IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

FLOYD W. DAMREN,)
Appellant,)
vs.)
STATE OF FLORIDA,)
Appellee.)
)

CASE NO.: 86,003
LOWER CASE NO.: 94-537-CF

On appeal from the Circuit Court of the Fourth Judicial Circuit, in and for Clay County, Florida

INITIAL BRIEF OF APPELLANT

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THE IMPOSITION OF THE DEATH PENALTY IN THIS CAUSE IS NOT PROPORTIONATE WITH THE IMPOSITION OF THE DEATH PENALTY IN OTHER CASES

STATEMENT OF THE CASE

Appellant, Floyd William Damren, was indicted for first-degree murder, armed burglary, and aggravated assault by the Clay County Grand Jury on May 10, 1994. (R-7). The indictment alleged that Damren committed first-degree murder of Donald Miller with premeditated design, and that Damren had burglarized Miller's place of business, R.G.C. Minerals Sands [sic] with the intent to commit the offense of battery therein, and finally, charged that Damren assaulted one Michael Knight with a metal pipe. (R-7).

Trial counsel filed the following motions as to the death penalty:

(1) Motion to declare section 921.141, Florida Statutes, unconstitutional as applied because of arbitrariness in jury overrides and sentencing.

(2) Motion for special verdict (R-63).

(3) Motion for statement of aggravating circumstances (R-72).

(4) Motion to dismiss and to declare sections 782.04 and 921.141, Florida Statues, unconstitutional for a variety of reasons. (R-76).

(5) Motion to declare section 782.04 and 921.141, Florida Statutes, unconstitutional, because of treatment of mitigating circumstances. (R-92).

(6) Motion to declare section 921.141 and 922.10, Florida Statutes, unconstitutional because electrocution is cruel and unusual punishment. (R-97).

(7) Motion for evidentiary hearing, and for payment of fees

and costs of expert and lay witnesses, on the constitutionality of death by electrocution. (R-112).

(8) Motion to declare section 921.141(5)(h), Florida Statues, unconstitutional. (R-124).

(9) Motion to declare section 921.141(5)(i), Florida Statutes, unconstitutional. (R-142).

(10) Motion to declare section 921.141(5)(d), Florida Statues, unconstitutional. (R-170).

(11) Motion for evidentiary hearing and for payment of fees and costs of expert witnesses on the constitutionality of death qualifications. (R-180).

(12) Motion to prohibit misleading references to the advisory role of the jury at sentencing. (R-185).

(13) Motion to prohibit impeachment of defendant by prior criminal convictions, or, in the alternative, to impanel a new penalty phase jury. (R-188).

(14) Motion to prohibit argument and/or instructions concerning first-degree murder. (R-192).

(15) Motion to prohibit instruction on aggravating factors 5(h) and 5(i). (R-197).

(16) Motion to preclude death qualifications of jurors in the innocence or guilt phase of the trial and to utilize a bifurcated jury, if a penalty phase is necessary. (R-200).

Trial counsel also filed a motion to incur costs of expert witnesses, seeking the court to approve the expense of retaining Dr. Robert T. M. Phillips, of the American Psychiatric Association.

(R-223). Trial counsel also filed a motion to suppress pre-trial photo identification and in-court identification [of appellant] by witness Mike Knight. (R-253). Appellant also filed a motion to prohibit pre-sentence investigation report. (R-268).

On May 5, 1995, the prosecution filed a notice of other crimes, wrongs, or acts evidence, pursuant to section 90.402 and 90.404(2), Florida Statutes. The state sought to introduce the following evidence:

> FLOYD WILLIAM DAMREN on or between the dates of the 18th day of April, 1994, and the 20th day of April, 1994, in the County of Clay, and the State of Florida, did unlawfully enter or remain in a conveyance, to-wit: motor vehicle, the property of Sun Electric, with the intent to commit an offense therein, to-wit: theft, contrary to the provisions of section 810.02, Florida Statutes.
>
> FLOYD WILLIAM DAMREN on or between the 18th day of April, 1994, and the 20th day of April, 1994, in the County of Clay, and the State of Florida, did knowingly obtain or use or endeavor to obtain or use a generator and other tools, the value of $300.00 or more, but less than $20,000.00, the property of Sun Electric, with intent to either temporarily or permanently deprive Sun Electric of a right to the property or benefit therefrom, or with the intent to appropriate the property to his own use or to the use of any person not entitled thereto, contrary to the provisions of Section 812.014(2)(c), Florida Statutes.

(R-318). Appellant filed a motion in limine as to the similar fact evidence and a motion to prohibit the use of this Williams Rule evidence, or, in the alternative to empanel a new penalty phase jury. (R-264-71).

Hearing on the notice of similar acts was actually held before opening statements; counsel for each party agreed to refrain from

mentioning the prior act in their opening statements. (T-348-57). After the conclusion of opening statements, further hearing was held, and the court ruled that the evidence of the prior theft from Sun Electric was "inextricably intertwined" with the events for which appellant was on trial, and was also relevant to the intoxication defense. (T-376). The defense motion in limine was denied, and the court permitted the state to introduce the similar fact evidence. (T-376).

During closing argument, the defense objected to the prosecutor's statements that "intoxication can be a defense if you cannot form a mental state . . . ," and "[h]how drunk would you have to be not to know you've committed a murder or a burglary?" (T-667; T-668). The trial court overruled the objection. (T-669). Appellant was convicted of first-degree murder, armed burglary of a structure, and aggravated assault. (R-415-17).

PENALTY PHASE

On May 18, 1995, the penalty phase of the trial was held. (T-715). The state indicated its intention to introduce victim impact evidence (T-719); and the defense filed a motion to exclude evidence or argument designed to create sympathy for the deceased. (R-282). The defense also filed a requested instruction on victim impact evidence. (T-726; R-686). Defense counsel filed requested penalty phase jury instructions (R-651), and an additional proposed instruction regarding the "heinous, atrocious, and cruel" instruction. (R-681). The defense also requested special instructions on the definition of "cold, calculated, and

pre-meditated," "doubling," and on victim impact evidence. (R-684, 685, 686).

The state presented written statements of the wife and of the daughter of the victim Donald Miller. (T-729; R-421-22). The defense objected to the admission of these statements in any form; after the court overruled this objection, the defense made specific objections to various portions of each statement. (T-730). The trial court denied the defense motion to exclude all of the victim impact evidence, but did modify the statements pursuant to defense request. (T-734). Amended statements of Donald Miller's wife and daughter were read to the jury. (T-831-37; R-423-24).

Prior to the introduction of penalty phase evidence, the state proffered evidence in support of its claimed aggravating factors. The state sought to introduce through in-court testimony the out-of-court statements of Jeffrey Chittam in support of its contention that the homicide had been heinous, atrocious and cruel and that the homicide had been committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (T-740). The state set forth the proffered statements in a memorandum, claiming the following statements were attributable to Chittam:

> Floyd and I went down to the mines tonight and Floyd hurt someone. Jeff said he was peeing on a locker when the man walked up and asked Jeff what he was doing. Floyd came up from behind the man with a metal pipe in his hand and at some point in time hit the man and knocked him to the ground.
>
> The victim then started begging for them to let him go. Floyd started pacing back and

> forth and Jeff was telling the man to get up. Jeff heard the victim's name over the intercom and the victim said "Hey that's me." During the time the victim was on the ground the victim told them that he was going on vacation and was going to take his grandson fishing.
>
> Jeff stated that he, Jeff, begged Floyd to let the victim go. At some point in time someone else came up and Jeff told Floyd there's someone else and Floyd started chasing him. Jeff then ran out the building and across the pipe into the woods. Floyd later got the truck and picked Jeff up down the railroad tracks.

(R-678). The defense stipulated to the existence of the aggravating factor of conviction of prior crime of violence, and to the aggravator of pecuniary gain and felony murder. (T-737-38).

During the penalty phase closing argument of the state, defense counsel objected to the following comment by the prosecutor:

> What has happened to this once great family must be considered in determining Floyd Damren's personal responsibility and guilt, his blameworthiness.

After deliberation, the jury returned an advisory verdict for imposition of the death penalty. (R-694).

Defendant filed a motion for new penalty phase hearing (R-711), which was denied on May 25, 1995. (R-718).

Appellant was sentenced to death on the charge of first-degree murder, to a term of natural life on the charge of armed burglary, and to ten years for the offense of aggravated assault.[1] (R-779). The trial court determined the following aggravating circumstances

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[1]Appellant was sentenced as a habitual offender on the second and third counts.

to exist in support of its imposition of the death penalty:

(1) the defendant has been previously convicted of a felony involving the threat of violence to some person;

(2) the crime for which the defendant is to be sentenced was committed while he was engaged, or was an accomplice, in the commission or attempted commission of the crime of armed burglary, and was committed for financial gain;

(3) the crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel;

(4) the crime for which defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R-789-91).

In its sentencing order, the trial court summarized the mitigating circumstances presented by appellant. (R-791). The trial court rejected most of the mitigating circumstances presented by defendant. Those to which the trial court gave no weight were:

(a) alcohol impaired Mr. Damren's judgment and thinking before he went to R.G.C.;

(b) alcohol impaired Mr. Damren's judgment and thinking when he and Jeff Chittam were at R.G.C.;

(c) Mr. Damren suffered emotional deprivation and little parental support as a child;

(d) Mr. Damren has held jobs and has performed well in his work;

(e) Mr. Damren has been kind to his mother, sister, and brother;

(f) Mr. Damren has shown patience with and affection for children;

(g) Mr. Damren has been a generous and devoted friend who has gone out of his way to do things for his friends;

(h) Mr. Damren served his country in the United States Army and in Vietnam;

(i) Mr. Damren maintained a relationship with Nancy Waldrup and treated Tessa Mosley like a daughter.

(R-791-96).

The trial court gave "little weight" to the following circumstances:

(a) The burglary did not involve a sophisticated plan or a preconceived plan to use weapons or violence;

(b) Mr. Damren did not act alone and the exact role of each accomplice is not clear;

(c) Mr. Damren has an alcoholic father and has suffered with his own alcohol problem;

(R-791-94). Finally, the court gave "some weight" to the fact that Mr. Damren exhibited good behavior in the Clay County Jail during the past year. (R-794-95).

Appellant timely filed his notice of appeal. (R-820).

STATEMENT OF THE FACTS

At 8:30 p.m. on May 1, 1994, Michael Knight was making his rounds at the R.G.C. Mineral Sands Company in Clay County, Florida. (T-380). Knight was a shift supervisor in charge of production control and plant security at the mining facility located off U.S. Highway 17. (T-379). After Knight checked the pumping area, he went to the electrical shop in the maintenance barn to look for Don Miller. (T-382-83). Miller had been paged about an hour previously to respond to a machinery problem, but had failed to respond to the page. (T-382).

Knight entered the electrical shop, looking for Miller. (T-383). When Knight opened the door he heard a "pipe sound hit the floor, a pipe sound come from the floor. . . . " (T-383). Knight opened the door to his immediate right, took two or three steps in, looked up and saw a man "holding Don's right britches -- his left britches leg." (T-384). Knight was about thirty to thirty-five feet away from Miller at that point. (T-384). Knight could only see Miller's lower trunk (from the waist down) at that time. (T-384).

The upper trunk of Donald Miller's body was obscured from Knight's view because it was blocked by a milling lathe. (T-402). Knight testified that although Miller was not being dragged, the man who had a hold of his "britches" leg looked like he had been dragging him. (T-384). Knight did not know whether the individual he saw who appeared to have been dragging Miller had been striking Miller prior to Knight's calling out. (T-385).

