frequency of 8.5 percent was not "statistically significant."[2] [Vol. XXXVII, 1293]. Mr. Nippes testified that a 4 percent genotype frequency means that one out of 25 persons would have that genotype; an 8.2 percent genotype frequency means that one of 12 persons would have that genotype; and an 11.4 percent genotype frequency means that one of 9 persons would have that genotype.[3] [Vol. XXXVII, 1311].

Defense Counsel orally amended the Motion in Limine to challenge Mr. Nippes competency to testify as to the data he used was compiled by another laboratory. [Vol. XXXVII, 1321-1322]. Defense counsel argued that PCR testing and the application of probability calculations to it was not proven to be generally

---

[2]Mr. Nippes description of the divergence in genotype frequencies as not being "statistically significant" was wrong. Statistical significance is a term used in the field of statistics to state whether an observed mathematical occurrence is more than a random occurrence. The only "significant" determination below was jury's assessment of the significance of Nippes' probability calculations in relation to whether the State had proved guilt beyond a reasonable doubt.

[3]Unfortunately the actual allele frequencies were neither discussed nor made a part of the record by either party to these proceedings. The genotype frequency discussed by Mr. Nippes merely represents the combined frequencies of the two alleles identified, 1.2 and 1.3, within the database used by Mr. Nippes. If the true ceiling principle were applied and the highest frequency for each of the identified alleles was chosen, an educated guess is that the frequency for the DQ alpha genotype would rise to approximately 20% or 1 in 5 persons.

accepted. [Vol. XXXVII, 1322-1323]. Counsel presented a draft of the NRC Report to the trial court. [Vol. XXXVII, 1326]. The court found the NRC's recommendations were not helpful and denied Mr. Murray's motion concluding, "It appears to me to be one of the clearer matters of not being an admissibility question but a weight [issue]." [Vol. XXXVII, 1330]. The court further stated, "There are a number of things, but every one of those goes to weight, not admissibility." [Vol. XXXVII, Tr. 1331]. The trial court also denied Mr. Murray's objection as to Mr. Nippes' testimony regarding the California database, reasoning it was admissible because that database was "generally accepted" and because Nippes found the differences between databases were "insignificant." [Vol. XXXVII, 1331]. Mr. Nippes then testified at trial as to his findings concerning his PCR analysis of Mr. Murray's hair and the crime scene evidence. [Vol. XXXVII, 1367, through Vol. XXXVIII, 1505].

The trial court erred by allowing in the PCR evidence because it found questions raised by Mr. Murray to be matters of weight and not admissibility. That finding regarding both the declaration of a match and the application of probability statistics to that declaration is contrary to this Court's precedent. In Hayes v. State, 20 Fla. L. Weekly S296, S299 (Fla. June 22, 1995), this Court excluded DNA profiling evidence which did not satisfy the Frye test. Indeed, the underpinning of the Frye test and general acceptance is based on barring the jury from making the type of determination it was asked to make in this case. See also, Vargas v. State, 640 So.2d 1139, 1150 (Fla. 1st DCA 1994), rev. granted,

659 So.2d 273 (Fla. 1995) (holding probability calculations applied to DNA profiling evidence were not generally accepted and were accordingly not admissible); United States v. Porter, 618 A.2d 629, 640 (D.C. App. 1992) (Finding, "[S]ince the probability of a coincidental match is an essential part of the FBI's calculation, we decline to hold that the defense objections to that precise calculation go only to its weight.") People v. Barney, 10 Cal.Rpt.2d 731 (Cal.App. 1st Dist. 1992) (concluding, "To end the Kelly-Frye inquiry at the matching step, and leave it to jurors to assess the current scientific debate on statistical calculation as a matter of weight rather than admissibility, would stand Kelly-Frye on its head."). Accordingly, this Court should hold that the trial court erred in allowing the PCR DNA profiling evidence because the court applied an incorrect legal test of admissibility.

Furthermore, this Court should also hold the trial court erred in allowing in the DNA profiling evidence because it was not generally accepted at the time it was offered. In reviewing admissibility, this Court should carry out a limited de novo review looking to the evidence offered below and looking to scientific literature, commentaries and case law which reflected, or reflect back on, scientific acceptance as of the time of the hearing. See Hayes v. State, 20 Fla. L. Weekly S296, S298-99 (Fla. June 22, 1995) (recognizing DNA technology is "constantly changing" finding State had not proven general acceptance after reviewing trial testimony and the NRC Report); Flanagan v. State, 625 So.2d 827, 828 (Fla. 1993) (finding, "After examining relevant academic

literature and case law, we find that sexual offender profile evidence is not generally accepted in the scientific community and does not meet the Frye test for admissibility."); Lindsey v. People, 892 P.2d 281 (Colo. 1995) (en banc) (holding reviewing court must determine "whether novel scientific evidence was generally accepted in the relevant scientific communities at the time it was offered into evidence at trial.").

The record in this case shows that the State did not carry its burden of establishing general acceptance. Indeed, the trial court found the NRC's recommendations, which this Court deemed central to satisfying the Frye test in Hayes, supra., were of no significance to its analysis. [Vol. XXXVII, 1329-1330]. Furthermore, Mr. Nippes misled the court in testifying that the NRC Report did not comment on probability calculations regarding PCR analysis. The NRC Report addresses the calculation of allele frequencies without comment as to the underlying type of testing. Logic dictates that the NRC's findings regarding conservative calculations are all the more applicable to PCR testing which identifies fewer allele sites than RFLP testing.

A recent commentator noted, "PCR's use in forensic science is relatively new and many courts utilizing the Frye test may hesitate to admit PCR test results due to questions about its general acceptance in the relevant scientific community." Snyder, Note: "Experimental or Demonstrable: Has DNA Testing Truly Emerged from the Twilight Zone?" 31 Willamette L. Rev. 201 n. 13 (Winter 1995). In State v. Russell, 862 P.2d 747 (Wa. 1994) (en banc), the

Washington State Supreme Court split in a five to four decision over the admissibility of PCR evidence. Notably, in Russell the court expressly noted that the population frequencies of the genotypes identified were not contested. Id. at 763. The Washington court also held that the Frye test it applied does not require "acceptance of the laboratory testing procedures used in the case before the court." Id. at 761. The court further held that the Frye test did not require general acceptance of the particular test kit used in that case. Id. at 768. Thus, the court in Russell applied a Frye test which is relaxed compared to the test applied by this Court in Hayes.

In Russell, the majority found that PCR testing passed its application of the Frye test. The appellant in this case urges this Court to consider the dissenting opinion which highlights the controversy regarding PCR testing which was recognized in the NRC Report. Id. at 789-799 (Anderson, C.J., dissenting). The dissenters found, "The testimony of the scientists in the Frye hearing in this case and the report from the scientists involved in the NRC study, show that there is still a 'significant dispute' among knowledgeable scientists about PCR testing of crime scene evidence." Id. at 790. In accord with the dissenting opinion in Russell, this Court too should review the NRC Report and hold that PCR evidence was not generally accepted at the time it was offered into evidence in Mr. Murray's case.

This Court should also review the NRC Report regarding probability calculations and conclude that the non-ceiling

principle evidence offered by the State was not generally accepted at the time of Mr. Murray's trial. See e.g., State v. Vandebogart, 652 A.2d 671, 676-77 (N.H. 1994) (holding probability calculations made using the interim ceiling principle were admissible under the Frye test); United States v. Porter, 1994 W.L. 742297 (D.C. Superior Ct. 1994) (holding probability calculations using interim ceiling principle were admissible). Contrary to Mr. Nippes' testimony, the controversy highlighted in the NRC Report's was not limited to the RFLP process. See People v. Barney, 10 Cal.Rpt.2d 731, 741-42 (Cal. App. 1992) (concluding based on NRC Report that, "There is disagreement between two groups, each significant in both number and expertise."). Accordingly, this Court should hold the PCR evidence and the accompanying calculations were not generally accepted at the time of Mr. Murray's trial, and the conviction below should be reversed.

IV.

THE TRIAL COURT ERRED BY PERMITTING THE ADMISSION OF HAIR EVIDENCE DESPITE INDICATIONS OF PROBABLE TAMPERING OR ALTERING.

On September 16, 1990, Jacksonville Sheriff's Office Evidence Technician David Chase collected two hairs from Ms. Alice Vest's body. [Vol. XXXVI, 1016-1017, 1019]. One hair was found on Ms. Vest's left leg and the other was found on her chest. [Vol. XXXVI, 1017]. Officer Chase collected the two hairs with tweezers and placed them in a manila envelope which was then placed in the evidence room of the Jacksonville Sheriff's Office. [Vol. XXXVI,

1018]. Joseph Dizinno, a hair and fiber expert for the Federal Bureau of Investigation, testified that when he tested the hairs, he found several caucasian head hairs, several caucasian body hairs, and a caucasian pubic hair. [Vol. XXXVII, 1360]. Although Mr. Dizinno could not give an exact number of hairs that he tested which had been obtained from the crime scene, he did testify that there were certainly more than two hairs. [Vol. XXXVII, 1360]. Defense counsel appropriately objected to the admissibility of the hairs and moved to have the hairs excluded on the basis of probable tampering. [Vol. XXXVII, 1362]. However, the trial court improperly denied the motion stating that any discrepancy between number of hairs collected and the number submitted for testing could be argued to the jury. [Vol. XXXVII, 1363].

This Court and other Florida courts have previously ruled that relevant physical evidence is inadmissible when there is an indication of probable tampering. Peek v. State, 395 So.2d 492 (Fla. 1981); see Helton v. State, 424 So.2d 137 (Fla. 1st DCA 1982); Armbruster v. State, 453 So.2d 833 (Fla. 4th DCA 1984). For example, in Dodd v. State, 537 So.2d 626 (Fla. 3d DCA 1989), there was a discrepancy as to the weight of the contraband seized. The seizing officer weighed the contraband and container at 317.5 grams. The container and contents were weighed again by the Florida Department of Law Enforcement which revealed a weight of 249.5 grams. The crime lab weighed the contraband at 220 grams. Id. The defendant moved for judgment of acquittal on the basis that the State failed to show a proper chain of custody. Id. The

trial court denied the motion and the defendant was convicted. Id.

