IN THE SUPREME COURT OF FLORIDA

GARY LEE THORP,)
)
Appellant,)
)
vs.) CASE NO. 91,663
)
STATE OF FLORIDA,)
)
Appellee.)
______________________________)

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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SEVENTH JUDICIAL CIRCUIT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

In this brief, the symbol "R" will designate pages in the record on appeal; the symbol "T" will designate pages of the jury trial and penalty phase transcripts; and the symbol “JS” will designate pages of the jury selection. Volumes will be referenced according to the sequential numbers assigned by the clerk’s office for the entire record on appeal, and not by the concurrent numbering of the court reporters.

STATEMENT OF THE CASE

The defendant was charged by information with the offense of first degree premeditated murder on June 23-24, 1993, of Sharon Chase, by strangulation. (Vol. 8, R 1268-1269) The defense moved to suppress blood and DNA evidence discovered following a search warrant, which warrant the defense alleged had been obtained unconstitutionally due to an improper affidavit which contained false statements, e.g. that the defendant matched the description by a witness of a man seen with the victim shortly before her death, and material omissions, e.g. that much of the "facts" in the affidavit were the result of hypnotically refreshed testimony. (Vol. 4, R 591-615; Vol. 6, R 839-1016) The court denied the motion to suppress evidence. (Vol. 7, R 1050-1051) The trial court did, however, grant the defendant's motion to suppress statements, ruling that there was a violation of his right to a lawyer and to terminate questioning. (Vol. 4, R 616-627; Vol. 5, R 807-814; Vol. 6, R 1050-1051)

The trial court denied the defendant's motion to empanel separate juries, one for the guilt phase and one for the penalty phase. (Vol. 4, R 644-645, 718-719) A jury trial, guilt phase, was held on August 22-28, 1997, before the Honorable Tonya Rainwater, Judge of the Circuit Court of the Eighteenth Judicial Circuit of Florida, in and for Brevard County. (Vol. 14-17; Vol. 9-12, T 1-649) During the course of the guilt phase of the trial, several objections were lodged by the defendant. After the state was permitted to delve into the contents of the affidavit in support of the search

warrant to obtain the defendant's blood (Vol. 9, T 124, 134-135), the defense attempted to elicit testimony on cross-examination that contradictory evidence not presented in support of the search warrant had been obtained by the police and included hypnotically-refreshed testimony. (Vol. 9, T 143-145) The court sustained the state's objection and would not allow the defense to question the officer concerning the hypnotically-refreshed testimony. (Vol. 9, T 145) The court, acting on a state objection, refused to allow the defense to question an expert witness on voir dire of his qualifications, about criticism in an opinion from this Court which criticized the expert's testimony and veracity in another case. (Vol. 11, T 392-402) The defendant objected to testimony (on the grounds it was speculative) from a cell-mate of the defendant as to his opinion of what the defendant meant by the statement, "We did [a prostitute]." (Vol. 11, T 500-501) The cell-mate opined that by the word "did" the defendant meant he had killed the prostitute, rather than just having sex with her. (Vol. 11, T 501)

The defendant's request for a jury instruction on circumstantial evidence and a principal instruction stating that mere presence and knowledge of the crime is insufficient to convict were denied by the court. (Vol. 7, R 1116-1117; Vol. 11, T 471-472, 474-478, 542; Vol. 12, T614 [objection renewed]) The defendant also objected to an instruction on felony murder and the underlying felony of sexual

battery, arguing that there was no evidence of lack of consent for the sexual encounter with the known prostitute, and that the killing occurred later after consensual sex. (Vol. 11, T 450-459, 527-538)

The defendant moved for a judgment of acquittal at the end of the state's case and at the close of all the evidence, urging the court to find that the circumstantial evidence was inconsistent with, and contradicted guilt, and failed to prove a sexual battery for a felony murder theory, rather only proving that the defendant had a sexual encounter with a prostitute, not that he killed her. (Vol. 11, T 516-524) The court denied the motions. (Vol. 11, T 523-524) The jury found the defendant guilty of first degree murder. (Vol. 7, R 1144; Vol. 12, T 621)

