IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

GARY BOWLES,

Appellant,

v. CASE NO. 89,261

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

GARY BOWLES,

Appellant,

v. CASE NO. 89,261

STATE OF FLORIDA,

Appellee.

_____/

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Gary Bowles is the Appellant in this capital case. He pled guilty to one count of first degree murder, so the issues in this appeal concern only the appropriateness of the death sentence he received. The record on appeal consists of 11 volumes.

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Duval County on December 8, 1994 charged the Appellant, Gary Ray Bowles, with one count of first degree murder and one count of robbery with a deadly weapon (1 R 1-2). He pled not guilty to those offenses (3 R 486), and he and the State filed the following notices or motions relevant to this appeal:

1. Motion to Prohibit instruction on aggravating factors 5(h) and (i) (1 R 99). Denied (1 R 102).

2. Motion to declare section 921.141(5)(i) Florida Statutes unconstitutional (1 R 110). Denied (1 R 137).

3. Motion to declare section 921.141(5)(d) unconstitutional (1 R 138). Denied (1 R 137).

Bowles later pled guilty to the murder, and the court accepted that plea (2 R 289, 4 R 597). As to the robbery charge, it did nothing at that time (5 R 810-11).

Bowles proceeded to the sentencing phase portion of his trial, and the empaneled jury heard evidence of how the murder was done and other evidence to aggravate the murder. Bowles then presented his case for mitigation, after which both sides made their arguments concerning the sentence, and the court instructed the jury on the appropriate law.

The jury recommended death by a vote of 10-2, and the court followed that verdict. In sentencing Bowles to death, the court found in aggravation:

1. The defendant had a previous conviction of a felony involving the use or threat of violence to some person.

2. The capital felony was committed by a person on probation. Merged with the previous conviction aggravator.

3. The defendant attempted to rob the victim.

4. The capital felony was committed for financial gain. Merged with the attempted robbery aggravator.

5. The murder was especially heinous, atrocious, or cruel.

(III R 455-57)

In mitigation, the court found Bowles:

1. has a serious substance abuse problem. Significant weight.

2. was abused physically and emotionally by two stepfathers. Some weight.

3. lived in an abusive, violent home-Significant weight.

4. never had a positive male role model in his life. Some weight.

5. never finished junior high school. Little weight.

6. helped the Tampa Sheriff's Office obtain a conviction of a person who had committed a sexual battery. Some weight.

7. confessed to the police and FBI. Some weight.

8. pled guilty. Little weight

This appeal follows.

STATEMENT OF THE FACTS

Gary Bowles[1], a homeless alcoholic, met Walter Hinton sometime in the latter part of October 1994 at a pier in Jacksonville Beach (9 T 1006). Hinton asked the Defendant to help him move some items he had in Georgia to his trailer in Jacksonville, and in return, he would let Bowles live there for a while (9 T 1007). He agreed and provided the assistance, and for a few weeks lived with Hinton (9 T 1007).

Sometime in the middle part of November, Hinton also let a woman known as Sharon Ann or Jo Ann stay with him. The trio seemed to live together well enough until Bowles made some sexual advances on Sharon that Hinton resented (9 T 1007-1008). He told the Defendant to leave, and Bowles left the trailer (9 T 1008). He was arrested the next day for being drunk, but was released from jail on Monday November 14 (9 T 1017). Although mad at Hinton for getting him taken into custody, he made up with him enough that Hinton allowed the Defendant to stay in the trailer until the end of the month (9 T 924, 928, 1017).

Two days later, Hinton brought home a man named Rick, and the trio smoked some marijuana and drank beer. They partied until Rick had to leave to catch a train, but even on the way to the station and while in its parking lot, the men drank beer and smoked the weed (10 T 1080, 1132). After leaving, Hinton and Bowles (who was very drunk (10 T 1133)) returned to the trailer. Hinton went to sleep, but the Defendant stayed up drinking as much as six "quart Magnum beers." (9 T 1017, 10 T 1080)

Something "snapped inside" Bowles, and he left the trailer, picked up a 40 or 50 pound concrete block and returned (9 T 873, 876). He put it on the table for a few minutes then went into Hinton's bedroom, raised the stone above him, and dropped it on his head. The block hit Hinton's face and fractured it (9 T 910). Bowles strangled Hinton who was struggling a little (9 T 919). He probably became unconscious within 30

[1]At the time of the murder Bowles was calling himself Timothy Whitfield, and had identification with that name on it (9 (T 1012).

seconds and died 30-45 minutes later (9 T 911). At some point - the Medical Examiner could not say when (9 T 916) - toilet paper was stuffed down his throat and a rag was put into his mouth (9 T 1017). The Defendant then covered the body with a sheet and left, driving the victim's car and wearing his watch. Some other items may have been taken, and Bowles looked for money, but found none (9 T 948, 951, 10 T 1081)

Hinton died from asphyxiation (9 T 900, 910).

After the death, Bowles picked up a Ginger Moye, another street person who had known him for a couple of years. During that time, she almost always saw him either drinking, drunk, or "staggering drunk" regardless of whether it was 7 a.m. or 2 a.m. (9 T 937).

She was sick and needed a place to stay, so they returned to Hinton's trailer and lived there for a couple of days (9 T 945, 954). Bowles then stayed at a motel on the beach, and he was arrested about a week after the murder at "Ameri-force" labor pool (9 T 965, 971). When questioned, although shaking from what "he called the DTs," he admitted killing Hinton (10 T 1082).

Bowles was born in 1962, and his mother was 15 or 16 years old at the time (10 T 1143). Until she married Bill Fields, and even for a few years afterward, life was OK, and her marriage was good (10 T 1146). Standing six feet tall, weighing about 210 pounds, and having a "nice build" Fields, in time, became "really abusive" to Bowles and his older brother, Frank (10 T 1145-47). He was a very strict disciplinarian, beating the boys with belts, fist, or "whatever he took a notion to hit them with." (10 T 1147) Bowles, who was six or eight when the beatings started (10 T 1176) had bruises on his face, and welts on his legs. Fields would throw him against a wall (10 T 1147), and would stop only when he got tired. "He seemed to enjoy it." (10 T 1176). When his mother tried to stop her husband, he turned on her. He was, as she said "a little bit uncontrollable." (10 T 1149)

She eventually divorced him and married Chet Hodges in 1978. If possible, he was more abusive than her previous husband. "He didn't care where he threw you, or where he hit you." (10 T 1153) He put Bowles' mother in the hospital three times (10 T 1152).[2] Chet was also an alcoholic and would drink from sunup until he went to bed. Bowles' mother also drank heavily (10 T 1181).

Bowles tried to escape the beatings his step fathers enjoyed inflicting. When he was a small child, he hid in the garage or went to friends' homes (10 T 1154). Later, starting when he was eight or nine, or maybe it was 10 or 11, he began drinking beer, sniffing glue, sniffing paint, and smoking marijuana (10 T 1150, 1177-78).

By the time Bowles was 12, he was "uncontrollable." (10 T 1164-65) He had some counseling in school, but he dropped out when he was in the 8th grade (10 T 115). He left home when he was 13, after being beaten and rejected by his mother (1- T 1157-58). Indeed, since Bowles was 11 years old, she has had little contact with him (10 T 1162).

Now on the streets, Bowles had only his body to use to get food, shelter, and money. He began "hustling gays," although he hated having sex with them (9 T 1020, 10 T 1067, 1101). He continued to drink, and in 1982, he was living with his girlfriend of two months who was also a prostitute. One night, while both of them were drunk, he beat her up badly and sexually battered her (10 T 1085, 1094, 1098). He was convicted of aggravated battery and sexual battery and sent to prison (10 T 1096). In 1991 he ran into another woman he had known years earlier, and after they had had a few drinks and she was leaving her car, he pushed her down and took some money from her purse (10 T 1106). She told him she was going to call the police, which she did, and they arrested him a short time later (10 T 1106). He was found guilty of strong armed robbery (10 T 1108-1109).

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[2]On returning from the hospital one time, "Chet was there, and he was drinking and beating the kids, and I just couldn't handle it. And I took a bunch of pills." (10 T 1155)

William Hinton was a homosexual, but Bowles never had any sex with him (9 T 928, 10 T 1078).

SUMMARY OF THE ARGUMENTS

Bowles presents ten penalty phase arguments for this court to consider. The first two deal with the homosexuality theme the State introduced and emphasized, starting with its opening statement through its sentencing memorandum. The victim's sexual orientation and Bowles' "hustling" of gays had no relevance to this case, yet the state, over repeated Defense objections, introduced and stressed them. Making sexual orientation a feature of this sentencing trial made "hate crimes" an un enumerated aggravator that the jury could use to justify its death recommendation. The evidence only destroyed Bowles' character, something he had not introduced. Because the State repeatedly emphasized and argued this aspect of the case, it became a feature of the trial, but one that only unfairly prejudiced Bowles.

Continuing this theme, the court sustained objections to testimony from State witnesses that Bowles was "rolling fagots" when he lived in Daytona Beach, and "he drank to make it easier to kill." This evidence implied he had committed other violent crimes, and though the court sustained his objections, the curative instructions were either too anemic or ineffective to erase the deep stain such evidence inevitably leaves.