On appeal, the court reversed the defendant's conviction and sentence. Id. at 628. The court reasoned that it was plain that the contraband received by the crime lab was not in the same condition as was testified by the seizing officer. Id. The court could not, based on the record, determine whether the contraband seized and the contraband introduced at trial were the same. Id. Accordingly, the court ruled it was error for the trial court to admit the evidence without the State explaining the discrepancies. See Peek, supra, at 495 (hair comparison analysis was admitted because there was no hint of tampering).

Similarly, in the instant case, the seizing officer obtained two hairs from the crime scene and placed them in a manila envelope and secured them in the Jacksonville Sheriff's Office evidence room. [Vol. XXXVI, 1018]. However, when tested at the FBI laboratory, there were more than two hairs. [Vol. XXXVII, 1360]. In fact, there were several head hairs, several body hairs, and a pubic hair. [Vol. XXXVII, 1360]. The state offered no explanation for this discrepancy. The trial court even noted that the discrepancy was "apparent." [Vol. XXXVII, 1363]. Based on the fact that it was plain that the hairs received by the FBI laboratory were not in the same condition as testified by the seizing officer, the trial court erred in not excluding the evidence.

Exclusion of this hair evidence is consistent with the Florida Evidence Code.[4] "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." §90.403, Fla. Stat. (1993) (emphasis added). In light of the fact that there is a reasonable probability that the hairs were altered or tampered with based on the discrepancy of the number of hairs seized and tested, the hairs and the testing of such hairs have little or no probative value.

There is, however, unfair prejudice. The altered or tampered hair allegedly seized at the crime scene is the only physical evidence linking Gerald Murray to the site of Ms. Vest's death. There were no fingerprints of Mr. Murray found at the crime scene. [Vol. XXXV, 1185-1187]. Likewise, Mr. Murray was eliminated as the donor of all of the seminal and blood stains found at the crime scene. [Vol. XXXVIII, 1252-1254, 1260]. The use of the critical, inadmissible hair evidence is severely prejudicial, and, as set forth in Argument II. C., supra, the error cannot be deemed harmless.

For the foregoing reasons, it was error for the trial court not to exclude the hair allegedly seized at the crime scene and evidence relating to testing of such hair despite a reasonable probability of the evidence being tampered with or altered. Accordingly, the conviction below should be reversed.

---

[4] Exclusion is also consistent with §918.13, Fla. Stat. (1995), which states that tampering with evidence is a felony of the third degree.

V.

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENSE COUNSEL'S MOTIONS FOR CONTINUANCE OF THE TRIAL AND THE PENALTY PHASE.

During the pretrial hearing held on February 25, 1994, defense counsel for Gerald Murray orally requested a continuance. [Vol. XXXII, 430]. Defense counsel exhaustively listed for the trial court the numerous reasons for the requested continuance, including but not limited to the fact that defense counsel had been appointed on January 13, 1994, only 32 business days prior to Mr. Murray's capital murder trial. [Vol. XXVIII, 180; Vol. XXIII, 430-431]. Defense counsel needed time to prepare cross-examination for the State's experts, to gather impeachment material of State witnesses, to be intelligently briefed by Mr. Murray's own DNA expert, and to prepare adequately for the penalty phase. [Vol. XXXII, 433-446]. Nonetheless, the trial court denied the motion, stating that Mr. Murray had made a knowing, informed and voluntary request that the trial proceed as scheduled. [Vol. XXXII, 463-464]. Moreover, the trial court denied Mr. Murray's motion for continuance of the penalty phase event though trial counsel suffered from inadequate time to be able to even speak with a number of potential witnesses regarding penalty issues. [Vol. LXIII, 2134-2136].

Criminal defendants have the right to trial preparation sufficient to assure a minimal quality of counsel. McKay v. State, 504 So.2d 1280, 1282 (Fla. 1st DCA 1986).

> The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment since access to counsel's skill and

> knowledge is necessary to accord defendant the ample opportunity to meet the case that the prosecution to which they are entitled.

Strickland v. Washington, 466 U.S. 668, 685 (1984). Accordingly, the right to counsel guaranteed by the Sixth Amendment to the United States Constitution and Art. I, Sec. 16 of the Florida Constitution is the right to the effective assistance of counsel. Id. at 686. This right can be violated when a request for a continuance in order for counsel to prepare adequately is denied. See Holley v. State, 484 So.2d 634, 636 (Fla. 1st DCA 1986). In such a case, the trial court has the discretion to grant or deny the continuance. Gore v. State, 599 So.2d 978 (Fla. 1992); Wike v. State, 596 So.2d 1020 (Fla. 1992). However, the court cannot abuse that discretion. Echols v. State, 484 So.2d 568 (Fla. 1985); Jackson v. State, 464 So.2d 1181 (Fla. 1985).

Factors to consider in determining whether a denial of a continuance is an abuse of discretion include time available for preparation, likelihood of prejudice from the denial, defendant's role in shortening the preparation time, complexity of the case, availability of discovery, adequacy of counsel actually provided, and skill and experience of chosen counsel. McKay, supra, at 1282. It is clear, based on consideration of these factors, that the trial court abused its discretion when it denied the motion for continuance.

Defense counsel had less than two months to prepare for a capital murder case. This time was actually even shorter in light of the fact that defense counsel was unable to secure the files of

Mr. Murray's previous defense attorneys until late January. [Vol. XXXII, 430-431]. It is not enough that the person beside the defendant at trial happens to be a lawyer; there must be an adequate time to prepare. See Strickland, supra, at 685. These principles carry the greatest force in a death penalty case.

Prior to trial, defense counsel informed the trial court of the substantial amount of preparation that remained in Mr. Murray's case. For these reasons, Mr. Murray's case was severely prejudiced without the continuance. Mr. Murray had no role in shortening the preparation time. Additionally, Mr. Murray's case was an extremely complex first degree murder case with the possibility of the death penalty being imposed. Also, the case was even more complex as the State intended to rely on DNA testing. Further, there was no indication in the record that defense counsel requested a continuance as a means of undue delay or in bad faith. Rather, the continuance was requested to provide defense counsel with sufficient time to prepare adequately, not only for the guilty phase but also for the penalty phase. These factors all favor the granting of a continuance. Accordingly, the trial court abused its discretion when it denied the requested continuances, both of the trial and, independently, of the penalty phase.

Similarly, the trial court's denial of defense counsel's motion for continuance violated the defendant's due process right to a fair trial as guaranteed by the Fifth Amendment to the United States Constitution and Art. I, Sec. 9 of the Florida Constitution. "The accused is entitled to be assisted by an attorney, whether

retained or appointed, who plays the role necessary to ensure that the trial is fair." Strickland, supra, at 685 (emphasis added). When the trial court denied the motion for continuance, defense counsel was unable to prepare adequately for Mr. Murray's murder trial with respect to both the guilt phase and the penalty phase. Thus, Mr. Murray lacked the necessary protection to ensure he received a fair trial as to both guilt and penalty.

For these foregoing reasons, it was an abuse of discretion for the trial court to deny the motion for continuance. Mr. Murray's conviction should be reversed and this case should be remanded for a new trial. See Holley, supra, at 636.

VI.

THE COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE STATE TO INTRODUCE EVIDENCE REGARDING MR. MURRAY'S COLLATERAL CRIMES TO SHOW BAD CHARACTER OR PROPENSITY TO COMMIT BAD ACTS.

Section 90.404(2)(a) reads as follows:

> (a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

Despite defense counsel's objections and motions, the trial court permitted the State to introduce evidence of Mr. Murray's collateral crimes or bad acts. The sole reason for permitting such evidence was to show that Mr. Murray had a propensity of committing crimes or bad character. The introduction of the evidence was

error and prejudiced Mr. Murray's case such that his conviction requires reversal.

Mr. Murray moved to exclude collateral crimes evidence, specifically his November 22, 1992 escape from the Duval County Jail, which motion was a basis for his motion for new trial. [Vol. III, 405]. Nonetheless, both motions were denied by the trial court. Accordingly, the State called various witnesses to testify that the defendant had escaped from the Duval County Jail pending his trial for murder. Specifically, the State called Sergeant Sharon Freeland of the Jacksonville Sheriff's Office, who testified that Mr. Murray was missing from the jail on November 22, 1992, and was returned on September 18, 1993, from Las Vegas. [Vol. XXXVIII, 1627-1628]. Patrolman Dale H. Groves stated that when he conducted roll call at the Duval County Jail on November 22, 1992, Mr. Murray did not answer, as he had escaped. [Vol. XXXIX, 1631-1633]. Sergeant Thomas E. Powell testified that he was notified that Mr. Murray was missing on November 22, 1992, and followed normal procedures to locate him but was unsuccessful. [Vol. XXXIX, 1634-1638]. Anthony M. Smith, then an inmate at Duval County Jail, stated that he had escaped with Mr. Murray. [Vol. XXXIX, 1640-1643].

Similarly, defense counsel objected to the introduction of testimony that Mr. Murray stole various automobiles during his flight from the Duval County Jail, but was overruled by the trial court. [Vol. XXXIX, 1713-1714, 1717-1718]. Also, Mr. Murray moved to exclude evidence of the alleged false identification card and

Social Security card seized when Mr. Murray was arrested in Las Vegas. [Vol. I, 134]. This motion, too, was denied.

