IN THE SUPREME COURT OF FLORIDA

GARY RAY BOWLS,

Appellant,

v. Case No. **96,732**

STATE OF FLORIDA,

Appellee.
_____/

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Pursuant to the Florida Supreme Court's Administrative Order of July 13, 1997, this brief has been printed in 14-point Times New Roman.

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Duval County on December 8, 1994, charged the Appellant, Gary Ray Bowles, with one count of first degree murder and one count of robbery with a deadly weapon (1 T 3-5). He eventually pled guilty to the murder, and was sentenced to death. This Court affirmed the conviction, but reversed the death sentence and remanded for a new sentencing hearing. Bowles v. State, 716 So.2d 769 (Fla. 1998). On remand, the State and defense filed the following motions, notices or requests relevant to this appeal:

1. Motion to Preclude use of homicide convictions as aggravating circumstances based on pleas entered after the defendant original penalty proceeding and sentence of death (1 T 23-26). Denied. (1 T 27).

2. Defense special penalty phase jury instructions:

a. Felony murder (1 T 31). Denied (1 T 32).

b. Heinous, atrocious, or cruel (1 T 33). Denied (1 T 34)

c. Cold, calculated, and premeditated (1 T 35). Denied (1 T 37)

d. Defining mitigation and instructing the jury to consider mitigating circumstances (1 T 42). Denied (1 T 43).

c. Mitigating circumstances put forward by the defendant (1 T 44). Denied (1 T 46).

f. Actions by the defendant after the death of the victim (1 T 50). Denied (1 T 51).

3. Motion to preclude use of prior violent felonies as aggravating circumstances (1 T 90). Denied (1 T 96).

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

The jury recommended death by a vote of 12-0 (8 T 1079), and the court followed that verdict. In sentencing Bowles to death, it found in aggravation:

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

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

3. The defendant attempted to rob the victim.

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

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

6. The murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification

(1 T 100-14)

In mitigation, the court found Bowles:

1. Had an abusive childhood and witnessed his mother being abused. Significant weight

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

3. never finished junior high school and little education. Little weight.

4. Cooperation in this and other cases, Little weight.

5. pled guilty. Little weight,

6. Use of intoxicants at the time of the murder. Little weight,

7. The circumstances which cause the Defendant to leave home or his circumstances after he left home. No weight.

(1 T 114-18)

This appeal follows.

STATEMENT OF THE FACTS

Gary Bowles,[1] a homeless alcoholic, met Walter Hinton sometime in the latter part of October or early part of November 1994 at a pier in Jacksonville Reach (6 T 636). Hinton asked the Defendant to help him move some items he had in Georgia to his trailer in Jacksonville, and in return, he would let Bowles live there for a while (6 T 636). He agreed and provided the assistance, and for a few weeks lived with Hinton (6 T **636).**

Sometime in the middle part of November, Hinton also let a woman known as Sharon Ann stay with him. The trio seemed to live together well enough until Bowles made some sexual advances on Sharon that Hinton resented (6 T 636). He told the Defendant to leave, and Bowles left the trailer (6 T **636).** He was arrested the next day for being drunk, but was released from jail on Monday November 14 (6 T 635, 637). Although mad at Hinton for getting him taken into custody (5 T 568), he made up with him enough that Hinton allowed the Defendant to stay in the trailer until the end of the month **(6** T 626,637).

Two days later, Hinton brought home a man named Rick, and the trio smoked some marijuana and drank beer (6 T 626,655). They partied until Rick had to leave

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[1] At the time of the murder Rowles was calling himself Timothy Whitfield, and had identification with that name on it (6 T 760).

to catch a train, but even on the way to the station and while in its parking lot, the men drank beer and smoked the weed (6 T *655).* After leaving, Hinton and Bowles (who by then was very drunk *(7* T *850))* returned to the trailer. Hinton went to sleep, but the Defendant stayed up drinking as much as four "quart Magnum beers." *(6* T **637,** *655-56)*

Something "snapped inside" Bowles, and he left the trailer, picked up a 40 or 50 pound concrete block and returned **(6** T 637). He put it on the table for a few minutes then went into Hinton's bedroom, raised the stone above Hinton, and dropped it on his head. The block hit Hinton's face, fracturing it, and stunning him *(5* T *559,* **6** T 637). Bowles strangled Hinton who struggled a little (5 T 554, *6* T *636).* He probably became unconscious within 30 seconds *(5* T *555).* At some point - probably after the victim has lost consciousness (5 T *560)* - toilet paper was stuffed down his throat and a rag was put into his mouth (5 T 542, 550). The Defendant then covered the body with a sheet and left, driving the victim's car and wearing his watch. Some other items may have been taken, and Rowles looked for money, but found none (6 T 656-57)

Hinton died from asphyxiation (5 T 550). He had a blood-alcohol level of .06, which was measured four days after his death *(5* T 559).

After the death, Rowles picked up a Ginger Moyc, another street person who had known him for a couple of years. During that time, she almost always saw him

either drinking, drunk, or "staggering drunk" regardless of whether it was 7 a.m. or 2 a.m. (5 T 581, 590).

She was sick and needed a place to stay, so they returned to Hinton's trailer and lived there for a couple of days (5 T 580). Twice the defendant bought a pint of vodka (5 T 583, 585). Bowles then stayed at a motel on the beach, and he was arrested about a week after the murder at "Ameri-force" labor pool (5 T 596-98). When questioned, although shaking from alcoholic withdrawal, he admitted killing Hinton (6 T 637-38, 656,662).

Rowles was born in 1962 to a teenage mother (7 T 861). Until she married Rill Fields, and even for a few years afterward, life was OK, and her marriage was good (7 T 868). Standing six feet tall, weighing about 200 pounds, Fields, in time, became "really abusive" to Rowles and his older brother, Frank (7 T 868). He was a cruel disciplinarian, beating the boys with belts, fist, or "whatever he found to use on them." (7 T 868) Bowles, who was seven or eight when the beatings started (7 T 870) had bruises on his face, and welts on his legs. Fields would throw him against a wall (7 T 870), and would stop only when he got tired. He "just beat the hell out of them." (7 T 829) When his mother tried to stop her husband, he turned on her (8 T 871)

She eventually divorced him and married Chet Hodges, a very muscular man standing 6'3" and weighing 230 pounds, in 1978. Tfpossible, he was more abusive

than her previous husband, and he put Bowles' mother in the hospital three times (7 T 875).[2] Chet was also an alcoholic and would drink from sunup until he went to bed, Bowles' mother also drank heavily (7 T 876).

Bowles tried to escape the beatings his stepfathers enjoyed inflicting. Starting when he was eight or nine, or maybe it was 10 or 11, he began drinking beer, sniffing glue and paint, and smoking marijuana (7 T 833, 834, 872). He also ran away from home (7 T 873). By the time Bowles was 12, he was "uncontrollable." (7 T 889, 891) He had some counseling in school, but he dropped out when he was in the 8th grade (7 T 879-80). Hc left home when he was 13, after being beaten and rejected by his mother who told him to his face that she preferred her husband to him (7 T 882-83). Indeed, since Bowles was 13 years old, she has had little contact with him (7 T 888), and then usually from jails (7 T 888).

He continued to drink, and in 1982, he was living with his girlfriend (6 T 691). One night, while both of them were drunk, he beat and sexually battered her (6 T 682). He was convicted of aggravated battery and sexual battery, and sent to prison, though neither one could reinembcr what had happened (6 T 693). In 1991 he ran into another woman he had known, and after a few drinks, and as she was leaving her car,

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- On returning from the hospital one time, Chet was there, drinking and beating the kids. Mrs. Gaines went into her bedroom, locked the door, "and took every pill I could find." (7 T 879)

he pushed her down and took some money from her purse *(6* T 700). **She** told him she was going to call the police, which she did, and they arrested him a short time later **(6** T 700). Hc was found guilty of strong armed robbery **(6** T 697).

In March 1994, Bowles knew and may have lived with a John Roberts in Daytona Beach. One evening they got into an argument over a woman, and during the struggle, the defendant hit him in the back of the head with a lamp and strangled him (6 T 782). Bowles took his belongings, put them in Roberts' car and drove to Missouri where his mother lived (6 T 782).

Two months later, in May, the defendant lived with an Albert Morris in Nassau County. One night, they got into an argument at a bar, made **up,** then started fighting again **(6** T **750-5**1, 757-58). Morris came at Bowles with a knife, trying to stab him (6 T 757), but the defendant took it from him and stabbed him "in his upper body somewhere." **(6** T 757) He got a shotgun and shot Morris, and fled in the victim's car, abandoning it sometime later **(6** T 758-59).

SUMMARY OF ARGUMENT

ISSUE I. The people of Florida are extremely reluctant to execute defendants who have committed first degree murders. Our sentencing scheme is replete with mechanisms designed to ferret out only those who have committed the most aggravated and least mitigated homicides. In contrast to this generally pro-life bias, the law allows a prosecutor to excuse jurors whose views on the death penalty would substantially impair their performance as a juror in following the law. Because jury recommendations play a pivotal role in capital sentencing the law only permits such cause challenges with reluctance. Hence, in this case the prosecutor's deliberate and open use of peremptory challenges to excuse persons who favored the death penalty, but who were not true believers, impermissibly made this jury far more death prone than the law should allow. That is, such people formed a "cognizable group," and as such, the prosecutor could not peremptorily excuse them solely because they lacked the fervor for executing Bowles that he wanted to see.

