IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CHADWICK BANKS,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

CASE NO. : 83,774
LOWER CASE NO.: 92-841-CFA

On appeal from the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant CHADWICK BANKS was arrested on September 24, 1992, in Gadsden County, Florida, and booked into the county jail on two counts of first-degree murder and one count of sexual battery on a child under the age of twelve. (R-1). Banks was indicted for two counts of first-degree murder and one count of sexual battery on a child under the age of twelve for the murders of Cassandra Banks and Melody Cooper, and for a sexual assault upon Melody Cooper. (R-10).

On March 14, 1994, Banks entered pleas of no contest to first-degree murder for the death of Cassandra Banks, to first-degree murder for the death of Melody Cooper, and to sexual battery on a child under the age of twelve. (R-144; T-1-12). The plea agreement between the prosecutor and appellant was as follows:

> The state agreed to waive the death penalty for the first-degree murder of Cassandra Banks, resulting in the imposition of the mandatory sentence of life with a twenty-five year minimum mandatory; the minimum mandatory penalty (life without possibility of parole for twenty-five years) as to the sexual battery charge in Count 111.

(R-144). There was no agreement between the state and the defense as to the sentence for the first-degree murder charge of Melody Cooper, and the state and defense agreed to try the penalty issue to a jury. (R-144; T-1-12).

Jury selection for the penalty phase began immediately after the entry of the pleas. (T-22). The defense made several challenges for cause which were denied. (T-240-49; T-242-43; T-244-46; T-414-15). The defense also challenged the state's

challenge of potential juror Fitzgerald for Neal violations. (T-250-51).

At the conclusion of the evidence, the court and trial attorneys met to discuss jury instructions. (T-844). Defense counsel requested a specially-drafted jury instruction regarding the weighing of aggravating and mitigating circumstances. **(T-847).** The trial court rejected that request, and gave the standard jury instruction. **(T-847-48;** T-894).

The trial court next considered instructions as to aggravating factors. The state requested the jury be instructed regarding appellant's prior conviction for the contemporaneous murder of Cassandra Banks. **(T-849).** The defense did not object to that instruction, but did object to the state's request to instruct the jury that appellant's prior case involving aggravated assault charges was a felony involving the use or threat of violence, (T-850).

The state also requested that the instruction be given that the capital felony was committed while the defendant was engaged in a sexual battery. (T-850). Appellant's trial counsel objected, arguing that the reliance upon a felony for that aggravating factor was impermissible where the felony was also the underlying felony for felony murder. (T-851). The trial court overruled the appellant's objection and gave the instruction that "the crime for which the defendant is to be sentenced was committed while the defendant was engaged in the commission of the crime of sexual battery." (T-851).

The state requested the trial court instruct the jury as to the aggravating factor "heinous, atrocious and cruel." (T-852). Trial counsel objected on several grounds: first, trial counsel asserted that there was insufficient evidence to support that instruction; second, trial counsel interposed an objection based on the adoption of the post-Espinoza instruction adopted by this Court in Jackson. (T-852). Trial counsel also objected as to the specific language of the instruction on this aggravator, and requested specific language to modify this instruction. (T-855).

The state also requested that the jury be instructed as to the aggravating factor "cold, calculated and premeditated manner." (T-856-57). Trial counsel objected, asserting there was no evidence introduced to support this factor, citing Rogers v. State, 511 So.2d 526 (Fla. 1987). (T-857). Additionally, trial counsel objected to the instruction on the cold, calculated, and premeditated aggravator because of insufficiently-drafted jury instructions. (T-857). The trial court noted the defense objection, but stated its intention to instruct the jury as to that factor. (T-859).

The defense requested instructions as to statutory mitigating factors of age and character of defendant and circumstances of the case. (T-861). The trial court granted those requests. (T-862).

Trial counsel also objected to the state's reliance upon the sexual battery of Melody Cooper as a qualifying felony for purposes of the aggravating factor "committed while engaged in a sexual battery," arguing that the jury could also consider the underlying

sexual battery in the aggravator "heinous, atrocious or cruel." (T-864). Trial counsel argued that such consideration would constitute improper doubling. (T-864-66).

Trial counsel renewed the objections to the jury instructions at the time the jury was instructed. (T-869).

The case was presented to the jury for deliberation on March 18, 1994; the jury returned a nine-three verdict in favor of death. (R-148). A sentencing hearing was held on April 29, 1994. The trial court imposed the death penalty, and entered its written findings in support thereof. (R-177). In support of the imposition of the death penalty, the trial court found the following aggravating factors:

a. Appellant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;[1]

b. The felony was committed while the defendant was engaged in the commission of a sexual battery; and

c. The felony was especially heinous, atrocious, or cruel.