"Evidence of collateral crimes, wrongs, or acts committed by the defendant is inadmissible if its sole relevancy is to establish bad character or propensity of the accused." Castro v. State, 547 So.2d 111, 114 (Fla. 1989), quoting, Williams v. State, 110 So.2d 654 (Fla. 1959). Under the so-called Williams rule, such evidence is admissible if it is relevant to a material fact in issue. Cyubak v. State, 570 So.2d 925, 928 (Fla. 1990). Therefore, the test for admissibility of collateral crimes evidence is relevancy. Heiney v. State, 477 So.2d 210, 213 (Fla. 1984); Hall v. State, 403 So.2d 1321 (Fla. 1981); Ruffin v. State, 397 So.2d 277, 279 (Fla. 1981). Significantly, the State has the burden of establishing a relevant connection. See State v. Norris, 168 So.2d 541 (Fla. 1964); Jackson v. State, 403 So.2d 1063 (Fla. 4th DCA 1981).

In the instant case, the testimony and evidence offered lacked relevance to any material fact in issue. Mr. Murray's state of mind over two years after the alleged offense is irrelevant to the essential elements of murder, burglary or sexual battery. This Court in Cyubak v. State, 570 So.2d 925, 928 (Fla. 1990), recognized and held that the fact that the accused was an escapee did not have any relevance to any material fact at issue in his murder trial. Therefore, testimony to establish Mr. Murray's mental state or consciousness was irrelevant and should not have been admitted. Similarly, the evidence regarding the various stolen vehicles and the false identification card and Social

security card was irrelevant to any material fact at issue. The only discernable purpose for the testimony in evidence was to establish bad character or propensity for committing bad acts. Accordingly, the evidence was erroneously admitted.

The trial court's error was prejudicial and requires that the conviction be reversed. The erroneous admission of collateral crimes evidence is presumptively harmful. Castro, supra; Peek v. State, 488 So.2d 52 (Fla. 1986); Straight v. State, 397 So.2d 903 (Fla. 1981). The danger lies in the fact that the jury will take the accused's bad character or propensity to commit crime as evidence of guilt of the crime charged. Castro, supra; Straight, supra. The rationale underlying the Williams rule is that such evidence

> would go far to convince men of ordinary intelligence that the defendant was probably guilty of the crime charged. But, the criminal law departs from the standard of the ordinary in that it requires proof of a particular crime. Where evidence has no relevancy except as to character and propensity of the defendant to commit the crime charged, it must be excluded.

Jackson v. State, 451 So.2d 458, 461 (Fla. 1984), quoting, Paul v. State, 340 So.2d 1249, 1250 (Fla. 3d DCA 1976).

As there was error in admitting the evidence, the State has the burden of showing that the error was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986). Such error of committing collateral crimes evidence is presumptively harmful and cannot be overcome even by the State showing that the evidence against the accused is overwhelming.

Castro, supra at 115. Rather, the State must prove that the verdict could not have been affected, beyond a reasonable doubt, by the error. Ciccarelli v. State, 531 So.2d 129, 132 (Fla. 1988). Indeed, the State will not be able to meet such a high standard. In its closing argument, the State actually stressed a number of Mr. Murray's collateral crimes and offenses:

> You heard evidence then of the escape from the Duval County Jail, now, that's relevant because it shows consciousness of guilt. That is the defendant realizing he's guilty, escapes to try to get away from it. He didn't want to be held accountable for the actions of September 15th, September 16, 1990.
>
> You then heard also evidence that he was arrested in Las Vegas by Special Agent David Kerns from the FBI and he testified about when he arrested the defendant along with other FBI agents, how they found him and he had a fake ID under the name of Doyle White. You recall that Ms. White's son's name, Juanita White. That was the same name he was using. He had false ID, a check cashing card and also a Social Security card.

[Vol. LX, 1956-1957]. The State continued in its closing argument by contending:

> [T]he fact that they [Mr. Murray and Mr. Smith], that is he escaped with Smith. A consciousness of guilt. Doesn't want to be held accountable as he is being held accountable at this time and you all are participating in that process. Statements to Smith while out and then arrested [in] Las Vegas.

[Vol. LX, 1974]. Because the State improperly emphasized to the jury that Mr. Murray had committed other bad acts, it will be unable to establish harmless error.

Mr. Murray's case was further prejudiced when the trial court refused to permit defense counsel to elicit testimony that Mr. Murray had escaped because he believed he was not getting a fair trial. [See infra, Issue VII]. In light of this denial, Mr. Murray, short of testifying himself, was given no opportunity to present evidence to explain his flight. Mr. Murray's defense was severely prejudiced and his conviction should therefore be reversed.

VII.

THE TRIAL COURT ERRED IN EXCLUDING THE APPELLANT'S STATEMENTS TO OTHERS AS TO HIS STATE OF MIND REGARDING HIS ESCAPE.

At trial, defense counsel questioned Michael Brown, an inmate at Union Correctional Institution who shared a cellblock with Gerald Murray in 1992, regarding Mr. Murray's escape in November, 1992. [Vol. XXXIX, 1745-1749]. The State objected on the ground that the testimony constituted inadmissible hearsay. [Vol. XXXIX, 1749]. Defense counsel appropriately argued that the testimony sought was admissible as an exception to hearsay preclusion pursuant to Florida Evidence Code §90.803(3)(a), in that it regarded Mr. Murray's then existing state of mind. [Vol. XXXIX, 1750]. The trial court sustained the State's objection. [Vol. XXXIX, 1753]. Further, the testimony of three other witnesses who had discussed with Mr. Murray his escape were likewise excluded. These three individuals included Thomas Morton Williams, a previous cellmate of Mr. Murray at the Duval County Jail, [Vol. XXXIX,

1790]; Paul Pinkham, a reporter for The Florida Times-Union, [Vol. XXXIX, 1795]; and William L. Drew, another previous cellmate of Mr. Murray at the Duval County Jail [Vol. LX, 1807].

Outside the jury's presence, each witness testified on proffer by defense counsel that Mr. Murray said he had escaped because he had become frustrated with the judicial system. Mr. Murray told Michael Brown, prior to his escape, that he was tired of the State's delay and was thinking of escaping if he had the chance. [Vol. XXXIX, 1755]. Mr. Murray had told Mr. Williams that he wanted to exercise his right to a speedy trial but that he was being delayed. [Vol. XXXIX, 1790-1792]. Similarly, Mr. Murray, after escaping, had complained to reporter Paul Pinkham that he was tired of his case being delayed, and he blamed his defense attorney. [Vol. XXXIX, 1798]. Likewise, Mr. Murray had informed Mr. Drew prior to his November, 1992 escape that he felt he was being "railroaded" and that his attorney was not working with him in getting a trial. [Vol. LX, 1807-1809]. Nonetheless, despite the fact that the statements made by Mr. Murray to these individuals constituted then-existing state of mind evidence, the trial court improperly excluded any statements made by Mr. Murray to any of these individuals. [Vol. LX, 1812].

Pursuant to the Florida Evidence Code, a statement of the declarant's then-existing state of mind is admissible as a hearsay exception when offered to prove declarant's state of mind when either an issue in the action or offered to provide or explain acts of subsequent conduct of the declarant. §90.803(3)(a), Fla. Stat.

(1993). In the instant case, it was obvious to defense counsel that the State intended to rely on Mr. Murray's escape as proof of his consciousness of guilt. [Vol. XXXIX, 1750]. Accordingly, the State made the reasons for Mr. Murray's escape an issue in the case. Also, the proffered testimony, specifically the testimony of the inmates indicating statements made by Mr. Murray prior to his escape, explained Mr. Murray's subsequent escape in November, 1992. To rebut the State's argument that Mr. Murray escaped because he was guilty of the murder, burglary and sexual battery in the instant case, defense counsel intended to call the above-referenced individuals for one specific purpose. Each was to testify before the jury as to Mr. Murray's state of mind; that is, his actual reasons for escaping. However, the trial court erred by excluding the admissible statements.

In Downs v. State, 574 So.2d 1095 (Fla. 1991), the defendant was charged with premeditated murder. The trial court excluded the defendant's statements to relatives, friends and police officers on the grounds that the statements were inadmissible hearsay. Id. at 1097. The statements were attributable to the defendant's state of mind and rebutted the State's theory that the defendant went to the deceased's home with intent to kill. Id. On appeal, this Court held that the statements by the defendant should have been admitted as a hearsay exception. Id. at 1097. See Morris v. State, 487 So.2d 291 (Fla. 1986) (hearsay statements admissible as going to declarant's intent).

Additionally, in Jenkins v. State, 422 So.2d 1007 (Fla. 1st DCA 1982), disapproved in part on other grounds, 444 So.2d 947 (Fla. 1984), the defendant was convicted of aggravated battery and carrying a concealed firearm. A key element of the defense was to establish that the victim attacked the defendant. Id. at 1008. In an effort to establish this defense, the defendant called a witness who was prepared to testify that the victim had stated he was "going to straighten [the defendant] up." Id. However, the trial court excluded the evidence as hearsay. On appeal, the First District Court ruled that it was error for the trial court to exclude the testimony as it was admissible as a statement of intent pursuant to §90.803(3)(a), Fla. Stat. Jenkins, 422 So.2d at 1008.

Similarly, in the present case, defense counsel sought to call four individuals, each of whom were to testify to statements made by Mr. Murray regarding his November 1992 escape. Such statements went to Mr. Murray's state of mind for escaping, which was an issue in this case. Additionally, the statements made to witnesses prior to November, 1992, explain Mr. Murray's intent as to his subsequent escape. Accordingly, it was error for the trial court to exclude Mr. Murray's statements as they constituted an exception to the hearsay rule.

Mr. Murray's defense was severely prejudiced, requiring reversal. The jury heard evidence and argument that Mr. Murray escaped because he knew he was guilty and thus was attempting to avoid prosecution. The jury was not permitted to hear, however, that Mr. Murray had escaped because he felt he was not getting

fair treatment in the judicial system. Therefore, the only evidence admitted (i.e., evidence of consciousness of guilt) sent a clear message to the jury that Mr. Murray escaped because he was indeed guilty of the charged offenses. Without an opportunity for Mr. Murray to present another explanation of the escape, the jury reasonably believed that he was indeed guilty. Accordingly, his defense was severely prejudiced by the trial court's error, which infected the entire trial, and the only adequate relief for such error is reversal of the conviction.