ISSUE II. At the resentencing, the State introduced two murders Bowles had pled guilty to in the time after his original sentencing hearing. While this Court has adopted a "clean slate rule" that would apparently allow the prosecution to introduce those convictions, this Court should not follow it in this case. That is, the State deliberately created the error in Bowles I, that enabled it to introduce those pleas in

a new sentencing hearing. In short, the State "sandbagged" the two murders, knowing that the character attack in the original sentencing proceeding would likely lead to a death recommendation and sentence. If not, and this Court reversed (as it did) it could have the two convictions it did not have originally to again virtually guarantee a death sentence. This Court has not let defendants benefit from similar type trial tactics, and this Court should not reward the prosecution in this case for intentionally creating error and then benefitting from it.

ISSUE III. Of course, all murders are heinous, atrocious, or cruel. They are not especially so, however, where the victim is either unawarc, or is aware for a brief time, of his or her impending death. In this case, Hinton was attacked while he slept with the 40 pound block. While the blow did not kill him, he was stunned, and if he resisted, it was only feebly so, His subsequent unconsciousness came quickly. Hence the murder was not especially heinous, atrocious, or cruel.

ISSUE IV. The trial court refused to instruct the jury that in order to find the defendant had committed the murder in an especially heinous, atrocious, or cruel manner, he had to have intended to have killed him that way. While this Court has, in some cases, rejected similar guidance, in others it has clearly said that defendants must have such a mind set in order for that aggravator to apply. In this case, Bowles was so drunk when he killed Hinton that he lacked to required mental state to have qualified

for the **HAC** aggravator. Because that was his theory of defense, he was entitled, as a inattcr of law, to an instruction supporting it.

ISSUE V. The court also instructed the jury on the cold, calculated, and premditated aggravator. Even though it used the instructed approved by this Court in Jackson v. State, 648 So.2d 85 (1994), that guidance was unconstitutionally vague and misleading.

TSSUE VI. The court found that Bowles committed the murder during an attempted robbery and for pecuniary gain (though it merged those aggravators). The State, however, presented insufficient evidence, beyond the mere taking of the victim's car and watch, that those thefts were the doininant motive for killing Hinton.

ISSUE VII. Without question or doubt, Bowles was very drunk on the night he killed Hinton. The trial court, however, gave that fact little weight because he used that "excuse" often when explaining his violent actions to the police. While this Court has given trial courts broad discretion in the weight it gives aggravating and mitigating factors, it should refuse to accept the lower court's evaluation when its reasons for giving it little weight are flawed. In this case, Bowles has been an alcoholic probably since he left home when he was 13 years old. Virtually every witness who knew Bowles said that every time they saw him he was either drinking or drunk. His "use of intoxicants and drugs at the time of the murder" was not a "convenient but poor

excuse." It was a reality of his life, and the trial court erred in dismissing it as either valid mitigation or of light weight.

ISSUE VIII. The trial court gave the instruction this Court approved in Alston v. State, 723 So.2d 148 (Fla. 1998), regarding how the jury was to consider the victim impact evidence presented at the resentencing. That was error because it only confused them, and gave them no guidance regarding how they could use this proof,

ISSUE IX. In sentencing Bowles to death, the trial court considered but rejected the two statutory mental mitigating factors. That was error because the defendant presented sufficient evidence to justify finding them

ISSUE X. Bowles **asked** the court to instruct the jury on the specific nonstatutory mitigators he had established. The court refused to do so, but it erred in denying that request. While this Court has approved refusing to provide detailed instructions such as Bowles requested here, there is no principled reason for that ruling. With the possibility that the reliability of the jury's recommendation would be greater with such an instruction, this Court should rc-examine its prior holdings on this issue, and declare that when a defendant proposes an instruction specifically listing the mitigation that he has proven, the trial court must so instruct the jury,

ISSUE XI. Similarly, Bowles asked the trial court to define "mitigation," but it refused to do so. This Court, in other cases, has approved that course, but it should re-examine its rationale for doing so.

ISSUE XII. The court let a police officer testify about what the internal injuries a doctor had observed of a victim Bowles had beaten and sexually battered in 1982. Allowing that hearsay was inadmissible because the officer was not a "neutral" witness that would have provided the defendant a fair opportunity to rebut what she had said.

ARGUMENT

ISSUE I

GARY BOWLES' SIXTH AND FOURTEENTH AMENDMENT RIGHT TO AN IMPARTIAL, JURY AND **HIS** DUE PROCESS RIGHT TO **A** JURY FROM WHICH NO JURORS HAVE BEEN SYSTEMATICALLY REMOVED BY THE **STATE** WERE VIOLATED WHEN THE STATE USED PEREMPTORY CHALLENGES TO REMOVE PROSPECTIVE JURORS WHO, WHILE IN FAVOR OF THE DEATH PENALTY, EXPRESSED SOME RESERVATIONS ABOUT IT.

During voir dire, several prospective members of the jury declared that while they had no scruples against the death penalty, they were, none the less, uneasy about imposing it. Ms. Robertson, for example, was not opposed to the death penalty, but "I consider it a really extremely great responsibility to be chosen to make that decision." (4 T 339) The State peremptorily challenged her, but defense counsel objected: "Your Honor, we would object to the peremptory on the basis of here death scruples. She indicated she was not totally opposed to the death penalty but she had some feelings against the death penalty. She's a death scrupled juror, and she feels it was an extremely great responsibility. And for the same reason the State put forward, we would object to the peremptory challenge." (5 T 444-455) The court denied that objection, as well as similar ones made on other members of the venire who had no problems with the death penalty but who nevertheless expressed some hesitancy in

imposing it (5 T 442-50).[3] The State willingly provided the reasons it challenged them. "I guess all those objections regarding the jurors, when he made those objections, so the record is clear, was we struck them because of their dcath beliefs. 1 guess that's why he was making those objections, just so the record is clear, and the Court already addressed that." (5 T 452)

The issue before this Court, thus becomes whether the State can constitutionally, peremptorily challenge prospective jurors solely because, while not opposed to the dcath penalty, they may have some hesitancy in imposing it. For the reasons presented below, it cannot do so.

First, however, Bowles admits that except for one United States District Court, state and federal courts that have considered this issue have rejected it. United States v. Villarreal, 963 F.2d 725, 729 (5th Cir. 1992); People v. Davis, 794 P.2d 159, 208-09 (Colo. 1990); State v. Wacaser, 794 S.W.2d 190, 196 (Mo. 1990); State v. Seiber, 56 Ohio St.3d 4, 564 N.E.2d 408,419 (1990); Romano v. State, 847 P.2d **368,** 377-78 (Okla. Crim. App. 1993); Hernandez v. State, 819 S.W.2d 806, 817-18 (Tex. Crim. **App.** 1991).

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[3] These members of the venire who favored the death penalty but had some reluctance in recommending it were Ms. Keaton, Ms. Salle, Mr. Woods, Ms. Robertson, Ms. Baker, Ms. Ursry, Mr. Cadd, and Ms. Williams (alternate),

In Brown v. Rice, 693 F.Supp. 301 (W.D. NC 1988), the court found a Sixth and Fourteenth Amendment violation when a prosecutor deliberately used his peremptory challenges to eliminate members of the venire who favored imposing a death sentence but were hesitant to some degree in doing so.

> In this case, the state went beyond the "Witherspoon-excludables" and used its peremptory challenges to remove every prospective juror who expressed some uncertainty about capital punishment. The state accomplished, through its use of peremptory challenges, what it could not constitutionally do through challenges for cause , i.e., "stack the deck against the prisoner." Witherspoon, 391 U.S. at 523, 105 S.Ct. at 1778.
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> * * *
>
> [The court then disagreed with Justice O'Connor's concurring opinion denying certiorari in Brown v. United State, 479 **U.S.** 940 (1986)] Permitting prosecutors to excuse peremptorily every prospective juror who expresses some reservation about capital punishment directly implicates the concerns expressed in Witherspoon. Witherspoon did not turn on the fact that jurors were excused for cause; Witherspoon turned on the fact that the resultingjury, "[c]ulled of all who harbor doubts about the wisdom of capital punishment -- of all who would be reluctant to pronounce the extreme penalty [would be a jury uncommonly willing to condemn a man to die, ... a tribunal organized to return a verdict of death." Witherspoon, 391 U.S. at 520-521, **88** S.Ct. at 1776. The ultimate outcome of a jury organized to return a verdict of death is no less partial when achieved through peremptory challenges than when achieved through challenges for cause; the violation of the sixth amendment's guarantee of an impartial jury is just as unconstitutional.

Brown v. Rice, **693** F.Supp at 391-92.

On appeal, the Fourth Circuit reversed that ruling.

> Wc have nothing but rcspcct for the district court's willingness to safeguard the rights of criminal defendants, and particularly of those facing a death sentence. We disagree, however, that the Sixth and Fourteenth Amendments contain the right it would extend to Brown, and therefore hold that a state may use its peremptory challenges to purge a jury of veniremen not excusable for cause under Witherspoon.
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> * * *
>
> We are unwilling to make the momentous conceptual leap Brown urges on us, a leap that would mean the practical elimination of the pcrernptory challenge as such. Neither Batson nor any other binding or instructive precedent supplies a writ for the conversion of every peremptory challenge to a challenge subject to judicial approval, and we have no confidence that such a conversion would better protect the principles our system of justice seeks to advance than does the current, and historic, arrangement.

Brown v. Dixon, 891 F.2d 490, 497-98 (4th Cir 1989). Despite this abundance of authority contrary to Bowles' contention, including opinions from this Court, San Martin v. State, 705 So.2d 1337, 1342-44 (Fla. 1997); Lucas v. State, 568 So.2d 18, 20 fn.2 (Fla. 1990), his position has a logical and moral imperative that should translate into a legal command.