Knight hollered, "What are you doing?" and the man turned and reached up with his right hand. (T-385). Knight testified that the man had a brown-colored object in his left hand and that the man picked up a piece of galvanized steel pipe in his right hand, and then started at Knight. (T-385). Knight testified he had been about eight feet inside the door at this point in time. (T-385). Knight turned and ran, and did not see anything after he ran out the door. (T-388). Knight testified that when he had arrived in the electrical shop, he had seen tools that were normally kept in lockers with padlocks on them which had been left out in the open. (T-403-04). Knight also testified a battery charger had been left outside the building; this battery charger would normally have been stored inside the shop. (T-403). Knight also testified that a Snap-On tool chest had been left open, although it was normally secured and locked. (T-406-07).

Knight admitted that if there had been a second person hidden behind the milling lathe, that he would not have been able to see that person, standing by Miller's upper torso. (T-414). Knight also admitted that he did not see any blows land on Miller, and could not say who actually had battered Miller. (T-415).

Knight testified that he recognized the man holding Miller's britches as Floyd Damren. He testified Damren had lived in his same neighborhood since childhood. (T-389-90).

Dr. Margarita Arruza, the associate medical examiner for the Fourth Judicial Circuit, testified that she had conducted an autopsy upon Donald Miller. (T-425). Dr. Arruza testified that

Miller had suffered a minimum of seven blows to his face (T-435), and three blows to the back of his head. (T-436). Dr. Arruza opined that each of the three wounds to the back of Miller's head and as well the "big chopping wound to his face and skull," would have been sufficient to cause a loss of consciousness. (T-436). Dr. Arruza testified that Miller had defensive wounds on his arms and hands. (T-425-31). Dr. Arruza testified that of the ten or so total blows to Donald Miller's body, that only the three to the back of the head and the one across the forehead would have been fatal. (T-441). Dr. Arruza testified that the cause of Donald Miller's death was "cranial cerebral injuries." (T-441).

Wendy Leigh Hedley testified that on May 1, 1994, she was living in a mobile home located on Warner Road, within a couple of miles of the R.G.C. mine operation in Clay County. (T-449). Hedley testified that on May 1, 1994, she had received a telephone call at her mother's house from Jeff Chittam around 7:30 or 8:00 o'clock in the evening. (T-448). Hedley testified that during this telephone conversation with Jeff Chittam she could tell that Floyd Damren was with him. (T-449). Hedley testified that she returned to her mobile home some thirty to forty minutes later. (T-448; T-450).

Hedley testified she returned to her mobile home around 9:00 p.m., and that Floyd Damren, Jeff Chittam, and Tessa Mosley (her stepsister) were at the trailer. (T-451-52). Hedley testified that at some point after returning to her trailer, she and Jeff Chittam had a conversation in the bathroom. (T-452). Hedley

testified that Jeff Chittam was "scared and acting nervous," and was crying a lot during the evening. (T-453). Hedley testified that Jeff Chittam told her that he and Floyd Damren had done something wrong, something "real bad." (T-453).

Hedley testified that she subsequently confronted Floyd Damren, who appeared to be a little more calm, and that at first Damren acted as if he didn't know what she had been talking about. (T-454). According to Hedley, Damren ultimately said that "I didn't do it, Jeff did." (T-454). Hedley testified that Floyd Damren had said that he could get the electric chair. (T-454). Hedley testified that she had seen Damren drink close to a twelve-pack of beer from 9:00 o'clock until midnight on that evening. (T-456). Hedley testified that Damren did not appear to be drunk when he left her trailer. (T-457-58).

WILLIAMS RULE EVIDENCE

Over objection by the defense, Hedley was permitted to testify about a prior incident which occurred on the property of R.G.C. Mines. (T-459-63). Hedley testified that about two weeks before, she had ridden with Floyd Damren down a dirt road onto the property belonging to the mining operation. (T-460). Hedley testified that at that time, Floyd had gotten out of the truck and gotten onto a bigger truck. (T-460). According to Hedley, Floyd had taken some property from the bigger truck. (T-460). Hedley also testified that Floyd said that "there was some good stuff, some more good stuff down there I'd like to get." (T-463).

Prior to trial, the state filed a notice of similar fact

evidence, seeking to introduce this testimony of Wendy Hedley regarding Damren's prior theft from Sun Electric. (R-318). In opposition to the introduction of this evidence, trial counsel introduced depositions of Wendy Hedley, Tessa Mosley, and Joann Waldrup. (R-513-89; R-590-630; R-631-50). Wendy Hedley had previously testified in deposition that after an argument with her boyfriend, Damren had offered to take her for a ride in his truck. (R-573). According to Hedley, she and Damren went "down a dirt road that led to the mines." (R-573). Hedley testified that she and Damren had been "going down the dirt road and talking about the woods and everything and then we ended up at the mines." (R-573). Hedley testified that they had "come up between some woods and some railroad tracks, . . . when we pulled up there was a truck." (R-574).

According to Hedley, it was still light out at the time she and Damren had pulled up to this truck on the prior occasion, but she did not know what day of the week it had been. (R-575).

Hedley continued to testify at deposition regarding the prior incident. She testified that Damren "got on the truck," . . . and that "he was getting things off the truck." (R-578). According to Hedley, Damren took tools, and a generator or an air compressor. (R-579). She testified that the object was "really big and heavy." (R-579).

On deposition, Wendy Hedley testified that at some point in time, Floyd Damren had told her "that there was some real good stuff down there [at the mines] that he would like to get." (R-

584). Hedley could not remember whether it was the same day that Damren had previously stolen the generator. (R-584).

The defense called Roger Prout, Bart Greenway, and Walter Carey. (T-552-86). Prout testified that he had been at a trailer two doors down from Wendy Hedley's trailer on May 1, 1994. (T-553-55). At about 4:00 or 4:30, Floyd Damren had arrived at that trailer. (T-555). Prout testified that when Floyd pulled up, a group of fellows that were standing around began drinking beer. (T-556). Prout testified that Floyd Damren consumed maybe a 12 pack from the time he arrived until the time he left about 6:30 p.m. (T-557). Prout testified that prior to May 1, he had been out with Floyd Damren, and that Floyd could outdrink him. (T-557).

Bart Greenway testified that he had also been at the trailer park, helping Walt Carey install a motor, and that he remembered Floyd Damren arriving around 4:00 o'clock that afternoon. (T-556-57). Greenway testified that he saw Floyd Damren drinking beer over the period of the entire day, and that Floyd drank at least a case. (T-567). Greenway testified that about 7:00 or 7:30, he, Floyd Damren and Jeff Chittam left the trailer park to go to the Food Lion to get more beer and some meat. (T-569). Greenway testified that during the trip to the Food Lion back to the trailer park, Floyd Damren was drinking beer. Greenway felt that Floyd had probably had a 12 pack of beer between 4:00 and 7:30. (T-570). Greenway also testified that he did not see Floyd Damren eat anything on May 1. (T-571).

Walter Carey also testified regarding the events that had

occurred at the trailer park on that Sunday afternoon. (T-575). Carey testified that he lived next door to Wendy Hedley, and that he remembered having a group of guys gathered at his house to work on his car. (T-577). Carey testified that he remember Floyd Damren being there "just hanging out," and that Floyd had gotten there sometime during the afternoon. (T-577-78). Carey testified that by the end of the day "[e]verybody was getting a little rowdy," and that the party broke up around dinner time. (T-580).

The defense also called Dr. Ernest Miller, M.D., a professor of psychiatry at the University of Florida College of Medicine. (T-588). Dr. Miller was qualified as an expert in forensic psychiatry. (T-589). Dr. Miller testified that he had had specific experience in studying the effects of alcohol on the human brain:

> That was the area of basic research and emphasis from the time of my residency on. I was at Tulane and farmed out to Yale University where I worked for one summer with Leon Greenberg, the inventor of the original breathalyzer machine. I did my basic research there. And following that, continued active in the field. I published about 20 papers. I have a book chapter and several awards in the area.

(T-591).

Dr. Miller determined that it was possible to determine the given blood alcohol level of an individual, based on body weight, time frame of alcohol ingestion, the strength of the alcohol, and other factors. (T-592). Dr. Miller also testified that beverage alcohol was a "sweet voluble liquid" with anesthetic properties. (T-592). Dr. Miller explained that increased amount of beverage

alcohol **could** produce up to a "third stage of surgical anesthesia." (T-592).

Dr. Miller explained that as alcohol is consumed, it progressively selects the areas of the brain rostrally [sic]; that is, from the frontal portion just behind the forehead back to the cerebellum. (T-592). Dr. Miller went on to state that "as the beverage alcohol level increased, areas of **the brain are** selectively **and** increasingly affected, deadened, weakened, anesthetized, if you will." (T-593).

Dr. Miller was given a hypothetical question:

> I want you to assume a male human being, 43 years of age, 6' 2" tall, weighing 180 pounds. Assume that that male human being has nothing to eat between 12 noon and about 7:30 p.m., but that he drinks approximately twelve 12 ounce beers between approximately 4:00 p.m. and 7:30 p.m.
>
> Based upon that -- those facts, can you tell what would be the approximate blood alcohol level that man would have from the time period between 7:30 and 8:30 p.m.?

(T-593). Dr. Miller opined that a person of this weight ingesting this amount of alcohol within this time frame would have a blood alcohol level of about .19 percent. (T-594). Dr. Miller testified that his calculations included a .025 margin of error in either direction. (T-594-95).

Dr. Miller testified that such an alcohol level would have a substantial and profound effect on the human brain. (T-595). Dr. Miller pointed out that one of the earliest areas affected by intoxication is frontal lobe area which is the repository of moral judgment and sensibility. (T-595). Miller opined that such an

alcohol level would certainly impair a person's ability to consciously decide to execute a plan. (T-596). Dr. Miller explained that while the frontal lobes are one of the first areas to be affected by the ingestion of alcohol, that it is actually the portal or rear portion of the brain which basically controls coordination and balance. (T-597).

PENALTY PHASE

The state presented testimony in support of aggravating factors at the penalty phase. (T-795). The state first called Wendy Hedley, who testified regarding a conversation she had with Jeff Chittam after he and Floyd Damren had returned from the mines. (T-797). Hedley testified that when she had returned to her trailer, that Jeff Chittam and Floyd Damren had been there and that Jeff Chittam had been sitting on the porch drinking a beer. Hedley testified that it wasn't until ten or fifteen minutes after she had arrived that she and Jeff had gone inside the trailer. (T-797-807). According to Hedley, Jeff Chittam made statements to her in the bathroom of her trailer about the activities of Floyd Damren on that same evening. (T-797). Hedley testified that Jeff told her that "they had went down to the mines and that they had done something bad. . . ." (T-797). In response to the state attorney's question, Hedley testified Chittam had said that it had been Floyd's suggestion to go to the mines. (T-797).

Hedley testified further that Jeff told her that he had been urinating on a locker when a man walked up and asked him what he was doing. (T-798). According to Hedley, Jeff said that Floyd

then came up from behind him [the man] and hit him [the man]. (T-798). Hedley testified Jeff had stated Floyd had hit the man with a steel pipe. (T-798). According to Hedley, Jeff recounted that when the man was first hit with the pipe that he fell. (T-798). Hedley testified further that Jeff said to her that the man had been begging for Floyd not to hurt him. (T-799). Hedley recounted Jeff's statement that Floyd had been "pacing back and forth in front of [the man]." (T-799).