Bowles presented extensive proof of his extraordinarily abusive childhood that directly or indirectly led to his life as a drunken, homeless man who had made a living by "hustling gays." He also showed that on the day of the murder, and at most, only an hour or two before the homicide, he had drunk at least a gallon of beer and smoked marijuana. Despite this evidence, the court refused to find the statutory mental mitigators that he had committed the murder while his capacity to appreciate the criminality of his conduct was substantially impaired, and he was under the influence of an extreme mental or emotional disturbance. He presented testimony to support finding both mitigators, and the State presented nothing to rebut or contradict them. In such instances, the court had no discretion, but had to find these two statutory mitigators. (ISSUE III)

The court found that Bowles committed the murder during the course of an attempted robbery and for pecuniary gain. Recognizing the doubling problem, it merged those aggravators, but it erred in finding Bowles had any motive to kill to take Hinton's money or property. He abandoned the victim's car, but more significantly, no evidence rebuts his hypothesis that what he took from Hinton occurred as an afterthought to the murder. Indeed, whatever plan he had arose because something "snapped" inside the Defendant. The State presented no evidence he murdered the victim to take his property from him. (ISSUE IV)

While Bowles strangled Hinton, and he died from asphyxiation, the murder was not especially heinous, atrocious, or cruel, contrary to the court's finding. Unlike most strangulation killings in which the aggravator presumptively applies, this one did not have a victim who had any prolonged awareness of his impending death. He was asleep when Bowles started his attack, and Hinton quickly lost consciousness. His struggling was feeble and for a short time. His death was not especially heinous, atrocious, or cruel. (ISSUE V)

The trial judge explicitly refused to consider Bowles' mental condition as it affected his ability to commit the murder in an especially heinous, atrocious, or cruel manner. While this court has approved that limitation on the use of mitigation it should re-examine that position. If strangulation murders are presumptively HAC, that conclusion becomes irrebuttable if the Defendant cannot, as a matter of law, present evidence this court in State v. Dixon, 283 So. 2d 1 (Fla. 1972), impliedly said can mitigate that aggravation. (ISSUE VI)

If this court agrees that the court improperly found the murder to have been especially heinous, atrocious, or cruel, and for a pecuniary gain motive, then only one uncontested aggravator remains: that Bowles has prior convictions for violent felonies. But that aggravating factor fails to distinguish this case from the "hundreds of capital felonies" this court has reviewed since the 1970's. Additionally, Bowles presented

significant mitigation, and argued the court should have found the two statutory mental mitigators. Taken together, these arguments, and the evidence supporting them, as well as the facts relied on by the State, show that death is proportionately unwarranted in this case. (ISSUE VII)

Even though the new instruction on the HAC aggravator has won this court's approval significant constitutional problems remain. (ISSUE VIII)

The court read the jury the revised instruction on the cold, calculated, and premeditated aggravating factor, but the definition of premeditation it read has significant constitutional infirmities. (ISSUE IX)

The court found that Bowles had committed the murder during the course of an attempted robbery, but it could not constitutionally do so because that felony also underlay the murder conviction. In short, the felony murder aggravator does nothing to narrow the scope of those who could receive a death sentence, and for that reason is unconstitutional. (ISSUE X)

ARGUMENT

ISSUE I

THE COURT ERRED IN ALLOWING THE STATE TO MAKE REPEATED REFERENCES TO AND INTRODUCE EVIDENCE OF THE VICTIM'S HOMOSEXUALITY AND THE DEFENDANT'S HUSTLING OF GAY MEN WHEN SUCH COMMENTS AND EVIDENCE HAD NO RELEVANCE TO THE PROPER DETERMINATION OF THE SENTENCE THE JURY HAD TO RECOMMEND, A VIOLATION OF BOWLES' FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

The theme that runs through the State's case focussed not so much on the aggravating and mitigating circumstances articulated in section 921.141, Florida Statutes (1995), but in Mr. Hinton's sexual orientation and Bowles' "hustling" of homosexuals. In the opening paragraph of the State's closing argument, it announced its intention of making hate crime[3] an unenumerated aggravator:

> May it please the Court, Counsel. Good afternoon. Walter Jammell Hinton is dead. He died at the hands of this man right there He died because he was a caring person, allowing strangers to live in his home. And I would submit to you that he died because he was a homosexual.

(11 T 1263) (Emphasis supplied.)

Bowles, anticipating this focus, filed pre-trial motions seeking to prevent the State from raising Hinton's sexual proclivities (2 R 340). The court, for example, granted his request that Timothy Daly, a prospective state witness, reported that the Defendant told him he had "killed six gay men." (2 R 340, 342) The court also granted his motions in limine seeking to prohibit evidence he may have killed other men because they were homosexual (4 R 730, 2 R 386-87).

Undeterred, the State raised the sexual orientation issue in its opening statement:

> Mr. Hinton was a homosexual. And the defendant didn't like homosexuals. In fact, the defendant had two former

[3]Section 775.085 enhances "the penalty for any felony or misdemeanor . . .if the commission of such misdemeanor evidences prejudice based on . . . sexual orientation. . . of the victim.

> girlfriends in the past who left him because of the defendant's lifestyle.
>
> MR. WHITE [Defense Counsel]: Objection, Your Honor. . . . I would object and move for a mistrial. We don't believe that is evidence that will come in this case properly . . . .I think that we have some motions pending concerning statements that the defendant made concerning whether he liked or disliked homosexuals. This is the type of evidence that the Court has not made a final ruling on. And to bring it in at this point it prejudices the defendant in a way that he can't defend against if the testimony is kept out at a later time. We would, therefore, move for mistrial.
>
> THE COURT: The motion for mistrial will be denied.

(8 R 802-804)

During its case in chief, the State continued the homosexual theme. The prosecutor asked Hinton's housekeeper, "Were you aware that Mr. Hinton was homosexual?" To which she not only said she was, but significantly that Hinton and the Defendant had no "relationship" that she was aware of (9 T 928).

The key witness, however, was a Detective Collins who testified about what Bowles had told a Ms. Pearson after she had had an abortion of Bowles' baby. According to the police officer the Defendant had told her that "he felt that homosexuals were responsible for the loss of the baby, and that they had ruined his life with women." (9 T 1032)[4] She also broke up with him because he was hustling gays (9 T 1033). As Bowles brought out, however, that had occurred in 1985, 11 years earlier (9 T 1037), and that sentiment had no connection with the killing of Mr. Hinton." (9 T 1038) Yet, on redirect, Detective Collins reiterated that Bowles blamed homosexuals for killing his baby (9 T 1038).

[4]The State also wanted Collins to tell the jury about another woman that had left Bowles because he hustled gay men. Bowles, wanting to prove his love for her, told her he would kill for her (9 T 1021-23). The court excluded that hearsay because the State had not laid the required predicate (9 R 1031). Regarding the hearsay of Ms. Pearson, the judge told the prosecutor, "I want it to be very brief." (9 T 1032)

The prosecution's next witness, a Timothy Daly, then told the jury that Bowles had admitted he was "rolling fagots" in Daytona (9 T 1046). The court sustained the Defendant's objection to that comment. Undeterred, the prosecutor pursued the homosexual theme with FBI agent Dennis Regan who testified that although Bowles hustled men, he disliked it and denied being homosexual (10 T 1067-68). Regan, as the housekeeper had done, also said Bowles and Hinton had had no sexual relations (910 T 1078).

Wanting to keep its homosexual theme before the jury, the prosecutor asked one of its last witnesses, on redirect, what the "defendant's occupation was" to which he responded, "he was a hustler." (10 T 1100-1101)

Then, the State opened its closing argument with its homosexual comment, and it focussed on that orientation in justifying finding Bowles' comment the murder in a cold, calculated, and premeditated manner:

> What did he say? It's not in the written statement, but he was asked by both FBI agent Mr. Regan, and by Detective Collins. He hated homosexuals. And you may think well, you know, if he hates homosexuals, what is he doing with a person who is a homosexual? In this case, the victim. I'm sorry to be talking about him that way, about the victim. But that's reality.
>
> Well, he was a hustler, as you will recall, which means he basically hustled men. Now, there is no evidence in this case that he had sex with the victim or that the victim had sex with him.
>
> You will recall that hatred that he had. Do you recall how he blamed homosexual men because of the abortion of his child? Why is that relevant? Because in his mind they were responsible for the death of his child in that the former girlfriend, who had his child, didn't want him hustling men anymore. And she left him and she had an abortion. And in his mind they were responsible.
>
> Because of the victim's lifestyle does this mean he should be killed? I asked you that in jury selection. I'm not trying to imply anything in the sense of-- in any way that you should think about homosexuals. I don't care what a person's views

> are about that. He is a human being. Do you think because he has a certain lifestyle--that doesn't mean he should get killed. Because where do we stop? What do we say about people because of the color of their skin, or how much they weigh or how tall they are. I mean, where would it stop?

(11 T 1289)

It certainly did not stop with the State because in its sentencing memorandum the prosecution continued to emphasize the homosexual link to prove the murder was cold, calculated, and premeditated: "The defendant admitted that he didn't like homosexuals and was aware that Walter Jammel Hinton was one. Defendant blamed homosexuals for his problems with not being able to have relationships with women and for the death of his son. A former girlfriend had left defendant and had aborted his child because defendant continued to hustle gay men." (3 R 430) Significantly, the court, in refusing to find that aggravator, made no mention of the homosexuality motivation of Bowles (3 R 459). It did so for good reason. It had no relevance to this case, and the court erred in allowing the prosecutor to develop it for the jury to consider as evidence of Bowles' bad character.

1. The evidence had no relevance and amounted to an improper character attack on Bowles.

In Flanagan v. State, 625 So. 2d 827 (Fla. 1993), this court held that the trial court had improperly admitted sex offender profile evidence either as "background information" or as substantive evidence of Flanagan's guilt of sexual battery.

> We also note that this testimony was completely inappropriate as substantive evidence of guilt. If anything, this profile evidence tended to show that because Flanagan and his house had certain traits which fit Dr. Goslin's child sex offender profile, he necessarily sexually abused his daughter. Establishing that a defendant has a certain character trait in order to show he acted in conformity with that trait on a certain occasions is forbidden by rules of evidence. Section 90.404(1) Fla. Stat. (1987); See generally Charles W. Ehrhardt, Florida Evidence, section 404.4 (1992).

Accord, Hitchcock v. State, 673 So. 2d 859 (Fla. 1996) (Evidence of Hitchcock's pedophilia irrelevant at capital sentencing). That is, there is no relevant connection

between the Defendant fitting a general "profile" and the conclusion that on a specific occasion he acted in conformity with it. Yet, that is the tautology the State presented to the jury in this case.

That Bowles made this murder a hate crime, according to the State, also had to compete with the other motives the State argued Bowles had when he murdered Hinton. The State created a smorgasbord of reasons for the homicide. It said the Defendant killed for pecuniary gain. No, it was during the course of a robbery (T 923). If not that, how about that he needed a place to stay (T 938)?

Here, the State reasoned that because Bowles had a general hatred of homosexuals, and Hinton was such, that was his motive for killing him (11 T 1263). Without any evidence linking that alleged universal hatred specifically to Hinton, the State could not make the logical leap it did, but which the Flanagan court said it could not.

Section 90.404(1), Florida Statutes (1996), prohibits general attacks on the Defendant's character:

> (1) Character evidence generally.-Evidence of a persons' character or trait of character is inadmissible to prove action in conformity with it on a particular occasion, except:
>
> > (a) Character of accused.-Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the trait.
> >
> > (b) Character of victim.-
> >
> > > 1. . . .[E]vidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the trait.