The United States Supreme Court first cxamincd the use of cause challenges in a capital case where the prosecutor deliberately, and successfully, challenged all potential jurors "who would be reluctant to pronounce the extreme penalty" Witherspoon v. Illinois, 391 **U.S.** 510, *520* (1968). Those left who became Witherspoon's jury, however, could not speak for the community on the issue of

the rest of his or her life in prison.' Excluding, as a matter of law, this identifiable and significant group, should cause this Court to examine with utmost scrutiny the systematic use of peremptory challenges to exclude those who, if they do not have serious qualms about imposing death, at least consider it as an "extremcly great responsibility." Permitting the prosecutor to further color an already death prone venire renders any subsequently imposed death sentence a violation of the Sixth Amendments right to a fair and impartial jury, and a violation of the Eighth Amendment.

> To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire member. It "stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law,

Gray v. Mississippi, 481 U.S. 648, **658** (1987).

We make this argument because the trials ofcapital murders differ from other trials in at least one vital aspect: the jury has an intimate, pivotal role in determining what punishment a convicted defendant should face. In no other instance in the criminal law does that body have a similar responsibility. We require citizen input in capital sentencing because in this most serious of human judgments, we want the

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[5] The same, ofcourse, holds true for those who believe every person who commits a first degree murder should be sentenced to death,

community's vote of approval that one of its members has forfeited his right to live. The judge may actually impose death, but he must take his guidance from and give great weight to the jury's recommendation. Tedder v. State, 322 So.2d 908 (Fla. 1975). Yet, the reliability of their vote, the confidence we place in it, and particularly the perceptions of fairness that surrounds it, becomes suspect when a significant, identifiable part of the community, those who are adamantly opposed to its imposition, have no voice in the penalty the court should impose. Id.

This skewing becomes exaggerated when the prosecutor, as done here, used the peremptory challenges alloted by law to eliminate those prospective jurors who, although in favor of capital punishment, wanted to think about their vote before they recommended a death sentence. Yet, anyone who had some hesitancy would not sit on this prosecutor's jury. While other states may have no problem with that use of peremptory challenges, they can take comfort in the knowledge that their juries must unanimously vote for death. Florida, on the other hand, has no similar requirement. Thus, a distinct likelihood existed here that, given the relatively small number of jurors needed to recommend death, the community's true opinion of whether a defendant should live or die was not reflected in the jury's vote of death. The moderating voice of those who were "soft" on imposing death had been deliberately and systematically eliminated by the prosecutor in his use of peremptories. Without the input of jurors

who could recommend death, but would do so with some understandable reluctance, the confidence we, as a community and a society, place in the jury's vote was undermined.

This argument gains added strength from Florida' unusual death sentencing scheme, and its strong "pro-life" bias. The thrust of this Court's and the United State Supreme Court's opinions since Furman v. Georgia, 408 U.S. 238 (1972), has been to limit discretion and narrow the class of persons who deserve death. State v. Dixon, 283 So.2d 1, 7 (Fla. 1972). It has been done in several ways. First, courts have said that only those who have committed a first degree murder face the death penally. Coker v. Georgia, 433 U.S. 581 (1977); Burford v. State, 403 So.2d 943 (Fla. 1981). Second, as to capital homicides, this Court has recently reiterated that death is reserved for the most aggravated and least mitigated murders. Ray v. State, 25 Fla. L. Weekly S96 (Fla. February 3, 2000). Also, this Court, contrary to what the United States Supreme Court has said, has declared that only those aggravators statutorily defined can justify imposition of a death sentence. Mitigation, on the other hand, has no similar limits,

The jury also has an important "pro-life" bent. They may believe death is too harsh, and have recommended the court sentence the defendant to life in prison. That voice, representing the conscious of community, should be accorded "great weight."

Tedder v. State, cited above. If, however, a vote for death reflected their inflamed emotions, the judge, as the actual sentencer, can temper that emotional response and impose a life sentence. Finally, if the facts of a particular case swayed both the judge and jury, this Court can, under its duty to conduct a proportionality review, find that life, not death, the appropriate punishment. E.g. Livingston v. State, 565 So.2d 1288 (Fla. 1990).

If Florida's death scheme has a strong bias against executing defendants convicted of first degree murder, that the jury by a mere majority vote can recommend death significantly straightens that tilt. In most states, juries actually impose the appropriate sentence, and must do so unanimously. In Florida, seven of the twelve jurors can make a virtually binding recommendation to the court to send a defendant to his death. Thus, Florida, unlike other states, should be very leery of approving the use of peremptory challenges to deliberately excuse prospective jurors who approve imposing the death penalty, solely because they want to think about doing so in a particular case.

Of course, peremptory challenges have traditionally been an area in which the judiciary has refused to tread. In the past twenty years, however, this Court, followed by the United States Supreme Court, has encroached on that previously off limits area. First, no party can constitutionally peremptorily challenge a prospective juror solely

on account of his or her race. State v. Neil, 457 So.2d 481 (Fla. 1984); Batson v. Kentucky, 476 U.S. 79 (1986). Once this Court opened the door to examine why parties used peremptory challenges on particular members of the venire, it expanded the inquiry to issues beyond those of race. Excusing prospective jurors simply because of their ethnic heritage, or that they were women, or that they were Jewish became unconstitutional. State v. Alen, 616 So.2d 452 (Fla. 1993); Abshire v. State, 642 So.2d 542 (Fla. 1994); Joseph v. State, **636** So.2d **777** (Fla. 3d **DCA** 1994). Indeed, this Court never limited Neil to simply race. "The applicability [of the Neil holding] to other groups will be left open and will be determined as such cases arise." Neil, at 487.

For a group to merit the protections of Neil, it must be a "cognizable group." In Alen, this Court identified the criteria for discerning which population subclasses qualify as such:

> First, the group's population should be large enough that the general community recognizes it as an identifiable group in the community. Second, the group should be distinguished from the larger community by an internal cohesiveness of attitudes, ideas, or experiences that may not be adequately represented by other segments of society.

Alen, at 454,

First, while large portions of American society support imposing the death penalty, that support wanes when alternatives to execution are presented." In 1996 77% of those surveyed by an ABC News pole favored the death penalty. By 1999, it had fallen to 66%, and it dropped below 50% when an alternative of life in prison was offered. A Time Magazine pole in 1997 revealed that 52% of Americans do not believe capital punishment deters crime, and 60 % thought that vengeance could not justify that punishment.[7] Obviously, there is serious concern about executing people, and while those who have problems with this form of punishment may be of every skin color, ethnic background, and gcndcr, they nevertheless form a substantial part of the American mosaic.

Their ideas about the death penalty provides the essential cohesiveness. That is, they are neither rabidly for or against executing defendants guilty of murder. Being in favor of that punishment they have a general willingness to impose it. They have no moral or intellectual qualms with it; yet they take the juror's duties seriously. If death is required, they will vote to impose it, but they want to make very sure the aggravators outweigh the mitigators before they pass that recommendation. Unlike the amorphus

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[6] Public Opinion about the Death Penalty, http://www.essential.org/dpic/po.html.

[7] Id.

"young adult," "college student," "blue collar **worker,"** and "less educated" groupings, Alen, cited above, at **p.** 454, f.n. 3, the sizeable part of the populace who give unhesitating, yet cautious support of capital punishment have the very significant common bond of their guarded support to unite them. Hence, their approach to the death penalty makes them a "cognizable group" so that prosecutors cannot peremptorily excuse them to gain ajury with a strong prejudice to impose death.

This Court has been a leader in restricting the improper use of peremptory challenges. Neil, cited above. It should have some hesitancy in further restricting their use as Rowles now argues. Ultimately, however, the moral and perceived legitimacy of Florida's death sentencing scheme requires the limits he now argues. This Court should declare that prospective jurors cannot be peremptorily challenged solely because they have some hesitancy in recommending a death sentence. This Court should reverse Gary Bowles sentence of death and remand for a new sentencing hearing before a jury fairly chosen.

ISSUE II

THE COURT ERRED IN PERMTTTING THE **STATE** TO INTRODUCE, **A?'** THE RESENTENCING HEARING, EVIDENCE OF TWO HOMICIDES, WHICH WERE INADMISSIBLE **AT** THE ORIGINAL SENTENCING HEARING, IN VIOLATION OF 'THE DEFENDANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Bowles acknowledges that he is rowing upstream with a stiff wind in his face on this issue. At his original sentencing hearing the trial court granted a defense motion that excluded, as Williams' Rule evidence, testimony that Bowles had killed two men *(2* T **148).** The court eventually sentenced him to death, and while that case was before this Court, the defendant pled guilty to first degree murder for both offenses (See State's Exhibits 40 and 42).[8] That became significant because this Court reversed the lower court's sentence of death and remanded for a new sentencing hearing, Bowles v. State, 71**6** So.2d **769** (Fla. 1998). **Despite** Bowles' arguments to the contrary, the trial court followed the "clean slate" rule announced by this Court in Preston v. State, 607 **So.** 404,407-409 (Fla. 1992), and admitted evidence of the earlier homicides at the resentencing. It then used that proof to increase the weight of the aggravator that the defendant had a previous conviction for a violent felony, It also used those

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[8] Bowles pled guilty to the Nassau County murder on March 24, 1997, and to the Volusia County homicide on August *6,* 1997.

additional, new convictions to justify finding the Hinton murder to have been committed in a cold, calculated, and premeditated manner (1 T I I 1-12).

> The State then suggests that the murder of John Roberts on March J5, 1994, in Volusia County, and the murder of Albert Morris on or about May 18, or 19, 1994 in Nassau Count, "help in showing why this murder was cold, calculated and premeditated." The State argues that either the Defendant wanted something his victims had or was upset at the way he was treated by each victim. The State suggests the killings were revenge for the way each victim had treated the Defendant.
>
> The murder of Mr. Roberts, committed just months earlier in a manner strikingly similar to the way Mr. Hinton's life was taken, convinces the Court that the Defendant devised his plan to take the life of Walter Hinton no later than from the moment he stepped outside the mobile home to retrieve the stepping stone which he later used to crush Mr. Hinton's face. This was a cold and calculated act done with heightened premeditation.