According to Hedley, Jeff had heard the man's name announced over a loud speaker.[2] (T-799). Hedley was permitted to testify that, according to Jeff, the man said that "the next day he was going on vacation and he **was** taking his grandson fishing." (T-799). Hedley testified further that Jeff then related that another man had come in and that he [Jeff] had been telling Floyd to leave. (T-800). According to Hedley, Jeff said that the man came in and Floyd took off after him. (T-800). Jeff told Hedley that he himself then left, running over a pipe through the woods back to Hedley's house. (T-800).

On cross-examination Hedley admitted that she didn't like Floyd Damren much, and that she and Jeff had been romantically involved. (T-801). Hedley also indicated that notwithstanding the fact that Jeff had made all of these admissions to her that he never requested that she call the police, and that he did not call the police himself. (T-801-02). Hedley testified that a number

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[2]Testimony from Don Knight was that Miller had been "paged" but it was unclear whether by a beeper or a loud speaker.

of other people heard these statements, but that Jeff requested none of them to call the police. (T-802).

On further cross-examination, Hedley testified that she couldn't really remember where at her home she was when the statements were made to her by Jeff, and that even though she had tried to put all of "it" behind her, that her memory had been better in May, 1995, than in March of that same year. (T-805).

The state also called Tessa Mosley in support of its contention that the murder had been heinous, atrocious, and cruel and cold, calculated, and premeditated. (T-813). Mosley testified that on the evening of the murder Floyd Damren and Jeff Chittam had arrived at Wendy's trailer about ten to fifteen minutes before Wendy arrived. (T-818). Mosley testified that as she went into the trailer to the bathroom, Hedley and Chittam came out of the bathroom and that she heard Jeff say "something about Floyd hurting somebody at the mines." (T-815). Mosley testified:

> He said that Floyd had hurt somebody down at the mines and hit him, I can't remember if he said once or twice, but he had hit him and he had begged the guy to get up.

(T-815-16). According to Mosley, Jeff Chittam said that he had gotten scared and had run from the scene. (T-816).

On cross-examination, Mosley admitted that after Floyd and Jeff had arrived at Hedley's trailer in Floyd's truck, that Wendy Hedley "yelled at Floyd for about twenty minutes or so." (T-818). Mosley testified that Wendy Hedley had then gone inside, and that Jeff Chittam had stayed outside sitting on the porch drinking beer. (T-818). Mosley testified that for the first ten or fifteen

minutes that Jeff Chittam had been at Hedley's trailer that he didn't say anything at all about the incident at the mines. (T-819).

Mosley testified that she could remember some of Jeff Chittam's statements, but there was "some of it that [she] really didn't pay that much attention to. . . . " (T-820). Mosley admitted that she did not pay attention to some of the small details. (T-820).

The state also called Joanne Waldrup in its penalty phase case. (T-821). Waldrup testified that she was at Wendy Hedley's trailer at 9:00 o'clock on May 1, 1994. (T-822). Waldrup testified that she had overheard Jeff Chittam talk about what had occurred at the mines. (T-822). According to Waldrup, Jeff said that "Floyd had went down there to steal something but someone had come in on him and Floyd had beat the man." (T-824). Waldrup related Jeff Chittam telling her that the beating had occurred with a pipe. (T-824).

Over defense objection, the state presented the testimony of Susan Miller, the wife of Donald Miller. (T-830). She was permitted to read a written statement regarding Miller's activities, and the effect that his death had on his family. (T-831-34). The state also presented Terri Sue Williams, Donald Miller's daughter, to read a written statement regarding the effect of his death on the family. (T-834-36).

The state then adopted all of the evidence presented in the guilt phase as a part of its case in the penalty phase, and rested.

(T-837).

The defense then presented its penalty phase case. The defense first introduced copies of a judgment and sentence of Jeffrey Wayne Chittam as defendant's Exhibit 1. (T-837-38). The defense called Ruby Chesser, Floyd Damren's mother, who testified regarding Floyd's family background. (T-838-50). Mrs. Chesser testified that Floyd was born in 1951 in Portsmouth, Virginia, into a navy family, (T-839-40). Mrs. Chesser testified that the family moved to Green Cove Springs in December of 1951, and that her husband, Floyd's father, was in the navy. (T-840). According to Mrs. Chesser, Floyd's father was gone a lot, but when he returned he tried to be quite strict with the children. (T-841). Mrs. Chesser testified that at one point in time the elder Mr. Damren was away in Iceland for a two-year period. (T-841).

Mrs. Chesser explained that her husband was basically uninvolved with his family, and did not send birthday cards or Christmas presents and that he never called or wrote his children regularly. (T-842).

Mrs. Chesser struggled to raise her children, and had no help from any other adult male as a "father substitute." (T-844). Floyd Damren's father was an alcoholic who drank daily, and who drank around the children. (T-843). He stole items from the Navy, including tools. (T-843-44). Mrs. Chesser testified that it was difficult for her to raise the children in her husband's absence. (T-844). When Floyd was about twelve or fourteen years old, his father returned and took him to Maine for a lengthy period of time.

(T-844).

Floyd remained in Maine for about two years, living with various relatives. (T-845). Mrs. Chesser presented two photographs of Floyd Damren; one was of Floyd in the army after completion of basic training, and the other was Floyd in front of a bunker in Vietnam with the 173rd Airborne Division. (T-846). Mrs. Chesser testified that Floyd had enlisted in the United States Army, and had served in Vietnam. (T-847).

Mrs. Chesser testified that in 1994 Floyd **was** living in Bostwick, near Palatka, with Nancy Waldrup. (T-847). Floyd lived about fourteen miles from her home, and she saw Floyd regularly prior to the homicide. (T-847-48). Mrs. Chesser testified that Floyd would drop by for visits, 'and help her with things around the house. (T-848). Floyd also took Mrs. Chesser to the doctor, and visited her when she was in the hospital. (T-848). Mrs. Chesser testified that she had seen Floyd help other people, including Ann Parker, who was an elderly woman living in Magnolia Springs Apartments. (T-849). Mrs. Chesser testified that Floyd built shelves to go in her bathroom, but would not accept payment for the work. (T-849). Mrs. Chesser testified that she would maintain contact with Floyd if he received a life sentence. (T-850).

Floyd Damren's brother, Keith, testified at the penalty phase. (T-850). Keith Damren testified that he was Floyd's younger brother, and that their father had never really been a real father to his children while they were growing up. (T-852). According to Keith, the children rarely even saw their father, and went as long

as two years without seeing him. (T-852). Keith explained that it was difficult for the elder Mr. Damren to return home after being an absent father for so long and was unable to participate in a good parent-child relationship. (T-852).

Keith testified that he remembered his father being home on only one Christmas, and that his father never wrote the children letters. (T-853). Keith testi'fied that the first letter he ever received from his father was after his father stopped drinking--when Keith was thirty-five years old. (T-853).

Keith testified that his father had been a heavy drinker "ever since I can remember." (T-853). Keith explained he remembered that when he was a child his father would get up in the morning and pour whiskey into his black coffee, the first thing. (T-853). Keith testified that this was a daily thing. (T-854).

According to Keith, Glenn Damren would run up tabs at bars, and by the time he got any little bit of money, he would pay the tab and have no money left. (T-854). The elder Damren never did anything with Keith and Floyd, other than taking them fishing once in a while. (T-854).

Keith explained that the elder Damren really did not get along with their mother. (T-855). Keith stated that he really never felt like he had a father and explained that "[h]e was just kind of like a stranger that came by every now and then." (T-855). Their father really never showed any affection for him or Floyd, until about five years before he died of cancer. (T-855).

Keith explained that although their mother had tried "as hard

as she could" to raise the children, it was hard for her to keep up with them. (T-856). Keith explained that the children eventually realized that they did not have to do what their mother said, and pretty much did what they wanted. (T-856). Keith also testified about Floyd Damren's generous spirit, especially toward the elderly lady, Ann Parker. (T-858-59).

The defense called Lori Ann Miller, Floyd Damren's sister. (T-860). Lori Miller is twelve years younger than Floyd; Floyd was already out of the house by the time she was six. (T-861). Lori testified she remembers seeing their father drink a lot, start fights with the mother, and break up the house and the furniture and the dishes. (T-861). Lori testified that she did not really know her father, because he was gone so much. (T-862).

Lori testified she had remained close to her brother, Floyd, and that she knew him to be generous and kind. (T-862). Lori testified that at one point in time she had had a friend brag about receiving a hundred dollars to buy school clothes, and that her mother did not have a hundred dollars, so Floyd had given it to her. (T-862-63). Lori testified that she would go fishing and crabbing with Floyd, and that he would always come by to pick her up and take her along on outings with a girlfriend. (T-863).

Lori testified that on one occasion she stayed with Floyd during a time that she and -her husband were having marital problems, and that he was very generous in making his home available for her. (T-863). Lori testified that she would remain in touch with Floyd if he were to be sentenced to life. (T-864).

Betty Ann Mathis, Floyd Damren's maternal aunt, also testified in his behalf. (~-865-66) . Ms. Mathis indicated that she knew Glen Damren, and felt that he had been a negative force on his children. (T-866). Ms. Mathis testified that Glen Damren had never set any good examples for his children, and had never established any rules. (~-867). Ms. Mathis described Glenwood Damren as a "heavy drinker.", (T-867). According to Ms. Mathis, her sister, Floyd's mother, had tried the best that she could, but was really unable to discipline her children in the absence of a father. (T-868). According to Mathis, Floyd's mother was "not affectionate." (T-868). Floyd had lived with Ms. Mathis while he was a teenager when his "father had dumped him off." (T-868-69). Floyd stayed with her about two to three months, and was a good child while he was with her. (T-869-70) .

Betty Ann Mathis testified that Floyd's father would come and visit Floyd while he was staying with her, but that for entertainment he would "take [Floyd] off drinking with him." (T-870). Mathis testified that Floyd would return "exhausted, hung over . . . " (T-870). Ms. Mathis testified that when Floyd had lived with her, he was responsible enough to watch her two children, who were younger than Floyd, and that Floyd was respectful to her. (T-871).

The state also called Alice Prescott, who testified by telephone from Maine. (T-873). Ms. Prescott is Floyd Damren's aunt; Glenwood Damren was her brother. (T-874). Ms. Prescott is five years younger than Floyd's father. (T-874). Prescott

testified that her brother did not spend "an awful lot of time" with his children. (T-875). Prescott testified that her brother was an alcoholic to the last few years of his life, and that when he was home on leave, he would run around with his buddies and with other women. (T-875-76). Prescott testified that Floyd Damren had also lived with her when he was about twelve or thirteen . (T-876). Prescott testified Floyd's father had brought him to her home saying he was going to leave Floyd there for a couple of weeks. (T-876). Prescott testified that Floyd had actually been left with her at her home for the better part of a summer. (T-876).

Prescott testified that while Floyd stayed with her at her family, he followed her instructions and was respectful toward her and her husband. (T-877). Prescott testified that Floyd was an accomplished artist, and that he liked attention. (T-877). Prescott did not consider that her brother had been a caring father, and that his children certainly did not come first on his list of priorities. (T-878).