In this instance, the defense never offered Bowles' or Hinton's homosexuality trait in evidence. Indeed, he sought to keep it from the jury (3 T 411, 8 T 802-803). It was the State that repeatedly made an issue not only of the Defendant's supposed hatred of

gays, his hustling of them, but of Hinton's homosexuality. Under section 90.404(a) or (b) such proof was inadmissible.

In other cases, this court has found a direct, relevant link between the victim's homosexuality and his death. For example, in Dufour v. State, 495 So. 2d 154 (Fla. 1986), the Defendant said he was going to "find a homosexual, rob and kill him." Later the same day, he did that. In Duest v. State, 462 So. 446 (Fla. 1985) , two days before Duest killed the victim in that case, he said he brought homosexuals to their apartments, beat, and robbed them of their money or jewelry. On the day of the murder, the victim was found in his residence, and his car and jewelry box were missing. In Smith v. State, 365 So. 2d 704 (Fla. 1978), Smith and two other men decided to "roll a queer" for beer money. They went to a bar, picked up the victim, and eventually killed him.

In each of these cases, the State provided the direct, relevant, context link between the victim's homosexuality and the motive for the murder. Within hours or a few days of the murders, the Defendants had breathed out their animosity against gays, and had soon acted on that hatred.

In this case the prosecution presented no similar, immediate, context link between Bowles' alleged hatred of homosexuals and his murder of Hinton. A generalized expression of ill will to all homosexuals because of what his girl friend had allegedly done a decade earlier fails to provide a motive for the murder this Defendant admitted doing.

2. The court's error in allowing the evidence was harmful.

The State's persistent attack on Bowles' character became a feature of the sentencing hearing that requires a new penalty phase trial. First, Bowles repeatedly objected to the State's efforts to get this evidence before the jury. He presented motions in limine, he objected to the State's opening statement. Second, the State asked almost every witness it called, from Hinton's housekeeper to Agent Regan and Deputy Collins about Hinton's sexual orientation or Bowles' hatred of gays. (9 T 928, 1020, 1032, 1044-

45, 10 T 1065, 1078, 1101). The State in closing argument made the illogical connection between Bowles' general animosity to homosexuals and the motive for killing Hinton in this case, and it spent considerable time discussing it (11 T 1263, 1289). See, Flanagan, cited above. Homosexuality became a feature of the Defendant's penalty phase trial and unfairly prejudiced the fair determination of the appropriate sentence Bowles should receive.

Moreover, as the court noted in its sentencing order, the Defendant presented several mitigating factors that deserved "significant weight." These included his disastrous childhood, and his lifetime alcohol and drug abuse. When placed in the balance without the homosexual reference, a jury may well have weighed the aggravators and mitigators differently. They may have done this because the court made no reference to it in its sentencing order, and that is particularly important here because it refused to find the CCP aggravator. Had it believed the homosexuality evidence had relevance to that aggravating factor it could have used it to justify finding it. That this experienced judge showed greater discretion than a jury may have exercised in not using the homosexual evidence, further demonstrates the irrelevancy of that evidence. See State v. Dixon, 283 So. 2d 1, 8 (Fla. 1972) ("Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience.")

The seriousness of the court's errors on this point become clearer if we shift the focus to the First Amendment. Allowing the State to raise the stench of a hate crime murder makes that focus an unenumerated aggravator. Section 775, Florida Statutes (1996), enhances the penalty for "any felony . . .if the commission of such felony . . evidences prejudice based on the . . . sexual orientation . . . of the victim." In construing the statute to accord with the First Amendment, this court held that the crime and the Defendant's motive for committing it must be closely connected. "The targeted activity - the selection of a victim - is an integral part of the underlying crime." On the other hand,

where, "The expression and crime share the same temporal framework, nothing more," the enhanced penalty provision finds no application. State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994).

Two United States Supreme Court cases show how this works. Dawson v. Delaware, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed 309 (1992) involved a prison murder in which the Defendant, a prison inmate and a member of the "Aryan Brotherhood," killed another prisoner. During the subsequent trial, the prosecution introduced evidence that the brotherhood was a white racist prison gang that started in California in the 1960's as a response to other gangs of racial minorities. The Brotherhood existed in many state prisons including those in Delaware. Such evidence had no relevance to Dawson's sentencing hearing because the State had provided no connection tying the murder Dawson committed to the beliefs of that gang.

On the other hand, in Wisconsin v. Mitchell, 508 U.S. --, 113 S.Ct. 2194, 124 L.Ed. 2d 436 (1993), a group of blacks, after watching the movie, "Mississippi Burning," accosted and beat a white person. The nation's high court found no encroaching on the First Amendment when Wisconsin sought to enhance the Defendant's punishment for aggravated battery that was motivated by racial animosity. Likewise in Barclay v. Florida, 463 U.S. 939, 942-44, 103 S.Ct. 3418, 77 L.Ed. 2d 1134 (1983), the sentencing judge could consider Barclay's hatred of whites in imposing a death sentence because the victim had been selected on account of his race.

This case shares more similarities with Dawson than Mitchell or Barclay. There is no "cause and effect" relationship between Bowles' faded expression of hatred for gays (made in 1985) and the 1994 murder of Hinton. Whatever association exists arises because the Defendant was in the business of "hustling gays," so he would be around them as a matter of course. As to Hinton, Bowles began living with him after he had helped the latter move some things from Georgia (9 T 1007). In short, only the prosecutor's imagination linked the murder and Bowles animosity. That is insufficient to

make this murder a "hate crime," State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994), and the court should not have let the prosecutor play to the jury's sympathies with the evidence of Hinton's homosexuality, Bowles' hatred of gays, and only argument connecting the two.

This court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE II

THE COURT ERRED IN DENYING BOWLES' MOTION FOR A MISTRIAL AFTER STATE WITNESSES TESTIFIED THAT THE DEFENDANT WAS "ROLLING FAGOTS" WHEN HE LIVED IN DAYTONA BEACH, AND "HE DRANK TO MAKE IT EASIER TO KILL," A VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

During the State's case, it called Timothy Daly, a convicted felon, who had met Bowles while both were housed in the Duval County Jail. The witness recounted the Defendant's admission that he had killed the victim, but the prosecutor especially wanted to know why he had committed the murder.

> Q. And when talking about the death of this individual, did he give you and explanation?
>
> A. Yes. He said that--he told me that he was living with a girl in Daytona and that he was rolling fagots.
>
> MR. MORRISSEY [Defense counsel]: Objection, you Honor. May we approach?. . . this is collateral crimes not properly admitted in this proceeding. It's not proper aggravation. I would move for a mistrial
>
> MRS. RADI [Prosecutor]: Your Honor, what I'm trying to get at from the witness at this point is exactly his feelings about homosexuals, why he did what he did, and that was because of his prior girlfriend and his feelings for homosexuals. The fact that he just mentioned about fagots has come out by the defendant himself; that he was hustling gay men and that's how he made his living. That is coming out at trial as -- not the focus of the question on this defendant but rather about homosexuals and what crime he committed.
>
> THE COURT: Well, if you really wanted what this defendant's feeling are about homosexuals you should have asked the question did he ever tell you what his feelings are about homosexuals. I sustain the objection. I suggest that if you think he is going to blurt this out again that you consider not asking him that. Let's proceed.
>
> MR. MORRISSEY: Judge, we would move for a curative instruction regarding the last point.
>
> THE COURT: Members of the jury, the response given by the witness to the last question should be completely

disregarded by you and you should give it not attention. Let's proceed.

(9 T 1047)

Undeterred, the State pressed its next witness, FBI agent Dennis Regan about why Bowles drank.

Q. Did he say why he drank regarding the murder, sir?

A. He drank to make it easier to kill.

MR. WHITE: Objection, Your Honor.

(10 T 1068)

After an extensive discussion at the bench about Regan's response, the court sustained Bowles' objection (10 T 1071). Unsatisfied, the Defendant also asked for a mistrial because the response "goes to the pattern of conduct in saying when he drinks it makes it easier to kill. I think the prejudice is there." (10 T 1073) The court denied that motion and told the jury to "disregard the last answer." (10 T 1078)

Refusing to grant Bowles' requests for a new sentencing hearing on each comment was error. Those mistakes become so troubling, especially when considered with the error discussed in the previous issue, that this court must reverse this Defendant's sentence of death and remand for a new sentencing hearing.

1. The evidence that Bowles "rolled fagots" and drank to make it easier to kill was not properly Williams rule evidence.

Section 90.404, Florida Statutes (1996), provides the relevant portion of the evidence code that controls this argument:

(2) Other crimes, wrongs, or acts.--

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

For this portion of Bowles' argument, the key phrase is "similar fact evidence of other crimes." Here the state presented only Daly's allegation that Bowles was "rolling fagots," and agent Regan's claim the Defendant drank to make killing easier. They became inadmissible allegations, not "similar fact evidence," because there were no similar facts. Several cases with facts very similar or less egregious to those here support this argument.

In Dibble v. State, 347 So. 2d 1096 (Fla. 2d DCA 1977), a Detective Herold arrested Dibble after she and a companion had tried to take money from him as the officer posed as a drunken derelict. While making the arrest, he told the defendant, "that this happens all the time on the street, people getting robbed, but this time I was a police officer, and 'You just all hit the wrong guy this time.'" Id. at 1097. Admitting that statement at trial, the Second District held, was error. It implied that Dibble had previously robbed someone, but there was no proof of such a crime, or that she had done it. Because the comment was "highly prejudicial," the court ordered a new trial.

In Jackson v. State, 451 So. 2d 458 (Fla. 1984), the defendant was charged with two counts of first degree murder, and during the state's case, one witness said that Jackson had told him that he was a "'thoroughbred killer' from Detroit." This court held that admitting that statement created reversible error because "the boast neither proved that fact, nor was that fact relevant to the case sub judice." Id. at 461.

In Finklea v. State, 471 So. 2d 596 (Fla. 1st DCA 1985), the state charged Finklea and his co-defendant with two counts of robbery with a firearm. The key witness against the defendant, when cross-examined by the co-defendant, tried to clarify his testimony by claiming Finklea took him by a car lot on Friday, not Tuesday or Wednesday. Significantly, this later time referred to two uncharged robberies. Even though the court sustained Finklea's objection and gave a cautionary instruction, the "introduction of a prior unrelated criminal act is too prejudicial for the jury to disregard." Id. at 597.