(R-178-80).

Although the trial court had instructed the jury on the question of cold, calculated and premeditated manner of homicide,

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[1]The court relied on the conviction for the simultaneous homicide of Cassandra Banks. Although the court had instructed the jury that appellant's prior aggravated assaults constituted prior violent felonies, the trial court determined in its sentencing order that because appellant had been on probation at the time of the homicide and had not been convicted of aggravated assault, that the aggravating circumstance "did not exist." (T-893; R-178).

and evidence had been presented on that issue, the trial court found in its written findings that this aggravating circumstance had not been proved beyond a reasonable doubt. (R-180).

The court found several non-statutory mitigating circumstances and one statutory mitigator had been proved, but held that some were only entitled to minimal weight. (R-181-83). Specifically, although the court found that the defendant's age was a mitigating factor, it indicated that the age of the defendant was a factor to which it would give only minimal weight. (R-182). Additionally, the court found that the non-statutory mitigating circumstances of service in the military, employment history, good character and contribution to the community and family had been proved, but that they were "no more than society expects from the average individual, and thus not entitled to great weight." (R-182).

The court rejected the defense claim that defendant was a religious person and as well rejected the claim that the defendant had been under the influence of alcohol at the time of the killing. (R-182). Additionally, the trial court awarded some weight to the non-statutory mitigating factor of potential for rehabilitation, but did state that this factor was not entitled to great weight under the circumstances *of* this case. (R-183).

The court also found that the non-statutory mitigating factor of "cooperation with the police" was entitled to only minimal weight and that the fact that the defendant had the love and support of his family was "not entitled to great weight." (R-183).

Appellant timely filed his notice of appeal. (R-207).

STATEMENT OF THE FACTS

Cassandra Banks and her daughter, Melody Cooper, lived in a trailer on East Highway 90 in Quincy, Florida, behind Dut's Tavern. (T-531; T-538). Dut's is a nightclub owned by Dut Collins. (T-526; T-534). On the night before her death, Cassandra Banks went to Dut's, where she apparently had some type of confrontation with the appellant, Chadwick "Chad" Banks, to whom she had been married since 1992. (T-535; T-539). Chad Banks had apparently been talking to another woman while he was at Dut's. (T-530; T-535-36).

Annie Pearl Collins, who worked for her uncle serving beer at Dut's, testified that she had served Chad had at least three sixteen-ounce malt liquors at Dut's place that evening. (T-534-35). Leonard Collins, the manager of Dut's Place, testified that he had also served Chad two or three Colt 45's that night. (T-773; T-779).

Cassandra had one child from a previous relationship, Melody Cooper, who was born in 1981. (T-538-39). On the night before the deaths, Chad Banks, Melody Cooper, and Bernice Collins (Cassandra's grandmother) had gone to services at the Kingdom Hall. (T-538; T-542). Bernice Collins lived right behind Dut's place, about 263 feet from Cassandra's trailer. (T-537; T-540).

About 2:50 a.m. the next morning, Bernice Collins saw Chad Banks drive up to Cassandra's trailer and sit in his car for "about three or four minutes." (T-548). Bernice Collins testified she saw Chad Banks get out of the car and go "onto the front" of the trailer, but that she did not think he was carrying anything with

him. (T-548). Ms. Collins testified that at 3:50 a.m. she heard a car "spin off" in front of her house. (T-550).

Bernice Collins testified that the next morning, "Buddy" Black had gone at her request to Cassandra's trailer, where he discovered the bodies of Melody and Cassandra. (T-552). At the conclusion of Ms. Collins' direct testimony, she broke into tears on the witness stand and cried out to appellant, "Why did you kill her?" (T-554). After the outburst, the court ordered the jury taken out of the courtroom and appellant's trial counsel moved for a mistrial, which was denied. (T-554). Ms. Collins testified that Chad had moved into Cassandra's trailer after he and Cassandra married, and that he attended religious services with Cassandra and her daughter, Melody. (~-557-58). Ms. Collins testified that Chad attended the Kingdom Hall on Sunday, Tuesday and on Wednesday nights. (T-558).

Rutherford Black ("Buddy"), Cassandra's father, testified that on the morning of September 24, 1992, he went to Cassandra's home at the request of Bernice Collins. (T-565). Buddy Black testified that he discovered Melody face down on her arms and that he found Cassandra with a little blood on her face. (T-566). Buddy Black testified that he "turned right around and got the telephone and called 911." (T-566).

