IN THE SUPREME COURT OF FLORIDA

THOMAS DAVIS WOODEL,	:	
Appellant,	:	
vs.	:	Case No. 95,110
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF TYPE USED

I certify the size and style of type used in this brief is Courier 12 point, a font that is not proportionally spaced.

PRELIMINARY STATEMENT

The record on appeal herein consists of nineteen (19) volumes and one (1) supplemental volume. Citations to the record will be by volume number and page number, except that citations to the supplement will be indicated by "SR," followed by the page number(s).

STATEMENT OF THE CASE

On January 16, 1997, a Polk County grand jury returned a four-count indictment against Appellant, Thomas Davis Woodel. (Vol. I, pp. 2-6) Count One charged Woodel with the first degree premeditated murder of Clifford Moody, on or about December 31, 1996, by cutting or stabbing him with a knife or other sharp instrument. (Vol. I, p. 2) Count Two charged Woodel with the first degree premeditated murder of Bernice Moody on the same date, by the same method. (Vol. I, p. 3) Count Three charged Woodel with robbery of Clifford or Bernice Moody with a deadly weapon on the same date. (Vol. I, p. 3) And Count Four charged Woodel with burglary of a dwelling that was the property of the Moodys on the same date, during which Woodel made an assault or battery upon Clifford or Bernice Moody. (Vol. I, p. 4)

This cause proceeded to a jury trial with the Honorable Robert E. Pyle presiding. (Vol. II, p. 1-Vol. XIX, p. 3155) The guilt phase was held on November 9-10, 12-13, 16-19, 24, and 30, and December 1, 2, 3, and 4, 1998.[1] (Vol. II, p. 1-Vol. XVII, p. 2735) Woodel presented no evidence at the guilt phase. (Vol. XVI, p. 2463) With regard to the murder charges, Woodel's jury was instructed on alternative theories of first degree murder: premeditation, and felony murder, with robbery or burglary as the underlying felony. (Vol. XVII, pp. 2683-2685) His jury found

[1] Court convened briefly on Friday, November 20, when the court and counsel discussed with Juror Gorum the attempted suicide of his wife, which caused the trial to be continued until the following Tuesday, but no testimony was taken on that day. (Vol. XII, pp. 1761-1773)

Woodel guilty as charged on all counts of the indictment. (Vol. II, pp. 188-191; Vol. XVII, pp. 2728-2730) The penalty phase was held on December 7, 1998. (Vol. XVII, p. 2736-Vol. XIX, p. 3155) It began at 9:05 a.m. (Vol. XVII, p. 2739), and the jury was not discharged until some time after 10:07 p.m. (Vol. XIX, pp. 3149-3155) After receiving additional evidence from the State and from the defense, the jury returned an advisory verdict that Thomas Woodel be sentenced to death for the murder of Clifford Moody by a vote of 9-3, and an advisory verdict that Woodel be sentenced to death for the murder of Bernice Moody by a vote of 12-0. (Vol. II, pp. 213, 214; Vol. XIX, pp. 3149-3150)

A Spencer[2] hearing was held before Judge Pyle on January 14, 1999. (Vol. II, pp. 216-242)

Sentencing itself was held on January 26, 1999. (Vol. II, pp. 249-262) With regard to the non-capital offenses of robbery and burglary, although the range permitted pursuant to the sentencing guidelines scoresheet was 62.85 to 104.75 prison months, Judge Pyle departed therefrom and imposed concurrent life sentences for both offenses. (Vol. II, pp. 253, 265-268, 276-277) The scoresheet listed "unscoreable capital convictions" as the reason for the upward departure. (Vol. II, p. 277) Judge Pyle sentenced Thomas Woodel to death for each of the two homicides. (Vol. II, pp. 254-260, 270-275) The court found the following aggravating circum-

[2] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

stances to exist (Vol. II, pp. 254-257, 271-273): 1) Woodel had previously been convicted of another capital felony (based upon the

contemporaneous killings of Bernice and Clifford Moody); 2) the killings were perpetrated while Woodel was engaged in the crime of burglary; 3) the killings were especially heinous, atrocious or cruel; and 4) the victims were particularly vulnerable due to advanced age or disability. The court specifically rejected the State's contention that the killing of Clifford Moody was committed for the purpose of avoiding arrest or effecting an escape. (Vol. II, pp. 257, 273)[3] The court discussed mitigation as follows (Vol. II, pp. 257-259, 273-274):

> B. MITIGATING CIRCUMSTANCES
>
> The State concedes that the defense has established both of the only two statutory mitigating circumstances offered:
>
> 1) **The defendant has no significant history of prior criminal activity.**
>
> 2) **The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.**
>
> The first mitigation bears little or no elaboration. Whatever weight as signed to factor pales to insignificance in the face of the enormity of these murders.
>
> The second "catch-all" mitigation consisted of seven separate considerations:
>
> 1. Physical abuse suffered as a child.
> 2. Neglect by mother as a child.
> 3. Instability of residences as a child.
> 4. Being a child of deaf mute parents.
> 5. Use of alcohol and drugs.
> 6. Willingness to meet with the daughter of Clifford and Bernice Moody.

[3] Appellant's jury was, however, instructed on this aggravating circumstance at penalty phase. (Vol. XIX, pp. 3141-3142)

> 7. Willingness to be tested for possible bone marrow donations for his daughter who has leukemia.
>
> Of those considerations the defense pursued primarily the proposition that Woodel was so intoxicated from overindulgence in alcoholic beverages that he was incapable of forming the requisite intent. This circumstance was not proven by a preponderance of evidence. The jury rejected that argument, as does the Court.
>
> The remaining considerations under the "catch-all" mitigating circumstances bear no further elaboration. They have been proven by a preponderance of the evidence and the Court has relegated them to relative insignificance and minimal weight.

The court went on to conclude that the aggravating circumstances "far outweigh" the mitigating circumstances, and that "the death penalty is the only appropriate sentence to impose as to each murder." (Vol. II, pp. 259, 274)

Thomas Woodel timely filed his notice of appeal to this Court on February 23, 1999. (Vol. II, p. 278)

STATEMENT OF THE FACTS

Guilt Phase

Clifford Moody, who was 79 years old, and his 74 year old wife, Bernice, lived in a trailer on Lot 533 at Outdoor Resorts of America, which was the last commercial business in Polk County before the Osceola County line. (Vol. XI, pp. 1502, 1507; Vol. XII, pp. 1686-1687, 1705, 1778; Vol. XIII, p. 1839; Vol. XIV, pp. 2024, 2059) The Moodys owned another unit next door to theirs, on Lot 532, which they sometimes rented out. (Vol. XI, pp. 1467, 1502; Vol. XII, p. 1778)

Clifford Moody had had triple bypass surgery, and had an enlarged heart. (Vol. XIII, pp. 1808, 1822; Vol. XIV, pp. 2058-2059) He had had a "myocardial infarct." (Vol. XIV, p. 2059) Cliff was also hard of hearing, and wore a hearing aid. (Vol. XII, p. 1800; Vol. XIII, pp. 1807, 1822) He had had knee replacement surgery, and walked with a rather uneven gait. (Vol. XIII, p. 1822; Vol. XIV, p. 2058) Bernice Moody was in excellent shape and looked younger even than she was. (Vol. XIII, pp. 1807-1808, 1822; Vol. XIV, pp. 2024-2025) They were always active, washing windows, cleaning, gardening, etc. (Vol. XII, pp. 1697-1698)

On December 30, 1996, the Moodys were preparing the unit on Lot 532 for a tenant. (Vol. XII, p. 1696) Fifty-three year old Thomas Collick, who, with his wife, spent most winters at Outdoor Resorts, helped them clean the unit, as well as the trailer where the Moodys lived, with a power-washer. (Vol. XII, pp. 1775-1776; 1780) Thomas and Kathryn Collick spent the early part of that

evening with the Moodys, but left around 8:00 or a little after when Fred and Rena Dupuis, who also wintered at Outdoor Resorts, arrived. (Vol. XII, pp. 1703-1704, 1707, 1712, 1780-1781; Vol. XIII, p. 1810) The Dupuis couple stayed until 10:00 or 10:30. (Vol. XII, pp. 1707-1708, 1712)

Appellant, Thomas Woodel, also lived at Outdoor Resorts of America, on Lot 301, about a block from where the Moodys lived, with his sister, Bobbi, and his girlfriend, Christina. (Vol. XII, p. 1658; Vol. XV, pp. 2221-2225, 2281) Woodel, whose only transportation was a bicycle, worked as a dishwasher and cook at a Pizza Hut not too far from the trailer park. (Vol. XII, pp. 1653-1654; Vol. XIV, pp. 2103-2104, 2117-2118, 2121, 2140-2141) His sister, Bobbi Woodel, also worked there. (Vol. XIV, p. 2104; Vol. XV, pp. 2221-2222) Frequently, Thomas Woodel would be driven home after work by other Pizza Hut employees. (Vol. XIV, pp. 2121-2122, 2132) According to his work schedule, Woodel was on duty from 7:00 p.m. on December 30 to 1:00 a.m. on December 31, 1996. (Vol. XIV, pp. 2142, 2158) When he got off that early morning, no one gave him a ride home. (Vol. XIV, p. 2133)

For awhile, Woodel was also working at Publix as a stock boy in the early morning hours. (Vol. XV, pp. 2248-2250) He developed an infection or rash, and broke out with red bumps or marks all over his hands, which his sister thought may have been from the cardboard boxes with which he worked. (Vol. XV, pp. 2248-2249)

Jeffrey Kurz was delivering the Orlando Sentinel to residents of Outdoor Resorts in the early morning hours of December 31, 1996. (Vol. XII, pp. 1716-1717) Around 4:30-4:45, Kurz observed a man, whom he had seen before, loading paper grocery bags into the back seat of his car, which was parked in the driveway. (Vol. XII, pp. 1718, 1721-1722) As he drove on through the neighborhood, Kurz saw an old woman in a housecoat, whom he believed to be the man's wife, looking out through a screen door or storm door from inside. (Vol. XII, pp. 1723, 1728-1729)

Elmer Schultz, 74 years old, was working security at the front gate of Outdoor Resorts overnight on December 30-31, 1996. (Vol. XII, pp. 1738-1739) This was the only entrance to Outdoor Resorts. (Vol. XII, p. 1777) Schultz started his shift about 11:40 p.m. (Vol. XII, p. 1739) It was a quiet, slow night. (Vol. XII, pp. 1743, 1748) Around 5:00 a.m., Schultz saw Clifford Moody arrive alone by car at the laundromat which was across the street on an angle from the guard house. (Vol. XII, pp. 1744-1745) Moody was doing laundry, and was still there when Schultz left about 5:30 or 5:40. (Vol. XII, pp. 1745-1746) Schultz did not remember seeing Thomas Woodel walk through the gate during the morning of December 31 while he was on duty. (Vol. XII, p. 1742)

Thomas Collick returned to the Moody's residence on the morning of December 31 at 8:30 to power-wash their driveway. (Vol. XII, pp. 1782-1783) The Moody's car was parked there. (Vol. XII, p. 1784) Collick knocked on their door and rang the bell, but

received no answer. (Vol. XII, p. 1783) Collick's wife arrived later to assist him with the washing. (Vol. XII, pp. 1783-1784) The couple went home around 11:30. (Vol. XII, pp. 1783-1785; Vol. XIII, p. 1815)

Lavern O'Connell, 67 years old, had arranged with the Moodys to rent the spare unit from them for three months. (Vol. XIII, pp. 1823-1824) He and his wife arrived at the front gate to Outdoor Resorts at approximately 12:45 p.m. on December 31, 1996, where there was supposed to be a key waiting, but no key was there. (Vol. XIII, pp. 1824-1825) O'Connell attempted to phone the Moodys, but there was no answer. (Vol. XIII, p. 1825) The guard gave O'Connell a daytime pass, and he drove back to the unit. (Vol. XIII, p. 1825) There was a car in the driveway of the unit next to the one O'Connell was going to rent, which he assumed belonged to the Moodys. (Vol. XIII, p. 1826) O'Connell pounded on the door of that unit, but received no answer. (Vol. XIII, p. 1826) He then went next door, to the rental unit, and entered. (Vol. XIII, pp. 1826-1827) He saw a gentleman, whom he assumed was Mr. Moody, lying on the floor. (Vol. XIII, p. 1829) O'Connell started to look for a telephone, and "found Mrs. Moody in the bedroom with blood all over her." (Vol. XIII, p. 1829) He backed out, and went across the street to where a man was mowing his lawn and called 911. (Vol. XIII, pp. 1829-1831)