Deloris Hill also testified by telephone. (T-880). Ms. Hill testified that she lived in Forestville, Tennessee, and that she had known Floyd Damren since 1971. (T-881-82). Ms. Hill testified that she had become good friends with Floyd, and that he was very helpful to her and her daughter. (T-882). Hill testified that at the time she had known Floyd, she did not have a car, and Floyd would take her and daughter shopping and other places. (T-883). Hill testified that Floyd was stationed at Ft. Campbell at that

time. (T-883). Hill also testified that Floyd had been very helpful to a woman named Nancy Mathews who was paralyzed from the neck down. (T-884-85).

Sergeant Linda Murphy of the Clay County Sheriff's Office also testified at the penalty phase, (T-886). Sergeant Murphy is a supervisor in Corrections at the Clay County Jail, and testified that she had supervised Floyd Damren during his year of incarceration prior to his trial. (T-886). Sergeant Murphy testified that during the year that Damren had been incarcerated, that he had never complained, or caused problems in the jail. (T-888). Murphy testified that Damren had done everything required of him and had been a model inmate. (T-888-89).

The defense also called Mark Stokes, of Grand Rapids, Michigan. (T-889-90). Stokes testified that he had served in the 173rd Airborne Brigade of the United States Army in Vietnam during 1970 and 1971. (T-890). Stokes testified that he had volunteered for Vietnam, and that he knew Damren pretty well while he served there. (T-890-91). Stokes testified that Floyd had been a "far cry better" soldier than most, and that he was a "track" [sic] soldier in every way, shape and form, as far as conducting himself in a miliary manner . . . . " (T-895). Stokes testified that Damren had been a "model soldier," and that he never had any problems with any superior officers. (T-895-96). Stokes testified that Floyd would often volunteer to do extra duty to help out, and that he was better than average. (T-896) .

The defense also presented testimony of William L. Wise, Sr.,

who was plant superintendent at Southeastern Specialties, a railcar repair facility located in Jacksonville. (T-898-99). Mr. Wise testified that Floyd Damren had worked at Southeastern Specialties on three or four occasions, and had been a good worker. (T-900). Wise testified that Damren had been a "burner and welder" of railcars. (T-900) . Wise testified that he had been Damren's supervisor, and that Damren had gotten along well with other employees at the company. (T-900-01) . Wise testified that Damren had been a good welder, showed up for work and did his job when at work. (T-901). Wise testified that Damren had been re-hired when the need arose. (T-901) .

Steve Hillary Brown also testified regarding Floyd Damren's prior employment. Brown testified that he was a welding supervisor at Vat-Con, a plant that builds sewer treatment trucks. (T-903). Brown testified that Floyd Damren had worked for Vat-Con on two occasions as a welder, and that Damren had been a very good welder and fitter. (T-903-04) . Brown testified that Floyd had gotten along "real good" with the other employees, and that he had been re-hired when the need arose. (T-904). Brown also testified that Damren had helped train other employees with less experience, and that he had done a good job of that. (T-905).

Roger Prout was also called as a defense witness in the penalty phase. (T-905) . Prout testified that he had known Floyd Damren for about four and one-half years and that Floyd had done some things to help him out. (T-906) . Prout testified that because he lived "way out in the woods," he needed help re-filing

his one-hundred propane cylinder for his stove. (T-906). Prout testified that Damren would help him by taking the cylinder to town and having it filled whenever it needed to be done. (T-906). Prout testified that Floyd had taught his little boy Christopher how to fish at Floyd's dock. (T-906).

Prout recounted that Floyd never charged him for driving the propane cylinder into town, and that his son Christopher enjoyed his times with Floyd. (T-906-07). Prout testified that Floyd used to help him get firewood, and that Floyd had helped out a friend of his by helping to build a shop. (T-907). Prout also testified that Floyd Damren had been with his family on social outings, and that he had been great with his children. (T-908-09).

Bart Anthony Greenway also testified at the penalty phase. [redacted]. Greenway testified that on May 1, 1994, he had gone with Floyd Damren and Jeff Chittam to the Food Lion to get beer and meat for the cookout. (T-910). Greenway testified that on the way home, Chittam tried to talk him into stealing gasoline. (T-911).

John Shagg was also called as a witness at the penalty phase. (T-911). Shagg testified that he owned Bad Boy's Custom Auto Parts in Palatka, which was business selling custom accessories for trucks and cars and providing window tinting services. (T-912). Shagg testified that he knew Floyd Damren through Roger Prout, and that Floyd had built a shed at his [Shagg's] house. (T-913). Shagg testified that he was real satisfied with the work Floyd Damren had done, and that Floyd worked long days completing the shed. (T-914).

Nancy Waldrup testified that she had been Floyd Damren's girlfriend for three and one-half years, and that they had lived together for part of that time. (T-916-17). Ms. Waldrup testified that she had had the occasion to observe Floyd Damren with children, and that he had helped her raising Ashley Mosley, Tessa's daughter. (T-917) . Waldrup also testified that when Tessa Mosley and her husband had had problems, Floyd had treated Tessa as his own daughter, and had helped her through that period. (T-919). Waldrup also testified that Floyd had accompanied her and her family to the flea market, and had enjoyed fishing with them. (T-920). Waldrup testified that Floyd and his mother had a very good relationship, and that he loved her very much. (T-920).

The defense then rested its penalty phase presentation. (T-921).

SUMMARY OF ARGUMENT

Appellant first argues that the trial court erred in permitting evidence of similar bad acts or other crimes to be presented at the guilt phase of his trial. Appellant relies primarily on the case of Griffin v. State, 639 So.2d 966 (Fla. 1994), for the proposition that the testimony relating to a prior equipment theft was not "inextricably intertwined'with the crime for which he was on trial, and therefore should not have been admitted. Appellant also argues that if such evidence were not "inextricably intertwined," then the evidence must be subject to the traditional Williams rule requirements. Appellant asserts that Williams rule requirements were not met in this case, and that the evidence is therefore inadmissible under any theory. Moreover, appellant asserts that when this evidence was admitted, the traditional "similar fact evidence" jury instruction should have been given, and that it was error for the trial court to fail to so do.

Appellant next asserts that the trial court erred in overruling his objection to the state's remarks in the guilt phase closing argument which denigrated his defense of intoxication. Appellant asserts that the prosecutor erred by requiring the jury to have a higher standard for an intoxication defense, and relies on Gardner v. State, 480 So.2d 91 (Fla. 1985), and on Pacifico v. State, 642 So.2d 1178 (Fla. 1st DCA 1994).

Appellant also asserts that the trial court erred in admitting of the "impact evidence" during the penalty phase, in violation of

Windom v. State, 656 So.2d 432 (Fla. 1995). Appellant asserts that Windom limits victim impact evidence to testimony regarding the victim's uniqueness in the community and the community's loss, and alleges that the prosecution introduced evidence that was calculated to play on the sympathy and emotions of the jurors.

Appellant next asserts that the trial court erred in permitting out-of-court statements of Jeff Chittam during the penalty phase of the trial. Appellant asserts that the statements of Jeff Chittam were governed by the "excited utterance" exception to the hearsay rule, and did not fall within the parameters of Rogers v. State, 660 So.2d 237 (Fla. 1995). Appellant asserts that the admission of this testimony was particularly harmful, because the trial court relied exclusively upon this evidence to determine that the homicide had been cold, calculated and premeditated.

Appellant argues that the trial court erred in finding that the murder was especially heinous, atrocious and cruel, and relies on Dixon v. State, 283 So.2d 1 (Fla. 1973), Robertson v. State, 611 So.2d. 1228 (Fla. 1993), and Watts v. State, 593 So.2d. 198 (Fla. 1992). Appellant asserts that this particular homicide had no facts that distinguished it from the "norm," and that it was not a murder that evinced extreme and outrageous depravity.

Appellant asserts that the evidence failed to establish that the murder was committed in a cold, calculated and premeditated manner, and relied on Barwick v. State, 660 So.2d. 685 (Fla. 1995), and Gamble v. State, 20 F.L.W. S. 242 (Fla. May 25, 1995). Appellant asserts that the state failed to show that a heightened

premeditation, and therefore failed to prove this statutory aggravator beyond a reasonable doubt.

Appellant also asserts that the trial court abused its discretion in rejecting appellant's non-statutory mitigating factors which appellant proved with unrebutted, unimpeached testimony. Appellant relies on Johnson v. State, 608 So.2d. 4 (Fla. 1992), of for the proposition that the trial court abused its discretion in rejecting his mitigators. Appellant asserts that this cause must be reversed for imposition of a life sentence.

Finally, appellant asserts that the imposition of the death penalty in this case is disproportionate with the death penalty in other cases.

ARGUMENT

ISSUE I:

THE TRIAL COURT ERRED IN PERMITTING EVIDENCE OF SIMILAR ACTS OR OTHER CRIMES TO BE PRESENTED AT THE GUILT PHASE OF THE TRIAL

The state sought to introduce evidence of a prior bad act by Floyd Damren, and filed its notice of intent to do so. (R-318). The state's notice of intent set forth the prior bad act:

> FLOYD WILLIAM DAMREN on or between the dates of the 18th day of April, 1994, and the 20th day of April, 1994, in the County of Clay, and the State of Florida, did unlawfully enter or remain in a conveyance, to-wit: motor vehicle, the property of Sun Electric, with the intent to commit an offense therein, to-wit: theft, contrary to the provisions of section 810.02, Florida Statutes.
>
> FLOYD WILLIAM DAMREN on or between the 18th day of April, 1994, and the 20th day of April, 1994, in the County of Clay, and the State of Florida, did knowingly obtain or use or endeavor to obtain or use a generator and other tools, the value of $300.00 or more, but less than $20,000.00, the property of Sun Electric, with intent to either temporarily or permanently deprive Sun Electric of a right to the property or benefit therefrom, or with the intent to appropriate the property to his own use or to the use of any person not entitled thereto, contrary to the provisions of Section 812.014(2)(c), Florida Statutes.

(R-318).

The testimony ultimately presented by the state to prove this prior bad act was as follows:

> By Mr. Shorstein:
>
> Q: And how did it come about? Tell the jury how you came about going to RGC with Floyd Damren.

By Wendy Hedley:

A: Jeff and I had gotten in an argument and I had walked across the street from my trailer to some woods and Floyd came over there to check on me and asked me if I wanted a ride and I asked him where and he said -- he just said go for a ride. And we went down a dirt road behind the woods and came up to the mines.

Q: How does it come into the mines property?

A: It's on the -- it's in the back behind the mines.

Q: Okay. And did you go onto the mines property?

A: We were on the mines property.

Q: And then what happened when you got to the mines, to RGC?

A: Floyd got out of the truck and got on a bigger truck that we were parked beside and got some property.

(T-460). The state offered no additional testimony on this point, other than the testimony of Michael Knight that a portable generator had been stolen from the back of a Sun Electric truck within the previous month. (T-394).

Immediately before opening statement, State Attorney Harry Shorstein informed the court that although the state had really felt that the testimony was not subject to a Williams rule notice, that the state had filed one anyway. (T-348). The state's theory was that because the prior bad act was such an intertwined element of the present crime, that it could be introduced without the necessity of section 90.403 procedural protections. (T-348).

Defense counsel objected, asserting that evidence of the prior

crime was not "inextricably intertwined" and was relevant only if it satisfied the Williams rule requirements of similarity. (T-351). Defense counsel summarized the differences between the prior theft and the instant case (T-350-54), and cited the case of Griffin v. State, 639 So.2d 966 (Fla. 1994). Defense counsel argued that if evidence of other bad acts is "inextricably intertwined" with the crime charged, then the evidence of the prior bad act does not fall under traditional Williams rule doctrine, but that if the evidence is not intertwined, then traditional doctrines apply.