Cassandra Banks had died of a gunshot wound to the left side of the head, while Melody Cooper had died of a gunshot wound to the top of the head. (T-711; T-716). The medical examiner, Dr. Thomas Wood, testified that Cassandra Banks had been asleep at the time she was shot, and that she had been rendered unconscious

immediately. (T-714; T-712-13). Dr. Wood also opined that Melody Cooper had also been rendered immediately unconscious and immobilized, and would not have lived very long after having been shot. (T-723-24). Dr. Wood also testified that Melody had been sexually battered. (T-721-22).

At the time of the murders, Chad Banks was twenty-one years old. (T-817). He worked as a production crew leader at Fiberstone Quarries in Quincy. Eric Weitzlaben, the production manager at Fiberstone Quarries, had hired Chad in 1991 after he had responded to a newspaper ad. (T-765). Mr. Weitzlaben testified that he had selected Chad's job application because it was in neat form and had been filled out completely, and as well, because Chad had the features they were looking for in an employee. (T-765). Mr. Weitzlaben testified that he had participated in the interview of Chadwick Banks, who seemed to be a very polite man, very courteous and forthright. (T-765). Mr. Weitzlaben testified that Chadwick Banks was hired and started work the next day as a production worker. (T-765-66). Mr. Weitzlaben testified that Chad was ultimately promoted to production crew leader, supervising four other employees. (T-766). Weitzlaben testified that Chad was on time and always seemed to be doing a good job. (T-766). Mr. Weitzlaben testified that he thought Chad had a very high work ethic, and had given him a raise on the Wednesday before the murders. (T-766). Weitzlaben testified that Chad was very dependable and straightforward. (T-766-67).

Weitzlaben testified that on the morning after the murders,

Chad came to work, but appeared as if he had been out "all night long drinking." (T-767). Weitzlaben indicated that Banks had told him he had had a fight with his wife; Weitzlaben testified that it was the first time he had ever seen Chadwick Banks looking the way he did. (T-768).

Docell Strong, Chadwick's cousin, also worked at Fiberstone Quarries. (T-732; T-734). In fact, Chadwick had helped him get his job there. (T-734). Docell Strong testified that he had met Chad's wife, Cassandra, at a family reunion, and that she and Chad loved each other very much. (T-35). Strong testified that he had never seen Chad and Cassandra argue in public and that Chad was a very loving young man who was willing to give his "last cent to whoever asked for it." (T-738). Strong also testified that Chad was a hard worker, had a good sense of humor and was a generous human being, (T-738).

Michael Figgers, Chad's band instructor at Shanks High School, testified in his behalf. (T-745). Band Director Figgers testified that Chad joined the band in the ninth grade when he came to Shanks High School, and that he had been a part of the band from ninth through twelfth grade. (T-746). Chad has been one of the baritone players, although when he first started in band he played trumpet. (T-746). Chad had been one of the better players in the Shanks band, and during his last two years in band he was the section leader in his section. (T-747). Figgers testified that Chad was "the one to serve as the example to the other persons . . . as to the kind of person you should be . . . having good character,

having high goals, being a good student academically as well as musically . . . ." (T-747). Figgers testified that there was never a time that Chad did not meet these qualifications. (T-747). Of the other fifty faculty members at Shanks High School, none ever reported to Band Director Figgers that Chad was having trouble in any other subject. Figgers testified that he did not recall any instance of negative reports of Chad's behavior. (T-749).

Figgers also testified that Chad was a person that liked to "have fun, make people laugh, [and who had al good sense of humor." (T-749). Figgers testified that he had never seen Chad involved in any abusive behavior or anything derogatory towards other students. (T-749) .

Figgers testified that both of Chad's parents were very, very active and very supportive in the band booster organization. (T-750). Figgers noted that Chad's father was always there for Chad and always very supportive of whatever function the band was involved in. (T-750-51). Figgers testified that Chad was always very respectful of teachers and of his parents. (T-751). Figgers testified that after Chad graduated from high school, he kept in touch with him by mail, and that oftentimes Chad would visit rehearsals in the band room when he was home. (T-754).

Genevieve Everett, who was the Curriculum Assistant at Havana Northside High School, testified that she knew Chad Banks from Carter Parramore School when he had been in the 9th grade, and had also known him at Shanks High School when he had been in the 12th grade, (T-756-57). Ms. Everett testified that Chad was typical

teenage student who was in the middle of his class academically. (T-758).

Ms. Everett testified that Chad was in a class she took on a field trip to Washington, D.C. (T-759). Ms. Everett testified that Chad's father chaperoned the trip, and that only students who had no behavior problems had been permitted to go. (T-760). Chad was in the ninth grade at the time. (T-802).