Lavern O'Connell encountered Thomas Collick outside and told him of discovering the bodies. (Vol. XII, pp. 1787-1789) After observing the bodies in the rental unit, Collick went to get his

wife, who was a critical care registered nurse. (Vol. XII, p. 1790; Vol. XIII, p. 1816) Kathryn Collick went into the rental unit and checked Clifford Moody for vital signs, but did not find any pulse in the carotid artery. (Vol. XII, pp. 1790-1791; Vol. XIII, p. 1816) When she touched Bernice's leg, she knew there was nothing she could do for her. (Vol. XII, pp. 1790-1791; Vol. XIII, p. 1817) When Kathryn went into the Moody's personal residence to call the family, nothing looked unusual or out of place. (Vol. XIII, p. 1819)

Deputy Ray Faulk of the Polk County Sheriff's Department was the first officer on the scene, arriving about 2:00. (Vol. XIII, p. 1838, 1840) Inside the unit at 532, which showed no signs of forced entry, he observed an elderly white male lying on the flat of his back in the kitchen/dining room area. (Vol. X, p. 1335; Vol. XI, p. 1511; Vol. XIII, pp. 1841, 1844)[4] His eyeglasses had been knocked off and were lying behind him, about two feet from his head. (Vol. X, pp. 1414-1415; Vol. XIII, p. 1841) He was wearing a silver-colored chain with a cross on it, and a watch on his left arm. (Vol. X, pp. 1413-1414; Vol. XI, pp. 1475, 1490) His underwear and trousers had been pulled down to his knees or ankles. (Vol. X, pp. 1410-1412; Vol. XIII, pp. 1841) There was some money there, and traces of blood on the wall. (Vol. XIII, p. 1841) When Faulk walked on to the end of the trailer, he saw the female victim lying in the bed in the back bedroom, with a sheet or mattress

[4] Polk County Sheriff's Deputy Alan Cloud, who arrived after Faulk, testified that the man was in the living room. (Vol. XV, p. 2259)

cover that was partially pulled up on her. (Vol. XIII, pp. 1841-1842) She was nude except for one sock. (Vol. XIV, p. 2018) She was wearing a gold-colored chain with a cross on it, a gold-colored watch, and a gold-colored wedding band. (Vol. XI, p. 1474; Vol. XIV, p. 2026) On the floor was a nightgown and a robe and female underwear with what appeared to be a knot tied in it. (Vol. X, pp. 1375-1376, 1430; Vol. XI, pp. 1449, 1491-1492) The woman's throat had been cut, and she had suffered numerous stab wounds. (Vol. XIII, p. 1841) Underneath her were what appeared to be pieces of the toilet tank lid from the bathroom. (Vol. X, p. 1431; Vol. XI, p. 1512; Vol. XV, pp. 2273-2274) The room was "covered in blood." (Vol. XIII, p. 1842)

Bernice Moody had significant blunt trauma to the head; her nasal bones were fractured. (Vol. XIV, pp. 2021, 2039, 2052) The associate medical examiner, Dr. Alexander Melamud, opined that she had been hit with several blows from a toilet seat or lid, which could have rendered her unconscious. (Vol. XIV, pp. 2021, 2045, 2066) She had incurred a total of 56 cut and stab wounds, 22 of which were in the neck area, including one to the jugular vein, which would have been the worst wound. (Vol. XIV, pp. 2032-2033, 2035, 2041, 2043, 2046-2047, 2049) Some of the wounds, primarily on the right arm, were defensive injuries. (Vol. XIV, pp. 2032, 2043, 2046, 2064) Dr. Melamud thought that she probably had arthritis, as she was taking drugs like Acetiminophen, Ibuprofen, as well as an allergy medication, but most people of her age took such medications. (Vol. XIV, p. 2025) The cause of Bernice Moody's

death was "loss of blood, external and internal." (Vol. IV, p. 2047) No semen or sperm was detected on swabs taken from Bernice Moody's vagina, rectum, and mouth. (Vol. XIII, pp. 1916-1918; Vol. XIV, p. 2053)

Clifford Moody incurred a total of eight stab wounds, which would have caused more internal than external bleeding. (Vol. XIV, pp. 2054-2057) The cause of death was the same as for his wife: bleeding, loss of blood. (Vol. XIV, pp. 2057-2058) Clifford Moody had no drugs in his system. (Vol. XIV, p. 2060)

Dr. Melamud was unable to say how long it took either Clifford or Bernice Moody to die, but he did believe it took much, much less than one hour. (Vol. XIV, pp. 2061, 2067) He could not give the sequence in which the injuries occurred. (Vol. XIV, pp. 2058, 2065, 2068)

Thomas Woodel worked at Pizza Hut on the evening of December 31, 1996. (Vol. XIV, pp. 2106-2107, 2124) He remarked to a coworker, John Haynes, that "somebody pulled a Charles Manson" the night before, two people had gotten killed at his trailer park. (Vol. XIV, p. 2108) Haynes was at Woodel's residence a few days after the incident in question, playing video games, and "every-thing seemed normal." (Vol. XIV, pp. 2109-2110) Haynes had been around Thomas Woodel when he was drinking and not drinking, and never saw him exhibit any violence of any kind to anybody. (Vol. XIV, pp. 2115-2116)

On the night of January 2, 1997, law enforcement personnel decided to search the dumpsters in which garbage collected at

Outdoor Resorts had been deposited, and the actual search took place the following morning. (Vol. XI, pp. 1523-1526; Vol. XIII, p. 1990; Vol. XV, pp. 2276-2278) It was conducted by law enforcement personnel and maintenance workers for Outdoor Resorts. (Vol. XIV, pp. 2073-2076, 2084) Among the items found were Pizza Hut boxes, pieces of porcelain toilet tank lid, a wallet containing identification and credit cards belonging to Clifford Moody, keys with a tag that said "Cliff's keys," glasses, bloody socks, paperwork with the address of Lot 301, and paperwork bearing the names of Christopher Woodel [Appellant's son] and Thomas Woodel. (Vol. XI, pp. 1528-1531, 1537-1544, 1545-1546, 1550; Vol. XIV, pp. 2082, 2165; Vol. XV, pp. 2228, 2279-2281, 2283) Several of the items (porcelain pieces, keys, paper with Christopher Woodel's name on it) were found in a cornflakes box. (Vol. XI, pp. 1528-1530, 1537-1540; Vol. XIV, pp. 2164-2165)

That afternoon, Polk County Detectives Mark Taylor, Alan Cloud, and Ann Cash went to Lot 301 to speak with Thomas Woodel. (Vol. XV, pp. 2284-2286) He was a little fidgety, and appeared to be a little nervous, but he was cooperative, and agreed to accompany Cloud and Cash to the substation. (Vol. XV, pp. 2285-2288) Before he left with them, Woodel signed a consent to search residence, as did his sister, Bobbi, and the trailer was subsequently searched. (Vol. XII, pp. 1677-1678; Vol. XIV, pp. 2145-2146, 2172-2178; Vol. XV, p. 2232-2233))

The detectives spoke with Woodel in an interview room at the Bartow Air Base substation. (Vol. XV, pp. 2292-2293) After initially not being "real concrete" about where he had been after getting off work at Pizza Hut on the night in question [December 30, 1996], Woodel eventually told the detectives he was at home asleep at the approximate time they believed the murders would have taken place. (Vol. XV, pp. 2295-2296) Detective Cloud later told Woodel that incriminating evidence had been found in the garbage. (Vol. XV, pp. 2298, 2370) Woodel "got quiet for a little while," and continued to deny having knowledge of the homicides briefly after that, but then gave the detectives a statement. (Vol. XV, pp. 2298-2299) He began writing something out, and then talked with them, saying that he was walking home from work when he saw a woman cleaning windows, and walked up to the trailer to find out what time it was. (Vol. XV, pp. 2300-2305) He tried to get the woman's attention, but she did not see him, and so he walked into the trailer and met the woman at the back door and asked her what time it was. (Vol. XV, pp. 2305-2306) She went to the kitchen and returned with a knife, which she pointed at Woodel and said, "you need to leave or I'm going to cut you." (Vol. XV, pp. 2305-2306) He pushed her down, but she came back up at him with the knife, and she ended up getting "poked." (Vol. XV, p. 2306) She continued to fight him, and he hit her over the head with the toilet tank lid, because he had seen this done on television. (Vol. XV, p. 2306) She ended up on the bed, and she got stabbed numerous times because she was struggling; Woodel was just holding the knife, and she

would flail and hit the knife. (Vol. XV, p. 2306) Woodel said at one point that he was holding the knife up to her throat, and she raised herself up and cut herself with the knife. (Vol. XV, p. 2306) After she was dead, he covered her with a sheet. (Vol. XV, pp. 2306-2307) As he was coming out of the bedroom, he had a confrontation with Clifford Moody, who was walking towards him and ended up stabbing Clifford Moody several times. (Vol. XV, p. 2307) As Woodel was preparing to leave the trailer, he thought he would take Clifford Moody's wallet. (Vol. XV, p. 2307) He could not get the wallet out of Moody's pants, and so he lowered the pants to the ankles in order to get it out. (Vol. XV, p. 2307) He did not remember the keys coming out, but he ended up with those also. (Vol. XV, p. 2307) Woodel then took a bucket and put some pieces of evidence into it, such as the knife, pieces of the toilet tank lid, and Bernice Moody's glasses. (Vol. XV, p. 2307) He washed off his hands and the knife in the sink, then left the residence on foot. (Vol. XV, p. 2307) Woodel gave the detectives a taped statement, which was played for the jury at his trial. (Vol. XV, pp. 2307-2362) On tape, he said that after getting off work at Pizza Hut on the night in question, he and Jessica Mueller, daughter of the manager of the Pizza Hut, sat at a picnic table and talked to three guys who had a case of Budweiser in bottles. (Vol. XV, pp. 2317-2318) Woodel had seven to eight beers, then left around 3:00 a.m. and walked to the park, where he sat at the entrance at a flower garden that had rock around it for 20 minutes,

and may have thrown up. (Vol. XV, pp. 2318-2319)[5] As he was walking home through the park, he approached a woman who was cleaning the outside of a glass sliding door to ask her what time it was. (Vol. XV, pp. 2319-2320) Woodel tried to get her attention, but, apparently, she could not see him. (Vol. XV, p. 2321) She went inside the trailer, then came back and shut the door to wash the inside. (Vol. XV, pp. 2321-2322) Woodel knocked on the door to ask her what time it was, but she apparently did not see or hear him. (Vol. XV, p. 2322) When she left the living room again and went toward the back, Woodel noticed that the back door was open, and decided to go to that. (Vol. XV, p. 2322) He was on the porch when the woman finally saw him. (Vol XV, pp. 2322-2323) She panicked, and began saying very loudly, "Get out of my trailer, get out, what do you want, get out." (Vol. XV, p. 2323) Woodel tried to explain that all he wanted was to find out what time it was. (Vol. XV, p. 2323) The woman had taken some backward steps to go the other way, but she came back toward Woodel with a long, thin knife with a serrated blade. (Vol. XV, pp. 2323-2324) She swung at him two or three times, then he blocked it and pushed her backwards. (Vol. XV, p. 2324) She hit her head when she fell, but did not seem to be hurt, only "more madder," and Woodel gained possession of the knife. (Vol. XV, p. 2324) He was thinking that he was going to be in a lot of trouble. (Vol. XV, pp. 2326-2327)

[5] Elmer Schultz, who was working security at the entrance that early morning, did not remember seeing anyone sitting in that area or throwing up. (Vol. XII, pp. 1742-1743) However, Schultz also testified that the rock garden was not even there on the morning in question; it was put in later. (Vol. XII, p. 1743)

As Woodel was telling the woman to calm down, all he wanted was to know what time it was, she came to him and shoved him to get him out. (Vol. XV, p. 2327) On the second or third shove, she got "poked" which was the word Woodel indicated he was using for "stabbed." (Vol. XV, p. 2327) He thought this poke was "totally accidental." (Vol. XV, p. 2328) Woodel pushed her onto the bed and went into the bathroom, where he took the ceramic toilet tank lid and hit her in the head with it, intending to make her pass out so that he could leave. (Vol. XV, p. 2329) Although the lid shattered, the blow did not have any effect on her, and so Woodel hit her again with the piece remaining in his hand, but still nothing happened. (Vol. XV, pp. 2329-2330) He turned to leave out the front door, but she got off the bed and came at him again, and he slashed her with the knife. (Vol. XV, p. 2331) He had poked her and pushed her down on the bed, and she was swinging at him, hitting her arms against the knife. (Vol. XV, pp. 2332-2335) Woodel put the point of the knife to her face, and she was still "flailing everywhere and jerking up and down," and the knife came across her throat. (Vol. XV, p. 2335) Woodel saw blood coming from her neck, but it did not seem to hurt her. (Vol. XV, p. 2335) The blood on the woman was making him get ready to throw up, so Woodel covered her up with the sheet. (Vol. XV, pp. 2335-2336) She was still struggling when he gave up and left to go out the front of the trailer. (Vol. XV, p. 2335) Woodel had tried to pull her robe off her shoulders to control her arms and keep her from hitting so much, but he took the robe off her when this did not help, although

he did not know why he did it. (Vol. XV, pp. 2336-2337) Woodel also acknowledged cutting off the woman's panties, but did not know why he did that. (Vol. XV, pp. 2337-2338) He did not think he tied them in a knot. (Vol. XV, pp. 2337-2339) He did not have sex with the woman. (Vol. XV, pp. 2344-2345)