Finally, although there are other cases supporting this point,[5] in Jackson v. State, 627 So. 2d 70 (Fla. 5th DCA 1993) , the detective investigating the robbery Jackson was eventually charged with committing, testified that he had first learned of a possible suspect when another policeman told him "that an individual had been taken in on another charge and he fit the description that been issued . . . of the suspect of the case." Id. at 70. All this evidence did, the Fifth District held, was demonstrate the defendant's bad character or propensity to commit crime. Id. at 71. Thus, unsubstantiated allegations the defendant committed other crimes generally have no relevance to prove the charged crime. Admitting such claims not only is error, it is error requiring a new trial.

So, here, Daly's testimony that Bowles had rolled homosexuals at some unspecified time in the past, and Regan's evidence that Bowles admitting he drank to make killing easier, only established his bad character and evil propensity. These allegations of extreme criminal violence could only have fatally damaged the fairness of his sentencing hearing. Chapman v. State, 417 So. 2d 1028, 1031 (Fla. 3rd DCA 1982).

Because the accusation of the prior crimes was "highly prejudicial" or was "presumptively prejudicial," this court must reverse Bowles' sentence and remand for a new sentencing hearing.

2. The evidence shared no unusual similarities with the charged crime to justify its admission.

If this court can get beyond the problem just raised, it will have to deal with the "similarity" requirement "Williams Rule" evidence must have. State v. Williams, 110 So. 2d 654 (Fla. 1959). That is, in Drake v. State, 400 So. 2d 1217 (Fla. 1981), this court

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[5]Malcolm v. State, 415 So. 2d 891 (Fla. 3rd DCA 1982) (new trial for sale and possession of drugs required when the court admitted evidence of Malcolm's involvement in another unrelated sale); McClain v. State, 516 So. 2d 53 (Fla. 2d DCA 1987) (New trial in a sexual battery case required when the court admitted testimony of the victim/baby sitter who told the defendant that "You probably did that to [appellant's five-year old stepdaughter], too.")

required that collateral crime evidence have an unusual similarity to the charged offense in order to be admitted at the defendant's trial. "A mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared factual situations." Id. at 1219. The collateral crime, in short, must have a "signature" like similarity with the charged offense.

> To minimize the risk of a wrongful conviction, the similar fact evidence must meet a strict standard of relevance. The charged and collateral offenses must be not only strikingly similar, but they must also share some unique characteristic or combination of characteristics which sets them apart from other offenses.

Heuring v. State, 513 So. 2d 122, 124 (Fla. 1987).

At most, all we have in this case are general similarities: purported murders and possibly victims who were homosexual. The collateral crime evidence simply had none of the striking similarities with the murder this court has required for it to have been admissible at Bowles' sentencing trial.

3. The evidence had no relevance other than to show Bowles' bad character.

Of course, if relevancy is the criteria for admitting evidence, Ruffin v. State, 397 So. 2d 277, 279 (Fla. 1981), then the Williams Rule analysis need not be used if the alleged prior violence had some pertinence to the state's case other than to show the defendant's bad character. That is, for example, evidence of other crimes is relevant if it puts the charged offense in "context." Smith v. State, 365 So. 2d 704, 707 (Fla. 1978) (charged murders occurred during one evening of prolonged criminal activity.) It also may be relevant if the collateral crime provides a motive for the defendant to commit another criminal act. State v. Richardson, 621 So. 2d 752 (Fla. 5th DCA 1993). For example, in Heiney v. State, 447 So. 2d 210 (Fla. 1984), the defendant was charged with committing a murder. At trial, the court properly admitted evidence to show that Heiney had killed another person a day or so before the Florida homicide. This court approved that decision because the earlier homicide established not only the "entire context" of the

criminal episode; it also tended to show that Heiney committed the Florida robbery/murder to avoid apprehension for the first killing. Other murder cases followed the Heiney rationale. Caruso v. State, 645 So. 2d 389 (Fla. 1994) (Caruso's prior drug activities relevant to provide a reason for breaking into the victims' house to look for money and then killing them when discovered.); Brown v. State, 611 So. 2d 540 (Fla. 3rd DCA 1992) (girl friend said that Brown had threatened to kill her if he found her with another man. Threat was relevant to explain why the defendant tried to murder her.)

In Sweet v. State, 624 So. 2d 1138 (Fla. 1993), the state had the problem of proving why the defendant would break into Marcine Cofer's apartment and spray it with bullets, killing a 13-year-old visitor. It solved that difficulty by introducing evidence that three weeks earlier Sweet had robbed her, and that the defendant could have reasonably believed she had reported it to the police only hours before he burst into her house. Hence, like Heiney, Sweet had to murder Cofer to prevent her from putting him in prison.

In this case, unlike in Sweet, the state presented no evidence, other than Daly's and Regan's allegations, linking Hinton's murder with other, implied killings and crimes (assuming Bowles had done them). With nothing stronger these collateral crimes were inadmissable

4. Admitting this evidence was sufficiently prejudicial to warrant a new trial.

Finally, the court's error requires this court remand for a new sentencing hearing. The harmless error rule has no application, and it does not for two reasons. First, errors of this sort or inherently prejudicial and unamenable to correction by way of a cautionary instruction. Finklea v. State, 471 So. 2d 596, 597 (Fla. 1st DCA 1985).

Second, as Bowles argued in ISSUE I, the State unfairly made a feature of the homosexuality theme. His rolling faggots, Hinton's homosexuality, and variations of those aspects permeated and percolated through this case. While the judge may have been immune, we cannot assume the jury was. State v. Dixon, 283 So. 2d 1, 8 (Fla. 1972).

This court should reverse the trial court's judgment and sentence and remand for a new trial. Despite the judge's anemic efforts to cure the prosecutor's deliberate efforts to prejudice the jury, they could have believed Bowles deserved death simply because he was a serial killer of homosexuals.

ISSUE III

THE COURT ERRED IN FAILING TO FIND THE TWO STATUTORY MENTAL MITIGATING FACTORS APPLIED IN THIS CASE, A VIOLATION OF BOWLES' EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In sentencing Bowles to death, the court considered, but rejected, the two statutory mental mitigating factors: 1. The Defendant suffered from extreme emotional disturbance at the time of the murder. 2. The capacity of the Defendant to appreciate the criminality of his acts at the time of the homicide, was substantially diminished (3 R 460-61). As to the first mitigator, the court said

> Evidence simply does not exist to support this mitigating factor. Although an argument has been made that the Defendant is an alcoholic and his actions indicate an emotional disturbance, evidence was not presented from which this Court could reasonably find that the Defendant suffers from an extreme emotional disturbance.
>
> The Court has considered the Defendant's drug addiction and alcoholism as a non-statutory or background mitigating factor, and has given it some weight.

Regarding the second mitigator, the court found:

> The Defendant contends that his level of intoxication at the time of the murder substantially reduced his ability to appreciate the criminality of his conduct. On the day of the murder, he had been drinking heavily. He drank six beers on his way to the train station with Mr. Hinton and Mr. Smith. He also smoked marijuana. When he returned to Mr. Hinton's home, he continued to drink. Although the Court finds that the Defendant was under the influence of drugs and alcohol at the time of the murder, the greater weight of the evidence does not sustain a finding that his ability to appreciate the criminality of his acts was substantially diminished.

(3 R 460-61)

The court erred, however, in refusing to find these mitigators because " a reasonable quantum of competent, uncontroverted evidence" supporting them mitigators was presented. Nibert v. State, 574 So. 1059, 1062 (Fla. 1990). As such, the court had

no discretion, or it abused whatever freedom it had, but to find these legislatively defined mitigating factors. Farr v. State, 656 So. 2d 448 (Fla. 1995).

The law in this area is simple and its application straightforward. A trial court has some discretion regarding what mitigating factors it finds and what weight it assigns to them. Id. On the other hand, if the Defendant presents "a reasonable quantum of competent, uncontroverted evidence of mitigation the trial court must find that the mitigating circumstance has been proved." Nibert, cited above, at p. 1062; Spencer v. State, 645 So. 2d 377, 384-85 (Fla. 1994). That is, when the State has presented nothing to contradict the proof presented by a Defendant facing a death sentence that one or both of the statutory mental mitigators exist, the court has no discretion but to find the mitigation offered by him. Of course, what weight it assigns the mitigation is left almost entirely to the trial court's discretion. It simply cannot, however, either ignore it completely or find it, but give the mitigator no weight. Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995). Only if the record has "competent, substantial evidence to support the trial court's rejection of the mitigating circumstance" can this court reject a Defendant's argument on appeal that the trial court should have found the legislatively defined mitigators. Nibert, cited above; Kight v. State, 512 So. 2d 922, 933 (Fla. 1987).

That the sentencing judge considered the evidence supporting the statutory mitigators in some form of nonstatutory mitigation also does not somehow cure the court's error in not finding the former. If the Defendant has presented proof justifying finding them, the court must do so. In Morgan v. State, 639 So. 2d 6 (Fla. 1994) this court found that the lower tribunal should have found both statutory mental mitigators, and, as additional mitigation, that Morgan had sniffed gasoline for many years and had done so on the day of the murder.[6] Similarly, in Knowles v. State, 632 So. 62, 67 (Fla. 1993), because the state had presented nothing rebutting the Defendant's evidence of his

[6]It also concluded he had no history of violence, was 16 years old at the time of the crime, he had a low intelligence and was extremely immature. Id. at 14.

mental deficiencies, this court concluded the trial judge "erred in failing to find as reasonably established mitigation the two statutory mental mitigating circumstances, plus Knowles' intoxication at the time of the murders. . ." (Emphasis supplied.)

In Spencer, cited above at p. 645, this court concluded the trial court had erred in ignoring the two statutory mitigators in its sentencing order even though it found the Defendant was a chronic alcoholic and had abused other substances as well as being paranoid.

In this case, the unrebutted evidence Bowles introduced at the penalty phase of his trial showed:

1. Bowles had suffered an extraordinary amount of beatings for years as a child. Terror, torture, and torment were the staples of this Defendant's early life (10 T 1147-49). He never knew his father, never heard a kind, and never felt his mother's love (10 T 1157, 1174-76). Perpetual drunkenness by his mother and stepfathers and daily beatings defined his childhood and teen years, or at least they did until he ran away for good when he was 13 (10 T 1149, 1153, 1157). Nibert.

2. Predictably, Bowles has had a life-long problem with alcohol and probably is a chronic alcoholic. Starting as early as eight years old (10 T 1178), he had smoked marijuana, sniffed glue and paint, and of course drank beer. If his brother, who had lived the same hell as the Defendant, and had used drugs since he was a child and "tried them all," (10 T 1183), Bowles has undoubtedly done the same.