(1 T 11 1-12)

In this case, and in this issue, Bowles does not challenge the general policy of the "clean slate" rule. Instead, he argues that the prosecution should not benefit at the resentencing from errors it deliberately created in the original sentencing hearing. Instead, it, like Bowles, should be placed in the same position as it was originally.

In Bowles I, the prosecutor sought to have the two murders admitted as Williams' Rule evidence. The lower court refused to admit this evidence. Without that evidence the prosecution's theory for the defendant's motive relied solely on a statement he had made 11 years before the Hinton homicide that he blamed

homosexuals for the abortion his girl friend had when she learned what "he was doing with men. Bowles v. State, 716 So.2d 769, 772 (Fla. 1998). Indeed, the prosecutor's attack started in his opening statement and was repeatedly emphasized as he presented his case, and during his closing argument. Without a doubt it became a feature of the trial. Bowles' supposed hatred of homosexuals, based solely on the prior statement made a decade earlier was never linked with Hinton's murder. This Court rejected that strategy because "the cited testimony and argument based upon this record were simply an attack on appellant's character unconnected to this murder." Bowles, at 773.

In Preston, the defendant, as here, "argued that the resentencing court erred in finding the aggravating circumstances not found by the trial judge in the original sentencing hearing." Id. at 407. This Court rejected that contention

> Because there was no acquittal of the death penalty, the State was not barred from resubmitting the aggravating factors not found by the judge in the original penalty phase proceeding. . . . The basic premise of the sentencing procedure is that the scntencer consider all relevant evidence regarding the nature of the crime and the character of the defendant to determine the appropriate punishment.

Id. at 408,409. While Bowles acknowledges the precedential importance of Preston, this case presents additional considerations that should limit the sweep of that earlier decision.

Specifically, the State clearly, and egregiously, erred in Bowles I when it persisted in trying to turn the Hinton homicide into the action of a homophobe. The prosecution fundamentally erred in its unjustified and illegal attack on Bowles' character. Normally, when someone does something wrong he or she cannot reap a benefit or advantage from their illegality. In Clark v. State, **363** So.2d 331 (Fla. 1979), for example, this Court required defendants to object at trial to improper comments to preserve them for appellate review. He could not object for the first time on appeal. "He will not be allowed to await the outcome of the trial with expectation that, if he is found guilty, his conviction will be automatically reversed." Id. at 335.

In a like manner, the State, in a case like this, should be unable to deliberately create error that will likely result in a death sentence, knowing that if it is caught, it will bc able to use evidence in a resentencing that it could not have relied on originally to make such punishment even more likely. The State, in short, benefitted from the error it deliberately created , and now stands in a stronger position than it originally did. If the law condemns undeserved windfalls for defendants, Evans v. Singletary, 737 So.2d *505* (Fla. 1999); Merritt v. State, 739 So.2d 735 (Fla. 1st **DCA** 1999), equal justice requires this Court similarly refuse to treat the State differently when it undeservedly benefits from the errors it created. C.f., Cannady v. State, 620 So.2d 167,170 (Fla 1993)(Procedural rules apply to the State as well as the defendant)

This Court should, therefore, reverse the trial court's sentence of death and remand with instructions that Bowles receive a new sentencing hearing in which the state cannot introduce the evidence of the two earlier homicides.

ISSUE III

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

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

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

2. I Iinton did not immediately die or lose complete consciousness.

3. He struggled with the Defendant.

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

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

(I T 109-10)

The court rejected Bowlcs contention that he never "en-joyed the suffering of Walter Hinton, [because] he was certainly indifferent and determined to take his life.

. . . [H]e was prepared to inflict further suffering" (1 T 1 10) The court also rejected the defendant's argument that Hinton was unconscious when the rag and toilet paper were stuffed down his throat. "Without a struggle, the Defendant's efforts to strangle Mr. Hinton would have, according to the medical examiner, taken at least 30 to 45 seconds before a loss of consciousness. With a struggle, Mr. Hinton would have endured the fright, pain, and fear of being strangled for an even longer period." (1 T 1 10-I I) The court erred in finding this murder to be especially heinous, atrocious, or cruel.

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

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies, the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

As this court has applied that definition, it has required HAC murders to have been torturous to the victim. Not simply physically so, but crucial and necessary, the victims must have been mentally tortured as well. Wickham v. State, 593 So.2d 191, 193 (Fla. 1991); Richardson v. State, 604 So.2d 1 109 (Fla. 1992). Thus, where the Defendant shot a victim, causing instant death, this aggravator may have applied

because preceding the painless death was a prolonged or significant period where the victim was aware of his or her impending death. Cooper v. State, 492 So.2d 1059 (Fla. 1986)(victim bound and helpless, gun misfired three times.); Preston v. State, 607 So.2d 404 (Fla. 1992)(Fear and strain can justify a **HAC** finding.) On the other hand, quick deaths, in which the victim had no awareness he or she was about to be killed, or that they knew for only a short time, did not become especially heinous, atrocious, or cruel, even where he or she was stabbed. Wickham v. State, 593 So.2d 191 (Fla. 1991)(Ambushing a "Good Samaritan'' and shooting him twice was not **HAC** even though he pled briefly for his life); Scull v. State, 533 So.2d 1137 (Fla. 1988) (Single blow to the head.); Wilson v. State, 436 So.2d 908 (Fla. 1983)(Single stab wound is not HAC).

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

From the definition, if the Defendant intended to torture the victim, or exhibited a morbid delight in the suffering of him or her, the resulting murder can be **HAC.** Multiple stabbings, brutal beatings, strangulations, and prolonged struggles exhibit this

level of indifference to the pain suffered. Pittman v. State, 646 So 2d 167, 172-73 (Fla. 1994)(Victim strangled, stabbed, drowned in her blood.); Whitton v, State, 649 So.2d 361, 866-67 (Fla. 1994)(30-minute attack); Hardwick v. State, 521 So.2d 1071 (Fla. 1988)(5-6 minute attack during which victim was stabbed three times, shot in back and struck about the head.) If he did not, it does not apply. Kearse v. State, 662 So.2d 677 (Fla. 1995)(No evidence the "defendant intended to cause officer unnecessary and prolonged suffering''); Williams v. State, 574 So.2d 136 (Fla. 1991)(**HAC** "is permissible only in torturous murders. . . .as exemplified either by the desire to inflict a high degree of pain or utter indifference or enjoyment of the suffering of another.")

Thus, this court in Orme v. State, 677 So.2d 258 (Fla. 1996), declared that "Our case law establishes, however, that strangulation creates a prima facie case for this aggravating factor. . . ." Id. at **263.** In that case, Orme strangled a former girlfriend who had responded to his call for help because he was having a bad drug high. That choking death became cspccially heinous, atrocious, or cruel because she knew for a significant time that she was about to die. "Her death in this manner presented the prototypical strangulation murder: the victim knows he or she is about to die, and it is that prolonged mental suffering that makes the resulting dcath especially shocking." Id. It is permissible to infer that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that

this method of killing is one to which the factor of heinousness applies. Tompkins v. State, 502 So.2d 415, 421 (Fla. 1986).

In that sense, this case is an anomaly because Hinton had no foreknowledge of his impending death. He was asleep when Bowles dropped the cement block on his head (6 T 637). Immediately after, the Defendant began to strangle him, and while the victim may have struggled, he presented only feeble resistance **(6 T 637).** Moreover, unconsciousness, if he was ever fully awake and aware, came mercifully quick, within seconds, while death may have arrived later (5 T 555). Most likely, Hinton was at most only semi conscious at the time of his death. Thus, he could have known only very briefly, and not very clearly at that, that he was about to die. Being asleep at the time of Bowles' attack, his use of alcohol and marijuana almost immediately before his death, and the stunning blow to the head combined to reduce to insignificance the time he could have been fully aware of his impending death (5 T 559).[9] Certainly, he never knew it for any appreciable time. See, Lott v. State, 695 So.2d 1239, 1244 (Fla. 1997); Wickham, cited above. The murder, as reprehensible as it was, was not especially heinous, atrocious, or cruel. This conclusion has support in other decisions from this court.

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[9] Hinton had a blood alcohol level of .06 when measured four days after his death (5 T 559).

In Rhodes v. State, 547 So.2d 1201 (Fla. 1989), although the victim was '"manually strangled" this court rejected the lower court's finding of the HAC aggravator. The victim was either "knocked out," drunk, or semiconscious at the time of her death, In Herzog v. State, 439 So.2d 1372 (Fla. 1983), relied on in Rhodes, to justify rejecting the **HAC** factor, the victim was also semiconscious when attacked. DeAngelo v. State, 616 So.2d 440, 442-43 (Fla. 1993).

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

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

ISSUE IV

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

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

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

(1 T 33)

Without giving any reason, the court rejected that request (1 T 34, 7 T 913). That was error. The trial court should have considered and have permitted the jury to weigh the Defendant's drunkenness on the night of the murder in determining whether he killed Hinton in an especially heinous, atrocious, or cruel manner.

Contrary to Bowles' argument, this Court in Orme v. State, 677 So.2d 258 (Fla. 1991) said:

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

Id. at 263

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

In Sochor v. Florida, 504 U. **S.** 527, 112 S.Ct. 2114, 2121, 119 L.Ed.2d 326 (1992), the nation's high court refused to follow Sochor's suggestion that this Court had applied the HAC aggravator in an inconsistent and over broad construction. However true that may have been generally, it was not the case in Sochor because "our

review of Florida law indicates that the State Supreme Court has consistently held that heinousness is properly found if the defendant strangled a conscious victim." Id. at 119 L. Ed.2d 339-40. (cites omitted,) Following that precedent, the court in Orme recognized that "strangulation creates a prima facie case for this aggravating factor." (Orme, cited above at p. 4)

In this case, however, the prima facie case became an irrebuttable presumption because Bowles could neither make an argument nor present any evidence that would specifically rebut, negate, or otherwise minimize the weight the jury could give that aggravator. That he believed he could do so to reduce the impact of that aggravator came from language in State v. Dixon, 283 So.2d 1 (Fla. 1973), which the Supreme Court cited in Sochor. In that early death penalty case, this Court defined and clarified **IIAC.**

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others, What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crimc which is unnecessarily torturous to the victim."