The woman's husband came in as Woodel was going down the hall to leave. (Vol. XV, p. 2339) Woodel raised the knife from his side to show it to him, and it went into his stomach or side. (Vol. XV, pp. 2341-2342) Woodel grabbed his wrist and twirled him around to get to the other side of him and closer to the door and poked him in the back. (Vol. XV, p. 2342) The man fell down and hit his head on the TV stand or TV. (Vol. XV, p. 2342) Woodel rinsed the knife off and was about to leave, when he thought that maybe the man had some money. (Vol. XV, p. 2342) He tried to take his wallet out of his back pocket, but it would not come out. (Vol. XV, p. 2342) Woodel loosened his pants and pulled them down for better access to his pocket, and was able to pull out the wallet. (Vol. XV, p. 2342) Before leaving, Woodel took a plastic pail the woman had been cleaning with and put into it the knife and the woman's glasses and the biggest pieces of the toilet tank lid that had blood on them. (Vol. XV, pp. 2342-2344, 2346-2347) He dumped the glasses and pieces of the lid into a canal. (Vol XV, pp. 2346-2347) Woodel took the pail, the knife, and the wallet home. (Vol. XV, pp. 2348-2350) He removed money from the wallet--it contained 30 or 40 dollars--then threw it into the trash can in his bedroom, along with his socks, which had blood on them. (Vol. XV, pp. 2349-2350)

Woodel then changed from his Pizza Hut uniform into shorts and a t-shirt. (Vol. XV, p. 2350)

In the morning when Woodel got up, he noticed that there were still some smaller pieces of the toilet tank lid in the pail, which he dumped into his kitchen trash can. (Vol. XV, p. 2352) He put the pail back in his bathroom because he needed a trash can there. (Vol. XV, p. 2352) He put the knife behind the dresser in his bedroom. (Vol. XV, pp. 2354-2355)

Near the end of the taped interview, Woodel stated that he was intoxicated at the time of the incident with the Moodys, which was not planned, and that he did not know why the events took place; this was something totally out of his character. (Vol. XV, p. 2359-2360)

At the conclusion of the taped interview, Thomas Woodel was placed under arrest. (Vol. XV, pp. 2361, 2371)

As Detective Cloud was typing up the probable cause affidavit, Woodel asked if he could read it. (Vol. XV, pp. 2370-2371) Cloud read it to Woodel, and asked him if that was pretty much true, and Woodel responded that it was. (Vol. XV, pp. 2371-2372)

While Woodel was still at the substation, Laurie Ward with the crime scene section of the sheriff's office took pictures of some injuries that he had. (Vol. XI, pp. 1609-1614) He had a possible scratch on his left cheek near his mouth, what appeared to be cuts on fingers of his right hand, what appeared to be a cut on his left little finger, a mark on the top of his right wrist, another mark on the inside of his left arm near the wrist, what appeared to be

a cut on the palm of his left hand, and a cut on his right thumb. (Vol. XI, pp. 1611-1612) Woodel told Ward that the injury to his thumb "was gotten during the incident," and he got the other injuries "during his job of digging ditches." (Vol. XI, p. 1614; Vol. XV, pp. 2367-2368)

The following afternoon, January 4, 1997, a dive team from the Polk County Sheriff's Office recovered toilet tank pieces and eyeglasses from the canal at Outdoor Resorts. (Vol. XIII, pp.1890-1898; Vol. XV, pp. 2373-2375)

At various times after he was arrested for the instant offenses, Tommy Woodel spoke to his younger sister, Bobbi, and told her what happened. (Vol. XV, pp. 2220-2236) He told her that he got out of work early on the evening in question and stayed in the vicinity of the Pizza Hut drinking beer, first with the manager's daughter, Jessica, and then with three "guys." (Vol. XV, pp. 2237-2238) He walked home, and as he was walking through the park, he saw a light on and went over to ask what time it was. (Vol. XV, p. 2238) He opened the door to ask her what time it was, because she could not see him standing there. (Vol. XV, p. 2238) When she finally realized he was there, he asked her what time it was, but she was telling him to get out, and getting excited. (Vol. XV, p. 2238) Woodel was standing there and saying, "I just want to know what time it is," but she got a knife and started waving it at Woodel. (Vol. XV, p. 2238) Woodel pushed her, and she fell backward and hit her head, and he took the knife away from her. (Vol. XV, p. 2238) He wanted her unconscious so that he could

leave, and so he hit her with the toilet tank lid. (Vol. XV, pp. 2238-2240) As he was getting ready to leave, that is when Mr. Moody came in. (Vol. XV, p. 2238) To divert suspicion, Woodel took a couple of knives out of the block on the counter,[6] and pulled the man's pants down and, as an afterthought, took his wallet to make it look like a robbery. (Vol. XV, pp. 2238-2241, 2246-2248) He cleaned up, then threw some items into the lake as he was walking down the boulevard. (Vol. XV, p. 2238) Tommy Woodel told his sister that he did not understand what had happened, or why, and he could not explain it, except to say that he just was not in his right mind. (Vol. XV, p. 2244-2246) Bobbi had never seen any violence in her brother's behavior; he never got upset about anything, and was not emotional. (Vol. XV, p. 2246)

Arthur Lee White, who had been convicted of "quite a few" felonies, "about five or six," testified that he and Thomas Woodel had been in the same dorm together at the Polk County Jail. (Vol. XV, pp. 2194-2195, 2205) After learning that Woodel was in jail for two murders, White struck up a conversation with him about the murders, intending to try to get the State to help him in his case, and to use the information he gained for his own benefit to try to get out of jail. (Vol. XV, pp. 2197, 2206) Woodel told White that "when he was walking past the house, he saw the woman cleaning or

[6] Law enforcement personnel who entered the Moody's rental unit after the homicides observed that the butcher block in the kitchen had slots for eight knives, but three of the slots were empty. (Vol. X, pp. 1424-1425)

looking out the window or something." (Vol. XV, p. 2198) He said something to her, and she closed the curtain. (Vol. XV, p. 2198) Woodel went inside the house. (Vol. XV, p. 2198) When the woman, who was in the kitchen area, saw Woodel, "she grabbed for the knife, and he wrestled it from her." (Vol. XV, p. 2198) As they were wrestling, she fell and hit her head. (Vol. XV, p. 2198) Woodel "drug her into the bedroom," where "he lost track of himself, and he stabbed her up and stuff like that there." (Vol. XV, p. 2198-2199) When White asked Woodel "did he fondle her or anything like that there," Woodel said, "yeah...he had pulled her bottom of the nightgown thing to the side." (Vol. XV, p. 2199) After he killed her and left her on the end of the bed, Woodel was washing himself in the bathroom when he heard the man. (Vol. XV, p. 2199-2201) The man started after him, fell over a TV, and Woodel stabbed him. (Vol. XV, p. 2199) White tried to use what Thomas Woodel told him to help himself, but was unsuccessful in this regard. (Vol. XV, pp. 2197, 2206)

Additional evidence introduced to connect Thomas Woodel with the instant offenses included a knife that law enforcement seized from behind a desk or dresser in his bedroom, and DNA evidence that was obtained using the polymerase chain reaction (PCR) technique. (Vol. XI, pp. 1605-1607; Vol. XII, p. 1678; Vol. XIII, pp. 1944-1985; Vol. XIV, pp. 2179-2181; Vol. XV, pp. 2233-2235) Items on which DNA matching that of Bernice Moody was found included broken pieces of the toilet tank lid, socks from the garbage bag, and the knife seized from Thomas Woodel's residence (Vol. XIII, 1959-1964)

DNA matching that of Woodel was found on a towel that law enforcement seized from the kitchen counter in the Moody's rental trailer, on a knife taken from the kitchen of that trailer, on a piece of toilet tissue or paper towel taken from the trailer, as well as in samples taken from the kitchen floor, the bathroom counter, and the north porch window in the trailer, and cuttings from the living room curtain. (Vol. XIII, pp. 1965-1969) DNA consistent with that of Woodel was also found on swabbings from Clifford Moody's wallet, on the socks found in the garbage, and on the knife and a bucket taken from Woodel's residence. (Vol. XIII, pp. 1970-1973)

Penalty Phase

State's Case

At penalty phase, the State presented additional testimony from Dr. Melamud, as well as victim impact evidence from eight family members and friends of Clifford and Bernice Moody. (Vol. XVII, p. 2750-Vol. XVIII, p. 2813)

Dr. Melamud could not say whether the blunt trauma to Bernice Moody rendered her unconscious, but he did note that there was a contusion of the brain. (Vol. XVII, p. 2753-2755) It would have taken a matter of minutes, rather than seconds, to inflict 56 cut and stab wounds to Bernice Moody. (Vol. XVIII, pp. 2760-2762) She had "multiple injuries of her arms, upper extremities, indicative that she was defending herself." (Vol. XVIII, p. 2762) Dr. Melamud opined that "it took several minutes" for her to die from blood loss, but he could not "pinpoint the time." (Vol. XVIII, p. 2762)

With regard to Clifford Moody, Dr. Melamud likewise could not say whether, or when, he would have lost consciousness prior to death. (Vol. XVII, p. 2757) He had had a triple bypass, and did not need as many injuries and probably died faster than Bernice, who "was in good health." (Vol. XVIII, p. 2763) There was no medication in Clifford Moody's system; everything was negative. (Vol. XVIII, p. 2763)

Michael Lima and his wife lived in Tampa, about a block away from one of the Moody's daughters. (Vol. XVIII, p. 2764) The Moodys "lived active lives. Bernice had the vitality of a woman 20 years younger." (Vol. XVIII, p. 2765) The Moodys "were closely

involved with their family and many friends. And they travelled the country to maintain that personal contact." (Vol. XVIII, p. 2765) Lima characterized the Moodys as "salt of the Earth." (Vol. XVIII, p. 2765)

Eugene Brah lived directly across the boulevard from the unit that Bernice and Clifford Moody called home for approximately five months a year. (Vol. XVIII, p. 2768-2769) He described how it was not unusual to see Bernice "briskly walk across the boulevard in her quick, determined pace" to share some news about her family with her neighbors. (Vol. XVIII, p. 2769) Nor was it unusual to see her cleaning one of the units early in the morning, before Brah had his first cup of coffee. (Vol. XVIII, p. 2770) He "marveled at her energy and ambition." (Vol. XVIII, p. 2770) Clifford Moody often went fishing at the lake with his brother, Stewart. (Vol. XVIII, pp. 2770-2771)

Stewart Moody was 77 years old. (Vol. XVIII, p. 2773) He and his wife bought a place about two blocks away from that of Clifford and Bernice, where they stayed four months a year, living in Illinois the rest of the year. (Vol. XVIII, pp. 2774-2775) Clif was the oldest of 11 children. (Vol. XVIII, p. 2775) The two brothers bought a boat together, and went fishing three or four times a week. (Vol. XVIII, p. 2775)

Joan Scanlon, 69 years old, was one of Bernice Moody's sisters. (Vol. XVIII, p. 2777) Bernice was 18 years old when she married Clifford. (Vol. XVIII, p. 2778) Among other things, Scanlon testified that Bernice was always there in time of need;

she flew from Florida to Illinois when Scanlon's son was killed in an automobile accident, even though Bernice had broken both wrists in a fall and had casts on her arms. (Vol. XVIII, pp. 2778-2779)

George Scott Richard was one of the Moody's grandchildren. (Vol. XVIII, p. 2780) He described how his grandparents helped him with his studies and provided many fun activities for the grand-children. (Vol. XVIII, p. 2784) In the early '90s, he learned line dancing with his grandmother; his grandfather could not do it because of his recent knee surgery. (Vol. XVIII, p. 2785)

Michelle Clark, age 33, was the oldest of the Moody's seven grandchildren. (Vol. XVIII, p. 2791) Her grandmother taught her to cook. (Vol. XVIII, p. 2793) Bernice Moody "was so active for a woman of her age." (Vol. XVIII, p. 2795) She would "line dance and Irish clogging." (Vol. XVIII, p. 2795) Clark "could hardly keep up with her" when they went to Disney. (Vol. XVIII, p. 2795) Clark described her grandparents as "very religious" Catholics who "had such good values." (Vol. XVIII, pp. 2795-2796)

Rebecca Moody Yowell, age 45, described how her parents, Bernice and Clif Moody, were always there for her. (Vol. XVIII, pp. 2797-2802) They taught her kids how to play cards, and Bernice taught them to play piano. (Vol. XVIII, p. 2802) Clif took her son fishing. (Vol. XVIII, p. 2802)

Mary Ann Richard, 55, was the oldest of the Moody's children. (Vol. XVIII, pp. 2802, 2805) Her father had had open-heart surgery in August, but "was recovering very, very well." (Vol. XVIII, pp.