VIII.

THE STATE'S COMMENTS DURING CLOSING ARGUMENT CONSTITUTE REVERSIBLE ERROR BECAUSE THE PROSECUTOR INTENTIONALLY EVOKED AN EMOTIONAL RESPONSE FROM JURORS.

During closing argument, the prosecutor overstepped well-established bounds of proper argument by attempting to evoke an emotional response from the jury. The prosecutor's improper remarks unfairly prejudiced the defendant. The proper remedy, therefore, is to reverse the conviction of the defendant.

The purpose of a closing argument is "to review the evidence" for the jury and "to explicate the inferences" which can reasonably be drawn from the evidence. Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985). It is well established that closing argument is not intended to provide the prosecutor with a means of inflaming the minds and passions of the jurors. Id. at 134; Taylor v. State, 640 So.2d 1127, 1134 (Fla. 1st DCA 1994). The jury's verdict must be based on "logical analysis of the evidence in light of the

applicable law," and not on an emotional response to the prosecutor's closing argument. Bertolotti, supra at 134. Furthermore, it is imperative that the prosecution not play on the passions of a jury when a person's life is at stake. Hall v. Wainwright, 733 F.2d 766, 774 (11th Cir. 1984).

In the instant case, during closing argument, the prosecutor made the following statements:

> Mr. Arias [defense counsel] says, well, we're showing you these pictures [of the victim] just for shock value and I apologize if you think that, but this is righteous indignation is what I would term it. You have the right to look at this and be angered by the senseless, brutal nature of the murder . . . and this speaks for itself.

[Vol. LXI, 2058-2059] (emphasis added). Based on this improper argument, defense counsel objected and moved for a mistrial as the statements were solely made to inflame the jury's passion and prejudices. [Vol. LXI, 2059]. Although the trial judge sustained the objection, he erroneously denied the motion for mistrial. [Vol. LXI, 2059]. Likewise, the judge curatively instructed the jury, "Ladies and Gentlemen, I've sustained the objection that was made and I will instruct you that the jury, you, do not have a right to be angry." [Vol. LXI, 2059]. However, curative instructions are of dubious value. Once the prosecution rings the bell and informs the jury, the bell cannot, for all practical purposes, be unrung by instructions from the Court. Gerald v. State, 601 So.2d 1157, 1161 (Fla. 1992), citing, Malcolm v. State, 415 So.2d 891 (Fla. 3d DCA 1982).

The prosecutor's statements constituted an unjustified appeal to inflame the emotions of the jury impermissibly. Accordingly, the natural effect of such an improper argument is to create hostile emotions by the jurors toward the accused. See Brown v. State, 593 So.2d 1210, 1211 (Fla. 2d DCA 1992) (improper comments required reversal); Edwards v. State, 428 So.2d 357 (Fla. 3d DCA 1983). Thus, as the prosecutor's comments prejudiced the defendant in the eyes of the jurors, the trial court erred by not granting a mistrial. The proper remedy, therefore, is to reverse the conviction.

IX.

THE EVIDENCE WAS INSUFFICIENT TO CONVICT GERALD MURRAY OF THE OFFENSES CHARGED.

At the end of the State's presentation of this case, Gerald Murray moved for judgment of acquittal as to all counts because the State had failed to prove a prima facie case as to the essential elements of the offenses charged. [Vol. XXXIX, 1736-1737]. The trial court denied the motion. [Vol. XXXIX, 1737]. Mr. Murray's counsel renewed the Motion for Judgment of Acquittal at the end of the presentation of the defense's case and was denied by the trial judge. [Vol. LX, 1916].

The trial court erred in not granting the motions for judgment of acquittal as the State failed to offer sufficient evidence to establish a prima facie case of first degree murder, burglary with an assault, and sexual battery. Each of the counts implicitly requires that the accused be present to participate in those

crimes. However, the only evidence that the State was able to offer to establish Mr. Murray's presence is one hair, which should have been suppressed, and the incredible, impeached testimony of four jailhouse snitches. [Vol. XXXVII, 1366-1368; XXXVIII, 1520-1521, 1573-1575; XXXIX, 1654, 1657]. Neither fingerprints taken nor semen samples collected at the crime scene placed Mr. Murray there. [Vol. XXXV, 1185-1187; XXXVII, 1252-1254]. This evidence is insufficient to establish Mr. Murray's presence of participation in the alleged crimes.

The State's expert could not discount the possibility that the hair from the crime scene could have come from someone other than Mr. Murray. [Vol. XXXVII, 1383-1385]. He also could not absolutely, positively identify the hair taken from the crime scene as belonging to Mr. Murray. [Vol. XXXVII, 1377-1378].

The only other evidence the State offered to establish Mr. Murray's participation was the testimony of four inmates to whom Mr. Murray had made incriminating statements, and they were rewarded with leniency in their own cases. [Vol. XXXVIII, 1524-1525, 1559-1561, 1542-1546, 1745-1748, 1573, 1575, 1576-1579; Vol. XXXIX, 1654, 1657, 1745-1748].

Based on this scant and incredible evidence, the State failed to establish a prima facie case against Mr. Murray. His motions for judgment of acquittal should have been granted. Accordingly, the trial court's error requires that Mr. Murray's convictions be reversed.

X.

THE TRIAL COURT ERRED IN FINDING THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE.

The trial court found applicable the aggravating circumstance that the crime at issue was especially heinous, atrocious or cruel. [Vol. III, 470-471]. During the penalty phase, the state argued to the jury that this aggravating factor "is the most important one in terms of what has been proven here...." [Vol. LXIV, 2301, lines 19-21]. For a number of reasons set forth below, this finding of the trial court was erroneous.

A. HAC Does Not Apply Where the Victim May Have Been Unconscious or Semi-Conscious.

This Court has recognized that the HAC aggravator does not apply where "the victim may have been semi-conscious at the time of her death." Rhodes v. State, 547 So.2d 1201, 1208 (Fla. 1989). Furthermore, as the pertinent facts of a case similar to Mr. Murray's were described by this Court:

> The actual period of unconsciousness is unclear. However, she was in this state at least during the period of time between the pillow incident and the act that caused her death. It can also be reasonably inferred from the record that she was semi-conscious during the whole incident as there is evidence that the victim offered no resistance, nor did she make any statements during the attack.

Herzog v. State, 439 So.2d 1372, 1380 (Fla. 1983).

The evidence in this case is entirely consistent with the victim being unconscious or semi-conscious during the portions of her attack upon which the trial court relied in finding this

factor. The trial court myopically considered only the testimony that the victim was "alive" during the matters assertedly relevant to the HAC aggravator. [Vol. III, 470-471]. The medical examiner testified that the victim suffered no defensive wounds whatsoever. [Vol. XXXVI, 1090-1092]. The medical examiner further testified that, although the victim remained alive until she was strangled, the evidence he found was consistent with her having been unconscious from the earliest moments of the attack. [Vol. XXXVI, 1090-1092]. No evidence exists to the contrary. Accordingly, the HAC aggravator does not apply in this case, and the death sentence should be reversed.

B. HAC Does Not Apply Where the Evidence Did Not Show That Appellant Intended to Cause the Victim Unnecessary and Prolonged Suffering.

The HAC aggravating circumstance does not apply unless the evidence demonstrates beyond a reasonable doubt that the defendant himself actually intended to cause unnecessary and prolonged suffering. See, e.g.. Porter v. State, 564 So.2d 1060, 1063 (Fla. 1990) (hypothesis consistent with crime not "meant to be deliberately and extraordinarily painful," and so not HAC); Bonifay v. State, 626 So.2d 1310, 1313 (Fla. 1993); Santos v. State, 591 So.2d 160, 163 (Fla. 1991); Cheshire v. State, 568 So.2d 908 (Fla. 1990); Mills v. State, 476 So.2d 172, 178 (Fla. 1985); Lloyd v. State, 524 So.2d 396, 403 (Fla. 1988); Smalley v. State, 546 So.2d 720, 722 (Fla. 1989).

In Bonifay, supra, for example, this Court found that the record:

> Fails to demonstrate any intent by Bonifay to inflict a high degree of pain or to otherwise torture the victim. The fact that the victim begged for his life or that there were multiple gunshots is an inadequate basis to find this aggravating factor absent evidence that Bonifay intended to cause the victim and unnecessary and prolonged suffering.

Id. at 1313 (citation omitted). The key aspects of the applicable standard, as pertinent to this case, and as described in Bonifay and Santos, supra, are that (1) the particular defendant facing a potential death penalty (2) intended (3) to inflict great pain or torture.

As set forth above, the record in this case does not demonstrate that (1) Mr. Murray himself, as opposed to Steven Taylor, (2) personally intended (3) great pain or torture to the victim. Clearly, this factor cannot be established with respect to Mr. Murray beyond a reasonable doubt. The record demonstrates that Mr. Murray, following his wife's death, regressed to falling under the dominating influence of Steven Taylor prior to the homicide of Ms. Vest, the record fails to establish beyond a reasonable doubt that Mr. Murray personally inflicted or intended to inflict great pain or suffering on Ms. Vest, and the record fails to establish that Ms. Vest was even conscious during the actions cited by the trial court, even to the extent of establishing that Ms. Vest most likely was unconscious during those incidents, as set forth above. Accordingly, the trial court erred in concluding that the "especially heinous, atrocious and cruel" aggravating factor

existed in this case, and Mr. Murray's death sentence should be reversed.

Critical to this inquiry is the trial court's focus on whether the victim suffered intense pain or torture. [Vol. III, 470-471, 481]. Suffering of a victim, however, is insufficient to establish the HAC aggravator because suffering in and of itself fails to set one murder apart from the norm of capital felonies.

> The facts that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies.