283 So.2d at 9.

Thus, Bowles wanted the court to instruct the jury and to consider in its sentencing order how his alcohol and drug soaked brain at the time of the murder reduced his ability to have a "design to inflict a high degree of pain with utter indifference to, or even enjoyment of," Hinton's suffering. In short, Bowles wanted to show that because his mind was grits he lacked the intent to commit an especially heinous, atrocious, or cruel murder. By refusing to allow any argument weakening the force of the HAC aggravator, except as against "the total case for aggravation." the State's prima facie case became irrebuttable.

Making its errors more significant, the lower court, in its sentencing order, never mentioned how, even from a "totality of circumstances'' perspective, Bowles's alcohol and drug abuse on the night of the murder specifically affected his mental abilities. It specifically rejected his substance abuse as statutory mitigators (1 T 114-15), and considered it only briefly (and then giving it only little weight) as part of the "Background and/or Personal History of the Defendant." "The Court has also given little weight to the defendant's use of intoxicants and drugs at the time of the murder. The frequency with which the Dcfcndant has used this as an explanation to law enforcement officers, when confronted about his violent actions, causes the court to give this fact Jess weight as mitigation and more weight as a convenient, but poor excuse." Thus, the trial court refused to consider how Bowles' life long sniffing,

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

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

The Orme approach of limiting the scope of mitigation to rebut a specific aggravator reflects this Court's inconsistent treatment of the **HAC** aggravator generally because other cases have acknowledged what Bowles now argues. In Cheshire v. State, 568 So.2d 908 (Fla. 1990), this Court said:

> As his third issue, Cheshire argues that the trial court improperly found the aggravating factor of heinous, atrocious or cruel. We agree. The factor of heinous, atrocious or cruel is proper only in torturous murders--those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. State v. Dixon, 283 So.2d 1 (Fla. 1973). The physical evidence simply does not support

such a finding here. **At** best, we can only conjecture as to the exact events of the murder. Since the evidence at hand is entirely consistent with a quick murder committed in the heat of passion, we believe the state has failed to prove beyond a reasonable doubt that the factor of heinous, atrocious or cruel existed.

(Emphasis supplied.) Accord, Gcralds v. State, 674 So.2d 96 (Fla. 1996).

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

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

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

substantial suggestion that Santos intended to inflict a high degree of pain or otherwise torture the victims.")

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

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

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

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

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

to the HAC aggravator. C.f., Griffin v. United States, 502 U.S. 46 (1991)(Jury likely to disregard a theory flawed in law that has no evidence to support it.)

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

ISSUE V

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

Over Bowles' objection, the trial court instructed the jury on the cold, calculated and premeditated aggravating circumstance. Sec. 921. I41(5)(I), Fla. Stat. ***(7*** T **953)** Although the instruction used was the one suggested in this Court's previous decision in this case, Jackson v. State 648 So.2d 85, 95 n.8 (Fla. 1994), it is unconstitutionally vague and misleading. Art. I, Secs. 2,9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const. The instruction to the jury was as follows:

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

> A prctcnse of moral or legal justification is any claim of justification or excuse that though insufficient to reduce the degree of the homicide nevertheless rebuts the otherwise cold and calculating nature of the homicide.

(8 T 1065-66)

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

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

(8 T 1066) This definition is meaningless and gives the jury no guidance. What does "a heightened level of premeditation" mean? This Court has held that a defendant must have intended the murder before the crime ever began. E.g. Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S. Ct. 1024, 112 L. Ed. 2d 106 (1991). Jackson and the standard instruction defined "calculated" to be a careful plan or prearranged design to commit the murder. The "premeditated" element cannot mean the same thing as the "calculated" element because each part of the statute has to have independent meaning and significance. The revised instruction approved by this Court in Standard Jury Instructions in Criminal Cases, 665 So.2d 212 (Fla. 1995),

recognizes that problem and attempts to cure it.[10] Rut, the attempted cure was not in place in this trial, and the resulting instruction was inadequate both as a matter of statutory construction and constitutional requirements of due process and cruel or unusual punishment. **Art.** I Sections. 2, 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const. Bowles is entitled to a new penalty phase trial with a new, properly instructed jury.

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

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

Id. (underscoring omitted).

ISSUE VI

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

In sentencing Bowles to death, the court found that he had murdered Hinton during the course of an attempted robbery and for pecuniary gain. It recognized the doubling problem with those aggravators, however, and merged the latter into the former (1 T 108). As to the attempted robbery aggravator, the court found:

> Mr. Hinton was found inside his locked home on November 22, 1994. His sister and her then fiance became concerned when he failed to respond to telephone calls and knocks on the door. After several days went by without word from Mr. Hinton, the fiance broke into his locked mobile home and found his dead body wrapped in sheets and bedspreads.
>
> Mr. Hinton's watch, car keys, automobile and stereo equipment were missing from the home. Stereo wires were cut. A knife was on the floor next to where the stereo equipment had formerly been. His wallet was found on the floor next to the bed. The Defendant was seen inside after the murder driving Mr. Hinton's car and wearing his watch.
>
> Although the Defendant admits that property of Mr. Hinton was taken, he submits that it was an afterthought and not the motivation for the murder. He suggests that his subsequent abandonment of the automobile and watch proves that he was not motivated by pecuniary gain. However, his prior statements prove other wise. In his statements to Agent Brian Reegan of the FBI, the Defendant stated he expected to find money on the victim or in the trailer. When he didn't find any, he felt stuck and unable to flee because he had no money and no other place to go. This evidence establishes beyond a reasonable doubt that the murder was committed in the course of an attempted robbery or robbery. The fact that money was not there to be taken does not preclude the finding of this aggravating circumstance.

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

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

In Allen v. State, 662 So.2d ***323*** (Fla. 1995), the State used this special type of evidence, and carried its burden of showing the pecuniary gain aggravator. This court noted the State showed that Allen, as Bowles, had taken the victim's car after killing the victim, but abandoned it shortly afterwards. Significantly for this case, the court

agreed with Allen that "the taking of Cribbs' car would not support the finding of pecuniary gain. . . .[I]t is possible that the car was taken to facilitate escape rather than as a means of improving Allen's financial worth," Id. at 330. See, also, Scull v. State, 533 So.2d 1137, 1142 (Fla. 1988); Peek v. State, 395 So.2d 492 (Fla. 1980). The State, however, had a lot of other evidence, including statements from Allen that he was a conman who had intended to steal the victim's money, and he had seen her put $4100 in her purse the day before her murder. This, plus other evidence, refuted his argument that pecuniary gain was not the primary motive for committing the murder.

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

In Elam v. State, 636 So.2d 1312 (Fla. 1994), Elam managed the victim's motorcycle parts shop. They got in a fight when the victim accused Elam of theft, and the Defendant killed him. "Although the fight erupted over the missing funds, the theft had long been completed and the murder was not committed to facilitate it." Id. at 1314.

When applied to this case, the law inexorably shows that the **State** failed to carry its burden of proving beyond a reasonable doubt that Rowles' motive for killing Hinton was for pecuniary gain. Indeed, it is hard to find any reason for this homicide. On the night of the murder, Hinton, Bowles, and a third man had been heavily drinking beer and smoking marijuana. Bowles had no especially acute need for money then, or at least there is no evidence of it. The only proof we have about a reason for killing the victim came from Bowles who said that after drinking at least a gallon of beer and smoking marijuana "something snapped inside me" and he got the **rock** and killed Hinton **(6** T 637). Unlike the Defendant in Allen, Rowles never said his intention in staying with Hinton was to cheat him out of his money. To the contrary, the victim merely provided him a place to stay for a while, and From what the evidence shows that is **all** Rowles ever expected from him.

That the taking of the car and watch became afterthoughts finds support from other proof presented at trial. **As** defendants did in other cases, Bowles took Hinton's car, but he abandoned it a short while later in the Jacksonville area and "walked away" from it **(6** T **619).** Indeed, if he had taken the car to help his escape he would have fled the area. Instead, he not only stayed in Jacksonville, he returned twice to Hinton's trailer (5 T 582, 584-85). That strange, peculiar fact also supports his contention that any taking was not only an after thought, but an after action as well. That is, he may

have very well have taken the watch and other items days after the murder and for reasons that developed then. Likewise, if Bowles needed money, as the State suggested in its closing (8 T 1004-1005), he could have pawned the watch and other valuable jewelry Hinton owned rather than keeping it. Instead, Jennifer Moye said Bowles showed it to her, claiming Hinton had given it to him as a gift (5 T 586). See, Hill, cited above. Similarly, that he said he expected to find money on the victim or in his trailer provides ambiguous evidence that he murdered him to take his cash. That idea may have been as much an afterthought as a motive, and without any more evidence establishing Bowles' reasons for murder, the State has not carried its burden in this circumstantial evidence case. It never proved Bowles killed Hinton for some gain, and it never refuted his argument that such reason arose, if at all, after the homicide.

Of course, the court found that an FBI agent claimed Bowles had told him "He wanted to get money from Mr. Hinton so he could flee the -- leave the scene." **(6** T 656) Yet, Bowles not only never left, the evidence belies that motive. That is, the house was never ransacked, and nothing indicates Bowles took anything, including Hinton's credit cards, from the trailer **(6** T 641). Admittedly he drove Hinton's car and took his watch, but he abandoned the vehicle in Jacksonville within days of the murder, and there is no evidence he took the watch contemporaneously with the killing.