2803, 2811) He had also had two knees replaced, but did "very well with those." (Vol. XVIII, p. 2804) There were "a little bit of things that he couldn't do. But in normal activities,...he was good." (Vol. XVIII, p. 2804) In early 1995, her mother slipped and fell in some antifreeze and broke her arm. (Vol. XVIII, pp. 2804, 2811) Through painful physical therapy, she "got so she could do most things," but "didn't have the strength in her arm anymore." (Vol XVIII, pp. 2804-2805, 2811) Both of Richard's parents wore bifocals. (Vol. XVIII, p. 2805) Her father could not hear with a hearing aid. (Vol. XVIII, p. 2805) She described them as "beautiful and loving parents" who "instilled in their children the religious and moral values that they exhibited." (Vol. XVIII, pp. 2805-2806) "Family was paramount to them[,]" and "they were always there" for their children. (Vol. XVIII, pp. 2806, 2810)

Defense Case

Jessica Wallace, who was 17 years old when she testified at Thomas Woodel's trial, had known him for four to six months in December of 1996. (Vol. XVIII, pp. 2816-2818) Wallace's mother, Patricia Mueller,[7] was Woodel's manager [at Pizza Hut] and friend. (Vol. XVIII, pp. 2817-2818) On the evening of the murders, Wallace waited outside of Pizza Hut until Woodel got off work between 11:00 and 11:30. (Vol. XVIII, p. 2819) Woodel went to get a beer at the 7-Eleven across the street. (Vol. XVIII, p. 2820) As they were

[7] Jessica Wallace was sometimes referred to during the trial as Jessica Mueller.

walking back, three men approached them, and they all walked to a campground. (Vol. XVIII, p. 2820) They drank beer, which a man named Jack pulled out of his book bag. (Vol. XVIII, p. 2820) Woodel had one full quart and probably three or four more while Wallace was there. (Vol. XVIII, pp. 2820-2821) When she left between 1:00 and 2:00, Woodel was acting happy, "getting a little loud and singing...`Green Acres.'" (Vol. XVIII, p. 2821) They were still drinking when Wallace left. (Vol. XVIII, p. 2821) She had been around Woodel before when he consumed alcohol; he never exhibited any signs of violence then or any other time, but was a peace maker who wanted to be happy and wanted everybody to get along. (Vol. XVIII, p. 2822) Wallace was very shocked when she heard about the murders; this was "not something that Tom would have done at all." (Vol. XVIII, p. 2822)

Leola Kilbourn worked with Tommy and Bobbi Woodel at Pizza Hut. (Vol. XVIII, pp. 2823-2824) She also rented them the places they lived in at Outdoor Resorts. (Vol. XVIII, pp. 2824-2825, 2827-2828) Kilbourn described Tommy Woodel as "very soft-spoken, very quiet." (Vol. XVIII, p. 2825) He was a "very mild-mannered person and easygoing[,]" and her never swore in front of her. (Vol. XVIII, p. 2825) He was a very hard and diligent worker who never complained about having to clean the dishes. (Vol. XVIII, pp. 2825-2826) Tommy Woodel seemed to have a very close relationship with his sister, and was very good with her baby. (Vol. XVIII, pp. 2826-2827) When Kilbourn learned that Woodel had been arrested and confessed to these homicides, her reaction was "total disbelief."

(Vol. XVIII, pp. 2828-2829) The whole crew at Pizza Hut was "in just total shock," and a counselor came in for several hours to try to help them get through it. (Vol. XVIII, p. 2829)

Lisa Kilbourne "became real good friends with Bobbi and Tommy" Woodel. (Vol. XVIII, p. 2831) Tommy Woodel was "always real nice" to her and everyone else. (Vol. XVIII, p. 2831) She never saw him violent; rather he was kind of like a peacemaker, and was "real easy to get along with." (Vol. XVIII, pp. 2831-2832) He was "a likable and gentle person." (Vol. XVIII, p. 2836) He loved his sister's baby and had a good relationship with the child. (Vol. XVIII, p. 2832) When Kilbourne found out that Woodel had confessed to these murders, she "was in total shock and disbelief," and felt that "[t]here was no way he could have done it." (Vol. XVIII, p. 2833) The workers at Pizza Hut were "in a daze," "all walking around like zombies for...several months" because they could not believe that Woodel did this. (Vol. XVIII, p. 2835) Kilbourne eventually realized that Woodel "had to of" done it, but it was "still hard to believe." (Vol. XVIII, p. 2837) Kilbourne and her mother met with Mary Ann Richard to try to help her understand what happened. (Vol. XVIII, pp. 2835-2836)

Attorney Allen Ross Smith, one of the two lawyers who represented Thomas Woodel in the court below, testified that Woodel agreed to, and did, meet with Mary Ann Richard and her husband on September 30, 1997, with the prosecutor present, and answered their questions about what happened. (Vol. XVIII, p. 2841)

With regard to the degree of Woodel's intoxication, Smith testified that Woodel told the police off the record that he had purchased as much as two quarts and three cases of beer at a 7-Eleven across the street from Pizza Hut. (Vol. XVIII, pp. 2845-2846) In an attempt to validate this information, Detective Mark Taylor went to the wrong 7-Eleven; he went to the one across from Outdoor Resorts instead of Pizza Hut. (Vol. XVIII, p. 2846) A defense investigator did go to the right 7-Eleven, but by that time more than a year had passed since the incident, and the clerk who was on duty the night of December 30, 1996 could not remember anything. (Vol. XVIII, p. 2846) Surveillance videotapes from that night were reused. (Vol. XVIII, p. 2846) Defense efforts to locate the three individuals with who Woodel was drinking that night also were unsuccessful. (Vol. XVIII, pp. 2846-2847)

In addition to his son, Christopher, Thomas Woodel also had a child with his girlfriend, Christina, a daughter named Breanna, who was 16 months old and suffering from acute leukemia at the time of the penalty trial. (Vol. XVIII, p. 2848) Woodel voluntarily had blood withdrawn to see if his bone marrow would be compatible, and they were awaiting the results at the time of penalty phase. (Vol. XVIII, pp. 2848-2849)

Smith felt that Woodel had a sincere desire not to hurt anybody, which was also felt by Detectives Cloud and Cash when Woodel expressed concern for their safety and told them to be careful, and Smith believed that Woodel's personality was "abso-

lutely 180 degrees different than what we see happen." (Vol. XVIII, pp. 2849-2850)

Albert Davis Woodel, Thomas Woodel's father, was deaf, and testified at penalty phase through an interpreter. (Vol. XVIII, pp. 2857-2858) He used to drink heavily, but stopped drinking so much 20 years ago. (Vol. XVIII, pp. 2861, 2876) Thomas Woodel's mother, Jackie, who was also hard of hearing, drank a lot. (Vol. XVIII, pp. 2861-2862) She would go out and drink, and not return until late at night when the children were in bed; as a result, they never really got to talk with their mother. (Vol. XVIII, pp. 2862-2863) Jackie was an unfit mother, and Albert Woodel sometimes had to assume the roles of both mother and father. (Vol. XVIII, pp. 2863-2864) He and Jackie would get into fist fights after he found her in a bar. (Vol. XVIII, p. 2864) The kids would sometimes go and hide when their parents were fighting, because they were scared. (Vol. XVIII, pp. 2864-2866) Bobbi and Tommy were always close and kind of protected each other. (Vol. XVIII, p. 2866) Up to the time they were around five or six, the kids got along with other children, played with them, and seemed to enjoy themselves. (Vol. XVIII, p. 2866) They were well-behaved, and none of the neighbors ever complained about them. (Vol. XVIII, p. 2866) Albert Woodel did not have contact with the children when they were older; custody was a big issue. (Vol. XVIII, pp. 2866-2867) There were changes of custody back and forth many times for awhile. (Vol. XVIII, p. 2869) Tommi and Booby lived at many different addresses during their childhood. (Vol. XVIII, p. 2870) Albert and Jackie

separated because she was drinking a lot, going off to bars and not taking care of the kids. (Vol. XVIII, p. 2867) Albert described one incident where Tommy ran after a train and jumped on it. (Vol. XVIII, p. 2867) Albert thought he was going to look for his mother, but did not know for sure. (Vol. XVIII, p. 2867) Tommy was not hurt, and the police brought him home. (Vol. XVIII, p. 2867)

At one point Albert took the children to Winston-Salem; Jackie refused to go there. (Vol. XVIII, p. 2868) Albert and his grandmother took care of the children until she became ill, and the kids were placed in the children's home for some months. (Vol. XVIII, p. 2869) Their mother took off with them from there, and it was awhile before Albert saw them again. (Vol. XVIII, p. 2869)

Albert and Jackie were poor, and the children wore hand-me-downs. (Vol. XVIII, p. 2870)

Tommy was a good boy as a child. (Vol. XVIII, p. 2870) Albert took him fishing, which he loved, and they would take walks together, and Tommy would help him cook at home. (Vol. XVIII, pp. 2870-2871) Albert taught Tommy to drive when he was almost 16. (Vol. XVIII, pp. 2871, 2877) But all that daily contact ended when Albert left. (Vol. XVIII, p. 2871) Tommy was about eight years old when Albert last had regular contact with him, except for a period of about a year when Tommy was 15 or 16 and lived with his father. (Vol. XVIII, pp. 2873, 2877)

When Albert heard that his son had killed two people, he could not believe it. (Vol. XVIII, p. 2871) Tommy was a very gentle person, like his father. (Vol. XVIII, pp. 2871-2872) Albert saw

him at a family reunion several months before the murders, at which time he was happy. (Vol. XVIII, p. 2872)

Albert and Tommy always had a lot of love for each other, and there was never anything negative between them. (Vol. XVIII, p. 2872)

Tommy seemed very interested in his own son, and took care of him. (Vol. XVIII, p. 2872)

Margaret Russell was Tommy Woodel's aunt. (Vol. XVIII, p. 2880) Tommy stayed with her for two or three months when Jackie was pregnant with Bobbi. (Vol. XVIII, p. 2882) Russell described the home environment in which the children lived as "dysfunctional." (Vol. XVIII, p. 2881) The family lived in Fayetteville, North Carolina, and was very poor, but their house was kept very neat. (Vol. XVIII, pp. 2882-2883) The children did not have any toys, and were barefoot most of the time. (Vol. XVIII, p. 2882) If they had shoes, they were old ones, and no socks. (Vol. XVIII, p. 2894) They wore second-handing clothing and "[n]othing ever matched." (Vol. XVIII, p. 2894) They were always frustrated because it was very hard to communicate with their deaf parents. (Vol. XVIII, p. 2883) Russell considered the children pitiful in that they kind of felt deprived because their needs were not being met. (Vol. XVIII, pp. 2884-2885) For example, if they wanted something to eat, they would take a piece of bologna or a hot dog from the refrigerator and eat it raw. (Vol. XVIII, p. 2885)

As a baby, Tommy had trouble getting to sleep. (Vol. XVIII, p. 2884) He would sometimes bang his head against his crib and bounce

the crib back and forth until Russell would go in to quiet him. (Vol. XVIII, p. 2884)

Jackie drank, smoked, was promiscuous and manipulative. (Vol. XVIII, p. 2887) She used her children to do her talking for her. (Vol. XVIII, p. 2890) "They had to grow up real fast." (Vol. XVIII, p. 2890)

The children had no privacy. (Vol. XVIII, p. 2891) Jackie removed the doors in the house so she could see what everybody was doing. (Vol. XVIII, p. 2890) She took the knob off the television so they could not watch it when she was not there, and took the telephone with her when she went out. (Vol. XVIII, pp. 2891-2892)

Russell thought that Tommy and Bobbi were in the children's home for "like two years" instead of only months. (Vol. XVIII, p. 2888)

After Tommy was around eight years old, his father was not around, because Jackie took the kids to Michigan. (Vol. XVIII, pp. 2903-2904)

Russell spoke of an incident that occurred when Tommy was staying with her in Pennsylvania. (Vol. XVIII, pp. 2894) He was suspended from school for driving off campus during school hours, which violated the restrictions of his "junior's license." (Vol. XVIII, pp. 2894-2895) Russell sent him home to Michigan, but his mother sent him back after two or three days; apparently she did not want to be bothered with him. (Vol. XVIII, p. 2895) After that, Russell took Tommy to the recruiting office in York, Pennsylvania, and told him to pick which service he would go into;

he chose the Navy. (Vol. XVIII, p. 2901) He made it through boot camp, and was being sent to either Kentucky or Tennessee for training, but Bobbi told Russell that Tommy was given a dishonorable discharge. (Vol. XVIII, p. 2904)

In addition to Jackie, another person who had a very bad influence upon Tommy was Jackie's second child from a previous marriage, Scott, who was about three years older than Tommy. (Vol. XVIII, pp. 2899-2900) Scott was in and out of reform schools. (Vol. XVIII, p. 2900) "If it wasn't nailed down, he'd take it." (Vol. XVIII, p. 2900) Jackie and Scott were very close, and she would give him preferential treatment over Tommy and Bobbi. (Vol. XVIII, p. 2900)

Bobbi Woodel's earliest memories were of being in the children's home. (Vol. XVIII, p. 2906) She recalled hearing her brother screaming at night when he was being beaten or disciplined at the home, which "seemed like it was a nightly occurrence." (Vol. XVIII, pp. 2915-2916) Their mother was an alcoholic who was irresponsible and used drugs. (Vol. XVIII, p. 2907) She only wanted to be a mother when it was convenient for her. (Vol. XVIII, p. 2907) When they lived in North Carolina, Jackie would drop the children off at places like roller skating rinks for hours at a time. (Vol. XVIII, p. 2913) When they moved to Michigan, she did not take them anywhere, except Taco Bell once a month, when her check came in. (Vol. XVIII, p. 2913) The only time she was affectionate was when she was drunk. (Vol. XVIII, p. 2907) She had a very bad temper; when she got mad, she would throw things. (Vol.