Because Griffin is so easily distinguished from the instant case, the trial court erred in determining that the evidence of the prior theft of equipment from Sun Electric was "inextricably intertwined" with the facts of the homicide of Donald Miller. Because the evidence relating to the prior theft tended to show Damren's bad character, and also permitted the jury to hear evidence of prior criminal behavior on Damren's part,[3] the admission of such evidence is error, and this cause must be reversed for a new trial.

Under the rule of Griffin, evidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not Williams rule evidence. 639 So.2d at 968. such inseparable or

[3]The defense had stipulated to non-existence of the mitigating factor "no significant history of prior criminal activity." Therefore, any mention of appellant's prior criminal activity was only at the behest of the state, and served only to show appellant's propensity for bad acts.

"inextricably intertwined" evidence is admissible under section 90.402, Florida Statutes, because "it is a relevant and inseparable part of the act which is in issue. . . . " Id. As this court stated in explaining the difference:

> In the past, there has been some confusion over exactly what evidence falls within the *Williams* rule. The heading of section 90.404(2) is "OTHER CRIMES, WRONGS, OR ACTS." Thus, practitioners have attempted to character all prior crimes or bad acts of an accused as *Williams* rule evidence. This characterization is erroneous. The *Williams* rule, on its face, is limited to "*[s]imilar fact evidence.*" . . .

639 So.2d at 968.

Therefore, if the complained-of evidence in this case is inseparable from the crime charged, or is "inextricably intertwined" with the crime charged, the issue of similarity does not arise. However, if the other crime is not inextricably intertwined with the homicide of Donald Miller, then it does become classic Williams rule evidence, and must be similar to the crime in question in order to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. It is clear that such evidence in inadmissible when the evidence is relevant solely to prove bad character or propensity to commit a crime.

The evidence of the prior theft of equipment from Sun Electric can hardly be said to be inextricably intertwined with the subsequent burglary of R.G.C. Mines, or with the homicide of Donald Miller. The underlying crimes in the instant case, the burglary of R.G.C. Mines and the homicide of Donald Miller, occurred on May 1,

1994. The burglary of a motor vehicle and the theft of machinery from Sun Electric (an entirely different victim)[4] which the state alleged that appellant had previously committed, those occurred in between April 18 and April 20, ***1994 -- more than ten days prior to the instant offense***.[5] (R-318). There was no evidence that appellant had been in any continuing, inextricably intertwined criminal activity leading up to the homicide of Donald Miller. There was no claim that appellant had stolen any tools or equipment subsequently used in the homicide. To the contrary, the evidence relating to the prior burglary of a truck and theft of equipment from Sun Electric shows that it was an unconnected, isolated incident, entirely dissimilar with the facts of the instant case. Therefore, the trial court erred in determining the evidence to be "inextricably intertwined" with the homicide.

The state attorney argued that because the defense was raising the issue of intoxication there "is more reason that the prior burglary and the announcement of his intention to go back and get other items becomes relevant . . . ." (T-373). The prosecutor went on to say, "I think the stated objective to go back and get more of what you stole before is totally inconsistent with not being able to form the intent to steal or the intent to burglarize." (T-373).

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[4]Sun Electric contracted with R.G.C. Mines to perform electrical work, and had apparently left a truck on the premises. (T-394).

[5]In fact, the State Attorney characterized it as "about two weeks before," (T-460) and Wendy Hedley agreed. (T-460; ***T-472).***

Trial counsel argued that not being drunk at the time of the commission Of one offense has no probative value as to the issue of intoxication at a later date. (T-373). The state's theory was that the prior motor vehicle burglary and equipment theft was "inextricably intertwined" because Wendy Hedley testified that Floyd Damren had said he was going to come back and commit a subsequent burglary at the mines. (T-375). Defense counsel pointed out that Wendy Hedley's actual statement was, "He told me -- that -- that there was some real good stuff down there that he would like to get." (T-376).

The trial court ruled:

> THE COURT: Well, if it were not for the specter of the intoxication defense, Mr. Chipperfield, I would think you were right. I think the Griffin case clearly shows, when it discusses the testimony about prior burglaries, that the mere reference to other burglaries was obviously not similar fact evidence; it did not describe acts which were inextricably intertwined with the events for which Griffin was on trial, nor was it relevant to prove any other material fact.
>
> But I find Mr. Shorstein's argument that it is relevant to the intoxication defense compelling and so I will Deny your Motion in Limine and allow that testimony.

(T-376).

The circumstances surrounding the nexus between prior bad act and the crime for which appellant is on trial in the instant case are wholly different than those in Griffin. In Griffin, the appellant complained of six separate instances of testimony relating to prior bad acts. In each of those instances, this court held that the testimony was necessary to establish through what

method Griffith had come into the possession of stolen automobiles and stolen guns used in the crime spree which ended in the death, and how he and accomplices had planned to begin a burglary spree which resulted in the murder of a police officer. (T-969). 639 So.2d at 969. In Griffin, the prior bad acts occurred immediately prior to the crime spree, and property stolen during those prior acts was key evidence against Griffin in the subsequent prosecution.

Because the facts relating to the prior motor vehicle burglary and equipment theft from Sun Electric are completely distinct and cannot be said to be inextricably intertwined with the homicide of Donald Miller, the evidence should not have been admitted under that theory. Nor can it be said the evidence is admissible under a traditional Williams rule similar fact evidence theory, because the facts of the Sun Electric theft are so distinct, different and dissimilar from the subsequent burglary and homicide.

Evidence of similar crimes is admissible only as provided in section 90.404(2), Florida Statutes. That section provides:

> 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.

Prior to determining whether factual evidence is sufficiently similar to be introduced in a given trial, the threshold of relevance must first be met. Similar fact evidence of other crimes is only admissible when relevant to prove a material fact in issue.

Material facts in issue described in the statute are "proof of motive," "opportunity," "intent, " "preparation," "plan," "knowledge," "identity," or "absence of mistake or accident." Section 90.404(2)(a), Fla. Stat.

Before evidence of a collateral offense can be legally admissible, "the points of similarity must have some special character or be so unusual as to point to the defendant." Edmond v. State, 521 So.2d 269 (Fla.2d DCA 1988), citing Drake v. State, 400 So.2d 1217, 1219 (Fla. 1981). The collateral offense "must be not only strikingly similar;" it must share some "unique characteristic or combination of characteristics which sets them apart from other offenses." Fulton v. State, 523 So.2d 1197 (Fla. 2d DCA 1988), citing Heuring v. State, 513 So.2d 122 (Fla. 1987) and Davis v. State, 376 So.2d 1198 (Fla. 2d DCA 1979); Smith v. State, 464 So.2d 1340 (Fla. 1st DCA 1985). Similar fact evidence is not admissible where the collateral crime is merely *similar* to the crime for which the defendant is on trial. See Smith, supra.

In Drake v. State, 400 S.2d 1217 (Fla. 1981), the state attempted to introduce into a first-degree murder trial evidence the fact that on two prior occasions the defendant had sexually assaulted two different women and (as with the victim of the murder case) had tied the victims' hands behind their backs. The material issue sought to be proved by this evidence was identity. This court reiterated the rule that proof of identity based on the "mode of operation theory" is "based on the similarity of and the unusual nature of the factual situations being compared." 400 So.2d at

1219. Stating that "a mere general similarity will not render the similar facts legally relevant to show identity," this court noted

> (g)iven sufficient similarity, in order for the similar facts to be relevant the points of similarity must have some special character to be so unusual as to point to the defendant.

400 So.2d at 1219. This court found the only similarity to be the binding of the hands and the fact all victims had left from a bar with the defendant. Noting that binding of the hands occurs in many crimes *involving many criminal defendants,* this court found the evidence not sufficiently unusual and ruled it inadmissible.

The requisite similarity to introduce evidence of a collateral crime was discussed by the First District Court of Appeal in Helton v. State, 365 So.2d 1101 (Fla. 1st DCA 1979). Helton was tried and convicted of sexual battery. The victim testified she was abducted and taken to a wooded area where the defendant choked her, threw her to the ground and forced her to participate in various sexual acts. She **was** subsequently able to get away and ran out to the highway nude, where she hailed a passing motorist. At the trial, another woman testified she had ridden home from work with Helton and that he drove to a wooded area where he told her he was going to rape her. She testified Helton ripped off her clothes, but then pushed her away stating, "Run before I kill you." She testified she screamed for help and was picked up by passing motorists. Helton had been convicted of simple battery for that offense. The First DCA rejected the testimony of the simple battery victim as being relevant to the sexual battery, and stated

> The only similarities between the two

> incidents are that they occurred in wooded areas, the victims allegedly did not consent to the encounters, and the victim in each case hailed a passing car for help. There are numerous dissimilarities.

365 So.2d at 1102.

The First District also held in Flowers v. State, 386 So.2d 854 (Fla. 1st DCA 1980), that sufficient similarities did not exist to justify admission of collateral crimes. Both cases involved burglary and sexual battery, but the court found the only similarity to be the apartments were entered on the second floor via sliding glass doors. Noting that the incidents occurred six weeks apart in areas four to five miles apart, the court held the collateral evidence inadmissible, and reversed and remanded for a new trial.

Requisite similarity was also discussed in Davis v. State, 376 So.2d 1198 (Fla. 2d DCA 1979). Again, identity was the issue sought to be proved. Both crimes involved a burglary and sexual battery. A window was used to gain entry into the homes of young women living alone. The crimes occurred within three weeks of each other, and happened about the same time of night. Additionally, money was taken from the victim in both cases. The court did note that the crimes occurred in different parts of the city, and the attitude of the assailant toward the victims varied significantly, The court did note that the crimes occurred in different parts of the city, and the attitude of the assailant toward the victims varied significantly. The court concluded there were not enoush similarities between the two to justify admission of the collateral

crime, and reversed and remanded for a new trial.

In Brown v. State, 397 So.2d 320 (Fla. 2d DCA 1981), the Second District Court of Appeal reviewed the similarities between two separate robberies, concluded the evidence showed "only a general similarity between the two crimes," and was therefore inadmissible, and reversed for a new trial. The state sought to introduce evidence of a bookstore robbery at the trial of a robbery of a market. The robberies were similar in that three men participated in each, money was put into a bag, and one man asked if an alarm had been set off. Additionally, in each robbery, one of the men had been described as large with red hair. The court ruled that the modus operandi of the two robberies were not unusual, and stated

> Unfortunately, robberies committed in the above-described manner are an everyday occurrence in our society.

397 So.2d at 323. The court held it was error to admit evidence of the bookstore robbery at the market robbery trial, and ordered new trials for each defendant.

Reiterating the rule that collateral crime evidence is "not admissible where the collateral crime is merely similar to the crime for which the defendant is on trial," the Second District considered the similarities between two burglaries in Crammer v. State, 391 So.2d 803 (Fla. 2d DCA 1980) . Two burglaries were committed in the same duplex within eight days of the other. A tape player and can opener from one victim's apartment was found in the defendant's home. A clock and a rug belonging to the other

victim was also found at the defendant's home. A clock and a rug belonging to the other victim was **also** found at the defendant's home. Because there were only general similarities about the crimes *and nothing particularly unique,* the appellate court ruled the evidence inadmissible. The court relied on its previously announced rules in Davis v. State, supra, and Bradley v. State, infra.