Additionally, that other items may have turned up missing could as likely occurred because Hinton pawned them, as he had done with some of his jewelry within days and weeks of his death (6 T 640). Indeed, that the defendant returned to the trailer and stayed there at least two nights supports his explanation for killing Hinton: that something "just snapped." That killing Hinton for some financial profit became his dominant motive, and that it was an integral, essential step in achieving that end, simply has little support in the record. Certainly, the State never removed the ambiguity surrounding the homicide to establish this aggravator beyond a reasonable doubt.

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

ISSUE VII

THE COURT ERRED BY GIVING LITTLE OR NO WEIGHT TO THE UNCONTROVERTED EVIDENCE THAT BOWLES USED DRUGS AND ALCOHOL ON THE NIGHT OF THE MURDER, AND HE WAS SEVERELY ABUSED AS A CHILD, IN VIOLATION OF THE; DEFENDANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In justifying sentencing Bowles to death, the trial court rejected by giving little weight to his use of alcohol and marijuana on the night of the murder, and it gave no weight to the circumstances that led to him leaving home when he was 13:

> The Court has also given little weight to the defendant's use of intoxicants and drugs at the time of the murder. The frequency with which the Defendant has used this as an explanation to law enforcement officers, when confronted about his violent actions, causes the court to give this factor less weight as mitigation and more weight as a convenient, but poor excuse. The Court has not given any weight to the Circumstances which caused the Defendant to leave home or his circumstances after he left home, As to the latter, no evidence was presented.

(1 T 118)

The trial court erred in its analysis of Bowles' use of beer and marijuana on the night of the murder, and had it correctly viewed the evidence, it may have given it more than the little weight it believed it deserved. That is, Bowles readily admits that normally as long as the trial court considers the mitigation a defendant presents he cannot argue about the weight it then gives to it. In this case, the court dismissed the

Second, a defendant's alcoholism, particularly as manifested at the time of a murder has always been strong, legitimate mitigation, Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990); Wickham v. State, 593 So.2d 191, 193 (Fla. 1991).

Finally, that Bowles' alcoholism was merely a convenient but poor excuse ignored the reality of the defendant's addiction. Probably since he was a teenager,

Bowles has been an alcoholic (7 T 833,834,872). Virtually every time someone saw the defendant he was either drinking or staggering from its effects (5 T 581, 590). No one, not even the State, ever contradicted or weakened that reality. Now, there are some alcoholics who can "hide" their addiction and marginally function. Bowles is not one of those. He never finished school, leaving or forced from home when he was 13 (7 T 879-80, 882-83). By 1994, he was a homeless bum living on the beaches in Jacksonville. He worked as a day laborer, making only enough money to stay alive and drink (6 T 618). If his alcoholism was a "convenient" excuse, it was because it has always been there. That is the nature of addictions. They are always present; you cannot turn them off at will. Thus, if Bowles' undenied and undeniable alcoholism was a poor excuse for murder it was a good mitigator to avoid a death sentence.

Similarly, but more obviously, the court erred in giving no weight to "the circumstances which caused the Defendant to leave home." Without any challenge, Bowles had two stepfathers who mercilessly beat him and his brother, not simply once or twice. Daily weekly, monthly, and into eternity these men whipped them with belts, hit them with their fists, threw them against walls, stopping only when they were tired (7 T 868, 870-71). Well, what is a small 6-10 year old child to do? He tried to hide physically, but he had to eat, so that had only limited efficacy. Drugs and alcohol, and the escape they offered, worked. Nevertheless, and not surprising, Bowles became

"uncontrollable" by the time he was 12 (7 T 889, 891), and then perhaps the cruellest blow of all: his mother told him she loved the sadist who daily beat him more than him (7 T 882-83). **So,** he left home, not as an adult eagerly wanting to prove himself to the world, but as an abused throwaway boy/child of **13.** What do children do to live at that age? IBM has no openings for them, neither does Publix nor MacDonalds. **So,** 20 years later, he is a stumbling alcoholic, living from day to day.

Thus, the trial court simply erred when it deliberately ignored "the circumstances which caused the Defendant to leave home." They certainly reflected on his character and mitigated, or reduced the moral culpability, we as a society might otherwise have laid on Bowles.

This Court should, therefore, reverse the trial court's sentence of death and remand for the trial court to enter a new sentencing order properly considering the defendant's alcoholism on the day of the murder, and the circumstances that drove him from his home as a child.

ISSUE VIII

THE COURT ERRED IN INSTRUCTING THE JURY THAT THEY COULD CONSIDER THE VICTIM IMPACT EVIDENCE PRESENTED DURING THE PENALTY PHASE OF BOWLES' TRIAL, IN VIOLATION OF THE DEFENDANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Rcfore the sentencing phase hearing began, Bowles filed a motion asking the court to instruct the jury:

> You must not consider as a reason to recommend a sentence of death any feelings of anger toward the defendant, feelings of sympathy for the victims or their survivors, the relative expense of imprisonment, or the deterrence of other persons.

(1 T **38)**

The court denied that request (1 T 40, **7** T 931-33), and instead read the instruction this Court approved in Alston v. State, 723 So.2d 148, 160 (Fla. 1998)(8 T 1067-68):

> [Y]ou shall not consider **the** victim impact evidence as an aggravating circumstance, but the victim impact evidence may be considered by you in making your decision in this matter." We find that this instruction comports with Windom [v. State, 656 **So.** 2d 432, 438 (Fla. 1995) and Bonifay [v. State, 680 So.2d 413 (Fla. 1996)].

That was error because it only confused the jury about how they could use this special type of evidence in weighing the aggravating and mitigating factors to reach a just recommendation on the sentence the court should impose.

Clarity is the guiding mantra in this area of the law, "for jurors must understand fully the law that they are expected to apply fairly." Periman v. State, 731 So.2d 1243, 1246 (Fla. 1999). Conversely, confusing instructions should be kept from the jury, especially in capital cases, where a human's life is at stake, and the potential for emotion and sympathy naturally, perhaps inevitably, become a part of the jury's deliberations, Courts, particularly the United States Supreme Court and this Court, have been especially vigilant in ensuring the jury receives only the clearest, least confusing guidance possible. Thus, the instruction on victim impact evidence should fail to pass judicial scrutiny, not **only** because it is confusing, but because it encourages the jurors to use or consider that testimony as a basis for an emotional and prejudiced recommendation.

It is confusing because it provides no help in guiding jurors in using victim impact evidence. Evidence at a sentencing hearing has relevance only if it pertains to mitigating or statutory aggravating factors. Thus, the victim impact instruction correctly told the jury it could not consider that evidence as an aggravating circumstance. If not as aggravation, how could they use it? Certainly, not as mitigation. **All** the guidance said on that crucial point was they could "consider" it. Yet, the tendency, even for sentencing judges, is to use victim impact evidence, if not explicitly as aggravation, then to shore up or justify a finding of one or more

aggravators. Zack v. State, 25 Fla. L. Weekly S 19 (Fla. January 6, 2000). That is improper.

Here, the jury was given no limits on how they could use the victim impact evidence. In a capital case, that was impermissible. It became reversible error in this case because such proof, where unchecked by an explicit instruction, increased the risk the jury would not follow the other instructions. Simmons v. South Carolina, 512 U.S. 154 (1994). This Court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE IX

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

In sentencing Bowles to death, the court considered, but rejected, the two statutory mental mitigating factors: 1. The Defendant suffered from extreme emotional disturbance at the time of the murder. 2. The capacity of the Defendant to appreciate the criminality of his acts at the time of the homicide, was substantially diminished (1 T 114-16). As to the first mitigator, the court said

> The Defendant asserts that evidence of his drinking and abusive childhood requires the finding that at the time of Mr. Hinton's murder, he was suffering from an extreme emotional disturbance. His theory, unsupported by expert testimony, is that the rage within him was unleashed by the use of alcohol and drugs. He argues that the 1982 prior violent felony in which he raped and battered his girlfriend, and Mr. Hinton's murder, can only be explained in the context of an underlying emotional disturbance.
>
> The Court finds that the Defendant is an alcoholic and has been using drugs and alcohol since his youth, and that many members of his family and extended family are alcoholics. However, this evidence does not support a finding of this mitigator unless being an alcoholic, standing alone, meets the definition of an extreme emotional disturbance. If so, then the Court would find this statutory mitigator to have been met by the evidence, but entitled to little weight.

(1 T 114-15)

Regarding the second mitigator, the court found:

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

(1 T 115)

The court erred, however, in refusing to find these mitigators because " a reasonable quantum of competent, uncontroverted evidence" supporting them mitigators was presented. Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990). As such, the court had no discretion, and it had to find these legislatively defined mitigating factors. Farr v. State, 656 So.2d 448 (Fla. 1995).

The law in this area is simple and its application straightforward. **A** trial court has some discretion regarding what mitigating factors it finds and what weight it assigns to them. Id. On the other hand, if the Defendant presents "a reasonable quantum of competent, uncontroverted evidence of mitigation the trial court must find that the mitigating circumstance has been proved." Nibert, cited above, at p. 1062 (Emphasis supplied); Urbin v. State, 714 So.2d 411 (Fla. 1997); Spencer v. State, 645 So.2d 377, 384-85 (Fla. 1994). That is, when the State has presented nothing to

contradict the proofpresentcd by a' Defendant facing a death sentence that one or both of the statutory mental mitigators exist, the court has no discretion but to find the mitigation offered by him. Of course, the sentencer has considerable leeway in giving it whatever weight it deserves, but it simply cannot either ignore it completely or find it, but give the mitigator no weight. Ferrell v. State, 653 So.2d 367, 371 (Fla. 1995). Only if the record has "competent, substantial evidence to support the trial court's rejection of the mitigating circumstance" can this court similarly reject a Defendant's argument on appeal that the trial court should have found the legislatively defined mitigators. Nibert, cited above; Kight v. State, 5 12 So.2d 922, **933** (Fla. 1987).