XVIII, p. 2909) She was paranoid, and thought the children were always talking about her. (Vol. XVIII, pp. 2910-2911) When they were around 10, 11, or 12, there were often times when Bobbi and Tommy stayed in the home by themselves. (Vol. XVIII, p. 2907) Quite often there was no food in the house. (Vol. XVIII, p. 2908) When Jackie got her AFDC and SSI checks around the first of the month, she would disappear for a day or two, or even longer. (Vol. XVIII, p. 2908) At the end of the month, the money had all been used up, and so there was no food or very little food. (Vol. XVIII, p. 2908) Sometimes, the children resorted to taking groceries from the trunks of other people's cars in order to have food. (Vol. XVIII, pp. 2908-2909) Bobbi and Tommy felt that they took care of their mother instead of their mother taking care of them. (Vol. XVIII, p. 2909) They used sign language to communicate with her. (Vol. XVIII, p. 2911)

Jackie had various boyfriends who would spend the night. (Vol. XVIII, pp. 2914, 2919-2920) One of them, Roberto, sexually molested Bobbi when she was eight years old, after Jackie gave him permission to sleep in Bobbi's bed. (Vol. XVIII, pp. 2919-2920) Bobbi suspected that he was doing the same thing to Tommy, who went from being friendly and outgoing to being shy, "a very closed child." (Vol. XVIII, pp. 2920-2921)

Their childhood with their mother was so tough that Bobbi tried to commit suicide when she was 14. (Vol. XVIII, p. 2921) After that, she went to live with her Aunt Becky. (Vol. XVIII, p. 2923)

When Tommy joined the Navy, he was happy and proud of himself. (Vol. XVIII, pp. 2923-2924) He was dishonorably discharged after going into a store where he was not supposed to be, and being considered AWOL. (Vol. XVIII, pp. 2924, 2940-2941)) As a result, he "felt very low of himself." (Vol. XVIII, p. 2924) The only time he did not feel that he was a disappointment to everyone was when he was in the Navy. (Vol. XVIII, p. 2924)

Tommy was happy about the birth of his son, Christopher, which happened in 1988 when Tommy was 18; his eyes would light up whenever he saw him. (Vol. XVIII, pp. 2924-2925, 2942-2943) He loved his son, and was close to him. (Vol. XVIII, pp. 2926-2927)

Tommy always wanted to work, and Bobbi did not consider him lazy. (Vol. XVIII, p. 2927) At Pizza Hut, he did whatever was asked of him. (Vol. XVIII, p. 2928) Although he was disappointed that they were always having him do dishes and not cook, he never expressed that to anyone except his sister. (Vol. XVIII, p. 2928)

Bobbi could not believe that her brother committed the murders, because such a thing was so out of character. (Vol. XVIII, p. 2929) Whereas Bobbi had a "very short temper," Tommy was the opposite. (Vol. XVIII, pp. 2929-2930)

Bobbi read into evidence two letters Tommy wrote her after his arrest. (Vol. XVIII, pp. 2932-2935) In one dated March 18, he wrote, among other things, "I'm guilty because I was drunk and not in the right frame of mind, willing to pay the consequences for which I take full responsibility for. I am sorry for what I have done." (Vol. XVIII, pp. 2932-2933) In the other letter, dated May

2, he wrote, in part, "I am sorry to the people who are no longer here because of me. I am sorry to their families and the feelings they are or will be going through. And I'm also sorry for my own family and people who knew me, for their feelings and output on circumstances. We will all meet again some day." (Vol. XVIII, pp. 2933-2934)

Tommy had difficulty showing that he was sorry about anything, but, based upon the letters and her knowledge of him, Bobbi concluded that he was remorseful for these murders. (Vol. XVIII, pp. 2935-2936)

Bobbi had seen Tommy drink to excess, but had never seen him violent; he was a happy drunk. (Vol. XVIII, p. 2937)

Bobbi summed up her brother in these words (Vol. XVIII, p. 2938):

> He's a very nice, loving person that gets misunderstood a lot because he has a hard time communicating. But violence doesn't even come close to being anything near his personality. He's a very gentle, caring person. And he tries to make light of a lot of situations by being funny.

The final defense witness, Dr. Henry Dee, was a clinical psychologist and clinical neuropsychologist who spent about 10-12 hours interviewing Thomas Woodel, and read the discovery in this case, and did research pertaining to children of deaf parents. (Vol. XIX, pp. 2959, 2962-2963) He also listened to the taped statement Woodel gave to law enforcement, and interviewed some of Woodel's family members and acquaintances. (Vol. XIX, pp. 2962-

2964) And he administered a series of psychological tests to Woodel. (Vol. XIX, pp. 2983-2986)

Dr. Dee noted that deaf people are typically raised in an institution, a school for the deaf. (Vol. XIX, p. 2965) As a result, contact with parents is limited, and most time is spent with their peers in the school. (Vol. XIX, pp. 2965-2967) This can cause problems when the deaf become parents, in that they may either "behave like peers that don't really act like parents in the usual sense of the term. Or since they don't have a lot of experience with authority, they'll tend to be very rigid and inflexible and inappropriate and confuse the children terribly..." (Vol. XIX, p. 2966)

Dr. Dee described the communicative difficulties Woodel encountered as a result of growing up in a home with deaf parents. (Vol. XIX, pp. 2968-2971) Bobbi Woodel did not encounter the same problems, as she grew up with a speaking sibling (Tommy). (Vol. XIX, p. 2968)

Dr. Dee found Thomas Woodel to be "an extraordinarily passive fellow[,]" who would not even respond in anger when his friends made cruel fun of his mother for her eccentricities and her deafness. (Vol. XIX, p. 2972)

Woodel had great difficulty communicating his feelings and emotions, which may have been largely a result of the fact that his non-hearing parents could not respond to his cries when he was a baby. (Vol. XIX, pp. 2979-2981)

The home where Woodel grew up was "extremely chaotic" and "dysfunctional" with "a lot of violence." (Vol. XIX, pp. 2973, 2975) Woodel recalled pots and pans "flying around," and a photograph of his mother in a bathrobe holding a frying pan when she had two black eyes. (Vol. XIX, p. 2973) The children had no privacy and "a good deal of deprivation," even to the extent that they had to steal food. (Vol. XIX, p. 2975)

The deprivation continued during the two years that Bobbi and Tommy were in the children's home, in the sense that the two siblings, who were very close, were not able to see each other often or communicate with one another openly. (Vol. XIX, pp. 2973-2975)

Being left alone at home or in a car for hours on end gave the children the feeling that no one really cared about them, including their parents. (Vol. XIX, pp. 2976-2978)

As they were growing up, Bobbi and Tommy thought they were deaf; they went to deaf clubs and communicated with deaf people. (Vol XIX, p. 3002) As they reached majority, they were told to go out into the hearing world, where they did not really feel they belonged. (Vol. XIX, p. 3002) Woodel belonged "in both worlds [hearing and deaf] or neither[.]" (Vol. XIX, p. 3002)

Their older half-brother, Scott, the "juvenile delinquent," encouraged them to engage in activities such as "running through stores, engaging in petit theft," etc. (Vol. XIX, pp. 2977-2978) The police who would bring the children home could not explain to their deaf parents exactly what they had done. (Vol. XIX, p. 2978)

The tests Dee administered showed Woodel to be emotionally unstable, prone to guilt, " very quick to blame himself, to see himself as non-belonging, as rejected by other people." (Vol. XIX, pp. 2983-2986) Woodel's IQ tested "in the normal range." (Vol. XIX, p. 2987)

Woodel told Dee that he first started drinking alcoholic beverages when he was between 10 and 12 years of age. (Vol. XIX, p. 2992) His drinking was sporadic, but when he drank, he drank to intoxication, that is, "binge drinking," which Dee "would characterize as an alcoholic[.]" (Vol. XIX, pp. 2992-2993)

Woodel also said he used marijuana from the age of 10 or 12. (Vol. XIX, p. 2996) His mother was doing it, and he became her supplier. (Vol. XIX, p. 2996) Woodel would get it, and they would smoke together. (Vol. XIX, p. 2996)

The incident involved in this case seemed "to be totally out of character[,]" and Dr. Dee could offer no explanation for it. (Vol. XIX, pp. 2983, 2986)

SUMMARY OF THE ARGUMENT

The court below erred in insisting that the jury and counsel complete the penalty phase of Thomas Woodel's trial in a single day. They were forced to put in a 13-hour day, during which the testimony of some 17 witnesses was presented. Working the jurors and lawyers to the point of exhaustion necessarily resulted in sentencing recommendations which are unreliable. The fact that the court may have had scheduling problems does not justify pushing the penalty trial to conclusion in one day.

The State failed to prove that Thomas Woodel had a fully formed, conscious purpose to kill either Clifford or Bernice Moody. Woodel clearly did not plan the homicides in advance, and the prosecution showed, at most, a general intent to kill, rather than the specific intent required for premeditated murder. The evidence of robbery was insufficient because the only property of value removed from the Moodys was taken after the killings, as an afterthought. Burglary was not proven because the State failed to prove that the intoxicated Appellant intended to commit theft or assault in the Moodys' trailer; he went there to find out what time it was. Without adequate proof of the underlying felonies, Woodel's murder convictions cannot be sustained on the basis of felony murder.

The State should not have been allowed to present the theory of felony murder to Thomas Woodel's jury when only premeditated murder had been alleged in the indictment. The State was allowed impermissibly to contructively amend the charging document, which

only the grand jury could do, and Woodel was deprived of proper notice regarding the charges against which he would have to defend.

In his opening statement to the jury, the prosecutor said that he would present testimony from Thomas Woodel's ex-wife regarding a statement Woodel made to her to the effect of "get rid of the knife." When this testimony was later ruled inadmissible, the court should have granted Woodel's motion for mistrial.

The evidence failed to establish two aggravating circumstances which were submitted to the jury and found by the court: that the homicides were committed during a burglary and that the victims were especially vulnerable due to age or disability. With regard to the latter, the Moodys were very active for their age. Bernice was in good health, and Clifford was leading a normal life. Nor was there any evidence to show that the Moodys were singled out for killing due to their age or any infirmities they suffered.

The trial court erred in sentencing Thomas Woodel to death without assigning specific weight to each mitigating circumstance. He also erred in failing to consider Woodel's intoxicated state at the time of the offenses under the correct legal standard, imroperly rejecting intoxication as a mitigator because it did not rise to the level of negating the specific intent required for first degree murder.

ARGUMENT

ISSUE I

THOMAS WOODEL WAS DENIED DUE PROCESS OF LAW AND EFFECTIVE ASSISTANCE OF COUNSEL AND SUBJECTED TO CRUEL AND/ OR UNUSUAL PUNISHMENT BY THE INSISTENCE OF THE COURT BELOW THAT THE PENALTY PHASE IN THIS CASE BE COMPLETED IN A SINGLE DAY.

Thomas Woodel's penalty trial began at 9:05 a.m. on December 7, 1998. (Vol. XVII, p. 2739) Immediately before the jury was brought in, the court made it clear to counsel that he expected them to complete the penalty phase that day (Vol. XVII, pp. 2748-2749):

> THE COURT: All right. One thing I think is abundantly clear, because of scheduling matters, we're going to just about have to finish this case today.
>
> MR. WALLACE [assistant state attorney]: Yes, Your Honor.
>
> THE COURT: Obviously, the nature of it, the severity of the charges, I'm not going to simply say, well, we're going to do it in one day and--
>
> MR. WALLACE: Your Honor, I don't believe--
>
> THE COURT: --period. I think we can.
>
> MR. WALLACE: I don't thing based on what we know how the testimony is going to go that there's even any real need, at this point in time, to say anything to the jury.
>
> The only thing that we might need to do is either during the lunch break or the afternoon break is explain to them that, you know, we're not going to finish by 5:00, if that's true, and that they might need to call and make arrangements for child care. But I don't think there's any need to tell them, you know, because I think we just need to go with the evidence.
>
> THE COURT: I told you to keep--to bear it in mind and present your case, as you need to present it.
>
> MR. WALLACE: Yes, Your Honor.