Bradley v. State, 378 So.2d 870 (Fla. 2d DCA 1979), also stands for the proposition that "more than a mere similarity between the collateral crimes" and the main offense is necessary. 378 So.2d at 872. After reviewing the evidence the court concluded the only possible relevance of the collateral crimes evidence was to show bad character and criminal propensity of the part of the defendant. The state sought to introduce evidence of a prior burglary at defendant's trial on two subsequent burglaries. All three burglaries happened in the same neighborhood within two weeks of the other, similar "fabric marks" were found in each residence, and in each entrance entry was gained through a window. The court stated there was "no valid basis" for introduction of evidence of the initial burglary into the later trial. 378 So.2d at 872.

In Smith v. State, 464 So.2d 1340 (Fla. 1st DCA 1985), the First District Court held that *arsenic poisoning* was "sufficiently unusual modus operandi to warrant the introduction of the collateral crime evidence." 464 So.2d at 1341. However, in Wilson v. State, 490 So.2d 1062 (Fla. 5th DCA 1986), the Fifth District Court of Appeal held that a prior undercover purchase of a $25.00

piece of cocaine should not have been admitted into Wilson's trial for sale/delivery of cocaine. Noting that "[n]o unusual circumstances or conditions were alleged or shown for either drug buy," the court held the admission error. 490 So.2d at 1064.

The Fifth District Court of Appeal stated in Wilson:

> A mere general similarity will not render the similar facts legally relevant. . , . In order for the similar facts to be relevant, the points of similarity must have some special character or be so unusual as to point to the defendant. Peek v. State, 488 So.2d 52 (Fla. 1986) ; Drake v. State, 400 So.2d 1217, 149 (Fla. 1981). The admission of collateral crime evidence is "presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Peek, 488 So.2d at 55, quoting Straight v. State, 397 So.2d 903, 908 (Fla. 1981).

490 So.2d at 1064.

In Garron v. State, 528 So.2d 353 (Fla. 1988), this court rejected the state's claim that evidence of Garron's prior criminal behavior was admissible in Garron's murder trial. This court set forth a rule for assessing the admissibility of similar fact evidence:

> In closely examining similar fact evidence, one critical issue of concern is whether the evidence is being used to prove any relevant issue besides character. . . . The focal of analysis is whether there is any similarity between the alleged misconduct and the crime for which appellant stands trial. That is, does the "similar fact" bear any resemblance to the charged crime.

528 So.2d at 358.

In Garron, this court found the connection between the prior

bad act and the crime for which appellant stood trial "far too tenuous to support the admission of the similar fact evidence." 528 So.2d at 358. Clearly, in the instant case, the prior purported equipment theft by appellant is far too tenuous to support its admission in a subsequent first-degree murder trial.

Similarly, in State v. Richardson, 621 So.2d 752 (Fla. 5th DCA 1993), the Fifth District court of Appeal concluded that the trial court had properly held that the appellant's prior possession of a firearm was not "so similar or unique as to prove identity or common scheme." The Fifth District Court of Appeal affirmed a portion of the trial court's order prohibiting the admission of prior bad acts. 621 So.2d at 758.

In the instant case, the record reflects no explanation of the Williams rule evidence by the prosecution. The state never -- in either opening or closing -- explained to the jury the reason for the introduction of the collateral crime evidence. Clearly, the only possible relevance of the collateral crimes evidence was to show bad character and criminal propensity on the part of appellant.

Admission of irrelevant similar fact evidence is *"presumed* harmful error because of the danger that a jury will take the bad character or propensity . . . as evidence of guilt of the crime charged." Carr v. State, 578 So.2d 398 (Fla. 1st DCA 1991), citing Keen v. State, 504 So.2d 396 (Fla. 1987). The Fourth District Court of Appeal has correctly noted the power of similar fact evidence:

> Evidence of other crimes frequently predisposes the minds of jurors to believe the defendant guilty.

Cox v. State, 563 So.2d 1116 (Fla. 4th DCA 1990) (citations omitted).

Moreover, evidence of an uncharged criminal act is inadmissible when it merely shows bad character or propensity of the accused. Richardson v. State, 528 So.2d 981 (Fla. 1st DCA 1981); Brown v. State, 472 So.2d 475 (Fla. 2d DCA 1985); Diaz v. State, 467 So.2d 1061 (Fla. 3d DCA 1985).

The state sought to admit the Williams rule testimony solely to prove appellant's bad character or propensity to commit crime. In this case, there is no question that the probative value of the references to other purported criminal activity was outweighed by the unfair prejudice to appellant. See Coler v. State, 418 So.2d 238 (Fla. 1982); Carr v. State, 578 So.2d 398 (Fla 1st DCA 1991).

In the instant case, the admission of the similar fact evidence was clearly error -- it operated to predispose the jury to convict appellant and deprived appellant of a fair trial. The conviction must be reversed.

Because this court erred in permitting the introduction of evidence of prior bad acts of appellant, this cause should be reversed and remanded for a new trial.

ARGUMENT

ISSUE II:

THE TRIAL COURT ERRED IN REFUSING TO GIVE THE STANDARD WILLIAMS RULE INSTRUCTION WHEN EVIDENCE OF PRIOR SIMILAR ACTS OR CRIMES WAS ADMITTED AGAINST DEFENDANT

Defense counsel requested the court instruct the jury as to the prior crimes evidence, and. objected to the admission of the evidence without a simultaneous instruction (T-394). The trial court's failure to give the instruction constitutes reversible, harmful error, and requires this court reverse for a new trial.

Because evidence of the prior bad acts could not have been admitted under the "inextricably intertwined" theory, the court should **have** given the standard similar fact jury instruction, which **reads as** follows:

> The evidence you are about to receive concerning evidence of other crimes allegedly committed by the defendant will be considered by you for the limited purpose of providing [motive] [opportunity] [intent] [preparation] [pl**an]** [knowledge] [identity] [the absence of mistake or accident] on the part of the defendant and you shall consider it only as it relates to those issues.
>
> However, the defendant is not on trial for a crime that is not included in the [information][indictment].

Appellant relies on his argument in Issue I, supra, and asserts that if any evidence of prior acts was admissible, then it was only admissible under traditional "Williams" rule doctrine, and thus the requested instruction should have been given.

ISSUE III:

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S OBJECTION TO THE STATE'S REMARKS IN GUILT PHASE CLOSING ARGUMENT REGARDING THE INTOXICATION DEFENSE

In his rebuttal argument during the guilt phase, the state attorney characterized the intoxication defense as follows:

> On intoxication, if it's true -- first of all, intoxication is not a defense. Mere intoxication is not a defense. No one will tell you that. It is -- it can be a defense if you cannot form a mental state; that is, if you don't know you're killing somebody or you don't know you're burglarizing or stealing.
>
> It's hard to envision, but if you believe --

(T-666-67). At that time, defense counsel objected to that characterization as misstatement of the law, asserting that the prosecution was setting forth the standard for an insanity defense. (T-667).

Continuing in the rebuttal closing argument, the state attorney argued:

> How drunk would you have to be not to know you'd committed a murder or a burglary? I don't know. The jury has to decide that. And if you're convinced or if we have failed to convince you beyond a reasonable doubt --

(~-668). Defense counsel objected again, asserting that the state's argument required the jury to apply the insanity defense, rather than an intoxication defense. (T-668-69). The court overruled the objection. (T-66'9) .

The state's comments in closing regarding the intoxication defense were misplaced, improper comment and deprived appellant of

his right to a fair trial. In State v. Compo, __ So.2d. __ (Fla. 2d DCA 1995), 20 F.L.W. D. 388, the Second District Court of Appeal has held that in determining whether a prosecutor's comments are improper, a court must consider:

> (1) whether the remarks were improper, and
>
> (2) whether they prejudicially affected the substantive rights of the appellant.

__ So.2d at __ Under the doctrine of Compo, this court should find that the prosecutor's comment in closing argument for the penalty phase substantially affected the substantive rights of appellant, because they misstated the law applicable to appellant's main theory of defense. Appellant's main defense in his guilt phase was that he had been incapable of forming the necessary premeditation for first-degree murder, or the necessary specific intent for the crime of burglary thereby vitiating the state's felony murder theory. When the prosecutor was allowed to improperly argue the law regarding appellant's defense, the substantive rights of appellant were so prejudicially affected as to require a new trial.

Where the primary issue for the jury to decide is the subject of improper prosecutorial comments, the prosecutorial impropriety becomes such a feature of the trial as to deprive a defendant of the fundamental right to a fair trial. See Pacifico v. State, 642 So.2d 1178 (Fla. 1st DCA 1994).

Moreover, where a prosecutor attempts to discredit or denigrate a lawful defense, the comment is deemed reversible error. See Taylor v. State, 19 F.L.W. D. 1144 (Fla. 1st DCA 1994); Garron

v. State, 528 So.2d 353 (Fla. 1988).

As this court explained in Gardner v. State, 480 So.2d 91 (Fla. 1985), voluntary intoxication ***is*** a defense to the specific intent crimes of first-degree, murder and robbery. 480 So.2d at 92. This court went on to say that: "[a] defendant has a right to a jury instruction on the law applicable to his theory of defense where any trial evidence supports that theory." *Id*. In this case, Floyd Damren presented ample evidence of his level of intoxication of the day of the murder; the defense presented uncontroverted testimony of eyewitnesses who saw how many beers Floyd Damren had consumed, and the defense presented unimpeached, uncontroverted expert testimony of Doctor Ernest C. Miller, regarding the probable blood alcohol level of Damren.[6]

The comments of the state during guilt phase closing constituted improper comment on appellant's lawful defense.

[6]In closing argument, State Attorney Shorstein told the jury that "Dr. Miller is an outstanding expert and a great psychiatrist." (T-641).

ISSUE IV:

THE TRIAL COURT ERRED IN ADMITTING "VICTIM IMPACT" EVIDENCE AT THE PENALTY PHASE

Over objection of trial counsel, the trial court permitted the wife and daughter of Donald Miller to read prepared statements to the jury at the penalty phase. (T-831-37). Prior to the reading of the two statements, the trial court, had at defense counsel's request excised portions of each of the statements, but permitted the remaining contents to be read to the jury.

This court's recent holding in Windom v. State, 656 So.2d 432 (Fla. 1995), permits victim impact evidence to be admitted at the penalty phase hearing under the guidelines of Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed. 2d 720 (1991).

In Pavne, the United States Supreme Court addressed only the limited issue whether the Eighth Amendment to the United States Constitution is a per se bar to the introduction of victim impact evidence during the penalty phase of a capital trial. 111 S.Ct. at 2601. The United States Supreme Court did not address the due process clause of the Fourteenth Amendment to the United States Constitution, nor did the Pavne court address state constitutional issues.

In Windom, this court held that in order for victim impact testimony to be admitted, it must be limited to the victim's uniqueness and to the loss to the community created by the victim's

death.[7] 656 So.2d at 438. The testimony presented by the wife of Donald Miller was not limited to the his uniqueness, and did not deal solely with the loss caused to the community by his death. The trial court permitted Miller's surviving spouse to testify about poignant moments they had shared. Mrs. Miller's testimony appealed to the emotions of the jury:

> Don has touched many people, especially his family.
>
> Don was the only child of Virginia and Donald Miller. They moved here to be close to their son in their retirement years. Now that is gone.
>
> Don has two children: Terri, age 27, at his death, and Jeff, age 23 at his death. True, they are grown, but that does not mean that they don't miss having him here to go to for advice or a laugh or a hug. Don was very proud of his kids. They were always very important to him. He loved them as only a father could. When Don was killed that also took my life as I knew it. So, in a sense, they have lost not only their father but their mother too.
>
> Jeff has had a hard time dealing with his father's death. He had transferred back to Indiana to finish his college education.
>
> Terri has had to deal with a lot. Trying to be strong for them and for me.
>
> Don and I started going steady when we were 14 years old, married at 18. At the time of his death we had been married for 28 years. Don was killed in the prime of his life. He was only 46 years old. We were planning a cruise in June of 1995, sort of the honeymoon we never had. Don was my life, he was my best friend.