Teffeteler v. State, 439 So.2d 840, 846 (Fla. 1983). Also, as set forth above, the evidence in the present case is insufficient to establish that the victim even endured prolonged suffering because the evidence is most consistent with her having been unconscious after the initiation of the crimes committed against her.

Even where an assumption of a trial court is based on a logical inference from the evidence that the victim suffered, such an assumption is insufficient where the State has failed to prove the HAC aggravator. Clark v. State, 443 So.2d 973, 976 (Fla. 1983). See, also, King v. State, 514 So.2d 354 (Fla. 1987) (aggravator may not be based on what might have occurred).

The case of State v. Hunt, 220 Neb. 707, 371 N.W.2d 708 (Neb. 1985), is illustrative. In Hunt, the Nebraska Supreme Court rejected an HAC finding because the court found "no evidence the acts were performed for the satisfaction of inflicting either mental or physical pain or that pain existed for any prolonged

period of time." 371 N.W.2d at 721. The Nebraska court rejected a finding of HAC where the record lacked further evidence that the acts at issue "were performed for the satisfaction of inflicting either mental or physical pain or that pain existed for any prolonged period of time." Id. The pertinent facts of Mr. Murray's case likewise do not show that he intended to inflict extreme or prolonged suffering, and so the trial court erred in finding that the HAC factor existed as to Mr. Murray. See, also, Perry v. New Jersey, 124 N.J. 128, 590 Atl.2d 624 (N.J. 1991) (method of killing does not constitutionally support an aggravator similar to HAC because the aggravator focuses on defendant's state of mind).

Additionally, the erroneous finding of HAC cannot be deemed harmless. The harmful nature of this error is magnified by the trial court's error in improperly rejecting each and every mitigating circumstance presented by Mr. Murray and its errors in determining and weighing aggravating circumstances argued below, as set forth elsewhere in this brief, see, Issues XI, XII, XIII and XIV, infra, particularly in view of the State's position that the HAC aggravator "is the most important one" argued by the State. [Vol. LXIV, 2301]. Accordingly, the death sentence imposed in this case should be reversed.

XI.

THE TRIAL COURT ERRED IN OVERRULING MR. MURRAY'S OBJECTIONS TO THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE INSTRUCTION AND DENYING HIS ADDITIONAL PROPOSED INSTRUCTIONS REGARDING THAT AGGRAVATING FACTOR.

During the penalty phase, the trial court instructed the jury with regard to the HAC aggravating factor by defining that factor as follows:

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

[Vol. III, 430; Vol. LXIV, 2359-2360]. Mr. Murray had proposed additional instructions with regard to this aggravating factor and objected to the instructions as given. [Vol. III, 414-416, 419-422; Vol. LXIV, 2214-2215]. The court overruled the objections and denied Mr. Murray's requests for additional HAC instructions. [Vol. LXIV, 2215]. The instruction given violated Mr. Murray's rights under the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution, requiring reversal of the death sentence in this case.

States are constitutionally required to narrow the class of those eligible for the death penalty and to narrow the discretion

of those imposing such a sentence by clear, objective and reviewable standards. Godfrey v. Georgia, 446 U.S. 420, 422, 432-433 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988). Special care in this regard is imperative in a state such as Florida where aggravating and mitigating circumstances first are weighed directly by a jury and then by a judge who must give great weight to the jury's weighing of the circumstances. See, Espinosa v. Florida, 505 U.S. 1079 (1992). The trial court is responsible to instruct the jury correctly on the law, even where the law conflicts with standard jury instructions. Yohn v. State, 476 So.2d 123, 126-127 (Fla. 1985); Steele v. State, 561 So.2d 638, 645 (Fla. 1st DCA 1990). The HAC jury instruction given below in this case was constitutionally infirm under these principles by failing to properly limit the jury's discretion in deciding what offenses qualify for this aggravator.

The unconstitutionality of any one of multiple theories upon which a case or penalty is submitted to a jury requires reversal. Leary v. United States, 395 U.S. 6, 31-32 (1969) (conviction); Boyds v. California, 494 U.S. 370, 379-380 (1990) (capital sentencing). The Florida HAC aggravator is phrased in the disjunctive: "Especially heinous, atrocious or cruel." §921.141(5)(h), Fla. Stat. (1993) (emphasis added). The precise instruction given in this case, absent the final sentence, has been held unconstitutional. Shell v. Mississippi, 498 U.S. 1, 2 (1990) (Marshall, J., concurring). The definitions of "heinous" and "atrocious" are so interlocking as to be indistinguishable from one

another. The definition of cruel as given in this case likewise provides no meaningful limitation on the discretion of the jury or the court in determining the penalty. Shell, supra; Maynard v. Cartwright, 486 U.S. 356, 361-364 (1988). The final sentence of the HAC instruction merely sets forth an example -- "the kind of crime" -- that might be included as HAC, clearly suggesting that crimes other than those found conscienceless or pitiless or unnecessarily torturous can meet the HAC definition.

The plurality in Proffitt v. Florida, 428 U.S. 242, 252-256 (1976), set forth that case law can provide limitations for the HAC factor, but as noted above, the very instruction supposed as a limitation is actually the opposite of a limitation. The HAC instruction in Florida "could be used by a person of ordinary sensibility to fairly characterize almost every murder." Shell, 498 U.S. at 3 (Marshall, J., concurring) (citation and internal quotations omitted).

As a result of the foregoing, the HAC instruction given to the jury in the trial below is unconstitutional because it fails to "channel the sentencer's discretion by clear and objective standards that make rationally reviewable the process for imposing a sentence of death." Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (internal quotations and citations omitted). Perhaps the most striking inconsistency in the result of the application of this aggravating circumstance is the diametrically opposite results when the aggravator was reviewed on the same facts in the same case on two different occasions. Compare, Raulerson v. State, 358 So.2d

826 (Fla. 1978), with Raulerson v. State, 420 So.2d 567 (Fla. 1982). Even this Court has been unable to apply this language in a consistent, predictable manner, and in no way can a jury, or a trial court required to give great weight to a jury's recommendation, apply this factor any more consistently. Accordingly, the death sentence in this case should be reversed because of the unconstitutionality of the HAC instruction given.

If the HAC instruction is constitutionally salvageable at all, that can only be accomplished by additional limiting instructions. Such instructions were proposed by the defense. [Vol. III, 414-416]. The narrowing points constitutionally required at a minimum must include those instructions offered by the defense on the basis of the case law of this Court.

First, any suffering of the victim must be found to have occurred over a substantial period of time. Clark v. State, 609 So.2d 513, 514-515 (Fla. 1992); Hallman v. State, 560 So.2d 223 (Fla. 1990). The HAC aggravator cannot be established by acts against the victim after the victim was rendered unconscious or dead. Rhodes v. State, 547 So.2d 1201 (Fla. 1989); Herzog v. State, 439 So.2d 1372 (Fla. 1983); Jones v. State, 569 So.2d 1234-1238 (Fla. 1990); Jackson v. State, 451 So.2d 458 (Fla. 1984). If the defendant suffered, but not as a result of the purpose of the defendant on trial to cause pain, the HAC aggravating factor is not established. Robertson v. State, 611 So.2d 1228, 1233 (Fla. 1993); Mills v. State, 476 So.2d 172, 178 (Fla. 1985); Teffeteler v. State, 439 So.2d 840, 846 (Fla. 1983); Omelus v. State, 584 So.2d

563 (Fla. 1991). Likewise, a crime is unnecessarily torturous only if the defendant intended that the victim suffer deliberate and extraordinary mental anguish or physical pain. Porter v. State, 564 So.2d 1060, 1063 (Fla. 1990).

Fear and emotional strain may establish the HAC factor only if the victim had a prolonged awareness of impending death. Clark v. State, 609 So.2d 513, 514 (Fla. 1992); Hallman v. State, 560 So.2d 223, 233 (Fla. 1990); Douglas v. State, 575 So.2d 165, 166 (Fla. 1991); Robinson v. State, 574 So.2d 108, 112 (Fla. 1991). Additionally, even if a defendant caused a victim's suffering, but that defendant did not himself intend such suffering, the suffering is not relevant to the HAC factor. Mills v. State,476 So.2d 172, 178 (Fla. 1985); Teffeteler, supra, at 846. Any conclusion of the jury that the defendant was or was not remorseful should not be considered in deliberations relating to the HAC factor. Pope v. State, 441 So.2d 1073, 1078 (Fla. 1984); Colina v. State, 570 So.2d 929, 933 (Fla. 1990). Even if the facts of the case are sufficient to support the HAC factor, jury must be informed that if the factual basis resulted from an irrational frenzy by the defendant, mitigating evidence must be weighed against the HAC factor specifically. Amazon v. State, 487 So.2d 8, 13 (Fla. 1986).

The foregoing principles were set forth in proposed additional jury instructions regarding the HAC factor submitted by the defense but denied by the trial court. The HAC instruction as given is unconstitutional, and its infirmities can be remedied constitutionally, if at all, only be the additional instructions as

proposed by Mr. Murray below. Accordingly, the death sentence in this case should be reversed.

XII.

THE TRIAL COURT ERRED IN REJECTING STATUTORY AND NON-STATUTORY MITIGATING CIRCUMSTANCES.

Mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted. Farr v. State, 621 So.2d 1368, 1369 (Fla. 1993). A court must find as a mitigating circumstance any factor "reasonably established by the greater weight of the evidence." Campbell v. State, 571 So.2d 415, 419 (Fla. 1990). "The rejection of a mitigating factor cannot be sustained unless supported by competent substantial evidence refuting the existence of the factor." Maxwell v. State, 603 So.2d 490 (Fla. 1992). Positive personality traits in a defendant are recognized as mitigating circumstances. See, e.g., Barrett v. State, 649 So.2d 219, 233 (Fla. 1994); Perry v. State, 522 So.2d 817, 821 (Fla. 1988). In the case presently before the court, the trial court erred in the legal standard it applied to mitigating evidence presented by the defendant and erred in finding that the matters presented by the defendant did not constitute mitigating factors. Accordingly, the death sentence in this case should be reversed.