> THE COURT: I, certainly, don't want you to cut any corners. But bear in mind, we do have some limitation on time. All right. I'm not going to limit you, obviously. But for practical matters, I would hope to see a conclusion before the day expires.
>
> So with that pronouncement, let's bring in the jury.

During the defense presentation, before the final defense witness was called, the court made the following remarks (Vol. XIX, p. 2954):

> Apparently, we're going to be here late tonight. How late, I'm not sure. But we will be taking a recess briefly and giving you the opportunity to call somebody if you need to call somebody and let them know that you are running late. Again, apologies for that fact, but it is a fact, and we might as well face it.

During the jury charge conference, the court mentioned that the hour was late, and emphasized the need to "move as fast as we can without jeopardizing either side." (Vol. XIX, p. 3048) Shortly thereafter, the following exchange occurred (Vol. XIX, pp. 3049-3050):

> THE COURT: Are you ready to give your arguments?
>
> MR. COLON [defense counsel]: As ready as we're going to be in this late of the day.
>
> THE COURT: It's not getting any early [sic], gentlemen.
>
> MR. COLON: I mean, I think it's kind of dangerous to do these kind of closings this late in the day, but I understand the logistical problems.
>
> THE COURT: I discussed that with y'all earlier.
>
> MR. COLON: Yes, sir.
>
> THE COURT: --if we started today, we would have to finish today.
>
> MR. COLON: That's no surprise, we were aware of that. I guess you don't realize it until 6:20 hits, and you haven't even begun

> closings. And I'm the one who's going to give the last final--the final closing and probably will not get done until way after 7:00, so.

The court and counsel thereafter discussed arrangements for feeding the jury. (Vol. XIX, pp. 3050-3053) Defense counsel said that he could look at the jurors and tell they were exhausted, and he was exhausted, too. (Vol. XIX, pp. 3051-3052) At the conclusion of this discussion, defense counsel lodged an "[o]bjection ... to the lateness in the day." (Vol. XIX, p. 3053)

After closing arguments and instructions, the jury retired to deliberate at 8:50 p.m. (Vol. XIX, p. 3146) Their recommendations as to penalty were returned at 10:00 p.m. (Vol. XIX, p. 3146)

Thomas Woodel was denied due process and the effective assistance of counsel by the trial court's "need for speed," his requirement that counsel and the jury complete the penalty phase in a single day. The jurors were forced to put in a 13-hour day, during which they listened to testimony of some 17 witnesses, nine for the prosecution, and eight for the defense. They, and counsel, could not possibly have paid close attention to all the proceedings during such a long day, nor given reasoned consideration to the penalty recommendations in their state of exhaustion.

"Haste has no place in a proceeding in which a person may be sentenced to death." Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990) "Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties." Id., 569 So. 2d at 1252. These statements emanating from this Court imply

that a certain deliberateness in the proceedings must take place in order for justice to be served. Thomas Woodel's penalty phase was lacking in this characteristic.

In Ferrer v. State, 718 So. 2d 822 (Fla. 4th DCA), review denied, 728 So. 2d 204 (Fla. 1998), the court reversed a criminal conviction and sentence where the trial court required counsel to begin jury selection at 7:30 p.m., after counsel had been in court all day, and selection ended at 8:25. The force of the original opinion is compelling. Unfortunately, on rehearing, the court withdrew its original opinion and substituted a much shorter one, while not changing the result. Suffice it to say that in the original opinion, the court cited logical considerations which make it unwise to conduct a jury trial beyond the conventional ending hour, such as unfairness to the jurors and busy counsel, and the exhaustion that deprives a party of the lawyer's skillful service. Obviously, these considerations are heightened in the context of capital litigation in which the defendant is facing the ultimate criminal sanction.

This Court cited Ferrer with approval in Thomas v. State, 24 Fla. Law Weekly S461, 463 (Fla. Sept. 30, 1999). The Court noted that "exhausting and pressured circumstances...[such as those that existed at Thomas Woodel's penalty trial] are simply not proper conditions for any jury, much less one in a capital punishment case..." 24 Fla. Law Weekly at S463.

The weariness of Appellant's jurors manifested itself in an error made in the initial penalty recommendation as to Bernice

Moody, which read: "A majority of the jury, by a vote of 12 to 12, advise and recommend to the court that it impose the death penalty upon Thomas Woodel." (Vol. II, p. 214; Vol. XIX, pp. 3147-3148) As a result, the fatigued jurors were required to extend their service yet a few more minutes to correct the verdict form to reflect a vote of 12 to 0. (Vol. XIX, pp. 3148-3150)

Whatever the court's scheduling problems, which apparently related to the judge's need to attend a conference for circuit judges on Amelia Island on December 8 (Vol. XVII, p. 2665), they did not justify requiring the lawyers and the jurors to work so late into the evening, to the point of making fatigue-related errors.

In Thomas Woodel's case, as in that of Jesus Scull, "the appearance of irregularity so permeates these proceedings as to justify suspicion of unfairness...which is as much a violation of due process as actual bias would be." Scull, 569 So. 2d at 1252. Under the circumstances of this case, the jury's penalty recommendations cannot be considered reliable. See Thomas, 24 Fla. L. Weekly at S463. His sentences of death cannot be permitted to stand, as they violate Amendments Five, Six, Eight, and Fourteen of the Constitution of the United States and Article I, Sections 9, 16, 17, and 22 of the Constitution of the State of Florida. These sentences must be reversed and this cause remanded for a new penalty trial.

ISSUE II

THE EVIDENCE PRESENTED BELOW WAS INSUFFICIENT TO PROVE THAT THOMAS WOODEL WAS GUILTY OF THE OFFENSES SUBMITTED TO HIS JURY, NAMELY, PREMEDITATED MURDER, FELONY MURDER, ROBBERY, AND BURGLARY.

After the State presented its case, Thomas Woodel unsuccessfully moved the trial court for a judgment of acquittal as to all counts of the indictment. (Vol. XVI, pp. 2452-2462) The motion should have been granted.

A. Premeditated Murder

The indictment herein charged Thomas Woodel with two counts of premeditated murder. Premeditation, as an element of first-degree murder,

> is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues. Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act. Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of the victim is concerned.

Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981) (citations omitted), cert. denied, 456 U.S. 984 (1982), overruled on other grounds, Pope v. State, 441 So. 2d 1073 (Fla. 1983); see also

Hoefert v. State, 617 So. 2d 1046, 1049 (Fla. 1993) (evidence consistent with unlawful killing insufficient to prove premeditation); Holton v. State, 573 So. 2d 284, 289 (Fla. 1990), cert. denied, 500 U.S. 960 (1991); Mungin v. State, 689 So. 2d 1026 (Fla. 1995). The premeditation essential for proof of first-degree murder requires "more than a mere intent to kill; it is a fully formed conscious purpose to kill." Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986). See also Brown v. State, 444 So. 2d 939 (Fla. 1984); Peavy v. State, 442 So. 2d 200 (Fla. 1983).

There was no direct evidence of premeditation adduced at Thomas Woodel's trial; any evidence of premeditation was purely circumstantial. Where the State seeks to prove premeditation circumstantially, the evidence relied upon must be inconsistent with every other reasonable inference. Hoefert v. State, 617 So. 2d 1046 (Fla. 1993). And if "the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained. [Citation omitted.]" Hoefert, 617 So. 2d at 1048. Accord, Norton v. State, 709 So. 2d 87 (Fla. 1997).

In Kirkland v. State, 684 So. 2d 732 (Fla. 1996), the State asserted that evidence of numerous slash wounds, blunt trauma, use of both a cane and knife, and the defendant having been sexually tempted by the victim was sufficient for premeditation. Kirkland, 684 So. 2d at 734-735. This Court found, however, that this evidence was insufficient for premeditation because: (1) "there was

no suggestion that Kirkland exhibited, mentioned, or even possessed

an intent to kill the victim at any time prior to the actual homicide"; (2) "there were no witnesses to the events immediately preceding the homicide"; (3) "there was no evidence suggesting that Kirkland made special arrangements to obtain a murder weapon in advance of the homicide"; and (4) the State presented scant, if any, evidence to indicate that Kirkland committed the homicide according to a preconceived plan." Id. at 735. These considerations are all applicable to the present case. There were no witness apart from Thomas Woodel (in his statements to law enforcement and others) as to the events immediately preceding the homicides, or what occurred during the killings. Woodel said that the murders were not planned, and the State produced no evidence to rebut this. The knife used in the homicides was apparently obtained at the scene, and may have originally been brandished by Bernice Moody rather than Woodel. Rather than having a premeditated design to kill either victim, the evidence showed that Woodel was merely lashing out in panic when he found himself in a bad situation.

In Coolen v. State, 696 So. 2d 738 (Fla. 1997), the victim died from six stab wounds, two of which were defensive in nature. Despite the fact that there was evidence that Coolen had threatened another person with the knife earlier in the evening, and that the victim tried to fight Coolen off, this Court found the evidence of premeditation insufficient to support a first degree murder

conviction. In doing so, the Court cited the intoxication of both the victim and the defendant at the time of the stabbing. The circumstances of the instant case, including Thomas Woodel's intoxication at the time of the homicides, should lead the Court to reach the same result as in Coolen.

In People v. Hoffmeister, 229 N.W. 2d 305 (Mich. 1975), the prosecutor argued that the number and nature of the wounds was sufficient evidence from which the jury could reasonably infer premeditation and deliberation. Quoting from LaFave & Scott, Criminal Law, § 73, at 565 (1972), the court rejected that argument and noted that the brutality of stab wounds is just as likely to be the result of impulse rather than premeditation:

> The brutality of a killing does not itself justify an inference of premeditation and deliberation. "The mere fact that the killing was attended by much violence or that a great many wounds were inflicted is not relevant (on the issue of premeditation and deliberation), as such a killing is just as likely (or perhaps more likely) to have been on impulse."

Hoffmeister, 229 N.W. 2d at 307.

Similarly, in Austin v. United States, 382 F. 2d 129 (D.C. Cir. 1967), overruled in part on other grounds sub nom., United States v. Foster, 785 F. 2d 1082 (D.C. Cir. 1986) (en banc), the evidence showed a killing caused by 26 major stab wounds, but the court ruled that the evidence was as consistent with an impulsive and senseless frenzy as with premeditation, and did not permit a reasonable juror to find beyond a reasonable doubt that there was premeditation. The court observed that a brutal murder is more likely to result from a depraved mind than from premeditation.

Tien Wang v. State, 426 So. 2d 1004 (Fla. 3d DCA 1983), which involved a stabbing, and which was cited by this Court in Wilson illustrates the heavy burden the State must carry on the matter of premeditation when it seeks to prove this element by way of circumstantial evidence. Even though there was evidence in Tien Wang that the defendant chased the victim down the street and struck him repeatedly, resulting in his death, and the appellate court acknowledged that the testimony was "not inconsistent with a premeditated design to kill," the court nevertheless reversed the conviction for first-degree murder, because the evidence was "equally consistent with the hypothesis that the intent of the defendant was no more than an intent to kill without any premeditated design." 426 So. 2d at 1006. The circumstantial evidence presented below failed to show that Thomas Woodel, in his state of high intoxication, possessed anything more than a general intent to kill, rather than the fully formed, conscious purpose to kill required to sustain his convictions for murder in the first degree.

B. Robbery

This case is controlled by Mahn v. State, 714 So. 2d 391 (Fla. 1998) on the issue of the sufficiency of the evidence to establish that Woodel committed robbery. In Mahn, this Court wrote: "[W]hile the taking of property after the use of force can sometimes establish a robbery...we have held that taking of property after a murder, where the motive for the murder was not the taking of property, is not robbery. [Citations omitted.]" 714 So. 2d at *. The only item of value removed from the Moodys was Clifford Moody's

wallet. Significantly, other items of value on the persons of Bernice and Clifford Moody were not taken. When Clifford Moody was found, he was still wearing a silver-colored chain with a cross on it, and a watch on his left arm. When Bernice Moody was found, she was still wearing a gold-colored chain with a cross on it, a gold-colored watch, and a gold-colored wedding band. Thomas Woodel indicated in his statements that the taking of the wallet was a mere afterthought, perhaps designed to divert law enforcement authorities. The motive for the murders, such that there was one, appears to have been to get away from the premises when Bernice Moody panicked upon seeing Woodel, not to rob either of the Moodys. Mahn is on all fours with this case, and requires reversal of Thomas Moody's robbery conviction.