3. Bowles ran away from home when he was 13 after getting another beating (10 T 1157). Perhaps it was the best choice he had in a dull gray life. But with no skills, he had only his youth and body to use to earn money. For years he traded the beatings from a known drunk for the abuse of being a male prostitute from unknown homosexuals. At best a grim existence, he must have lived a life of perpetual homelessness, uncertainty, and fear.

4. His relationship with Hinton summarized his life. Trading his labor for a place to stay for a few weeks, Bowles faced an uncertain but cold winter when Hinton told him to leave his trailer. He was arrested, and then he wormed his way back into Hinton's favor at least for a few days (9 T 924, 1007-1010, 1017). On the day of the murder, and immediately before the homicide, he drank at least six "quart magnum beers" and smoked some marijuana (9 T 101810 T 1080, 1133). He was very drunk (10 T 1133).

Following Nibert, Spencer, and Knowles, the sentencing court should have found Bowles suffered from an extreme emotional disturbance, and his ability to appreciate the criminality of his conduct was significantly diminished. Even though it considered his alcoholism and childhood in its sentencing order (and then only briefly), that it did not also find two statutory mitigators was error. It became reversible error because as Justice Grimes said in his dissent in Stewart v. State, 558 So. 2d 416, 421-22 (Fla. 1990): "In setting forth statutory aggravating and mitigating circumstances, the legislature has concluded that these are the most significant factors to be considered in determining whether to impose the death penalty." That the trial court in this case deliberately refused to find the two statutory mental mitigators when the evidence clearly supported finding them was reversible error. This court should reverse the trial court's sentence of death and remand for a new sentencing.

ISSUE IV

THE COURT ERRED IN FINDING BOWLES COMMITTED THE MURDER DURING THE COURSE OF AN ATTEMPTED ROBBERY AND FOR PECUNIARY GAIN, IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In sentencing Bowles to death, the court found that he had murdered Hinton during the course of an attempted robbery and for pecuniary gain. It recognized the doubling problem with those aggravators, however, and merged the latter into the former (3 R 456-57). As to the attempted robbery aggravator, the court found:

> Mr. Hinton was found inside his locked home on November 22, 1994. His sister and her boyfriend became concerned when he failed to respond to telephone calls and knocks on his door. After several days went by without word from Mr. Hinton, the boyfriend broke into his locked trailer and found his dead body wrapped in sheets and bedspreads.
>
> Missing from his home were his stereo equipment, watch, car keys, and automobile. Stereo wires had been cut. A knife was on the floor next to where the stereo equipment had formerly been. His wallet was found on the floor next to the bed. The defendant was seen after the murder in possession of Mr. Hinton's car and watch.
>
> The Defendant admits that property of Mr. Hinton was taken but argues that is was an afterthought and not the motivation for the murder. He suggests that his subsequent abandonment of the automobile and watch proves that he was not motivated by pecuniary gain. However, his statements prove otherwise. Agent Dennis Regan of the FBI, testified to the following statements given by the Defendant after his arrest:
>
> He said that he expected to find--what he really thought he would find was money on the victim or in the possessions in the trailer. And when he didn't find any, he was almost stuck. He believed that he would flee the City of Jacksonville, but since he had no money he had not place to go.
>
> This evidence proved beyond a reasonable doubt that the murder was done in the course of an attempted robbery and that the motivation was pecuniary gain. It is not a defense to this aggravator that the money was not there to be taken.

(3 R 456-57)

The court erred in finding these aggravating factors applied. Even though Bowles took Hinton's watch and car, the mere taking of the victim's possessions without any other evidence showing that pecuniary gain was the motive for the murder provides insufficient evidence either aggravator applies.

In order for either of them to apply, the state must provide that the murder was necessary to obtain some specific gain. Hardwick v. State, 521 So. 2d 701 (Fla. 1988). It applies "only where the murder is an integral step in obtaining some sought after specific gain." Id. at 1076. The link between the murder and the money must be direct and certain, as for example, it usually is in the typical robbery-murder. E. g. Lawrence v. State, 614 So. 2d 1092 (Fla. 1993). Of course, the State can use circumstantial evidence to prove either aggravator with the caveat that such proof must not only show it applies, but that it refutes any reasonable explanation seeking to negate those aggravating circumstances. Chaky v. State, 651 So. 2d 1169 (Fla. 1995); Simmons v. State, 419 so. 2d 316 (Fla. 1982).

In Allen v. State, 662 So. 323 (Fla. 1995), the State used this special type of evidence, and carried its burden of showing the pecuniary gain aggravator. This court noted the State showed Allen, as Bowles, took the victim's car after killing the victim, but abandoned it shortly afterwards. Significantly for this case, the court agreed with Allen that "the taking of Cribbs' car would not support the finding of pecuniary gain. . . .[I]t is possible that the car was taken to facilitate escape rather than as a means of improving Allen's financial worth." Id. at 330. See, also, Scull v. State, 533 So. 1137, 1142 (Fla. 1988); Peek v. State, 395 So. 2d 492 (Fla. 1980); The State, however, had a lot of other evidence, including statements from Allen that he was a conman who had intended to steal the victim's money, and he had seen her put $4100 in her purse the day before her murder. This, plus other evidence, refuted his argument that pecuniary gain was not the primary motive for committing the murder.

In other cases, the State had less convincing evidence, and this court refused to find the financial gain aggravators applicable. In Hill v. State, 549 So. 2d 179, 182-83 (Fla. 1989) the State proved only that Hill took the sexual battery/murder victim's billfold, and that before the crimes he had had no money to buy drinks. Relying on Scull and Simmons this court agreed with Hill that the taking could have been an afterthought as much as being the motive for the murder.

In Elam v. State, 636 So. 1312 (Fla. 1994), Elam managed the victim's motorcycle parts shop. They got in a fight when the victim accused Elam of theft, and the Defendant killed him. "Although the fight erupted over the missing funds, the theft had long been completed and the murder was not committed to facilitate it." Id. at 1314.

When applied to this case, the law inexorably shows that the State failed to carry its burden of proving beyond a reasonable doubt that Bowles' motive for killing Hinton was for pecuniary gain. Indeed, it is hard to find any reason for this homicide. On the night of the murder, Hinton, Bowles, and a third man had been heavily drinking beer and smoking marijuana. Bowles had no especially acute need for money then, or at least there is no evidence of it. The only proof we have about a reason for killing the victim came from Bowles who said that after drinking at least a gallon of beer and smoking marijuana "something snapped inside me" and he got the rock and killed Hinton (9 T 1018). Unlike the Defendant in Allen, Bowles never said his intention in staying with Hinton was to cheat him out of his money. To the contrary, the victim merely provided him a place to stay for a while, and from what the evidence shows that is all Bowles ever expected from him.

That the taking of the car and watch became afterthoughts finds support from other proof presented at trial. As Defendants did in other cases, Bowles took Hinton's car, but he abandoned it a short while later in the Jacksonville area and "walked away" from it (9 T 1018). Likewise, if Bowles needed money, as the State suggested in its closing (11 T 1281), he could have pawned the watch rather than keeping it. See, Hill, cited above.

Similarly, that he said he expected to find money on the victim or in his trailer provides ambiguous evidence that he murdered him to take his cash. That idea may have much an afterthought as a motive, and without any more evidence establishing Bowles' motive, the State has not carried its burden in this circumstantial evidence case. It never proved Bowles killed Hinton for some gain, and it never refuted his argument that such reason arose, if at all, after the homicide.

Therefore, the court erred in concluding Bowles committed the murder for pecuniary gain and during the course of an attempted robbery. This court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE V

THE COURT ERRED IN FINDING THIS MURDER TO HAVE BEEN COMMITTED IN AN ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL MANNER, A VIOLATION OF BOWLES' EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In sentencing Bowles to death, the court found the murder to have been committed in an especially heinous, atrocious, or cruel manner. In summary, the court justified finding this aggravator because:

1. Bowles dropped a forty pound cement stepping stone on Hinton, fracturing his face from his cheek to jaw.

2. Hinton did not die or lose complete consciousness.

3. He struggled with the Defendant.

4. He had five broken ribs, scrapes and abrasions on his right forearm and other parts of his body.

5. Bowles choked Hinton with his hands, and stuffed some toilet paper and a rag inside the victim's mouth.

(3 R 458)

The court also relied on this court's opinion in Orme v. State, 677 So. 2d 258 (Fla. 1996) that "strangulation creates a prima facie case" for finding the murder to have been especially heinous, atrocious, or cruel. While Orme may say that, this case differs from the usual one involving a strangulation, and the court ignored some crucial facts in its analysis of this aggravator.

Any consideration of the HAC aggravator must begin with the definition this court provided in State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973):

> 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 conscienceless or pitiless crime which is unnecessarily torturous to the victim.

As this court has applied that definition, it has required HAC murders to have been torturous to the victim. Not simply physically so, but crucial and necessary, the victims must have been mentally tortured as well. Wickham v. State, 593 So. 2d 191, 193 (Fla. 1991); Richardson v. State, 604 So. 2d 1109 (Fla. 1992). Thus, where the Defendant shot a victim, causing instant death, this aggravator may have applied because preceding the painless death was a prolonged or significant period where the victim was aware of his or her impending death. Cooper v. State, 492 So. 2d 1059 (Fla. 1986)(victim bound and helpless, gun misfired three times.); Preston v. State, 607 So. 2d 404 (Fla. 1992) (Fear and strain can justify a HAC finding.) On the other hand, quick deaths, in which the victim had no awareness they were about to be killed, or that they knew for only a short time, do not become especially heinous, atrocious, or cruel, even where he or she was stabbed. Wickham v. State, 593 So. 2d 191 (Fla. 1991)(Ambushing a "Good Samaritan" and shooting him twice was not HAC even though he pled briefly for his life); Scull v. State, 533 So. 2d 1137 (Fla. 1988) (Single blow to the head.); Wilson v. State, 436 So. 2d 908 (Fla. 1983)(Single stab wound is not HAC).

Awareness of death becomes an important factor, and murders committed when the victim is unconscious or even semi-conscious typically lack the gruesomeness to make them especially heinous, atrocious, or cruel. Herzog v. State, 439 So. 2d 1372, 1379-80 (Fla. 1983); Clark v. State, 443 So. 2d 973, 977 (Fla. 1984).