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

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

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

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

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

1. Bowles had suffered an extraordinary number of beatings for years as a child. Terror, torture, and torment were the staples of this Defendant's early life (7 T 829, 868, 870-71, 875). He never knew his father, never heard a kind, and never felt his mother's love (7 T 828-29, 831, 882-83). Perpetual drunkenness by his mother and stepfathers and daily beatings defined his childhood and early teen years, or at least they did until he ran away for good when he was 13 (7 T 873, 882-83, 888). Nibert v. State, 574 So.2d 1059, 1062 (Fla, 1990).

2. Predictably, Bowles has had a life-long problem with alcohol and probably is a chronic alcoholic. Starting as early as eight years old, he had smoked marijuana, sniffed glue and paint, and of course drank beer (7 T 833-34, 872). If his brother, who

had lived the same hell as the Defendant, and had used drugs since hc was a child and "tried them all," (7 T 838), Bowles had undoubtedly done the same. Indeed, by October 1994, alcohol was a constant part of his life, and everyone who saw him remembered him as drinking, or drunk (5 T 570, 580-81, 590).[12] Jennifer Moye, the homeless woman he befriended, said that at times he was so drunk he had a difficult time speaking. "Not quite too often, but not sober a lot either." (5 T 581) Adding detail to that observation, she said that after the murder, on two nights he had taken her to Hinton's trailer to get her out of the weather. On each occasion he had bought a pint of vodka, from which she had taken only a sip (5 T 583, 585). When the police searched the trailer, they found the empty bottles and some beer cans (5 T 616). Clearly, while others may have drunk beer or smoked marijuana for the pleasure or "buzz" it gave, Bowles was an addict who drunk to get drunk (6 T 655), and when deprived of the booze went into withdrawal (6 T 662).

3. Bowles ran away from home when he was 13 after getting another beating (7 T 882-83). Perhaps it was the best choice he had in a dull gray life. At best a grim existence, he must have lived a life of perpetual homelessness, uncertainty, and fear.

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[12] Bowles' alcoholism started when he was a child, and plagued him ever since. Every time he committed some crime, he and his victims had been drinking and/or taking drugs, often to the point of unconsciousness (6 T 691, 702-703, 749, 757, 764, 766, 782, 786).

4. His relationship with Hinton summarized his life. Trading his labor for a place to stay for a few weeks, Bowles faced an uncertain but cold winter when Hinton told him to leave his trailer, **He** was arrested, and then he wormed his way back into Hinton's favor at least for a few days **(6** T **637).** On the day of the murder, and immediately before the homicide, he drank several "quart magnum beers" and smoked some marijuana **(6** T *655)* He was very drunk *(2* T **236, 6** T 786).

5. His actions after the murder showed no planning, sound judgment or quick thinking to avoid detection. Whitfield v. State, 706 So.2d 1 (Fla. 1997); Jimenez v. State, 703 So.2d 437 (Fla. 1997). To the contrary, he returned to Hinton's trailer after the murder and stayed there two nights with Jennifer Moye, another homeless person (6 T **639).** At no time did he hide the body from her or the rest of the world. Similarly, although he **took** Hinton's car, he merely abandoned it in Jacksonville *(6* T **6** 19). Once the police knew who they were looking for, they quickly descended on the day labor office Bowles frequented. Sure enough, he was there, and when he saw the police he merely went into the bathroom *(5* T 600).

Following Nibert, Spencer, and Knowles, the sentencing court should have found Bowles suffered from an extreme emotional disturbance, and his ability to appreciate the criminality of his conduct was significantly diminished. **As** is clear from those cases and the undenied and uncontroverted facts in this one, these statutory

mitigators apply when the defendant not only is alcoholic but suffers from parental neglect, abuse, and torture. Bowles, contrary to the trial court's analysis, argued the mitigators applied for far more reasons than simply his alcoholism. Even though the court's truncated analysis may have arguably considered his alcoholism in determining the existence of the extreme emotional disturbance mitigator (and then only briefly), completely ignoring Bowles' tragic childhood and his homeless lifestyle was error. That it rejecting finding the two statutory mitigators was error. It became reversible error because as Justice Grimes said in his dissent in Stewart v. State, 558 So.2d 416, 421-22 (Fla. 1990): "In setting forth statutory aggravating and mitigating circumstances, the legislature has concluded that these are the most significant factors to be considered in determining whether to impose the death penalty." That the trial court in this case deliberately refused to find the two statutory mental mitigators when the evidence clearly supported finding them was reversible error. This court should reverse the trial court's sentence of death and remand for a new sentencing.

ISSUE X

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE SPECIFIC NONSTATUTORY MITIGATORS BOWLES HAD PRESENTED EVIDENCE SUPPORTING, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Bowles filed a motion titled "Defense requested jury instruction instructing the jury on mitigating circumstances put forward by Defendant." (1 T 44). In it, he listed the specific statutory and nonstatutory mitigators he wanted the court to explicitly tell the jury it could consider as mitigation. For example, he wanted them to know it could consider:

> 4. The intoxication of the defendant at the time of the homicide substantially impaired his ability to conform his conduct to the requirements of the law.
>
> 5. The background and personal history of the defendant
>
> a. The Defendant has a serious substance abuse problem
>
> b. The Defendant was abused physically and emotionally.
>
> c. The Defendant lived in an abusive and violent home as a child.
>
> d. The Defendant never had a positive male role model in his life.

e. The Defendant was abandoned by his mother at an early age.

f. The Defendant grew up in an environment in which his mother and stepfathers drank to excess.

(1 T 44-45)

6. The Defendant assisted in the prosecution of the rape of an inmate while in jail.

7. The Defendant pled guilty in this case.

The court denied the defendant's request to read the requested jury instruction (1 T 46). That was error. It was so even though this Court has repeatedly rejected the argument made here.

> **As** his seventh point, Davis argues that the trial court erred in denying his proposed jury instructions on nonstatutory mitigating factors. We have repeatedly ruled that the standard jury instructions are sufficient. The trial court acted within its discretion to deny a special instruction. E.g., Kilgore v. State, 688 So.2d 895 (Fla.1996); Ferrell v. State, 653 So.2d 367, 370 (Fla.1995), cert. denied, --- U.S. ----, 117 S.Ct. 1262, 137 L.Ed.2d 341 (1997); Gamble v. State, 659 So.2d 242, 246 (Fla.1995), cert. denied, --- U.S. ----, 116 S.Ct. 933, 133 L.Ed.2d 860 (1996).

Davis v. State, 698 So.2d 1182, 1192 (Fla. 1997).

This Court should re-examine its ruling in Davis. If death sentencing requires not simply a reliable determination that death is appropriate, but a heightened degree

of reliability, telling the jury explicitly what they can consider as mitigation would strengthen the confidence we have in their recommendation. After all, we require the judge to explicitly consider every mitigating factor the defendant puts forward Campbell v. State, 571 So.2d 415 (Fla. 1990). This Court would never accept a judge's sentencing order that said it had considered whatever nonstatutory mitigation a defendant had proposed. Why should not the jury be similarly told the specific mitigation present in a capital case for it to consider?

As a practical matter, every trial judge and trial lawyer who has ever tried a capital case in this state knows that the Lockett "catchall" instruction is an anemic solution to a request for more specific guidance on nonstatutory mitigation. When the jury is given an explicit list ofaggravators and statutory mitigators it can weigh, and then given a "table scraps" instruction as to the often times important nonstatutory mitigation, anybody can catch the import of the latter guidance: nonstatutory mitigation is less significant and deserves less weight than those factors the legislature has explicitly determined are important.

This denigration of nonstatutory mitigation became especially evident in this case when the prosecution, during voir dire, asked the jury

> Does everybody think the defendant should get a break because hc pled guilty to the first part, that we're concerned about the first part?
> MK. WHITE: Objection, Your Honor, that's improper.

* * *

> THE COURT: Do you remember that the defense asserted as a nonstatutory mitigator the fact that he pled guilty? Which the Court, I believe and law, is required to consider, so the objection is sustained.
>
> MR. WHITE: Your Honor, I would move to strike this panel. Think that the tenor of the beginning of this voir dire has prejudiced this jury panel against the defendant by the prosecutor getting up and denigrating a mitigating circumstance which the Court gave some weight in its prior sentencing and ordered it.

(3 T 96-97) The court denied that latter request, but gave a satisfactory curative instruction (3 T 99). If the prosecution, starting in voir dire, minimized the significance of the nonstatutory mitigation, this Court should take special steps to make sure that that tendency is specifically rejected by the trial court. The best place for that occurs when the judge gives the jury explicit guidance about what mitigators they can consider in determining whether to recommend the defendant should live or die.

There is, in short, no principled reason the jury in this case could not hear the court tell them specifically what they could consider as mitigation if the evidence supported finding them. This Court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE XI

THE COURT ERRED IN REFUSING TO GIVE A REQUESTED JURY INSTRUCTION DEFINING MITIGATION, IN VIOLATTON OF BOWLES' EIGHTH AND FOURTEENTH AMENDMENT RIGHTS,

During the penalty phase charge conference, Bowles' lawyer proposed that the court use the definition of "mitigation" as adapted from the American College Dictionary:

> Mitigation is defined as follows: The quality of lessening wrath or harshness in force for intensity, the moderation of the severity of anything distressing.

(7 T 929)

The court denied that request (7 T 932), but its failure to provide some clarifying guidance regarding mitigation created reversible error.