Chad Banks' father, Dennis Banks, also testified. (T-789). Mr. Banks testified that Chad was the oldest of seven children, and that the family had always lived in Gadsden County. (T-790-91). Dennis Banks testified that Chad had been a leader at home, and had presented a "fatherly image" to the other kids. (T-792). Mr. Banks testified that his family was a church-going family, and that Chad would often take responsibility for getting the other kids back and forth to church and school activities. (T-792). Mr. Banks testified that because both he and his wife worked, Chad had a lot of responsibility. (T-793). Dennis Banks testified that at the Banks' home there had been a religious hour every evening, and that Chad had been a leader in that activity. (T-793).

Mr. Banks testified that his mother (Chad's grandmother) lived next door on the family property, and that Chad had always made sure that she was taken care of. (T-794). Chad spent nights with his grandmother in order to make sure that she was not alone, (T-794).

Mr. Banks testified that he and his other children had visited Chad in jail since his arrest, and that they would continue to

support him. (T-795).

At the time of the trial, Mr. Banks worked for a private security company, providing security at the interstate highway rest stops. (T-790). He had previously worked as a corrections officer for the state prison system, and at the time of Chad's arrest had been working at Liberty Correctional Institution. (T-795-96).

Mr. Banks testified that he had visited Chad in the county jail after his arrest, and that Chad's behavior at that time led him to believe that Chad had been drinking. (T-798). According to Mr. Banks, Chad was "kind of sluggish" at that time. (T-800).

Dennis Banks described his relationship with his son Chad:

> Our relationship was one that no man could imagine. As a matter of fact, the whole family structure -- I mean, it's just -- what can you say about a son that was there for his father, and vice-a-versa? Chadwick and I spent -- 1 think we spent more time together than anybody else in this county. We just did numerous things together. From the point of conception I was there up, until he graduated from high school. And we just did everything together. We participated in over -- I don't know the number, but ever since my son was in 4th or 5th grade, there wasn't a game somewhere Friday night we weren't going to. We would go out-of-town a lot. We went to Atlanta on numerous trips, we went [to] Gainesville and this was school activities. And if he went on 400 trips, I was there with him.

(T-801-02).

Mrs. Rosemary Banks, Chad's mother, also testified. (T-813). Mrs. Banks testified that she was the coordinator of the State Housing Initiative Program in Gadsden County, and prior to that had been the Assistant Financial Director to the Clerk of Courts. (T-

814). Mrs. Banks testified that she kept the family history of her family, and had prepared a photograph album with family photographs, which was admitted into evidence as Defense Exhibit one. (T-815-17). The photo album contained photographs of family activities from Christmas to summer vacation to various graduations. (T-818-21). Mrs. Banks also testified about various certificates that Chad had received during school, including a certificates for outstanding achievement. (T-821).

Mrs. Banks also testified that on the morning after the murders, she had gone over to her mother-in-law's trailer, where Chad had slept. (T-835). Mrs. Banks testified that she had to shake Chad several times to wake him up and that she could tell that Chad had been drinking. (T-837). Mrs. Banks testified that she made Chad get in the car so she could take him to work, stating, "If he can stay out all night, he can work." (T-837). Mrs. Banks testified that because he had been concerned about the way Chad looked that morning, she followed him directly to his job. (T-837).

The state did not present evidence to rebut the defendant's evidence of mitigating circumstances. (T-843). However, the state did introduce evidence of Banks' prior charges of aggravated assault, for which he had been placed on probation. (T-699-702; State's Exhibit 40). At the time of the homicide, Banks had not been convicted of the offenses of aggravated assault. (R-178).

SUMMARY OF ARGUMENT

Appellant first asserts that the trial court erred in instructing the penalty phase jury as to the aggravating factor of "cold, calculated, and premeditated." Appellant relies on the case of Rogers v. State, 511 So.2d 516 (Fla. 1987), for the proposition that this aggravating factor did not apply under the facts of this case, and also relies on Jackson v. State, 648 So.2d 85 (Fla. 1994), to attack the validity of the actual instruction given.

Second, appellant asserts that the evidence presented in the penalty phase proceeding failed to establish that the murder was especially heinous, atrocious, or cruel. Appellant relies on Dixon v. State, 283 So.2d 1 (Fla. 1973) and its progeny in support of this point.