From the definition, if the Defendant intended to torture the victim, or exhibited a morbid delight in the suffering of him or her, the resulting murder can be HAC. Multiple stabbings, brutal beatings, strangulations, and prolonged struggles exhibit this level of indifference to the pain suffered. Pittman v. State, 646 So. 2d 167, 172-73 (Fla. 1994) (Victim strangled, stabbed, drowned in her blood.); Whitton v. State, 649 So. 2d 861, 866-67 (Fla. 1994) (30 minute attack); Hardwick v. State, 521 So. 2d 1071 (Fla. 1988) (5-

6 minute attack during which victim was stabbed three times, shot in back and struck about the head.) If he did not, it does not apply. Kearse v. State, 662 So. 2d 677 (Fla. 1995) (No evidence the "defendant intended to cause officer unnecessary and prolonged suffering."); Williams v. State, 574 So. 2d 136 (Fla. 1991) (HAC "is permissible only in torturous murders. . . .as exemplified either by the desire to inflict a high degree of pain or utter indifference or enjoyment of the suffering of another.")

Thus, this court in Orme declared that "Our case law establishes, however, that strangulation creates a prima facie case for this aggravating factor. . . ." Id. at 263. In that case, Orme strangled a former girlfriend who had responded to his call for help because he was having a bad drug high. That choking death became especially heinous, atrocious, or cruel because she knew for a significant time that she was about to die. "Her death in this manner presented the prototypical strangulation murder: the victim knows he or she is about to die, and it is that prolonged mental suffering that makes the resulting death especially shocking." Id. It is permissible to infer that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable. Tompkins v. State, 502 So.2d 415, 421 (Fla.1986).

In that sense, this case is an anomaly because Hinton had no foreknowledge of his impending death. He was asleep when Bowles dropped the cement block on his head (9 T 1018). Immediately after the Defendant began to strangle him, and while the victim may have struggled, he presented feeble resistance (9 T 1018). Moreover, unconsciousness came mercifully quick, within seconds (9 T 911), while death may have arrived quite a bit later. Thus, Hinton could have known, if at all, that he was about to die, only very briefly. His death, therefore, was not especially heinous, atrocious, or cruel. This conclusion has support in other decisions from this court.

In Rhodes v. State, 547 So. 2d 1201 (Fla. 1989), although the victim was "manually strangled" this court rejected the lower court's finding of the HAC aggravator. The victim was either "knocked out," drunk, or semiconscious at the time of her death.

In Herzog v. State, 439 So. 2d 1372 (Fla. 1983), relied on in Rhodes, to justify rejecting the HAC factor, the victim was also semiconscious when attacked.

Applying this law to the facts of this case, shows that the murder here, as gruesome and tragic as it may have been, was not especially heinous, atrocious, or cruel, as this court has defined and applied that phrase. The evidence shows that Hinton, who had been drinking and smoking marijuana the evening of his death, literally never knew what hit him, and he lost consciousness, if he ever fully awoke from his sleep, at most only seconds later.

This court should reverse the trial court's sentence and remand for a new sentencing hearing.

ISSUE VI

THE COURT ERRED IN FAILING TO CONSIDER AND INSTRUCTING THE JURY THAT THEY COULD CONSIDER EVIDENCE OF THE DEFENDANT'S DEFECTIVE MENTAL CONDITION WHEN HE COMMITTED A MURDER TO DIMINISH THE WEIGHT IT GIVES TO THE AGGRAVATING FACTOR, THAT THE MURDER WAS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL."

During the charge conference, Bowles requested the court instruct the jury that if it found Bowles did not intend the murder to have been committed in an especially heinous, atrocious, or cruel manner, it could not find it so as an aggravating factor.

> It is not enough to establish this aggravating circumstance that the State prove that the acts leading to Mr. Hinton's death were outrageously depraved and caused great pain. The State must also prove beyond a reasonable doubt that it was the defendant's intention and desire to kill in that manner.

(2 R 374, 5 R 920-21)

The court rejected that request (5 R 921), and gave the standard instruction on the HAC aggravator. In justifying applying this factor to the murder Bowles committed, it explained why it rejected the Defendant's requested guidance.

> The defendant argues that in order for the Court to find this aggravating factor, ti must find that the Defendant intended to inflict a high degree of pain, or that he was indifferent to or enjoyed the suffering of the victim and cites Santos v. State, 591 So. 2d 163 (Fla. 1991) and McKinney v. State, 579 So. 2d 80 (Fla. 1991). Recently, in Orme v. State, [677 So. 2d 258 (Fla. 1996)], the Supreme Court of Florida stated that strangulation creates a prima facie case for this aggravating factor. A defendant's mental state only figures in as a mitigating factor that may or may not outweigh the total case for aggravation.

(2 R 458)

Despite what this court said in Orme, the trial court should have considered and have permitted the jury to weigh the Defendant's drunkenness on the night of the murder in determining whether he killed Hinton in an especially heinous, atrocious, or cruel manner. In Orme, this court said:

> As his fourth point, Orme contends that his mental state at the time of the murder was such that he could not form a "design" to inflict a high degree of suffering on the victim. Thus,

> argues Orme, the trial court erred in instructing the jury regarding, and in later finding, the aggravating factor of heinous, atrocious, or cruel. Our case law establishes, however, that strangulation creates a prima facie case for this aggravating factor; and the defendant's mental state then figures into the equation solely as a mitigating factor that may or may not outweigh the total case for aggravation. Michael v. State, 437 So.2d 138, 142 (Fla.1983), cert. denied, 465 U.S. 1013, 104 S.Ct. 1017, 79 L.Ed.2d 246 (1984).
>
> Orme cites to cases such as Mann v. State, 420 So.2d 578 (Fla.1982), and Porter v. State, 564 So.2d 1060 (Fla.1990), cert. denied, 498 U.S. 1110,111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991), in support of his argument, but we find them unpersuasive. Mann, 420 So.2d at 581, clearly upheld the heinous, atrocious, or cruel aggravator but then faulted the trial court for failing to issue a clear ruling as to the nature of the mitigating evidence to be weighed in counterbalance. Porter, 564 So.2d at 1063, moreover, involved a gunshot slaying that factually could not qualify as heinous, atrocious, or cruel--a conclusion simply inapplicable in the context of a strangulation murder. We find no error.

Id. at 263

This Court's conclusion that mitigation applies against "the total case for aggravation" and not to particular aggravators marks a significant divergence from the United States Supreme Court's rulings considering Florida's death penalty scheme.

In Sochor v. Florida, 504 U. S. 527, 112 S.Ct. 2114, 2121, 119 L.Ed.2d 326 (1992), the nation's high court refused to follow Sochor's suggestion that this Court had applied the HAC aggravator in an inconsistent and over broad construction. However true that may have been generally, it was not the case in Sochor because "our review of Florida law indicates that the State Supreme Court has consistently held that heinousness is properly found if the defendant strangled a conscious victim." Id. at 119 L.Ed.2d 339-40. (cites omitted.) Following that precedent, the court in Orme recognized that "strangulation creates a prima facie case for this aggravating factor." (Orme, cited above at p. 4)

In this case, however, the prima facie case became an irrebuttable presumption because Bowles could neither make an argument nor present any evidence that would

specifically rebut, negate, or otherwise minimize the weight the jury could give that aggravator. That he believed he could do so to reduce the impact of that aggravator came from language in State v. Dixon, 283 So. 2d 1 (Fla. 1973), which the Supreme Court cited in Sochor. In that early death penalty case, this Court defined and clarified HAC.

> 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 conscienceless or pitiless crime which is unnecessarily torturous to the victim." 283 So. 2d at 9.

Thus, Bowles wanted the court to instruct the jury and to consider in its sentencing order how his alcohol and drug soaked brain at the time of the murder reduced his ability to have a "design to inflict a high degree of pain with utter indifference to, or even enjoyment of," Hinton's suffering. In short, Bowles wanted to show that because his mind was grits he lacked the intent to commit an especially heinous, atrocious, and cruel murder.

The Trial Court, however, refused to consider any evidence Bowles offered except as against "the total case for aggravation." The prima facie case, in short, became irrebuttable.

Making its errors more significant, the lower court never mentioned how, even from a "totality of circumstances" perspective, Bowles's alcohol and drug abuse on the night of the murder specifically affected his mental abilities. It specifically rejected his substance abuse as statutory mitigators (3 R 460-61), and considered it only briefly (though it gave it significant weight) as part of the "Background and/or Personal History of the Defendant." (3 R 462) "The Defendant drinks to excess and has used controlled substances, beginning with sniffing paint since the approximate age of ten. This personal history factor was proved by a greater weight of the evidence and was given significant

weight." Thus, the trial court refused to consider how Bowles' life long sniffing, smoking, and drinking of any liquid, gas, or solid that would dull his mind as mitigation of this murder. See, Wickham v. State, 593 So. 2d 191, 193 (Fla. 1991). Bowles' intoxication was simply another of several mitigating factors the court found. It never gave detailed consideration to the mental state Bowles had on the night of the murder and how his defective brain may not have intended Hinton's death generally or specifically that he never wanted him to suffer an extraordinary amount. In short, what this court said in Orme has not worked out in practice, as this case demonstrates.

Thus, Hinton's murder was especially heinous, atrocious, or cruel, and Bowles could say nothing to rebut the allegation or minimize its significance. Only in the most general way could he argue his mental condition in some undefined way mitigated a death sentence.

Now, Bowles does not want to minimize the importance of that general attack on the "total case for aggravation" because 2 of the 12 jurors voted that he should have received a life sentence. One significant aspect of this crime that could have swayed those jurors was his extreme intoxication on the night he killed Hinton.

Such an approach, limiting the scope of mitigation to rebut a specific aggravator, reflects this Court's inconsistent treatment of this aggravator generally, see Sochor, at 339, but also as to applying mitigation to it particularly. In Cheshire v. State, 568 So. 2d 908 (Fla. 1990), this Court said:

> As his third issue, Cheshire argues that the trial court improperly found the aggravating factor of heinous, atrocious or cruel. We agree. The factor of heinous, atrocious or cruel is proper 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. State v. Dixon, 283 So. 2d 1 (Fla. 1973). The physical evidence simply does not support such a finding here. At best, we can only conjecture as to the exact events of the murder. Since the evidence at hand is entirely consistent with a quick murder committed in the heat of passion, we believe the state has failed to prove

> beyond a reasonable doubt that the factor of heinous, atrocious or cruel existed.

Accord, Geralds v. State, 674 So. 2d 96 (Fla. 1996).

Similarly, in Kearse v. State, 662 So. 2d 677, 686 (Fla. 1995).