Two cases from the United States Supreme Court control this issue. Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994); Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992).

In Simmons, the court held that a jury charged with the task of deciding if the defendant should live or die must have accurate information in order to make a reliable determination. In particular, the jury needed to know what "life imprisonment" meant because many believed that defendants rccciving that punishment were eventually released from prison. Id. at 129 L.Ed. 2d 139-40.

Justices Souter and Stevens, concurring with the court's opinion, went further and found the Eighth Amendment's heightened reliability requirement in capital cases demanded the court define important legal terms.

> That same need for heightened reliability also mandates recognition of a capital defendant's right to require instructions on the meaning of the legal terms used to describe the sentences (or sentencing recommendations) a jury is required to consider, in making the reasoned moral choice between sentencing alternatives. Thus, whenever there is a reasonable likelihood that a juror will misunderstand a sentencing term, a defendant may demand instruction on its meaning, and a death sentence following the refusal of such a request should be vacated as having been "arbitrary or capriciously" and "wantonly and . . . freakishly imposed.

Id. at 129 L.Ed. 2d 148.

That observation holds true in this case. "Mitigation" has become a crucial part of death penalty litigation, and its meaning has evolved into a term of art. Certainly, Bowles' proposed definition would have clarified things in the jury's mind.

Of course, defense counsel argued the evidence he presented mitigated a death sentence, but it remained just that. Argument. And, as such, it carried less weight than an instruction from the court providing specific, explanatory guidance about the meaning of mitigation. Id. at 129 L.Ed. 2d 148, 151 (Souter concurring, O'Connor concurring.)

In Espinosa, the nation's high court, giving meaning to several pronouncements of this Court, held that neither the jury nor the judge can weigh invalid aggravating

circumstances. Id. at 120 L.Ed.2d 859. The court explicitly rejected this court's reasoning in Smalley v. State, 546 So.2d 720, 722 (Fla. 1989), that because the jury does not actually sentence the defendant, they need not receive specific penalty phase instructions. The logic of Espinosa compels the conclusion that the jury must be as fully informed on the law governing the penalty phase considerations as the trial judge. If it is kept ignorant on complete definitions of aggravators, or the full meaning of mitigation, for example, then this Court cannot say the jury's recommendation is reliable.[13]

Cases from this Court also support this argument. The standard in this area of the law is simple: the defendant is entitled to have the jury instructed on the rules of law applicable to the case and his theory of defense. Hooper v. State, 476 So.2d 1253 (Fla. 1985). This does not mean the court has to give the jury confusing, contradictory, or misleading guidance. Butler v. State, 493 So.2d 451 (Fla. 1986). Instead, it must provide instructions that, when taken as a whole, are clear, comprehensive, and correct. Maynard v. State, 660 So.2d 293 (Fla. 2d DCA 1995). Further, this court does not presume the standard instructions accurately reflect the law in any particular case. Yohn v. State, 476 So.2d 123 (Fla. 1985):

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[13] This argument does not allege that the standard instructions fails to adequately define the mitigating circumstances. Gamble v. State, 659 So. 2d 242 (Fla. 1995).

> While the Standard Jury Instructions can be of great assistance to the Court and to counsel, it would be impossible to draft one set of instructions which would cover every situation. The standard instructions arc a guideline to be modified or amplified depending upon the Facts of each case.

Id. at 127.

Here, the court told the jury it would be their duty "to determine whether mitigating circumstances exist which outweigh the aggravating circumstances." **(8** T 1067) The court then told the jury what mitigation it could consider. The court, however, never defined mitigating circumstances. That was error, especially when counsel gave the court an instruction that would have supplied that definition.

The standard jury instructions mcrcly provide a list of mitigating Factors for the jury to consider. They never define mitigation, a crucial failing since the guidance also provides that "Among the mitigating circumstances that you may consider . . ." **(8** T 1067) (Emphasis supplied.) What the jury may have found mitigated a death sentence in this case was left to their unchanneled discretion, and the standard instructions in that respect were deficient in failing to control it. They needed a definition of mitigation similar to the one Bowles supplied, and that the court here failed to define that term was error. **In** Jones v. State, 652 So.2d **346,** 351 (Fla. 1995), the trial court gave a defense requested definition of mitigation. That guidance, when read with the standard instructions on statutory and nonstatutory mitigation, sufficiently informed the jury that

it could consider all the mitigation Jones offered. Without similar, expanded guidance here explaining mitigation, this court cannot reach the same conclusion.

This issue, thus, is different from the dozens of cases this court has decided in which the trial court failed to instruct the jury they could consider nonstatutory mitigation. Hitchcock v. Dugger, 481 U.S. 393, 10 S.Ct. 1821, 95 L.Ed.2d 347 (1987); O'Callaghan v. State, 542 So.2d 1324 (Fla. 1989). The error is more basic, and is similar to giving an inadequate definition of reasonable doubt, Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). Not only did the trial court in this case err in failing to define one of the most basic terms in capital sentencing, its error flawed the reliability of the jury's recommendation. See, Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)(Harmless error analysis not applicable to error resulting from trial court giving an inadequate definition of reasonable doubt.) Of course, the court never defined what aggravation was, but in a sense it did when it gave the jury the exclusive list of aggravating factors it could consider.

Such method of definition, by limiting what the jury could consider, has no application when explaining nonstatutory mitigation, a term that has considerably more breath than the aggravating factors. Because the scope of mitigation is potentially so large the jury needed explicit guidance what it was. Otherwise, they might have

defined the term much more narrowly than contemplated by the law. See, Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (Sentencer cannot be precluding, as mitigation, "any aspect of a defendant's character or record and any of the circumstances of the offense . . . "); **Maxwell** v. State, 603 **So.** 2d 490, 494 (Fla. 1992)("'Nonstatutory mitigating evidence' is evidence tending to prove the existence of any factor that 'in fairness or in the totality of the defendant's life or character, may be considered as extenuating or reducing the degree of moral culpability for the crime committed' or 'anything in the life of the defendant that might militate against the appropriateness of the death penalty.'")

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

ISSUE XII

THE COURT ERRED IN ALLOWING CORPORAL JAN EDENFIELD TO TESTIFY ABOUT THE INTERNAL INJURIES BOWLES ALLEGEDLY TNFLICTED ON WESLEY BLEASE , IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

As part of the State's case, the prosecutor presented the testimony of Corporal Jan Edenfield. In June 1982, she investigated a sexual battery of a female, Wesley Blease. **She** had been severely beaten around her face, and may have been choked and bitten (6 T 683). She also had injuries to her vagina and rectum, but the police office never saw those (6 T 682-83). Nevertheless, over defense objections (6 T 683-86), she testified that "According to the doctors they said that there was tearing and lacerations inside both the rectum and the vagina." (6 T 688). Admitting this last testimony was error.[14]

This Court's opinion in Rodriguez v. State, 25 Fla. Law Weekly S93 (Fla. February 3, 2000), provides the analytical framework and justification for this argument. At the penalty phase hearing in that case, a police officer testified about that

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[14] The court had originally sustained Bowles' objection because she had not seen the internal injuries **(6** T 683-84). The court, nevertheless recognized that "hearsay [is] admissible in sucha case," (6 T 684) and allowed the testimony once the prosecution had established whether "she read the medical reports or she spoke to the doctors." (6 T 686) Defense counsel found her testimony objectionable because "essentially what we're hearing is her interpretation of some medical records that the State has provided me." (6 T 685)

a jail house informant had told him the defendant had admitted to the latter that he was not insane. He acted that way to prevent the police from linking him to other crimes. On its way to finding the trial court erred, though harmlessly, in admitting this evidence, this Court made several observations pertinent to Bowles' argument:

1. The Sixth Amendment right to confrontation applies to the penalty phase of a capital trial.

2. While hearsay is admissible at a penalty phase hearing, the defendant must have a fair opportunity to rebut any hearsay statements.

3. The defendant did not have the required fair opportunity to rebut what the informant had said even though he had taken the latter's deposition, and he was available to testify. The State never called him, which would have given Rodriquez the required opportunity to cross-examine him.

4. Unless fair or neutral to the defendant, a police officer may not present hearsay testimony at a sentencing hearing.

5. "[W]e caution both the State and trial courts against expanding the exception to allow witnesses to become the conduit for hearsay statements made by other witnesses who the State chooses not to call, even though available to testify." Id. at 25 Fla. Law Weekly S94.

In this case, Corporal Edenfield, obviously not an expert in medicine, reported what the attending physician had seen when he or she had conducted an internal examination of Blease. What the witness said was hearsay, Moreover, unlike the police officer testifying about the bland fact of a defendant's conviction, she was the investigating officer in a particularly violent sexual assault. At least it was unusually brutal from this officer's perspective, a position she could bolster by giving the shielded testimony of the doctor that also confirmed her conclusion. In short, if police are engaged in an often competitive enterprise of ferreting out crime, Aguilar v. Texas, 378 U.S. 108, 115 (1964), what she told the jury the doctors told her was of a distinctly different stripe than hearsay from a police officer establishing the uncontrovertable reality of a defendant's status as a convicted felon. She departed from her role as a neutral law enforcement officer and became more like a witness to a crime. Rodriquez, at 25 Fla. Law Weekly S94. Hence, her hearsay testimony was inadmissible,

Of course, even if the court erred in admitting it, such a mistake may have been harmless. While arguably true, before this Court tosses this issue on the harmless error trash pile, he asks it to consider it along with the other mistakes the lower court made in this case. When that is done, this body cannot say beyond all reasonable doubts that it, in combination with the other errors, was harmless.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished to RICHARD MARTELL, Assistant Attorney General, by hand delivery to The Capitol, Plaza Level, Tallahassee, Florida 32399-1050, and a copy has been mailed to appellant, GARY RAY BOWLES, on this day,

Respectfully submitted,

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