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[7] In Windom, this court held the questioned testimony had been erroneously admitted, but found the error had not been preserved for appellate review. 656 So.2d at 438.

> The last conversation.1 had with him on May 1, 1994 was when he was leaving to go back to the mine. I had asked him is [sic] he would be long and he told me it didn't matter because at 7:00 that next morning he would be on vacation and he'd be home by 8:00 a.m. Don didn't get to come home.

(T-831-32.)

Donald Miller's daughter also testified pursuant to the "Victim Impact" statute. Terri Miller testified as follows:

> Don Miller was more than just a case number. He was my dad. He had a family. He used to play catch with my son, Nicholas, who was seven at the time, getting him ready for this first baseball game. He never got to see that game. On the 2nd of May, the day after my father was killed, he had planned to go fishing with my son. That will never happen now.
>
> When my daughter, Stephanie, turned five he tool her to Merle Norman at the mall to get her ears pierced. That was her "special" gift from her Papa. He told her that every year on her birthday he would take her shopping for earrings. He never go to do that either. She was still only five years old when he died.
>
> These two grandchildren were the "apple of his eye." Now he can't be there for them as they grow up like he always was for me and my brother. These kids are now six and eight and are in counseling through their school to try to learn how to deal with their grief and to understand death. A lot of their childhood has been taken away. Now [sic] only have they lost their Papa, but they have also been forced to see the ugly side of life at a very young age.
>
> My dad had many friends from all walks of life. He fit in almost anywhere. I can think of 25 to 30 of his good friends off the top of my head. He was the type of person who was always willing to help you out as long as you were trying to help yourself. He had respect for other people and their feelings nd he got respect in return.

> This whole ordeal has taken its toll on our entire family, we've all suffered such a loss. We've lost our child, husband, dad, grandpa and friend - we never got a chance to say goodbye.

(T-835-36).

Clearly, the statements of the wife and the daughter of Donald Miller were not limited to descriptions of Donald Miller's uniqueness in the community, or to the community's loss; rather the statements were clearly designed to elicit emotion, sorrow, and sympathy on the part of the jurors. Because this testimony was not limited under the Windom rule, the jury was unfairly permitted to hear testimony designed to play on their sympathy. As Justice Stevens stated in his dissenting opinion in Payne, such evidence sheds no light on the defendant's guilt or moral culpability, and thus serves no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason. 501 U.S. at 856, 111 S.Ct. at 2625. Because Florida's death penalty. statute is constitutional because of its strict scheme of permissible aggravating circumstances, reliance by an unguided jury on "victim impact" evidence could well render the entire statute void under Proffit v. Florida, 96 S.Ct. 2960 (1976) . The death sentence should be reversed, and this cause remanded for a new penalty phase hearing, with instruction to the trial court to prohibit the admission of such impermissible testimony.

ISSUE V:

THE TRIAL COURT ERRED IN ADMITTING HEARSAY TESTIMONY AS TO OUT-OF-COURT STATEMENTS OF JEFF CHITTAM

Over objection of defense counsel, the state presented the testimony of Wendy Hedley, Tessa Mosley and Joanne Waldrup at the penalty phase hearing. (T-797), Hedley testified in court about out-of-court statements of witness Jeff Chittam purportedly made on May 1, 1994, after Jeff Chittam and Floyd Damren had returned from the mines. (T-797). Hedley testified that when she had returned to her trailer on the evening of May 1, that Jeff Chittam had been sitting on her porch drinking a beer. (T-803). Hedley testified that ten or fifteen minutes after she had returned to her trailer, that she and Jeff Chittam had gone inside the trailer and had had a conversation. (T-797-807). Hedley testified at trial that all of Jeff's statements had been made after she and Jeff had gone into the bathroom. (T-803). Hedley testified that at that point some ten to fifteen minutes after she had arrived, Jeff then told her that "they had went down to the mines and that they had done something bad. . . ."

Tessa Mosley testified that Jeff Chittam had been at Wendy Hedley's trailer some ***ten to fifteen minutes*** before Wendy Hedley had arrived on may 1, 1994. (T-818). Mosley was permitted to testify that as she went inside the trailer to the bathroom, Hedley and Chittam came out of the bathroom and that she [Mosley] heard Jeff "say something about Floyd hurting somebody at the mines." (T-815). Mosley also testified that for the first ten or fifteen

minutes that Jeff Chittam had been at Hedley's trailer, that he hadn't said anything at all about the incident at the mines. (T-819).

The testimony of Wendy Hedley, Tessa Mosley and Joanne Waldrup relating to the out-of-court statements made by Jeff Chittam was error, and this cause should be reversed for a new trial as a result thereof. The testimony of Jeff Chittam was introduced as an exception to the hearsay rule, section 90.803(2), Florida Statutes. That statutory section defines an excited utterance as "a statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

An excited utterance is admissible as an exception to the hearsay rule because a declarant does not have the reflective capacity necessary for conscious misrepresentation. Thus, statements made by someone who is excited are spontaneous and have sufficient guarantees of truthfulness. Rogers v. State, 660 So.2d 237 (Fla. 1995). In Rogers, this court stated:

> A statement qualifies for admission as an excited utterance when (1) there is an event startling enough to cause nervous excitement; (2) the statement was made before there was time for reflection; and (3) the statement was made while the person was under the stress of the excitement from the startling event.

660 So.2d at 240, citing State v. Jano, 524 So.2d 660 (Fla. 1988).

In Rogers, unlike the instant case, the excited utterance involved the statements of a witness who was described as

"hysterical," and who collapsed after calling the police. The in-court witness recounted the out-of-court declarant's behavior as pacing and remaining very excited as she recounted the events. According to the in-court witness, the out-of-court declarant never appeared relaxed or calm as she recounted the evening's kidnapping and murder. 660 So.2d at 240.

Rogers is clearly distinct from the facts of the instant case. In this case, testimony established that Jeff Chittam had arrived at Wendy Chittam's trailer some fifteen minutes before Wendy arrived. (T-818). Wendy then spent ten to fifteen minutes outside before going into the trailer, where the out-of-court statements of Jeff Chittam were purportedly made. (T-818). Moreover, Tessa Mosley testified that when she arrived at the trailer, Jeff Chittam was outside squatting on the ground, drinking a beer. (T-819) .

Joanne Waldrup testified that she had arrived at Wendy's trailer about 9:30 p.m., and had stood around outside for about an hour before Jeff and Wendy went inside. (T-828). During that hour, according to Waldrup, Jeff and Wendy had been arguing about their relationship. (T-828). Moreover, Waldrup stated that even after Jeff and Wendy had gone inside the trailer they went to the bedroom to continue their argument. (T-828). According to Waldrup, Jeff did not make the statements about the incident at the mines until after he had been there for an hour and a half. (T-829). No witness ever described Jeff Chittam as being panicked, upset, hysterical, or otherwise in a state of excitation. To the contrary, each witness testified that Jeff Chittam had said nothing

about the murder at the mines for at least the first fifteen minutes that he was at Wendy Hedley's trailer. (T-819).

As this court stated in Rogers

> The test regarding the time elapsed is not a bright-line rule of hours or minutes. Instead, "'where the time interval between the event and the statement is long enough to permit reflective thought, the statement will be excluded in the absence of some proof that the declarant did not in fact engage in a reflective thought process."'

660 So.2d at 240 (Citations omitted),

This case is more akin to Holmes v. State 642 So.2d 1387 (Fla. 2d DCA 1984), where the state attempted to introduce the out-of-court statements of a victim through the in-court testimony of a police officer. In Holmes, although the statements had been made at the hospital where the victim was being treated, the statements occurred an hour and a half after the shooting and the only evidence of the victim's mental state was the detective's observation that she was "upset." The Second District Court of Appeal held that such out-of-court statements did not qualify as an excited utterance "because the time between the shooting and the interview allowed an opportunity for reflection or fabrication and removed the indicia of reliability inherent in a spontaneous statement." 642 So.2d at 1389, *citing* Lyles v. State, 412 So.2d 458 (Fla. 2d DCA 1982).

As this court stated in Hamilton v. State, 547 So.2d 630 (Fla. 1989), "it is central to the reliability of statement that the declarant not have time to reflect on the event before making the "excited utterance." 5457 So.2d at 633 (Citations omitted).

In Hamilton, at least two and one-half hours had elapsed between the shooting and the out-of-court statement. This court determined that the declarant had had "ample opportunity . . . to overhear deputies, investigators and several other people state that opinion." 547 So.2d at 633. This court held:

> This time lapse renders [the] statement unreliable and thus inadmissible under the excited utterance exception.

547 So.2d. at 633.

Like the declarant in Hamilton, Jeff Chittam had "ample opportunity" to reflect and consider the situation about which he commented. He engaged in an argument with his girlfriend and consumed beer. His statements about his and Floyd's activities at the mines do not qualify as excited utterances, and should not have been admitted during the penalty phase. Because the hearsay testimony as to Jeff Chittam's out-of-court statements was so harmful and so prejudicial to appellant,[8] this cause must be remanded for a new penalty phase hearing.

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[8]The trial court relied exclusively on Chittam's purported statements in finding the murder to be cold, calculated and premeditated, and the jury may well have relied on Chittam's statements in returning its advisory verdict of death.

ISSUE VI:

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:

> The victim suffered at least ten blows from a pipe or other heavy object before being knocked unconscious. He sustained numerous contusions, abrasions and bruises to his arms, legs, chest, nose, ears, cheek and head. His nose was fractured. The injures were to both front and back and several to the arm were defensive wounds, showing that the victim was trying to protect himself. Several of the wounds to the face were inflicted upon the victim while he was till conscious and moving his head in an effort to avoid being hit. It is clear that the victim's death was preceded by a great deal of pain, suffering and fear, and finally by the knowledge that his death was at hand. The defendant's choice of weapons, a heavy metal pipe or other heavy metal object, to beat the victim to death was especially atrocious and cruel.
>
> This is an aggravating factor. The Court gives considerable weight to this circumstance.

(R-789-90).

The facts of this case do not rise to the level of "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),

In order for the record to sustain the finding of the statutory aggravating factor of "heinous, atrocious and cruel," there must be evidence of extreme and outrageous depravity exemplified by either the desire to inflict a high degree of pain or other indifference to or enjoyment of the suffering of the victim. Robertson v. State, 611 So.2d 1228 (Fla. 1993); Watts v. State, 593 So.2d 198 (Fla. 1992), citing Shere v. State, 579 So.2d 86 (Fla. 1991); Cheshire v. State, 568 So.2d 908 (Fla. 1990); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. *denied,* 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed. 2d 295 (1974).