> We also agree with Kearse that the heinous, atrocious, or cruel aggravating circumstance was improperly applied in this case (issue 5). A murder may fit this description if it exhibits a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another. Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990). However, "a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious, or cruel." Lewis v. State, 398 So. 2d 432, 438 (Fla. 1981); see also McKinney v. State, 579 So. 2d 80 (Fla. 1991) (HAC not shown where semiconscious victim suffered seven gunshot wounds on right side of body and two acute lacerations on head). While the victim in this case sustained extensive injuries from the numerous gunshot wounds, there is no evidence that Kearse "intended to cause the victim unnecessary and prolonged suffering." Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993).

Accord, Wickham v. State, 593 So. 2d 191, 193 (Fla. 1991) ("[T]his aggravating factor requires proof beyond a reasonable doubt of extreme and outrageous depravity exemplified either by the desire to inflict a high degree of pain or an utter indifference to or enjoyment of the suffering of another.); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991) ("The present murders happened too quickly and with no substantial suggestion that Santos intended to inflict a high degree of pain or otherwise torture the victims.")

This Court has, thus, limited the United State Supreme Court's decisions in cases like Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed. 1 (1982), that hold that the sentencer cannot be precluded from considering, as mitigation, "aspects of the defendant's character and record and [] circumstances of the offense." Id. at 110. Here if one of the circumstances was the heinousness of the murder, another was the Defendant's severely diminished mental capacity that prevented him from "enjoying" what he did.

This rejection of mitigation applied to a specific aggravating factor compares with the approach the Texas courts took when presented with a Defendant who was mentally retarded. Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). In Penry this Supreme Court found that Penry had no vehicle through which he could argue his mental retardation mitigated a death sentence. "Penry argues that his mitigating evidence of mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment. We agree." Id. at 322.

"In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering it sentencing decision." Id. 328.

Similarly, in this case, without any specific guidance from the court that the jury could consider Bowles's alcohol and drug intoxication to mitigate the "especially heinous, atrocious, or cruel" aggravating factor, there was no way it could give specific, mitigating effect to that aggravator.

As a result, jurors may have given scant consideration to Bowles's extreme alcohol and drug intoxication on the night of the murder as a nonspecific mitigator out of a general antipathy for alcoholics and dope addicts. On the other hand, they would probably have accorded this debilitation greater weight if the trial court had specifically told them they could consider it in determining what, if any, weight to give the HAC aggravator. In light of the revised and expanded definition of this factor, Bowles's mental capacity might have negated the State's contention he killed Hinton with "utter indifference to, or even enjoyment of," his suffering. Dixon, cited above at p. 9. Thus, the jury had plenty of mitigating evidence but no explicit legal justification to apply it to

the HAC aggravator. C.f., Griffin v. United States, 502 U.S. ___, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991) (Jury likely to disregard a theory flawed in law that has no evidence to support it.)

This court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE VII

DEATH IS A DISPROPORTIONATE SENTENCE TO IMPOSE IN THIS CASE.

When this court reviews death sentences, it compares the case at hand with others involving similar facts.

> 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.

Porter v. State, 564 So. 2d 1060 (Fla. 1990). Later, in Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993), the court expanded on the quality of proportionality review it conducts:

> While the existence and number of aggravating or mitigating factors do not in themselves prohibit or require a finding that death is nonproportional. . . we nevertheless are required to weigh the nature and quality of those factors as compared with other similar reported death appeals.

Defendants who commit similar crimes should receive similar punishment. Uniformity thus drives this unusual form of appellate scrutiny. Tilman v. State, 591 So. 2d 167, 169 (Fla. 1991). Accordingly, this case falls into the "alcoholic haze" genre. The Defendants found in that category, and often times the victims, have been alcoholics, drug addicts, or other substance abusers for most of lives. Alcoholism defines them, and more significantly, it sets the stage for the murders the Defendants commit. Typically, they (and occasionally a co-Defendant) and the people they will murder have spent the day drinking beer, snorting or smoking cocaine, or sniffing glue. Sometime during the end, a fight may "spontaneously" erupt during which the victim may be tied up and beaten to death. Though the murder may have been especially heinous, atrocious, or cruel, it is not cold, calculated, and premeditated. Subsequent thefts or "robberies" typically occur as an afterthought. The Defendants also may have a criminal history of committing violent crimes.

On the other side of the scale, and of more significance, the Defendants usually have extensive histories of alcoholism, were drunk at the time of the murder (as were their victims), have lost emotional control, and have substantial impairment of the capacity to control their behavior. Other mitigation may exist. The attacks are the result of the drunken spree and erupt for trivial reasons. The Defendant's alcoholic background and the situation it placed him in that resulted in the death of his drunken buddy define the crime better than the aggravation that itself may reflect the Defendant's lifelong alcoholic lurch.

Despite the presence of one or more aggravators, some being especially weighty, this court has consistently rejected death sentences for Defendants in these situations. "Nevertheless, we found that the evidence taken in the worst light showed that this was a spontaneous fight, occurring for no apparent reason between the defendant, a disturbed alcoholic, and the victim, who was legally drunk.." Vorhees v. State, 22 Fla. L. Weekly S 357 (Fla. June 19, 1997); Sager v. State, Case No. 84, 539 (Fla. June 26, 1997); Kramer v. State, 619 so. 2d 274, 278; Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); Knowles v. State, 632 So. 2d 62 (Fla. 1993); White v. State, 616 So. 2d 21 (Fla. 1991).[7]

Bowles' murder of Hinton shares the same defining characteristics as other cases that fall into the "alcoholic haze" category. While it qualifies as a first-degree murder, a death sentence is proportionately unwarranted.

First, the aggravation lacks any compelling quality, and is the type usually found in cases of this sort. As explained in ISSUES IV and VI, the HAC, attempted robbery/pecuniary gain aggravators were improperly found. This leaves one valid

[7]Justice Wells, in his dissent in Vorhees, and Sager, contended that this court's opinion in Whitton v. State, 649 So. 2d 861 (Fla. 1994) controlled instead of Kramer. Like Kramer, Whitton was an alcoholic, but on the night he murdered his very drunk buddy, there was no evidence he was drunk. See, Wickham v. State, 593 So. 2d 191 (Fla. 1991)(Death sentence affirmed. No evidence alcoholic was drunk at time of murder.) Whitton has no precedential value here because the uncontroverted evidence shows Bowles and Hinton as being intoxicated.

aggravator, Bowles' prior violent felony convictions. This Court has affirmed the death penalty despite mitigation in one-aggravator cases only "where the lone aggravator is especially weighty." Ferrell v. State, 680 So. 2d 390, 391 (Fla. 1996). Where it is a prior violent felony, as here, "especially weighty" means a prior murder or similar prior violent assault. See Ferrell (prior second-degree murder); Lindsey v. State, 636 So. 2d 1327 (Fla.) (prior second-degree murder), cert. denied, 115 S.Ct. 444, 130 L.Ed.2d 354 (1994); Duncan v. State, 619 So. 2d 279 (Fla.), cert. denied, 510 U.S. 969, 114 S.Ct. 453, 126 L.Ed.2d 385 (1993) (prior second-degree murder); King v. State, 436 So. 2d 50 (Fla. 1983), cert. denied, 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 163 (1984) (prior axe slaying of common-law wife); Lemon v. State, 456 So. 2d 885 (Fla. 1984), cert. denied, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985) (prior conviction for assault with intent to commit first-degree murder for stabbing); Harvard v. State, 414 So. 2d 1032 (Fla. 1982), cert. denied, 459 U.S. 1128, 103 S.Ct. 764, 74 L.Ed.2d 979 (1983) (death sentence affirmed for shooting second ex-wife where prior conviction was for aggravated assault arising from shooting attack on first ex-wife and her sister).

The prior violent felonies in the present case, though serious, are a breed apart from those the Court has found sufficiently weighty to support the death penalty. Bowles has a 1991 conviction for a strong armed robbery that involved pushing a woman down and snatching her purse (10 T 1106). The other convictions involved a serious beating and sexual battery of his girl friend. Significantly, both had been drinking and using drugs, and the violence of those offenses was probably due to his drinking.

Second, as argued in ISSUE III, the court should have found that the two statutory mental mitigators. Indeed, alcohol and drugs, particularly the former, have defined Bowles' life since he was old enough to be a Cub Scout. If not using them grossly to excess himself, he was beaten by those who were almost always drunk and should have cared for him. The court acknowledged he was an alcoholic and gave it "significant weight." (3 T 462). That debilitation plus the significantly reduced ability to appreciate

the criminality of his conduct, and the obvious loss of emotional control makes this murder one that "hardly lies beyond the norm of the hundreds of capital felonies this Court has reviewed since the 1970s." Kramer, cited above.

In Kramer, Kramer fought with the victim and hit him several times with a rock. Falling face down, the latter was hit again. Kramer had a prior conviction for an attempted murder (in which the victim eventually died), and the trial court found the homicide to have been especially heinous, atrocious, or cruel.

Despite this significant aggravation, this court declared death too harsh a punishment.

> The factors establishing alcoholism, mental stress, severe loss of emotional control, and potential for productive functioning in the structured environment of prison are dispositive here. While substantial competent evidence supports a jury finding of premeditation here, the case goes little beyond that point. The evidence in its worst light suggests nothing more than a spontaneous fight, occurring for no discernible reason, between a disturbed alcoholic and a man who was legally drunk. This case hardly lies beyond the norm of the hundreds of capital felonies this Court has reviewed since the 1970s

Id. at 278. (Cites omitted.); See, also, Nibert v. State, 574 So. 2d 1059 (Fla. 1990).

We have in this case the classic "alcoholic haze" scenario. The Defendant, a lifelong alcoholic and very drunk on the night of the murder kills his drinking buddy and benefactor. Despite the State's efforts to find a motive for Hinton's murder, it never latched onto one that has much convincing power. We know only that "something snapped" inside Bowles. Why that happened remains a mystery. Nibert, cited above. (Despite Nibert's statement that he intended to rob the victim, the police found no evidence of that crime. Death disproportionate.) Accompanying and caused by the alcoholism, Bowles suffered an extreme emotional disturbance and his ability to control his behavior was substantially impaired.

This court should reverse the trial court's sentence of death and remand for imposition of a life sentence without the possibility of parole.