Third, appellant asserts that the trial court impermissibly doubled the statutory aggravators "during the commission of a felony" and "heinous, atrocious, and cruel." In support of this contention, appellant cites Castro v. State, 597 So.2d 259 (Fla. 1992), and Provence v. State, 337 So.2d 783 (Fla. 1977). Appellant asserts that because the trial court's sentencing order relied so heavily upon the sexual battery upon the victim to sustain its finding of "heinous, atrocious, and cruel," that the trial court impermissibly doubled the sexual battery.

Appellant next contends that the trial court erred in instructing the penalty phase jury regarding the prior crimes of aggravated assault when appellant had never been convicted of those offenses prior to the homicide. Appellant relies on the cases of

Garron v. State, 528 So.2d 353 (Fla. 1988), and Preston v. State, 564 So.2d 120 (Fla. 1990), in support of the proposition that the trial court should never have permitted mention of the prior offenses to the jury.

Additionally, appellant argues that the trial court erred by instructing the jury it could consider that the homicide had been committed during the commission of a sexual battery, when the same sexual battery was the underlying felony for purposes of first-degree felony murder. Appellant cites Maynard v. Cartwrisht, 486 U.S. 356 (1988), and Zant v. Stephens, 462 U.S. 862 (1983) in support of this argument.

Finally, appellant asserts that the trial court erred in rejecting or in assigning slight weight to the statutory and non-statutory mitigating factors presented by appellant.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO THE JURY AS TO THE AGGRAVATING FACTOR OF "COLD, CALCULATED AND PREMEDITATED"

Notwithstanding its ultimate finding that the state had failed to provide the aggravating factor of "cold, calculated and premeditated," the trial court instructed the penalty phase jury as to that factor, (R-180; T-856-59). The trial court gave the then standard jury instruction as to that aggravator:

> Four, the crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification. Premeditation, within the meaning of the first degree murder law, requires proof that the homicide was committed after consciously deciding to do so. The decision must be present in the mind of the defendant at the time of the killing. The law does not fix the exact period of time that must pass before the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

(T-893-94).

Trial counsel objected, arguing that there was no evidence had been adduced to support the heightened premeditation required in order to prove this aggravating factor. (T-857). Trial counsel cited Rogers v. State, 511 So.2d 516 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed. 2d 681 (1988), in support of the proposition that the aggravating factor "cold, calculated and premeditated" does not apply to every first-degree murder. (T-

857).

Trial counsel also objected to the jury instruction based on this court's holding in Jackson v. State, 648 So.2d 85 (Fla. 1994). In Jackson, this court declared the then-standard jury instruction unconstitutionally vague, and proposed an interim instruction as follows:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner with out any pretense of moral or legal justification. In order for you to consider this aggravating factor, you must find the murder was cold, calculated and premeditated, and that there was no pretense of moral or legal justification. "Cold" means the murder was the product of calm and cool reflection. "Calculated" means the defendant had a careful plan or prearranged design to commit the murder. "Premeditated" means the defendant exhibited a higher degree of premeditation than that which is normal required in a premeditated murder. A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

648 So.2d 85 (Fla. 1994).

The trial judge's giving of. the instruction as to "cold, calculated and premeditated" was doubly impermissible. First, because there was no competent, credible evidence to sustain the aggravating factor, the trial court erred in instructing the jury on the factor at all. This court has previously held that the state must prove a "heightened premeditation" in order to distinguish this aggravating circumstance from the premeditation element of first-degree murder. See, e.g. Crump v. State, 622 So.2d 963 (Fla. 1993) and cases cited therein. As this court held

in Crump:

> This Court has adopted the term "heightened premeditation" to distinguish this aggravating circumstance from the premeditation element of first-degree murder. See, e.g., Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988); Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed. 2d 681 (1988). The State can show heightened premeditation by the manner of the killing, but the evidence must prove beyond a reasonable doubt that the defendant planned or arranged to commit the murder before the crime began. Hamblen, 527 So.2d at 805; Rogers, 511 So.2d at 533. However, the Court has found that heightened premeditation is inconsistent when the killing occurs in a fit of rage. Mitchell v. State, 527 So.2d 179, 182 (Fla.), cert. denied, 488 U.S. 960, 109 S.Ct. 404, 102 L.Ed. 2d 392 (1988) .

See e.g. Hunter v. State, 20 F.L.W. S. 251 (Fla. June 1, 1995). In this case, there are no facts which can sustain a finding of "heightened" premeditation; in fact, the circumstances of this killing are not inconsistent with a fit of rage.

Second, the instruction given is absolutely insufficient under the rule of this court in Jackson v. State, 648 So.2d 85 (Fla. 1994). As this court noted in Jackson, "the jury is unlikely to disregard a theory flawed in law." 648 So.2d at 90.