C. Burglary

The crime of burglary requires an "entering or remaining in a dwelling, structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain." §810.02(1), Fla. Stat. (1997). "The three essential elements of burglary of a dwelling are 1) knowing entry into a dwelling, 2) knowledge that such entry is without permission, and 3) criminal intent to commit an offense within the dwelling. [Citations omitted.]" D.R.v. State, 734 So. 2d 455 (Fla. 1st DCA 1999); accord, T.S.J. v. State, 439 So. 2d 966, 967 (Fla. 1st DCA 1983) The indictment in this case alleged that Woodel intended to commit

theft or assault. (Vol. I, p. 4) The State failed to prove that Woodel had the charged intent.

The only concrete evidence as to what Woodel intended when he approached the trailer came from Woodel himself. In his intoxicated condition, he felt, for some reason, that it was very important to ascertain the time of day, and he approached Bernice Moody to try to obtain this information. No other direct evidence of his intent in entering the trailer was adduced, and it is unlikely that Woodel could have formed any criminal intent after consuming so much beer. The only other evidence of intent was circumstantial, that is, what actually happened when Woodel was in the trailer. A charge such as this one that rests exclusively on circumstantial evidence must exclude all reasonable hypotheses of innocence.

> It is the responsibility of the State to carry its burden. When the State relies upon purely circumstantial evidence to convict an accused, we have always required that such evidence not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. (citations omitted).
>
> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, it is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. <u>Even though the circumstantial evidence is sufficient to suggest a probability of</u>

> guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.

Davis v. State, 90 So. 2d 629, 631-32 (Fla. 1956) (emphasis added). See also McArthur v. State, 351 So. 2d 972 (Fla. 1977) and Heiney v. State, 447 So. 2d 210 (Fla. 1984). Here, the State's evidence was inadequate to rebut the reasonable hypothesis advanced by the defense that, in Woodel's condition, he could not and did not formulate any intent other than to try to find out what time it was, and the burglary conviction cannot be sustained.

Conclusion

The evidence was insufficient to show that Thomas Woodel was guilty of premeditated murder. Likewise, the evidence failed to establish that he was guilty of the felonies used to support felony murder, and so he could not be convicted of felony murder either. His convictions must be reversed and this case remanded to the lower court with directions to enter judgments for second degree murder, petit theft, and trespass, and to resentence Woodel accordingly.

ISSUE III

IT WAS ERROR TO CONSTRUCTIVELY AMEND THE INDICTMENT HEREIN CONTRARY TO THE GRAND JURY CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS IN ORDER TO SUBMIT THE FELONY MURDER THEORY TO THE JURY.

Prior to trial, Thomas Woodel, through counsel, filed a Motion to Prohibit Argument and/or Instruction Concerning First Degree Felony Murder, on the ground that only premeditated murder, and not felony murder, was alleged in the indictment herein, which the court denied on September 4, 1998. (Vol. I, pp. 117-119; SR, pp. 330-333) Woodel unsuccessfully renewed his objections to the State being allowed to proceed on an alternative theory of felony murder during the trial. (Vol. VIII, pp. 953-954; Vol. XVI, pp. 2482-2483) His jury was instructed on alternative theories of first degree murder: premeditation, and felony murder, with robbery or burglary as the underlying felony. (Vol. XVII, pp. 2683-2685)

Article I, Section 15(a) of the Constitution of the State of Florida provides in pertinent part: "No person shall be tried for capital crime without presentment or indictment by a grand jury..." The Fifth Amendment to the Constitution of the United States has the same requirement with regard to charging a capital crime.

Proceeding on a theory of felony murder, when only premeditated murder was alleged in the indictment in this case, constituted a constructive amendment of the indictment. See, e.g. United States v. Davis, 679 F. 2d 845 (11th Cir. 1982) (constructive amendment occurs by jury instructions and evidence

expanding the case beyond what is specifically charged); United States v. Cruz-Valdez, 743 F. 2d 1547, 1553 (11th Cir. 1984). However, only the grand jury has the authority to amend an indictment. State ex rel. Wentworth v. Coleman, 163 So. 316 (Fla. 1935); Phelan v. State, 448 So. 2d 1256 (Fla. 4th DCA 1984).

In Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960), the Court noted that the Federal Constitution's Grand Jury Clause prohibits amendment of an indictment by anyone other than the grand jury. In Stirone the Grand Jury Clause was violated even though there was no formal amendment of the indictment. The indictment was, in effect, amended by the prosecutor's presentation of evidence and the trial court's charge to the jury which broadened the possible basis for conviction:

> And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned. Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same.

80 S. Ct. at 273. The Court went on to state the importance of the Grand Jury Clause protection from broadening what the grand jury specifically expressed in its indictment:

> The very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for interference with interstate commerce which the grand jury did not charge.

80 S. Ct. at 270-271. The Court made it clear that while there may be several methods of committing an offense, conviction may only be based on the method alleged in the indictment:

> The charge that interstate commerce is affect is critical since the Federal Government's jurisdiction of this crime rests only on that interference. It follows that when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another has been burdened.

80 S. Ct. at 271. Later, in United States v. Miller, 105 S. Ct. 1811 (1985), the Court reiterated that it matters not that multiple methods of committing the offense are pursued by the prosecution as long as they are alleged in the indictment:

> The Court has long recognized that an indictment may charge numerous offenses or the commission of any one offense in several ways. As long as the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means of committing the same crime.

105 S. Ct. at 1815.

In Watson v. Jago, 558 F.2d 330 (6th Cir. 1977), a case out of Ohio, the court noted that a constructive amendment of an indictment, which only alleged premeditated murder, by adding a felony-murder theory, would violate the Grand Jury Clause. However, the court eventually reversed the conviction on the basis

that the constructive amendment violated the right to fair notice. 558 F.2d at 338.[8]

Also implicated by the constructive amendment of the indictment to add felony murder counts is Thomas Woodel's right "to be informed of the nature and cause of the accusation" against him. Amend. VI, U.S. Const.; Art. I, § 16, Fla. Const. In Givens v. Housewright, 786 F.2d 1380 (9th Cir. 1986), the information charged willful murder, a form of first degree murder in Nevada analogous to Florida's premeditated murder. The jury was also instructed on another form of first degree murder, murder by torture, which did not require an intent to kill, and is analogous to Florida's felony murder. The Ninth Circuit Court of Appeals held that it was Sixth Amendment violation to allow a jury instruction and prosecutorial argument on murder by torture as a theory of first degree murder, even though the information listed a statutory subsection which included both willful murder and murder by torture.

In Stirone, the Court made clear that reversal was necessary due to the unauthorized constructive amendment which added a second method of proving the offense which might have been the basis for conviction and which would constitute a conviction on a charge that was never made by the grand jury. Likewise, Thomas Woodel's murder

[8] Unlike in Florida, Ohio law permitted amendment of indictments by others than the grand jury. 558 F.2d at 337.

convictions must be reversed, as they violate the provisions of the Federal and State Constitutions discussed above.[9]

[9] Appellant is aware that this Court has rejected previous arguments that it is improper to allow the State to proceed on a felony murder theory when felony murder was not alleged in the indictment. See, for example, Valdes v. State, 728 So. 2d 736 (Fla. 1999) and Gudinas v. State, 693 So. 2d 953 (Fla. 1997). However, he raises this issue here in order to preserve it for possible future litigation, and also asks the Court to re-examine the issue in light of the arguments he presents.

ISSUE IV

THE COURT BELOW ERRED IN REFUSING TO GRANT A MISTRIAL AFTER EVIDENCE THE STATE PROMISED IN OPENING STATEMENT TO PRESENT TO THE JURY WAS HELD INADMISSIBLE.

During his opening statement to the jury at the guilt phase of Thomas Woodel's trial, the prosecutor was telling the jury what he expected the evidence to show regarding certain events that occurred at Woodel's trailer before he was taken to the substation at Bartow Air Base for questioning (Vol. X, pp. 1296-1298):

> But what had happened was when Tom Woodel was there, getting ready to go off with the officers, he had whispered something to Gayle Woodel. He had not told her about this incident that had happened, but he had whispered to her about the knife is behind the dresser, get rid of the knife, something along those lines, which really didn't make sense to her because she did not know that he had been the person that had attacked Clif and Bernice Moody.
>
> This had been overheard by another person who told the officers that they had heard the defendant whispering words of this nature to his ex-wife, Gayle.
>
> So the officers then went and spoke with Gayle. And she said, yeah, that's what he told me, wa that hide the knife, get rid of the knife, it's behind the dresser, behind the dresser, something like that, but she had not gone looking for it.
>
> Now, the officers had missed that in their initial search. They will show you items that they initially found that they seized from his residence. They found various areas where they thought there was blood, they took samples of that. They found the bucket and clothing. They took a number of items out of his residence, but they had not found a knife. But based upon this information that Gayle confirmed, they went back to the bedroom, and they began to look around the dresser, still couldn't really find it. But

> they then moved the dresser, and they found the knife.
>
> They collected the knife. And you'll see the knife. It's a fairly long knife, very sharp knife. That knife did have, just as in that first knife I told you about that was found in the butcher block, it did have the blood of the defendant on it. But in addition to having his blood on it, it also had Bernice's blood on it.
>
> The DNA analysis showed that there were two separate and distinct donors of the blood that was found on that knife, even though not a great deal of blood, not great amounts that were very, very obvious to the eye. But when they do the scientific testing, they found Bernice's blood on that knife, and they found the defendant's blood on that knife.
>
> The knife was compared insofar as possible with the knives that were there at the scene where the crimes took place, in the butcher block. And you'll see that each one of those slots had a knife in it. There wasn't one that was apparently missing. And this particular knife and style and design, things of that nature, was not part of a set that came from that particular residence.
>
> At the defendant's residence, the officers looked for knives, as well, to see if this was maybe part of a set that had come from his residence. They didn't find that this knife was really part of any type of a match or set from his residence.
>
> They knew he'd worked at Pizza Hut, so they went to Pizza Hut, took the knife there to see whether or not it matched up with any style or design or the wood grain, things of that nature, with any of the knives that were used at that Pizza Hut, and it didn't match up with any of the knives there at the Pizza Hut.

A problem cropped up for the State later, when it became time to introduce into evidence Gayle Woodel's testimony regarding what Thomas Woodel whispered to her before he was taken to the Polk County Sheriff's Department substation. A proffer of Gayle Woodel's testimony showed that, at the time of the statement at issue, Gayle was not Thomas Woodel's "ex-wife," as the prosecutor

had said in his opening statement; she and Thomas were still married at the time of Thomas Woodel's trial, although they had been separated for some time. (Vol. XI, p. 1619-Vol. XII, p. 1632) The prosecutor explained that he had "been under the impression that she [Gayle Woodel] was divorced from the defendant[.]" (Vol. XII, pp. 1632-1633) However, as the court below found and the State conceded, the marital privilege codified in section 90.504 of the Florida Statutes rendered Gayle Woodel's testimony as to what Thomas Woodel said to her inadmissible. (Vol. XII, pp. 1632-1634)[10] This development prompted defense counsel to move for a mistrial due to the prejudicial nature of the assistant state attorney's opening statement, which the court denied. (Vol. XII, pp. 1634-1645) The motion should have been granted.

The general rule of law regarding the prosecutor's opening statement is that he may "outline the evidence which he, in good faith, expects the jury will hear during presentation of the state's case." Ricardo v. State, 481 So. 2d 1296, 1297 (Fla. 3d DCA), rev. den., 494 So. 2d 1152 (Fla. 1986). In Occhicone v. State, 510 So. 2d 902, 904 (Fla. 1990), this Court noted that "the purpose of opening argument is to outline what an attorney expects to be established by the evidence."

In the instant case, Thomas Woodel was prejudiced by the prosecutor's rather extended discussion of damaging evidence which was later ruled inadmissible. Had the assistant state attorney

[10] Gayle Woodel did subsequently testify in the presence of the jury regarding other matters, as the State's third guilt-phase witness. (Vol. XII, pp. 1647-1667)

conducted an adequate investigation into the marital status of Tom and Gayle Woodel, he would have known that the marital privilege would prevent him from calling Gayle to testify as to what Tom said to her in the trailer. The prosecutor correctly observed that the type of evidence in question "would tend to show the motivation on the part of the defendant to do something to avoid being detected, to hide the fruits of the crime or the instrumentality of the crime." (Vol. XII, pp. 1636-1637) Put another way, the excluded evidence would have tended to show "consciousness of guilt" on the part of the defendant; thus the prosecutor's reference to the evidence was extremely harmful to any attempt to present a defense. Furthermore, as defense counsel noted, the use of the privileged information raised additional questions as to whether other evidence that was developed (presumably, including discovery of the knife itself) was "fruit of that poisonous tree." (Vol. XII, p. 1640)[11]

The case at bar is analogous to that of Commonwealth v. Wilson, 402 A. 2d 1027 (Pa. 1979). There, the prosecutor made references in opening statement to the defendant's incriminating statements following his arrest. These statements were never introduced into evidence at trial. Nothing that when a confession is introduced into evidence, a defendant may cross-examine the

[11] It appears that defense counsel were anticipating developing this theme further (Vol. XII, pp. 1640-1641), but undersigned counsel could not find anything in the record to show that they actually did so.

witness who attests to it, the Wilson court held that the defendant was denied due process. Although the prosecutor was acting in good faith (because the statements had been previously found admissible after a pretrial motion to suppress) the prejudice to the defense required reversal.