ISSUE VIII

THE TRIAL COURT ERRED IN GIVING THE STANDARD JURY INSTRUCTION TO DEFINE THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE, A VIOLATION OF BOWLES' EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The defense objected to the standard penalty phase jury instruction on the heinous, atrocious or cruel aggravating factor and requested a substitute instruction. (2 R 377) Counsel renewed his objection at the instruction charge conference. (5 T 919-20, 11 T 1229) The trial court overruled the objections and refused to give the requested instruction. (5 T 920) The jury was not sufficiently instructed on the heinous, atrocious or cruel aggravating circumstance. Bowles recognizes that this Court has approved as constitutional the current standard jury instruction on the heinous, atrocious or cruel aggravating circumstance in Hall v. State, 614 So.2d 473 (Fla. 1993). However, he urges this Court to reconsider the issue in this case.

The trial court followed the standard jury instruction and instructed on the aggravating circumstances provided for in Section 921.141(5)(h), Florida Statutes as follows:

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

(11 T 1352)

The instructions given were unconstitutionally vague because they failed to inform the jury of the findings necessary to support the aggravating circumstance and a sentence of death. Amends. VIII, XIV U.S. Const.; Art. I, Secs. 9, 16 & 17, Fla. Const.; Espinosa

v. Florida, 505 U.S. 112, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992); Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); Shell v. Mississippi, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990).

The United States Supreme Court held Florida's previous heinous, atrocious or cruel standard penalty phase jury instruction unconstitutional in Espinosa v. Florida. This Court had consistently held that Maynard v. Cartwright, which held HAC instructions similar to Florida's unconstitutionally vague, did not apply to Florida since the jury was not the sentencing authority. Smalley v. State, 546 So.2d 720 (Fla. 1989). However, the Espinosa Court rejected that reasoning since Florida's jury recommendation is an integral part of the sentencing process and neither of the two-part sentencing authority is constitutionally permitted to weigh invalid aggravating circumstances. Although the instruction given in this case included definitions of the terms "heinous, atrocious or cruel," where the instruction in Espinosa did not, the instruction as given, nevertheless, suffers the same constitutional flaw. The jury was not given adequate guidance on the legal standard to be applied when evaluating whether this aggravating factor exists.

In Shell v. Mississippi, the state court instructed the jury on Mississippi's heinous, atrocious or cruel aggravating circumstance using the same definitions for the terms as the trial judge used in this case. The Mississippi court told the jury the same definitions of "heinous", "atrocious" and "cruel" as the trial judge told Bowles's jury. 112 L.Ed.2d at 4, Marshall, J., concurring. The Supreme Court remanded to the trial court stating, "Although the trial court in this case used a limiting instruction to define the `especially heinous, atrocious, or cruel' factor, that instruction is not constitutionally sufficient." 112 L.Ed.2d at 4. Since the definitions employed here are precisely the same as the ones used in Shell, the instructions to Bowles's jury were likewise constitutionally inadequate. This Court held that the mere inclusion of the definition of the words "heinous," "atrocious," or "cruel" does not cure the constitutional infirmity in the HAC instruction. Atwater v. State, 626 So.2d 1325 (Fla. 1993).

The remaining portion of the HAC instruction used in this case reads:

> The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts to show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

(11 T 1352). This addition also fails to cure the constitutional infirmities of the HAC instruction. First, the language in this portion of the instruction was taken from State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) and was approved as a constitutional limitation on HAC in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). However, its inclusion in the instruction does not cure the vagueness and overbreadth of the whole instruction. The instruction still focuses on the meaningless definitions condemned in Shell. Proffitt never approved this limiting language in conjunction with the definitions. Sochor v. Florida, 504 U. S. 527, 112 S.Ct. 2114, 2121, 119 L.Ed.2d 326 (1992). This limiting language also merely follows those definitions as an example of the type of crime the circumstance is intended to cover. Instructing the jury with this language as only an example still gives the jury the discretion to follow only the first portion of the instruction which has been disapproved. Shell; Atwater. Second, assuming the language could be interpreted as a limit on the jury's discretion, the disjunctive wording would allow the jury to find HAC if the crime was "conscienceless" even though not "unnecessarily torturous." The word "or" could be interpreted to separate "conscienceless" and "pitiless and was unnecessarily torturous." Actually, the wording in Dixon was different and less ambiguous since it reads: "conscienceless or pitiless crime which is unnecessarily torturous." 283 So.2d at 9. Third, the terms "conscienceless," "pitiless" and "unnecessarily torturous" are also subject to over broad interpretation. A jury could easily conclude that any homicide which was not instantaneous would qualify for the HAC circumstance. Furthermore, this Court said in Pope v. State, 441 So.2d 1073, 1077-1078 (Fla. 1983) that an instruction which invites the jury to consider if the

crime was "conscienceless" or "pitiless" improperly allows the jury to consider lack of remorse.

Proper jury instructions were critical in the penalty phase of Bowles's trial. However, the jury instruction as given failed to apprise the jury of the limited applicability of the HAC factor when the perpetrator of the homicide does not have the requisite intent to cause suffering. See, Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990). Bowles was entitled to have a jury's recommendation based upon proper guidance from the court concerning the applicability of the aggravating circumstance. The jury should have received a specific instruction on HAC which advised the jury of the necessary mental state required before HAC could be considered. The deficient instructions deprived Bowles of his rights as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution. This Court must reverse the death sentence.

ISSUE IX

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COLD, CALCULATED AND PREMEDITATED USING AN UNCONSTITUTIONALLY VAGUE INSTRUCTION.

The trial court improperly instructed the jury on the cold, calculated and premeditated aggravating circumstance. Sec. 921.141 (5)(I) Fla. Stat. (11 T 1352-53) Although the instruction used was the one suggested in this Court's previous decision in this case, Jackson v. State 648 So.2d 85, 95 n8 (Fla. 1994), it is unconstitutionally vague and misleading. Art. I, Secs. 2,9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const. The instruction to the jury was as follows:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> Cold means that the murder was the product of calm and cool reflection. Calculated means that the defendant had a careful plan or prearranged design to commit the murder.
>
> A killing is "premeditate (sic) if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing. However, in order for this aggravating circumstance to apply a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.
>
> A pretense of moral or legal justification is any claim of justification or excuse that though insufficient to reduce the degree of the homicide nevertheless rebuts the otherwise cold and calculating nature of the homicide.

(11 T 1352-53)

This instruction fails to adequately apprise the jury of the legal limitations of the CCP circumstance, specifically concerning the element of heightened premeditation. The entire instruction was unconstitutionally vague, particularly the portion defining the heightened premeditation element. The judge instructed:

> However, in order for this aggravating circumstance to apply a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.

(11 T 1353) This definition is meaningless and gives the jury no guidance. What does "a heightened level of premeditation" mean? This Court has held that a defendant must have intended the murder before the crime ever began. E.g. Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S. Ct. 1024, 112 L. Ed. 2d 106 (1991). Jackson and the standard instruction defined "calculated" to be a careful plan or prearranged design to commit the murder. The "premeditated" element cannot mean the same thing as the "calculated" element because each part of the statute has to have independent meaning and significance. The revised instruction approved by this Court in Standard Jury Instructions in Criminal Cases, 665 So. 2d 212 (Fla. 1995), recognizes that problem and attempts to cure it.[8] But, the attempted cure was not in place in this trial, and the resulting instruction was inadequate both as a matter of statutory construction and constitutional requirements of due process and cruel or unusual punishment. Art. I Secs. 2, 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const. Bowles is entitled to a new penalty phase trial with a new, properly instructed jury.

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[8] Standard Jury Instructions in Criminal Cases, 665 So. 2d 212 (Fla. 1995), defined heightened premeditation as:

> [As I have previously defined for you] a killing is "premeditated" if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated into to kill must be formed before the killing.
>
> However, in order for this aggravating circumstance to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.

Id. (underscoring omitted).

ISSUE X

THE FELONY MURDER AGGRAVATING CIRCUMSTANCE (FLORIDA STATUTES 921.141(5)(D)) IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE.

The felony-murder aggravating circumstance (Florida Statute 921.141(5)(d)) violates both the Florida and United States Constitutions. The use of this aggravator renders Bowles' death sentence unconstitutional pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Bowles filed a motion to declare this aggravator unconstitutional (1 R 138-147), which the court denied (1 R 148). The jury was instructed on this as an aggravating circumstance and the trial court found it. (11 T 1349-50, 3 R 456-57).

Aggravating circumstance (5)(d) states:

> the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnaping, or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb.

Fla. Stat. 921.141.

All of the felonies listed as aggravators are also felonies which constitute felony murder in the first degree murder statute. Fla. Stat. 784.04(1)(a)2.

This aggravating circumstance violates both the United States and Florida Constitutions. The decisions of the United States Supreme Court have made clear that under the Eighth and Fourteenth Amendments an aggravating circumstance must comply with two requirements before it is constitutional. (1) It "must genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1983). (2) It "must reasonably justify the imposition of a more severe sentence compared to others found guilty of murder." Zant, supra.

It is clear that the felony murder aggravator fulfills neither of these functions. It performs no narrowing function whatsoever. Every person convicted of felony-murder qualifies for this aggravator. It also provides no reasonable method to justify the death penalty in comparison to other persons convicted of first degree murder. All persons convicted of felony murder start off with this aggravator, even if they were not the actual killer or if there was no intent to kill. However, persons convicted of premeditated murder are not automatically subject to the death penalty unless they act with "Heightened premeditation." See Fla. Stat. 921.141(5)(I). Rogers v. State, 511 So.2d 526 (Fla. 1987). It is irrational to make a person who does not kill and/or intend to kill automatically eligible for the death penalty whereas a person who kills someone with a premeditated design is not automatically eligible for the death penalty. This aggravating circumstance violates the Eight and Fourteenth Amendments pursuant to Zant, supra. This aggravating circumstance also violates Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

Three state supreme courts have held this aggravator to be improper under state law, their state constitution, and/or federal constitutional grounds. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979); Engberg v. Meyer, 820 P.2d 70, 87-92 (Wyo. 1991); State v. Middlebrooks, 840 S.W.2d 317, 341-347 (Tenn. 1992). This Court should follow these courts and declare this aggravator unconstitutional pursuant to the Eighth Amendment to the United States Constitution and Article I, Section 17, of the Florida Constitution.

CONCLUSION

Based on the arguments presented here, the Appellant, Gary Bowles, respectfully asks this honorable court to reverse the trial court's sentence and remand for a new sentencing hearing before a jury, or to remand for imposition of a life sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL; and a copy has been mailed to appellant, Gary Bowles, DC #086158, Florida State Prison, Post Office Box 181, Starke, FL 32091, on this ___ day of July, 1997.

Respectfully submitted,

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