Because the trial court erred first in instructing the jury on this statutory aggravator, and erred as well in giving an insufficient instruction in this regard, appellant was deprived of his right to a fair and impartial and properly instructed penalty phase jury, The imposition of the death sentence based on the advisory verdict of the jury in this cause must be reversed and remanded for a new sentencing hearing before a new jury.

ISSUE II

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL

In its "finding in support of the sentence of death," the trial court determined that the capital felony was especially heinous, atrocious, or cruel, and stated:

> Evidence was presented on this aggravating circumstance and the Jury was instructed on it. While the evidence presented indicated that the victim, Melody Cooper, died almost instantly upon being shot through the top of the head by Defendant, Chadwick D. Banks, the bullet lodging in her spine, it is clear from the evidence presented that the victim, a child under twelve (12) years of age was physically and sexually assaulted for approximately twenty (20) minutes prior to Defendant's murdering her. The actions of the Defendant, Chadwick D. Banks, clearly demonstrate that the crime was conscienceless and pitiless and unnecessarily torturous to the victim, Melody Cooper.
>
> The Court finds that this aggravating circumstance was proved beyond a reasonable doubt.

(R-179-80).

Appellant asserts that the evidence presented regarding the homicide of Melody Cooper fails to prove beyond a reasonable doubt that the murder was especially heinous, atrocious, or cruel. In support of this contention, appellant cites Dixon v. State, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed. 2d 295 (1974). In Dixon, this court interpreted the meaning of "especially heinous, atrocious, or cruel:"

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile;

> **and,** that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the consciousless or pitiless crime which is unnecessarily torturous to the victim.

283 So.2d at 9. See also Robertson v. State, 611 So.2d 1228 (Fla. 1993), and Watts v. State, 593 So.2d 198 (Fla. 1992).

Generally speaking, in order to be classified as "heinous, atrocious, or cruel," homicides must have some fact about them that is extremely distinguishable from the "norm." For example, in Campbell v. State, 571 So.2d 415 (Fla. 1990), "HAC" was sustained where the victim was stabbed twenty-three times over the course of several minutes and had defensive wounds.

Moreover, the facts of the crime must be vile and shocking, such as the facts in Thompson v. State, 619 So.2d 261 (Fla. 1993) (victim was repeatedly and continuously tortured, beaten, sexually assaulted and mutilated over a long period of time for apparent enjoyment).

As this court stated in Robertson v. State, 611 So.2d 1228 (Fla. 1993), "[t]he circumstance of heinous, atrocious, or cruel is appropriately found 'only in torturous murders--those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another'." 611 So.2d at 1233 (citations omitted).

Nothing sets this case apart from the "norm" of capital felonies, thus making the "HAC" finding improper. See, Lawrence v. State, 614 So.2d 1092 (Fla. 1993). Because only two aggravating factors remain, the error cannot be said to be harmless. The trial court's finding of the aggravating factor "heinous, atrocious, or cruel" constitutes error and the imposition of the death penalty based on such a finding must be reversed.

ISSUE III

THE TRIAL COURT IMPERMISSIBLY DOUBLED THE STATUTORY AGGRAVATORS OF "DURING THE COMMISSION OF A FELONY" AND "HEINOUS, ATROCIOUS AND CRUEL"

Because the trial court impermissibly "doubled" the offense of sexual battery to sustain the two separate aggravating factors "crime committed during the course of a sexual battery" and "heinous, atrocious and cruel," this cause should be reversed and remanded for a new sentencing hearing before a new jury.

It is' clear that the statutory aggravators cannot be doubled when the aggravators refer to the same aspect of the crime. Davis v. State, 604 So.2d. 794 (Fla. 1992); Castro v. State, 597 So.2d 259 (Fla. 1992); Provence v. State, 337 So.2d 783 (Fla. 1977). Because the sexual battery was such an essential part (in fact, the **only** basis for the finding) of the trial court's finding of "heinous, atrocious and cruel," the finding of both these circumstances constitutes an improper doubling.

The trial court's sentencing order specifically found that the aggravating factor of "crime committed during the course of a felony" had been proved beyond a reasonable doubt. (R-179). The trial court also found that the murder was especially heinous, atrocious or cruel, noting:

> It is clear from the evidence from the evidence presented that the victim, a child under twelve (12) years of age, was physically and sexually assaulted for approximately twenty (20) minutes prior to Defendant's murdering her. The actions of the Defendant, Chadwick D. Banks, clearly demonstrate that the crime was consciousless and pitiless and unnecessarily torturous to the victim, Melody

Cooper.