As this court stated in Watts:

> Where, as here, death results from a shooting that is ordinary in the sense that there are no additional acts to set the murder apart from the norm of capital felonies, this aggravating factor does not apply. See also Cochran v. State, 547 So.2d 928 (Fla. 1989) (death resulted from single gunshot following abduction at gunpoint); Jackson v. State, 502 So.2d 409 (Fla. 1986) (robbery victim died shortly after single fatal shot); *cert* denied, 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed. 2d 686 (1987); Lewis v. State, 398 So.2d 492 (Fla. 1981) (victim died instantly from multiple gunshot wounds); Fleming v. State, 374 So.2d 954 (Fla. 1979).

593 So.2d at 204. Clearly, no such evidence exists in this case to establish the homicide was shockingly evil or outrageously vile.

The circumstance of "heinous, atrocious or cruel" is appropriately found only in torturous murders--those that evince extreme and outrageous depravity either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. McKinney v. State, 579 So.2d 80 (Fla. 1991).

In this case, the facts do not nearly rise to the level of that required by this court in McKinney, and this court should find that the trial court improperly determined that the statutory aggravating factor of heinous, atrocious and cruel had been proved.

Similarly, in Bonifay v. State, 626 So.2d 1310 (Fla. 1993), the record failed to demonstrate any intent by the defendant to inflict a high degree of pain or to otherwise torture the victim. Even though this court found the murder "vile and senseless," the court found that it did not rise to one that is especially cruel, atrocious and heinous as contemplated in State v. Dixon, Supra. The court went on to state that the fact that the victim begged for his life is an inadequate basis to find this aggravating factor absent evidence that the defendant intended to cause the victim unnecessary and prolonged suffering. 626 So.2d at 1313 (emphasis supplied). Moreover, where the state has failed to show that a defendant directed or knew how the victim would be killed in a case where there are co-defendants, the finding of "heinous, atrocious and cruel" cannot be upheld. S&Williams v. State, 622 So.2d 456 (Fla. 1993).

The trial court's determination that the statutory aggravating factor of "heinous, atrocious and cruel" exists is error and the sentence of death imposed in this cause should be reversed and this cause should be remanded for the imposition of a life sentence. This cause should not be remanded for a new sentencing hearing because the prohibitions against double jeopardy bar the re-trial of a sentencing hearing wherein the state has presented

insufficient evidence to sustain an aggravating factor. Poland v. Arizona, 106 S.Ct. 1749, 476 U.S. 147, 90 L.Ed. 123 (19__).

ISSUE VII:

THE EVIDENCE FAILED TO ESTABLISH THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER

In its sentencing order, the trial court relied exclusively upon the out-of-court statements of Jeff Chittam to find that the homicide had been committed in a cold, calculated and premeditated manner:

> After the defendant's first blow, his partner in crime, Jeff Chitham, [sic] "begged" the defendant not to hurt the victim. Chitham [sic] told the defendant not to hit the victim **again and** asked him to leave. The victim also begged the defendant not to hit him and begged for his life. The victim told the defendant he was going on vacation the next day and **was** taking his grandson fishing and asked to be let go. All this time the defendant was pacing and surely contemplating the situation, considering the pleas of Chitham [sic] and the victim and reflecting on his next course of action. The result of defendant's musing was an act of deliberate ruthlessness: the resumption of his attack on the victim and the cold, calculated and premeditated murder of Donald Miller. Despite being interrupted by Mike Knight and suspending his beating of the victim to chase Knight, he again returned to continue. Defendant's actions demonstrate **a** heightened premeditation.
>
> This is an aggravating circumstance. The Court gives considerable weight to this circumstance.

(R-790-91). Appellant asserts that because the out-of-court statements of Chittam were inadmissible, that this finding cannot be sustained upon this evidence. (See Issue I, supra).

Moreover, the evidence presented by the state in the guilt phase and adopted in the penalty phase established that Damren **had** intended to commit a burglary of the tool shed and theft of tools

at R.G.C. Mines. Testimony established that the burglary was interrupted by Michael Knight, an R.G.C. Mines employee. In its sentencing order, the trial court stated that Damren had gone to R.G.C. to steal. (R-787). No testimony established that there had been any calm and cool prior planning to murder the victim, or that there had been any heightened pre-meditation. No testimony whatsoever was offered by the state to prove that there had been any pre-arranged plan to kill Donald Miller.

As this court stated in Barwick v. State, 660 So.2d 685 (Fla. 1995), "a plan to kill cannot be inferred solely from a plan to commit or the commission of another felony." 660 So.2d at __, citing Geralds v. State, 601 So.2d 1157 (Fla. 1992), Sochor v. State, 619 So.2d 285 (Fla. 1993), Power v. State, 605 So.2d 856 (Fla. 1992), Hardwick v. State, 461 So.2d 79 (Fla. 1984). The rule of Barwick is that where the evidence suggests that a defendant planned to commit felonies rather than to kill, the murder cannot be said to be committed in a calculated manner. In this case, as in Barwick, the evidence showed that the defendant planned to burglarize and steal, rather than to kill, and it cannot be said that the homicide in this **case** was committed in a cold, calculated and premeditated manner.

The most recent pronouncement of this court regarding the statutory aggravator "cold, calculated and premeditated," is found in Gamble v. State, 20 F.L.W. S 242 (Fla. May 25, 1995). In Gamble, this court, citing Jackson v. State, 648 So.2d 85 (Fla. 1994), noted that this aggravating factor is properly found when

> The killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), ***and*** that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), ***and*** that the defendant exhibited heightened premeditation (premeditated), ***and*** that the defendant had no pretense of moral or legal justification.

(20 F.L.W. S at 242). In Gamble, the evidence established days of advance planning and an elaborate scheme. This court has also recently stated that the heightened premeditation which is the element of this aggravator is "cool and calm reflection." Windom v. State, 656 So.2d 432 (Fla. 1995).

The rule of this court is that in order to prove the existence of the aggravator of "cold, calculated, and premeditated," the state must show a ***heightened*** level of premeditation establishing that the defendant had a careful plan or prearranged design to kill. Sweet v. State, 624 So.2d 1138 (Fla. 1933). Moreover, where the evidence regarding premeditation is "susceptible to . . . divergent interpretations," the state fails to meet the burden of establishing beyond a reasonable doubt the statutory aggravator of cold, calculated, and premeditated. Geralds v. State, 601 So.2d 1157 (Fla. 1992). In Geralds, the facts, as in the instant case, were equally susceptible of the planning of a burglary, rather than a homicide. In the instant case, the testimony of Michael Knight and of Tessa Mosley could lead to the conclusion that appellant had been involved only in the planning of a burglary and a theft, not a homicide.

This court has stated that the "heightened" premeditation

required to prove this statutory aggravator does not apply when a perpetrator intends to commit an armed robbery . . . but ends up killing the store clerk in the process. Porter v. State, 564 So.2d 1060 (Fla. 1990). The facts in this case fail to rise to the level of heightened premeditation, and appellant does not fall within the narrow class of persons eligible for the death penalty by reason of this statutory aggravator. The trial court's finding of this aggravator flies directly in the fact of Zant v. Stevens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed. 2d (1983). In order to pass constitutional muster, the interpretation of this statutory aggravator must apply only to murders "more cold-blooded, more ruthless, and more plotting than the ordinary reprehensible crime of premeditated first-degree murder." Porter, supra, at 1064.

Where, as here, the record is void of the kind of evidence indicative of the heightened premeditation necessary for application of this aggravating circumstance, this court cannot sustain the trial court's findings. For example in Jackson v. State, 498 So.261 906 (Fla. 1986), where the appellant had planned the robbery and shot the victim, this court held that an intent to rob is not indicative of heightened premeditation. Moreover, the premeditation of a felony cannot be transferred to a murder which occurs in the course of that felony for purposes of this aggravating factor. See Harrv v. State, 522 So.2d 817 (Fla. 1988); Hardwick v. State, 461 So.2d 69 (Fla. 1984), cert denied, 471 U.S. 1120, 105 S.Ct. 2369, 86 L.Ed. 2d 267 (1985).

Finally, where there is no basis in the record for a finding

that the homicide was committed in a cold, calculated manner with a heightened sense of premeditation, the finding cannot be sustained. In Hamilton v. State, 547 So.2d 630 (Fla. 1989), this court took the extra step of discussing the application of statutory aggravators in a case which was reversed for error during the guilt phase. It is clear from this court's ruling that facts supporting the statutory aggravators must be proved beyond a reasonable doubt, and cannot be based on speculation. See also Schafer v. State, 537 So.2d 988 (Fla. 1989), and cases cited therein.

Because the trial court erred in determining that the statutory aggravator "cold, calculated and premeditated" had been proved beyond a reasonable doubt, this court should reverse the sentence of death and impose a life sentence.

ISSUE VIII:

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 presented by the defense,

Therefore, it was error for this court to reject or to assign slight weight to mitigators; this cause must be reversed and remanded with instructions for the imposition of a life sentence.

ISSUE IX:

THE IMPOSITION OF THE DEATH PENALTY IN THIS CAUSE IS NOT PROPORTIONATE WITH THE IMPOSITION OF THE DEATH PENALTY IN OTHER CASES

The death penalty in this case must be reversed because the imposition of the death penalty in this case would not be disproportionate with other death penalty cases. In Sinclair v. State, 657 So.2d 1138 (Fla. 1995), this court cited Tillman v. State, 591 So.2d 167 (Fla. 1991), for the concept of proportionality review:

> We have described the "proportionality review" conducted by this Court in every death case as follows:
>
> because death is a unique punishment, it is necessary in each case to **engage** in a thoughtful, deliberate, proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances . . . . The requirement that death be administered proportionately **has a** variety of sources in Florida law, including the Florida constitution's express prohibition against unusual punishments . . . It clearly is "unusual" to impose death based on facts similar to those in which death previously was deemed improper . . . Moreover, proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties.

657 So.2d at __ (Citations omitted.)

In Thompson v. State, 647 So.2d 824 (Fla. 1994), this court determined that the imposition of a death sentence was disproportionate, and remanded for the imposition of a life sentence. Under the doctrine of Thompson, Tillman, and Sinclair,

this court should remand this cause with instructions to vacate and a set aside the death penalty and impose a life sentence.

CONCLUSION

Because the trial court erred in permitting the evidence of prior bad acts of appellant, in refusing to give the standard Williams rule instruction simultaneously therewith and in overruling appellant's objection to the state's improper remarks in guilt phase closing argument, appellant was deprived of his right to a fair trial; this cause should be reversed and remanded for a new trial.

The trial court also committed error in the penalty phase which necessitates remand for a new penalty phase, including the admission of "victim impact evidence" and the admission of the out-of-court statements of Jeff Chittam. Because this testimony was impermissibly permitted to be presented to the jury during the penalty phase, a new penalty phase is required.

Finally, the trial court erred in finding the aggravating factors of "especially heinous, atrocious and cruel," and "cold, calculated and premeditated;" prohibitions against double jeopardy bar the re-trial of a sentencing hearing wherein the state has failed to present sufficient evidence to sustain the aggravators. This cause should be remanded for the trial court to vacate the death sentence and to impose a life sentence for the offense of first-degree murder.

Moreover, the imposition of the death penalty in this case is not proportionate with the death penalty in other cases, and must be vacated and set aside for the imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Robert A. Butterworth, Attorney General, the Capitol, Tallahassee, Florida 32301; and to Harry Shorstein, State Attorney, Duval County Courthouse, Jacksonville, Florida, 32202, by regular United States Mail this 16th day of May, 1996.

Teresa J. Sopp

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