Evidence presented at sentencing in this case demonstrated that Mr. Murray has or had a loving relationship with his nephew, late wife and children, [Vol. LXIV, 2238-2239, 2247-2259, 2254]; helped provide food to the poor, [Vol. LXIV, 2245-2247]; was

emotionally devastated by his wife's unexpected death ten days after the birth of their second son and less than a month before the homicide of Ms. Vest, [Vol. LXIV, 2250-2254]; was unduly influenced by Steven Taylor to drink heavily and commit crime except during his marriage, [Vol. LXIV, 2241-2245, 2248-2249, 2253]; and, in 1993, helped care and provide for his girlfriend and her two younger children, [Vol. LXIV, 2264-2269].

However, the trial court flatly found that some of this evidence did not constitute any mitigating factor whatsoever and utterly ignored the evidence of Mr. Murray's positive traits. [Vol. III, 476-477]. The trial court erred as well in failing to accord any significance to Mental Health Resource Center records of Dr. Henry Lepley regarding Mr. Murray's admission, diagnosis and treatment at that facility shortly after Ms. Vest was killed. [Vol. LXIV, 2273-2283]. These records documented Mr. Murray's depression, decompensation, suicidal thoughts and predilections, impaired judgment and reasoning, alcohol abuse and ineffective psychological coping with distress and frustration in the wake of is wife's death. [Vol. LXIV, 2275-2276, 2278, 2283]. The trial court's rejection of these mitigating circumstances constitutes reversible error with respect to the sentence imposed. Campbell, supra; Maxwell, supra.

The trial court specifically found that none of the matters presented by the appellant established any mitigator factor whatsoever. [Vol. III, 472-477]. The mitigating factors presented were:

1. The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance, [Vol. III, 472];

2. The defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor, [Vol. III, 474];

3. The capacity of the defendant to appreciate the criminality of his conduct and conform it to the requirements of law was substantially impaired, [Vol. III, 475];

4. Any other aspect of the defendant's character or record and any other circumstances of the offense, [Vol. III, 476].

As to the fourth mitigating circumstance, the trial court improperly evaluated the evidence presented at the sentencing hearing and further utterly ignored evidence presented with respect to Mr. Murray's positive personality traits and family background. In rejecting this mitigating circumstance entirely, the trial court erred by disregarding supporting evidence, including relevant mental health evidence; by finding that the factor was inapplicable because Mr. Murray had been gainfully employed; by relying on facts not supported in the record "that the co-defendant was reported to be mildly retarded and easily led;" and by concluding that the evidence presented did not establish the mitigating circumstance because many individuals educated in classes for those with learning disabilities subsequently lead normal and productive lives. [Vol. III, 477]. As set forth above, the trial court

failed to consider whatsoever the uncontroverted evidence of Mr. Murray's positive personality traits.

With respect to the first three mitigating factors, the trial court erred in a number of ways. The trial court first ignored the evidence demonstrating that Mr. Murray was under the influence of extreme mental or emotional disturbance as a result of his wife's sudden, unexpected death only ten days after delivering their second child and a short time, approximately one month, prior to the homicide in this case, as well as the impact of Mr. Murray regressing to alcohol dependency and the undue influence of Steve Taylor following the death of his wife.

As to the second mitigating circumstance, that Mr. Murray was an accomplice with a relatively minor role in the offense, the trial court merely relied on its "peer pressure observation with respect to the influence of Steve Taylor" on Mr. Murray, disregarding ample evidence presented in support of this mitigator and an absence of evidence that Mr. Murray's role in the offense was any different than as described by this statutory mitigator. None of Mr. Murray's fingerprints were found at the crime scene or on any item of evidence. [XXXV, 1185-1187]. Mr. Murray was eliminated as the donor of any seminal or blood deposits discovered during the investigation. [Vol. XXXVII, 1252-1254, 1260]. A single hair at the scene constituted the sole evidence of Mr. Murray's presence. [Vol. XXXVII, 1366-1368, 1377-1378, 1383-1385; Vol. XXXVIII, 1405-1406]. The only further testimony regarding any role of Mr. Murray in this case was that of inmates, of dubious

credibility, who said Mr. Murray had made incriminating statements to them. [Vol. XXXVIII, 1520-1521, 1524-1525, 1542, 1559-1561, 1573, 1575-1579; Vol. XXXIX, 1559-1560, 1654, 1657, 1745-1748]. This evidence demonstrates that Mr. Murray established the §921.142(7)(c), Fla. Stat. (1993) mitigator.

With regard to the third mitigating circumstance, the trial court flouted the evidence in finding that Mr. Murray appreciated the criminality of his conduct at issue. The evidence does not support the trial court's conclusions that Mr. Murray himself severed any telephone line at the victim's residence. The trial court made a finding utterly unsupported by the evidence that Mr. Murray made a concerted effort to eliminate evidence linking him to the offense. [Vol. III, 475]. An absence of evidence utterly fails to support a conclusion that Mr. Murray made a concerted effort to conceal evidence. Somehow, inexplicably, the trial court concluded that evidence indicating that Mr. Murray endeavored to conduct legal research with respect to hair evidence at sometime after his incarceration constituted any matter with a bearing on Mr. Murray's appreciation, vel non, of the criminality of his conduct at the time of the homicide at issue in this case. [See, Vol. III, 475]. The trial court further disregarded Mr. Murray's highly relevant mental health evidence.

The foregoing demonstrates that the trial court erred, individually and cumulatively, in rejecting the mitigating circumstances presented in this case. Accordingly, the death sentence in this case should be reversed.

XIII.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND MAKING FINDINGS OF TWO AGGRAVATING CIRCUMSTANCES THAT MERGE.

The trial court instructed the jury that it could find the existence of an aggravating circumstance if "the crime for which the defendant is to be sentenced was committed while he was engaged or an accomplice in the commission of or attempted commission of the crimes of burglary and/or sexual battery." [Vol. LXIV, 2359]. The trial court further instructed that the jury could find the existence of an additional aggravating factor if it determined that "the crime for which the defendant is to be sentenced was committed for financial gain." [Vol. LXIV, 2359]. The trial court, however, never instructed the jury in a manner to prevent the doubling of the aggravators of burglary and crime for financial gain, and the trial court itself considered the factors separately. [Vol. III, 467-469, 480, 482]. As a result, the trial court permitted the jury to double these aggravating circumstances, and subsequently doubled these aggravators itself, a result prohibited by Provence v. State, 337 So.2d 783 (Fla. 1976).

Because burglary occurs in most circumstances for pecuniary gain, and because the facts of this case indicate that the burglary at issue was committed specifically for pecuniary gain, these two factors should have been merged if found by the jury. The jury should have been so instructed and the trial court itself should have merged these factors. See, e.g., Cherry v. State, 544 So.2d 184, 187 (Fla. 1984); Mills v. State, 476 So.2d 172, 178 (Fla.

1985). Accordingly, the death sentence in this case should be reversed.

XIV.

THE PECUNIARY GAIN AGGRAVATING FACTOR DOES NOT APPLY TO THE FACTS OF THIS CASE.

The trial court instructed the jury that it could find an aggravating circumstance in support of a death sentence if it determined that "the crime for which the defendant is to be sentenced was committed for financial gain." [Vol. LXIV, 2359]. At best, the record in this case may support a conclusion that the burglary of which the defendant was convicted was a crime committed for pecuniary gain. The evidence, however, fails to demonstrate that the murder at issue was itself committed for pecuniary gain. The mere conclusion that a murder occurred during the course of a burglary does not demonstrate that the murder was itself committed for the purpose of pecuniary gain. See, e.g., Clark v. State, 609 So.2d 513, 515 (Fla. 1992) (aggravator not established absent proof that pecuniary gain was specific motive for murder, as opposed to motive for burglary); Hill v. State, 549 So.2d 179, 183 (Fla. 1989). Accordingly, the death sentence in this case should be reversed.

XV.

THE TRIAL COURT ERRED IN DENYING ALL BUT UNOPPOSED OBJECTIONS OF MR. MURRAY'S PRIOR VIOLENT FELONIES.

At the outset of the penalty phase below, the trial court denied all except two of Mr. Murray's objections relating to evidence of his prior violent felony convictions. [Vol. III, 410-411; Vol. LXIII, 2137-2138]. Mr. Murray filed written objections to evidence of prior crimes of Mr. Murray on the basis of hearsay and presentation of facts unnecessary to establish that certain prior convictions had been obtained, in particular emphasizing that the defense would lack any reasonable opportunity to rebut such matters. [Vol. III, 410-411]. Section 921.141, Fla. Stat. (1993) permits admission of certain evidence in a penalty proceeding beyond that otherwise admissible, but only if "the defendant is accorded a fair opportunity to rebut any hearsay statements." Particularly, in light of the trial court's denial of the motions to continue Mr. Murray's trial and penalty phase, see Issue 4, supra, Mr. Murray was deprived of any fair opportunity whatsoever to rebut hearsay statements that were presented, which hearsay statements constituted almost the entirety of the evidence presented with respect to prior violent felonies. Accordingly, the death sentence in this case should be reversed.

Hearsay testimony is admissible in the penalty phase of a capital trial if the defendant has a fair opportunity to rebut such hearsay. Waterhouse v. State, 596 So.2d 1008 (1992). However, such hearsay statements are properly excludable under certain

circumstances despite the Legislature's relaxation of rules of evidence for a capital penalty phase. Cannady v. State, 620 So.2d 165 (Fla. 1993); Dragovich v. State, 492 So.2d 350 (Fla. 1986).