The instant case is unlike Rutledge v. State, 374 So. 2d 975 (Fla. 1979), in which this Court found no reversible error in the prosecutor's fleeting reference to a tape recording that was later ruled inadmissible. In Rutledge the assistant state attorney uttered but a single, rather innocuous sentence about the disputed evidence; here the prosecutor went on at some length regarding the evidence and its significance.

For these reasons, Thomas Woodel's trial did not conform with principles of due process of law and was unfair. Art. I, §§ 9 and 16, Fla. Const.; Amends. V and XIV, U.S. Const. He must be granted a new one.

ISSUE V

THE EVIDENCE PRESENTED BELOW WAS INSUFFICIENT TO PROVE THAT THE KILLINGS WERE COMMITTED WHILE THOMAS WOODEL WAS ENGAGED IN THE CRIME OF BURGLARY, OR THAT THE VICTIMS WERE PARTICULARLY VULNERABLE DUE TO ADVANCED AGE OR DISABILITY.

A. Burglary

The court below instructed the jury that it could consider as an aggravating circumstance that the crimes for which Thomas Woodel was to be sentenced were committed while he was engaged in commission of, or flight after committing, a burglary (Vol. XIX, p. 3141), and found in his sentencing order that this aggravator had been established. (Vol. II, p. 271) For the reasons discussed in Issue II.C. above, the evidence was inadequate to support this factor, and it should not have been submitted to the jury nor found by the court.

B. Victims particularly vulnerable

The court below instructed the jury at penalty phase that they could consider in aggravation that the victims of the capital felony were particularly vulnerable due to advanced age or disability (Vol. XIX, p. 3142), and found this factor to exist in his sentencing order, where he wrote (Vol. II, pp. 272-273):

> **4) The victims of the killings were particularly vulnerable due to advanced age or disability.**
>
> Mrs. Moody was a 74-year old lady who, though in overall good health for a lady her age, had a prior injury to her shoulder that had diminished her use of one arm. Mr. Moody, however, was a 79-year old man who had in the recent past undergone heart by-pass surgery

> and suffered the residual problems and effects therefrom. Indeed, while Mrs. Moody fought valiantly, her age and disability without a doubt contributed to her defeat and death at the hands of a healthy man approximately one third her age. Mr. Moody's age and physical condition forced him to yield to the overpowering youth and strength of the defendant. The Court finds this aggravating circumstance has been proven beyond a reasonable doubt.

The aggravating circumstance in question, found in section 921.141(5)(m) of the Florida Statutes, is relatively new, having been enacted into law only a few months before the instant homicides. See State v. Hootman, 709 So. 2d 1357 (Fla. 1998), and undersigned counsel has been unable to find any cases decided by this Court construing this factor. In construing this subsection, it is important to keep in mind this Court's admonition in the capital case of Merck v. State, 664 So. 2d 939, 944 (Fla. 1995) that "...penal statutes must be strictly construed in favor of the one against whom a penalty is imposed." See also Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990)

In the context of mitigating circumstances, this Court has indicated that youthful age in and of itself is not significant unless linked with some other characteristic of the defendant, such as immaturity. Mahn v. State, 714 So. 2d 391 (Fla. 1998), and cases cited therein. This same principle should be applied in a defendant's favor when considering whether homicide victims were particularly vulnerable due to their age. That is, advanced age alone, without more, should not be considered significant.

Here, the evidence failed to establish that Clifford and Bernice Moody, both in their 70s, were especially vulnerable either because of their age or any disabilities they may have had. Their family members and friends emphasized during the penalty phase just how active they were for their age. Dr. Melamud, the medical examiner, testified that Bernice was in good health. While Clifford may have had some medical problems, he was able to lead a normal life. Significantly, the medical examiner found no medications in his system at the time of Clifford's death.

It must also be emphasized that no evidence was presented to show that Thomas Woodel selected Clifford and Bernice Moody as his victims because of their age or physical condition. Without such a nexus between the age and condition of the victims and the defendant's state of mind, principles of lenity dictate that this factor should not be applied.

Conclusion

The trial court should not have submitted the two aggravating circumstances discussed in this issue to Appellant's jury, or found them in his sentencing order. Thomas Woodel must receive a new penalty trial. See Bonifay v. State, 626 So. 2d 1310 (Fla. 1993) and Omelus v. State, 584 So. 2d 563 (Fla. 1991).

ISSUE VI

THE COURT BELOW DID NOT GIVE PROPER TREATMENT TO THE MITIGATING CIRCUMSTANCES IN THIS CASE, BECAUSE HE FAILED TO ASSIGN SPECIFIC WEIGHT TO EACH MITIGATOR, AND USED AN INCORRECT LEGAL STANDARD IN EVALUATING THE EVIDENCE OF THOMAS WOODEL'S INTOXICATION AT THE TIME OF THE OFFENSES.

In its order sentencing Thomas Woodel to death, the court below discussed the evidence in mitigation as follows (Vol. II, pp. 257-259, 273-274):

> B. MITIGATING CIRCUMSTANCES
>
> The State concedes that the defense has established both of the only two statutory mitigating circumstances offered:
>
> 1) **The defendant has no significant history of prior criminal activity.**
>
> 2) **The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.**
>
> The first mitigation bears little or no elaboration. Whatever weight as signed to factor pales to insignificance in the face of the enormity of these murders.
>
> The second "catch-all" mitigation consisted of seven separate considerations:
>
> 1. Physical abuse suffered as a child.
> 2. Neglect by mother as a child.
> 3. Instability of residences as a child.
> 4. Being a child of deaf mute parents.
> 5. Use of alcohol and drugs.
> 6. Willingness to meet with the daughter of Clifford and Bernice Moody.
> 7. Willingness to be tested for possible bone marrow donations for his daughter who has leukemia.

> Of those considerations the defense pursued primarily the proposition that Woodel was so intoxicated from overindulgence in alcoholic beverages that he was incapable of forming the requisite intent. This circumstance was not proven by a preponderance of evidence. The jury rejected that argument, as does the Court.
>
> The remaining considerations under the "catch-all" mitigating circumstances bear no further elaboration. They have been proven by a preponderance of the evidence and the Court has relegated them to relative insignificance and minimal weight.

There are at least two deficiencies in the court's findings in mitigation: failure to assign specific weight to each mitigating circumstance found to exist, and consideration of Woodel's intoxication at the time of the offense under an incorrect legal standard.

This Court has "held that a trial court must find as a mitigator each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence. [Citation omitted.]" Barwick v. State, 660 So. 2d 685, 696 (Fla. 1995). See also Ferrell v. State, 653 So. 2d 367 (Fla. 1995); Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). The trial court may only reject a defendant's claim that a mitigating circumstance has been proved if the record contains "competent substantial evidence to support the rejection[.]" Nibert, 574 So. 2d at 1062. "Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight." Campbell v. State, 571 So. 2d 415, 420 (Fla. 1990). Accord, Ferrell v. State, 653 So. 2d 367 (Fla. 1995). The Court has also

stressed the importance of issuing specific written findings of fact in support of aggravation and mitigation in capital cases. Van Royal v. State, 497 So. 2d 625 (Fla. 1986); State v. Dixon, 283 So. 2d 1 (Fla. 1973). The sentencing order must reflect that the determination as to which aggravating and mitigating circumstances apply under the facts of a particular case is the result of "a reasoned judgment" by the trial court. State v. Dixon, supra at 10. Florida law requires the judge to lay out the written reasons for finding aggravating and mitigating factors, then to personally weigh each one in order to arrive at a reasoned judgment as to the appropriate sentence to impose. Lucas v. State, 417 So. 2d 250, 251 (Fla. 1982). The record must be clear that the trial judge "fulfilled that responsibility." Id. Weighing the aggravating and mitigating circumstances is not a matter of merely listing conclusions. Nor do the written findings of fact merely serve to memorialize the trial court's decision. Van Royal v. State, supra at 628. Specific findings of fact are crucial to this Court's meaningful review of death sentences, without which adequate, reasoned review is impossible. Unless the written findings are supported by specific facts, this Court cannot be assured that the trial court imposed the death sentence on a "well-reasoned application" of the aggravating and mitigating circumstances. Id.; Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). Although the Court considered the sentencing order sufficient (but barely) in Rhodes, the Court cautioned that trial judges should use greater care in preparing their sentencing orders so that it is clear to the

reviewing court just how the trial judge arrived at the decision to impose death over life. As the Court held in Mann v. State, 420 So. 2d 578, 581 (Fla. 1982), the "trial judge's findings in regard to the death sentence should be of unmistakable clarity so that we can properly review them and not speculate as to what he found." With regard specifically to evidence presented in mitigation, the trial court has a responsibility under Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990) to "expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. [Citation omitted.]" See also Walker v. State, 707 So. 2d 300 (Fla. 1997) and Reese v. State, 694 So. 2d 678 (Fla. 1997).

The trial court failed to assign any specific weight to the statutory mitigating circumstance that Woodel has no significant history of prior criminal activity, as required by Campbell, instead merely stating that "[w]hatever weight" was assigned to this factor would be insignificant "in the face of the enormity of these murders." Nor did the court assign specific weight to each of the factors considered under the so-called "catch-all" provision, but merely "relegated them to relative insignificance and minimal weight."

With regard to the issue of Woodel's intoxication at the time of the offenses as a mitigating circumstance, the court rejected this factor because Woodel failed to prove that "he was incapable

of forming the requisite intent" and because the jury rejected Defendant's argument. However, the fact that Woodel did not prove he was intoxicated to the extent necessary to negate the specific intent required for first degree murder did not justify the court's outright rejection of intoxication as a mitigating circumstance for sentencing purposes. The trial judge in Knowles v. State, 632 So. 2d 67 (Fla. 1993) made a similar error in failing to find the defendant's intoxication at the time of the murders as a mitigating circumstance. This Court noted that "rejection of Knowles' insanity and voluntary intoxication defenses does not preclude consideration of statutory and nonstatutory mental mitigation[,]" and concluded that "the trial court erred in failing to find as reasonably established mitigation the two statutory mental mitigating circumstances, plus Knowles' intoxication at the time of the murders, and his organic brain damage." Id., 632 So. 2d at 67. Also relevant to this discussion is Cheshire v. State, 568 So. 2d 908 (Fla. 1990), in which this Court stated that the trial court should have considered the defendant's mental disturbance as nonstatutory mitigation, even if it did not rise to the level required for the statutory mitigator of "extreme" mental disturbance. Similarly, the court below should have considered Woodel's intoxication in mitigation, even if it did not rise to the level necessary to establish that he did not have the intent required for first degree murder. Nor could the court properly conclude that the jury rejected Woodel's intoxication argument. This may be true as far as the guilt phase is concerned, because of

the verdicts finding Woodel guilty as charged. However, in light of the fact that the sentencing jury is not required to make specific findings regarding aggravating and mitigating circumstances, there is no way to know what the jurors found in mitigation, or what they rejected. Three of the jurors found sufficient mitigation to recommend that Thomas Woodel be sentenced to life for killing Clifford Moody. It is entirely possible that they and other jurors found Woodel's intoxicated state to constitute a mitigating circumstance, but, in casting votes for death, found this factor, and any other mitigation they found, to be outweighed by the aggravation. The mere fact that the jury recommended death for the homicides does not in itself show that the jurors rejected Woodel's argument that he was intoxicated at the time of the homicides.

It was particularly important in this case that the sentencing court give full and proper consideration to the evidence that Woodel was intoxicated at the time of the offenses, because that state of intoxication provides the only plausible explanation for why these homicides occurred. Only Woodel's consumption of large amounts of beer in the time period immediately preceding these killings can possibly account for why he might have committed acts so totally out of character, with no apparent motive.

For these reasons, the sentences of death were not imposed in accordance with principles of due process of law. Art. I, §§ 9 and 16, Fla. Const.; Amends. V and XIV, U.S. Const. To allow them to stand would subject Thomas Woodel to cruel and/or unusual

punishment in violation of the Eighth Amendment to the Constitution of the United States and Article I, Section 17 of the Constitution of the State of Florida. His death sentences must be reversed and this cause remanded for resentencing.

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, your Appellant, Thomas D. Woodel, prays this Honorable Court for relief in the alternative, as follows:

1.) Reversal of his convictions and remand with directions to adjudge Woodel guilty of two counts of second degree murder, one count of petit theft, and one count of trespass, and to resentence him accordingly.

2.) Reversal of his convictions and remand for a new trial.

3.) Reversal of his death sentences and remand for a new penalty trial.

4.) Reversal of his death sentences and remand for resentencing by the court.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of December, 2001.

Respectfully submitted,

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