(R-180). In this instance, the trial court has relied solely on the fact that the victim was sexually assaulted before her death in order to sustain its finding that the murder was especially heinous, atrocious, or cruel. In fact, no other facts relating to the circumstances surrounding this homicide were proved. The sole evidence relating to this homicide consists of the fact that the victim was sexually battered and that she died instantaneously of a gunshot wound to the head. These facts are insufficient to prove the homicide was "especially heinous, atrocious, or cruel."

Because the trial court impermissibly relied on the sexual battery of the victim as a basis for two separate statutory aggravating factors, this court should reverse the imposition of the death penalty and remand for resentencing with instructions that the sexual battery **may** be relied on for only one aggravator, and that the trial court may not consider the sexual battery in determining whether the murder was especially heinous, atrocious or cruel.

ISSUE IV

THE TRIAL COURT ERRED IN INSTRUCTING THE PENALTY PHASE JURY THAT APPELLANT'S PRIOR CRIMES OF AGGRAVATED ASSAULT COULD BE CONSIDERED IN DETERMINING WHETHER AN AGGRAVATING FACTOR EXISTED

Although appellant was on probation for the crime of two counts of aggravated assault at the time of the murder in the instant case, he had never been convicted of those offenses. (R-178; R-159). When the state requested the trial judge instruct the jury that the crime of aggravated assault would be a previous crime of violence or threat of violence for aggravating purposes, trial counsel objected, noting that Banks had not ever been convicted of the offense of aggravated assault. (T-849-50).

In its instructions to the jury on the aggravating factor "prior crime involving threat of violence," the trial court instructed the penalty phase jury that "the crime of aggravated assault is a felony involving the threat of violence to another person," and allowed evidence of the prior pleas of no contest to be presented. (State's Exhibit No. 40). (T-893). At closing argument, the state argued that appellant Banks had been "previously convicted of a felony involving the use or threat of violence to some person". (T-872). The state went on to say:

> The second part of this, the defendant was previously convicted of a felony involving the use of or threat of violence to some person. How do we know that? On March the 29th, 1991, the defendant committed aggravated assault on two people: James Edward Baker and Tyrone Davis. We know that by the information that he pled to and the judgment by this very Court. This was introduced by me as evidence

> during this case. This crime took place just a little over a year before these murders happened.
> The law makes it an aggravator if a person has earlier been involved in a crime of violence.

(T-872-73).[2]

At the sentencing hearing, the trial court noted that notwithstanding its jury instructions as to regarding the aggravating circumstance of conviction of prior felony of violence, that at the time of the commission of the homicide, Banks had been on probation and adjudication of guilt for the aggravated assaults had been withheld. The trial court's sentencing order specifically rejected the aggravated assaults as an aggravating factor, stating that this factor had not been proved beyond a reasonable doubt. (R-178).

Because of the ultimate findings of the trial court, it was error for the court to allow evidence of the aggravated assault charges to be presented to the jury and to inform the jury it could consider them. Moreover, because the prosecutor emphasized the two prior cases of aggravated assault, the error cannot be said to be harmless. See Preston v. State, 564 So.2d 120 (1990), on appeal after remand 607 So.2d 404, cert. denied 113 S.Ct. 1619, 123 L.Ed. 2d 178 (19__). In Preston, this court noted:

> [W]e note that the prosecutor emphasized the importance of the prior violent felony in his closing

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[2]Appellant's trial counsel objected, arguing "misstatement of the law." (T-873). Trial counsel pointed out that the aggravator was only effective upon a ***conviction,*** and the court agreed. (T-873). However, the record is unclear as to the status of appellant's trial counsel's objection. (T-873).

> argument to the jury. . . . Under the circumstances, we are unable to say that the vacation of Preston's prior violent felony conviction constituted harmless error as related to his death sentence. 564 So.2d at 123.

At the time ft the offense in this case, section 921.141(5)(b), Florida Statutes (1991) permitted aggravating circumstances as follows:

> (a) The capital felony was committed by a person under sentence of imprisonment.
>
> (b) The defendant was previously convicted of another capital felony or of a felony involving the use of threat of violence to the person.

Subsection (a) was subsequently amended to include community control, but subsection (b) has not been amended. Therefore, at the time of the murder in this case, only prior ***convictions (or*** pleas of guilty in cases awaiting adjudication) of a felony involving the threat of violence to the person could be relied upon to sustain that aggravating factor. Garron v. State, 528 So.2d 353 (Fla. 1988). See also McCrae v. State, 395 So.2d 1145 (Fla. 1981). The state's emphasis that Banks had committed crimes involving the use or threat of violence upon two separate people was misleading and prejudicial and constituted error; this court must reverse this cause for a new sentencing proceeding before a new jury.