In order to establish the aggravating factor described in §921.141(5)(b), Fla. Stat. (1993), the State presented certified copies of judgments and sentences of prior criminal cases brought against Mr. Murray through the supervisor of the felony department of the Duval County Circuit Court Clerk. [Vol. LXIII, 2158-2163]. That was enough. However, the State was permitted, over defense objection, to present three police officers who provided hearsay testimony, including hearsay within hearsay, with respect to numerus particular factual allegations of those prior offenses. [Vol. LXIII, 2140-2157]. In essence, Mr. Murray was required to defend against numerous factual allegations far in excess of those necessary to establish that he had previously been convicted of felonies involving the use or threat of violence to a person. This circumstance is even more egregious in light of the fact that Mr. Murray's appointed counsel were accorded less than two months to prepare for a first degree murder trial and death penalty phase. Under these circumstances, Mr. Murray was not afforded any fair or reasonable opportunity to attempt to rebut this hearsay testimony. Accordingly, the death sentence in this case should be reversed.

XVI.

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO ARGUE IMPROPERLY IN THE PENALTY PHASE.

During closing argument, the State impermissibly argued that the victim in this case sustained a number of superficial wounds "because the defendant is an evil person." [Vol. LXIV, 2316]. Defense counsel objected, but the trial court, without ruling on that objection, simply directed the State to "move on to something else." [Vol. LXIV, 2316-2317]. The State additionally was permitted to argue, over objection of the defense, that evidence presented in mitigation was "an attempt to get sympathy." [Vol. LXIV, 2318, 2322-2323]. The trial court additionally denied a defense motion for mistrial based on the State's improper closing argument. [Vol. LXIV, 2323-2324]. The State also argued to the jury in a manner that improperly minimized the role of the jury in determining the penalty to be imposed. [Vol. LXIV, 2328]. Additionally, the State's penalty phase argument grossly distorted the evidence presented regarding Mr. Murray's prior record. [Vol. LXIV, 2305-2309]. Individually and cumulatively, the State's improper arguments in the penalty phase were unfairly prejudicial. Accordingly, this Court should reverse the death sentence imposed below.

Closing argument is not a proper vehicle to be used by a prosecutor as a means to inflame the minds and passions of jurors. Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985); Taylor v. State, 640 So.2d 1127, 1134 (Fla. 1st DCA 1994). The principle that the prosecution not be permitted to play on the emotions or

passions of the jury carries the greatest force when a death sentence is at stake. Hall v. Wainwright, 733 F.2d 766, 774 (11th Cir. 1984). The natural and probable effect of a prosecutor's impermissible argument in this regard is to create or inflame hostile emotions by jurors towards the accused, and such argument can require reversal. Brown v. State, 593 So.2d 1210, 1211 (Fla. 2d DCA 1992); Edwards v. State, 428 So.2d 357 (Fla. 3d DCA 1993).

In the present case, the State's argument, permitted by the trial court, grossly distorting evidence and asserting that Mr. Murray is an evil person, that Mr. Murray sought the sympathy of the jury and that the jury's role in determining a penalty was minimal clearly meets these standards for determination of improper argument and reversal on that basis. Accordingly, the death sentence in this case should be reversed.

XVII.

FLORIDA'S STATUTORY PROVISION ALLOWING PRESENTATION OF VICTIM IMPACT EVIDENCE IN A CAPITAL SENTENCING PROCEEDING IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE.

Florida's provision allowing the presentation of victim impact evidence in a death penalty proceeding is unconstitutional because it affirmatively provides unguided discretion in death penalty decisions. The statute further is unconstitutionally vague and overbroad, is prohibited by the Florida Constitution, was promulgated in violation of the Florida constitutional reservation of practice and procedure rules to the Florida Supreme Court and, as applied to this case, constitutes an unconstitutional ex-post

facto law. Victim impact evidence was received at sentencing in this case by the trial court. [Vol. III, 491-498]. Accordingly, the death penalty in this case should be reversed.

A. Section 921.141(7), Florida Statutes (1993), Results in Unbridled Discretion in Death Penalty Decisions.

Effective July 1, 1992, §921.141(7), Fla.Stat. was enacted as part of the State's sentencing scheme for capital cases. Enactment of the statute was a response to the decision in Payne v. Tennessee, 501 U.S. 808 (1991) but occurred absent consideration of the constitutional impact of the provision to Florida's capital sentencing scheme.

The Florida capital sentencing statutes provide, "aggravating circumstances shall be limited to the following ...." §921.141(5), Fla.Stat. (1993) (emphasis added). Consideration of aggravating factors not set forth in §921.141(5) renders a death sentence in Florida violative of the Eighth Amendment. Sochor v. Florida, 504 U.S. 527 (1992); Stringer v. Black, 503 U.S. 222 (1992). Victim impact evidence, as permitted by the 1992 statutory amendment, constitutes nothing more than an aggravating factor not otherwise permitted by law and with no purpose other than to inflame the sentencing court. As a result, permitting victim impact evidence renders the statutory sentencing scheme unconstitutional in Florida capital cases.

The primary concern at the heart of constitutional prohibition of random and arbitrary capital sentencing procedures is grounded on the risk of committing death penalty decisions to the unbridled

discretion of a sentencing jury and/or court. Furman v. Georgia, 408 U.S. 238 (1972); Proffitt v. Florida, 428 U.S. 242 (1976). Inherent in the recent statutory allowance of victim impact evidence is that no reviewing court can determine the role of such evidence in a capital penalty decision, and so appellate review of the weight given to such evidence and the impact of such evidence on the discretion of the sentencing court is impossible to determine. That circumstance alone renders the victim impact provision unconstitutional.

After the decision in Payne, supra, this Court reversed a death sentence because of the presentation of victim impact evidence. Burns v. State, 609 So.2d 600 (Fla. 1992). In Burns, this Court found that such evidence simply was not relevant to any material fact at issue in a sentencing determination. Id. The addition of §921.141(7) to Florida's capital sentencing statute straightforwardly permits irrelevant evidence to be admitted in a death penalty proceeding. Such a provision violates not only the Eighth Amendment but also deprives a defendant facing a capital sentencing proceeding of any meaningful due process of law. Accordingly, the death sentence in this case should be reversed.

B. Section 921.141(7), Florida Statutes (1993), Violates the Due Process Clauses of the Florida and United States Constitutions Because it is Vague, Overbroad and Violative of Equal Protection.

The 1992 victim impact statute contains no limitations, by defining of terms or otherwise. The provision merely describes victim impact evidence as "designed to demonstrate the victim's

uniqueness as an individual human being and the resultant loss to the communities' members by the victim's death." §921.141(7), Fla.Stat. (1993). Indefinite provisions of statutes, particularly penal statutes, render such statutes unconstitutionally vague. Locklin v. Pridgeon, 30 So.2d 102 (Fla. 1947); D'Alemberte v. Anderson, 349 So.2d 164 (Fla. 1977). The statute at issue fails to define or to limit evidence that can be used to demonstrate "loss to the community," rendering death penalty decisions subject to application by popular opinion.

Likewise, presentation of victim impact evidence regarding a victim's "uniqueness as a human being" renders the provision at issue subject to results in which the death penalty is imposed against those convicted of killing popular or successful victims, as opposed to victims whose individual accomplishments and contributions to the community are less clearly demonstrable, such as members of lower socioeconomic classes. Clearly, that is not a permissible constitutional result under federal and Florida equal protection requirements. Furthermore, because victim impact evidence merely constitutes an additional aggravating factor beyond those enumerated in §921.141(5), and the description of this aggravator "is so vague as to the leave the sentencer without sufficient guidance for determining the presence or absence of the factor," the provision cannot withstand constitutional scrutiny. Espinso v. Florida, 505 U.S. 1079 (1992).

Application of this factor can lead to racial or class prejudice for or against particular victims and defendants, see,

Turner v. Murray, 476 U.S. 28 (1986) and Robinson v. State, 520 So.2d 1 (Fla. 1988), denying equal protection of the laws both to victims and defendants based on improper consideration of issues such as the social acceptability, vel non, of a particular individual. See, Bolender v. State, 422 So.2d 833 (Fla. 1982); Coleman v. State, 610 So.2d 1283 (Fla. 1992). This factor also compels defense counsel to litigate capital sentencing, in part, by seeking to devalue the uniqueness or community contributions of particular victims, a consequence that should not be invited. Accordingly, the death sentence in this case should be reversed.

C. Victim Impact Evidence is Prohibited by the Additional Provisions of the United States and Florida Constitutions.

Article I, Section 17 of the Florida Constitution provides broader protection for the rights of a capital defendant and the United States Constitution because of its prohibition of cruel or unusual punishment." Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). A death sentence can be unconstitutional by being found unusual due to the procedures employed in a capital sentencing proceeding. Id. Because of the vagaries and uncertainties of the degree of availability of victim impact evidence in a particular case, application of §921.141(7) is wholly random. This randomness further demonstrates the unbridled discretion released by permitting victim impact evidence. These circumstances all demonstrate that the admission of victim impact evidence violates the Fifth, Sixth, Eighth and Fourteenth Amendments of the United

States Constitution and Article I, Sections 9, 17 and 21 of the Florida Constitution. Also, enactment of §921.141(7), Fla. Stat., violates Article V, Section 2 of the Florida Constitution by constituting a legislative encroachment of this Court's sole authority to regulate practice and procedure in Florida courts. Cf., Haven Federal Savings and Loan Association v. Kirian, 579 So.2d 730 (Fla. 1991); State v. Garcia, 229 So.2d 236 (Fla. 1969). Accordingly, the death sentence in this case should be reversed.

D. Application of the Victim Impact Statute to This Case Violates the Ex Post Facto Clauses of the United States and Florida Constitutions.

The offense at issue in this case occurred in September 1990. The victim impact statute, §921.141(7), Fla.Stat., became effective in July 1992. Article I, Sections 9 and 10 of the Florida Constitution, prohibit legislative enactments of punitive measures with retroactive application to conduct previously completed. At the bottom of these ex-post facto provisions is the assurance that "legislative acts give fair warning to their effect and permit individuals to rely on their meaning until explicitly changed." Weaver v. Graham, 450 U.S. 24, 28-29 (1981). Where a defendant is disadvantaged by application of a new law to events occurring before the enactment of that law, the ex-post facto provision is violated. Blankenship v. Dugger, 521 So.2d 1097 (Fla. 1988); Miller v. Florida, 482 U.S. 423, 430 (1987). Application of the victim impact provision to this case clearly denigrates a

substantial and substantive right of the defendant. Accordingly, the death sentence below should be reversed.

XVIII.

THE SENTENCING COURT ERRED BY IMPOSING MULTIPLE PUNISHMENTS FOR SINGLE CONVICTIONS.

Mr. Murray was found guilty of sexual battery and burglary with an assault, and his burglary sentence was enhanced under the habitual offender statute. [Vol. III, 447, 453]. Likewise, the sentencing court used those offenses and prior offenses as aggravating factors to impose the death penalty for Mr. Murray's murder conviction. By doing so, the sentencing court punished Mr. Murray twice for the same offense in violation of the double jeopardy clause. See North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (double jeopardy clause protects against multiple punishments for the same offense). Accordingly, the sentencing court violated Mr. Murray's rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9, of the Florida Constitution.

XIX.

THE TRIAL COURT IMPROPERLY FAILED TO ADVISE THE JURY OF THE GRAVITY OF ITS SENTENCING RECOMMENDATION.

The death sentence in this case should be reversed because the trial court failed to convey to the jury any meaningful sense of the gravity with which the trial court was bound by law to consider

the recommendation of the jury. The jury was instructed that its penalty verdict was merely advisory and that "the final decision as to what punishment shall be imposed is the responsibility of the judge." [Vol. III, 429; Vol. LXIV, 2358]. At no time did the trial court advise the jury that the judge was required to give great weight to the jury's penalty recommendation.

As a matter of law, a circuit judge in Florida is required to give great weight to the sentencing recommendation of the jury in a capital case. See, e.g., Christmas v. State, 632 So.2d 1368, 1371 (Fla. 1994); Marshall v. State, 604 So.2d 799, 805 (Fla. 1992); Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). Although this Court has affirmed similar failures to instruct the jury as to the great weight of its penalty recommendations in capital cases, e.g., Grossman v. State, 525 So.2d 833, 839-840 (Fla. 1988), such a failure to convey to the jury its role in the capital sentencing scheme violates the principles enunciated in Caldwell v. Mississippi, 472 U.S. 320 (1985). The affirmance of Florida's multi-phase capital sentencing scheme in Spaziano v. Florida, 468 U.S. 447 (1984), upon which this Court relied in Grossman and other cases, did not address the issue presented here.

Because the role of the jury is crucial in Florida's capital sentencing scheme, the jury must be informed that its recommendation carries the great weight in order to properly evaluate the sentence it recommends, and so further the constitutional requirement that the death penalty be reserved for

only the most extreme capital cases. Accordingly, the death sentence in this case should be reversed.

XX.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A DEATH SENTENCE.

The aggravating factors sought to be proved by the State in this case involved evidence that Mr. Murray had committed prior violent felonies, that the crime for which a death sentence was sought was committed during the course of burglary and/or sexual battery and was committed for financial gain, and that the crime was especially heinous, atrocious or cruel. As argued by the State, the HAC factor "is the most important one" of the aggravating circumstances asserted. [Vol. LXIV, 2301]. As set forth elsewhere in this brief, the HAC determination was improper, other aggravators were erroneously found or applied, the mitigating circumstances presented by the defendant were improperly not found to be established, and the remaining asserted aggravating circumstances are insufficient to outweigh the mitigating evidence presented. See, Issues X, XI, XII, XIII, XIV, XV, XVI and XIX. This is particularly so in light of the paucity of evidence of Mr. Murray's guilt of the underlying offenses, as argued elsewhere in this brief. See, Issue IX. Accordingly, the death sentence in this case should be reversed.

XXI.

FLORIDA'S DEATH PENALTY IS UNCONSTITUTIONAL BECAUSE ELECTROCUTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

The sole method of administering the death penalty in Florida is by electrocution. Section 922.10, Fla. Stat. (1993). Electrocution, however, constitutes cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sec. 17 of the Florida Constitution because of its torturous inherent nature, evolving standards of decency and the availability of less cruel but equally effective methods of execution. Electrocution inflicts excruciating torture per se. Gardner, Executions and Indignities -- An Eight Amendment Assessment of Method of Inflicting Capital Punishment, 39 Ohio State L.J. 96, 125 n. 217 (1978). Further, unspeakable torture results from malfunctions in the electric chair. Louisiana ex rel Frances v. Resweber, 329 U.S. 459, 480 n.2 (1947); Buenonano v. State, 565 So.2d 309 (Fla. 1990). These facts further are aggravated by the bodily mutilation and mental anguish attendant to electrocution and its preliminaries.

These factors alone demonstrate that electrocution violates the cruel and unusual punishment prohibition of the Eighth Amendment. Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In Re Kemmler, 136 U.S. 436, 447 (1890); Coker v. Georgia, 433 U.S. 584, 592-596 (1977). Moreover, certain types of punishment constitutionally permissible in the past become unconstitutionally cruel and unusual as less torturous methods of execution are

developed. Furman v. Georgia, 408 U.S. 239, 279 (Brennan, J., concurring), 342 (Marshall, J., concurring), 430 (Powell, J., dissenting). Less cruel alternatives to electrocution not only have been developed but have been implemented in a growing number of states, particularly lethal injection. See, Gardner, supra, at 128-129. In light of all of the foregoing, execution of a death sentence by electrocution violates the United States and Florida constitutions by constituting nothing more than a purposeless and needless imposition of pain and suffering. Coker, 433 U.S. 592. The time has come to abolish electrocution as Florida's method of inflicting the death penalty because that method is unconstitutional. Accordingly, Mr. Murray's death sentence should be vacated and remanded for imposition of a sentence of life imprisonment.

XXII.

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

Proportionality review of a death sentence is bottomed on "the premise that death is different." Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988). The death penalty may lawfully be applied only to "the most aggravated, the most indefensible of crimes." State v. Dixon, 283 So.2d 1, 8 (Fla. 1973).

Where aggravating factors are stricken, where as few as one aggravating factor remains, a death sentence may be affirmed only where little or nothing exists in mitigation of the penalty. McKinney v. State, 579 So.2d 80, 81 (Fla. 1991). As set forth

above, the trial court ignored the mitigating evidence presented by Mr. Murray in its entirety, and the aggravating circumstances either are substantially fewer than as determined below, or carry little weight, or both, as set forth elsewhere in this brief.

As a first principle, proportionality analysis is not based solely on the number of aggravating factors. Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988) (death not proportional despite five aggravating factors, including a prior violent felony); Livingston v. State, 565 So.2d 1288, 1292 (Fla. 1988) (death not proportional reviewing two aggravating factors, including prior violent felony, against mitigating factors). See, also, Kramer v. State, 619 So.2d 274 (Fla. 1993) (death not proportional; two aggravators (prior violent felony and HAC) and mitigators of alcoholism, mental stress, loss of emotional control, good worker, adjustment to prison); Livingston v. State, 565 So.2d 1288 (Fla. 1988) (death not proportional; two aggravators (prior violent felony and murder during commission of felony) and mitigators of low intelligence, cocaine and marijuana abuse and abusive childhood); Fitzpatrick, 527 So.2d at 811 (death not proportional despite five aggravators); Jackson v. State, 575 So.2d 181 (Fla. 1991) (death not proportional despite two aggravators, including prior violent felony). As a result of the foregoing, the death sentence in this case violates Art. I, Secs. 9, 16 and 17 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. Accordingly, the death sentence in this case must be reversed.

XXIII.

THE SENTENCING COURT ERRED IN SENTENCING GERALD MURRAY TO TWO CONSECUTIVE LIFE SENTENCES WHEN HIS SENTENCE ON ONE COUNT HAD BEEN ENHANCED UNDER THE HABITUAL OFFENDER STATUTE.

Mr. Murray was found guilty of burglary with an assault. [Vol. III, 447]. For that conviction, he was found to be an habitual offender and his sentence was enhanced to life. [Vol. III, 451, 453]. Mr. Murray was likewise found guilty of sexual battery and sentenced to life imprisonment. [Vol. III, 447, 452]. The sentencing court ordered that Mr. Murray serve these sentences consecutively. [Vol. III, 452].

It is well established that a sentencing court cannot impose a habitual offender enhanced sentence on one count and impose the sentence consecutively to that for another count for acts occurring during a single criminal episode. See, Hale v. State, 630 So.2d 521 (Fla. 1993); Garrison v. State, 654 So.2d 1176 (Fla. 1st DCA 1995); Goshay v. State, 646 So.2d 213 (Fla. 1st DCA 1995); Anderson v. State, 637 So.2d 971 (Fla. 5th DCA 1994). The court had the option of enhancing Mr. Murray's sentence by finding him to be a habitual offender or by ordering that his sentences be served consecutively, but not both. Hale, supra; Anderson, supra. Accordingly, the sentencing court erred by ordering that his life sentences be served consecutively. Accordingly, Mr. Murray is entitled to a new sentencing hearing with respect to non-capital offenses.

CONCLUSION

For all of the foregoing reasons, the convictions and sentences in this case should be reversed.

Respectfully submitted,

Wm. J. Sheppard, Esquire
Florida Bar No.: 109154
Richard W. Smith, Esquire
Florid Bar No.: 013943
D. Gray Thomas, Esquire
Florida Bar No.: 956041
Sheppard and White, P.A.
215 Washington Street
Jacksonville, Florida 32202
Phone: (904) 356-9661
Facsimile: (904) 356-9667
ATTORNEY FOR APPELLANT

Fletcher N. Baldwin, Esquire
Georgia Bar No.: 034600
University of Florida
College of Law
P.O. Box 117625
Gainesville, Florida 32611
Phone: (904) 392-2260

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Richard Martell, Esquire,** Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050, by mail, this 13th day of November, 1995.

ATTORNEY

lh.0113