ISSUE V

THE TRIAL COURT ERRED IN INSTRUCTING THE PENALTY PHASE JURY THAT THE MURDER WAS COMMITTED DURING THE COMMISSION OF A SEXUAL BATTERY, WHEN THE SAME WAS AN UNDERLYING FELONY FOR PURPOSES OF FIRST DEGREE FELONY MURDER

In the instant case, there was no specific determination that the murder of Melody Cooper was premeditated, or whether it was felony murder. The state urged that the jury be permitted to consider the aggravating factor "committed while the defendant was engaged in the commission of a sexual battery." (T-850). The trial court instructed the jury that they could consider whether the state had proved that the crime had been committed while the defendant was engaged in the commission of the crime of sexual battery. (T-893). Trial counsel objected to that instruction, asserting state and federal constitutional grounds, and citing Maynard v. Cartwrisht, 486 U.S. 356 (1988) .

The net result of allowing the sexual battery to be relied upon as an aggravator is to make all felony murders in which the crimes enumerated in section 921.141(5)(d), Florida Statutes constitute the underlying felony eligible for the death penalty. Such an automatic aggravating circumstance does not genuinely narrow the class of persons eligible for the imposition of the death penalty, and is therefore violative of both state and federal constitutional guarantees. Zant v. Stephens, 462 U.S. 862 (1983). If the state employs aggravating factors to decide eligibility for the death penalty, it cannot use factors which as a practical

matter fail to guide the sentencer's discretion. Stringer v. Black, U.S. ___, 112 S.Ct. 1130 (1992). The penalty phase jury should not have been permitted to consider this aggravating factor, and the trial court's finding that it existed must be set aside.

ISSUE VI

THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING OR IN ASSIGNING ONLY SLIGHT OR LITTLE WEIGHT TO THE NON-STATUTORY MITIGATING FACTORS WHICH APPELLANT PROVED

This court has held there must be competent, substantial evidence to support a trial court's rejection of mitigators. See Johnson v. State, 608 So.2d 4 (Fla. 1992). In this case, appellant proved the evidence of nine non-statutory mitigating factors, and the court found seven of these factors had been proved. (R-182-83). The state presented no evidence to rebut or to impeach the evidence of these mitigators, and the facts of the homicide did not on their face rebut any of the mitigation evidence.

Appellant proved the mitigating factors through witnesses who were solid, stable members of the community: (1) the director of the high school band, (2) a long-time employee of the school board, (3) his employer who owned and managed a successful local business, and (4) and (5) his parents. Appellant's father was a long-time employee of the Department of Corrections and his mother worked for the State Housing Initiative Program in Gadsden County, but had previously worked for the Clerk of the Courts. (T-790; T-795-96; T-814).

The trial court's outright rejection of the non-statutory mitigation evidence presented by Banks as to his religious activities and that the crime was committed while he was under the influence of alcohol was not based on competent, substantial evidence. The state elected to present no evidence to rebut or

impeach this testimony; in fact, some of the evidence as to these two non-statutory mitigating factors came from the state's own witnesses. Cassandra Banks' grandmother testified about the regularity with which Chad Banks attended religious services, and Leonard and Annie Pearl Collins testified about the amount of alcohol Banks had been served the evening before the murders. (T-534-35; T-558; T-773; T-779). The trial court's outright rejection of these two non-statutory mitigating factors was error; the trial court's assignment of slight weight to the remaining mitigating factors compounded the error, When the mitigating factors proved by appellant are considered--especially in the face of the erroneous consideration of two of the three aggravating factors--it is clear that the imposition of the death penalty in this case in inappropriate.

CONCLUSION

The trial court erred in finding the homicide in this case to be "especially heinous, atrocious, or cruel," and erred in finding that the offense was committed during the commission of a sexual battery. Because only three aggravating factors were proved, the improper determination that these two aggravators existed, coupled with the significant evidence of mitigation, mandates that the death sentence in this case be set aside and this cause be remanded for the imposition of a life sentence with no possibility of parole for twenty-five years.

Alternatively, because the trial court erred in its instructions to the penalty phase jury, this case must be reversed and remanded for a new penalty phase hearing before a new jury,

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, Quincy, Florida, 32351; and to Robert A. Butterworth, Attorney General, the Capitol, Tallahassee, Florida 32301, by regular United States Mail this 10th day of January, 1996.

Teresa J. Sopp
Attorney for Appellant