The penalty phase of the trial was held the following day, on August 29, 1997. (Vol. 12, T 650-796) Prior to commencement of the penalty phase, the defendant renewed his motion for a separate jury, which was again denied. (Vol. 12, T 638-639) The defendant objected to the court instructing the jury on the aggravating circumstances of heinous, atrocious, or cruel, and the murder was committed during the course of a sexual battery, arguing that both factors were precluded since there was no evidence of either. (Vol. 12, T 740-744) The defense contended that there was no evidence of HAC since there was no testimony of bleeding or of torture or pain more than the simple strangulation. (Vol. 12, T 741-742, 744) The court allowed the HAC

aggravator to go to the jury, ruling, "I think that case law is clear that any strangulation death is entitled to the aggravating factor." (Vol. 12, T 744) The court also instructed the jury on the aggravating factor of during the course of a sexual battery, over the defendant's objection. (Vol. 12, T 740) The court did not submit mitigating factor (b) extreme mental or emotional disturbance to the jury, despite the defendant's request to do so based on his alcoholism and cocaine usage. (Vol. 12, T 737-739) The jury returned an advisory verdict, recommending death by a vote of 10-2. (Vol. 7, R 1151; Vol. 12, T 787-789)

The court, after hearing argument of counsel, denied the defendant's motion for a new trial. (Vol. 7, R1154-1157, 1160-1163, 1194-1197, 1199-1200; Supp. Vol. 1, T 1272-1285) Sentencing memorandum from both the defense and the state were submitted and the court heard further argument orally from both the defense and the state as to the aggravating and mitigating circumstances. (Vol. 7, R 1164-1175, 1176-1192; Supp. Vol. 1, T 1286-1326) The trial court imposed a sentence of death on the defendant, finding three aggravating factors: (b) a previous conviction of a felony involving the use or threat of violence, to-wit: a second degree murder occurring after the instant offense to which the defendant had pleaded no contest, which the court assigned "great weight;" (d) while engaged in a sexual battery, which the court gave "some weight;" and (h) heinous, atrocious, and cruel, which the court found on the

basis of strangulation which is not instantaneous, with the victim having a foreknowledge of death, accompanied by extreme anxiety and fear, and which the court assigned "great weight." (Vol. 7, R 1201-1203) The court rejected all of the statutory mitigating factors, including circumstance (b) that the defendant suffered from extreme mental or emotional disturbance, which the court did not submit to the jury despite the defendant's request at the penalty phase charge conference, and which was argued by the defendant at the *Spencer* hearing (Vol. 12, T 737; Supp. Vol. 1, T 1295-1296); and mitigator (f) that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (Vol. 7, R 1204-1205) The court rejected this latter mitigator on the ground that, although the defendant contended he suffered from alcoholism and drug usage and had consumed alcohol and cocaine on the night of the killing and could not remember much of that night, the defendant did not appear to be heavily under the influence and did remember having sex with the victim, "but he continues to deny that he actually killed the victim." (Vol. 7, R 1204-1205) The court did find the existence of two nonstatutory mitigating factors each of which it gave "some weight," listing (1) the defendant's disadvantaged and painful childhood, as evidenced by his premature birth and resultant sterile environment of an incubator for the first three months of his life and his painful affliction with Cerebral Palsy, which

caused "significant developmental delays during his early childhood" and prevented Thorp from functioning as a normal child; and (2) his family background. (Vol. 7, R 1205-1206, 1207) The court rejected as nonstatutory mitigating circumstances that the defendant had exemplary work habits (since he moved from state to state and job to job); that he contributed to society by his willingness to help at the CITA ("**C**hrist **I**s **T**he **A**nswer") Mission (even though he volunteered to work at the mission much more than was required of a resident and was, in fact, the owner's right-hand man, the court ruled that he did not contribute to society any more than an ordinary person would); the defendant's remorse for his alcohol- and drug-plagued lifestyle (ruling that remorse is only a mitigating factor if it is for the victim and her family); and the defendant's exemplary prison record (rejecting this as a mitigating circumstance since he had gotten a single disciplinary report while awaiting trial in this case for making jailhouse alcohol with other inmates, despite his perfect record in prison, ruling that this would be a mitigating factor only if the defendant had absolutely no disciplinary reports). (Vol. 7, R 1205-1208) The court ruled that the aggravating factors it had found outweighed the mitigating circumstances, and imposed a sentence of death. (Vol. 7, R 1208-1209)

A notice of appeal was timely filed. (Vol. 8, R 1227) This appeal follows.

STATEMENT OF THE FACTS

Sharon Chase, a prostitute and crack cocaine addict (Vol. 9, T 124, 148) and the victim of a strangulation, was seen during the late night hours of June 23, 1993, with a white male crossing a bridge on U.S. 1 in Melbourne and entering Bean Park. (Vol. 9, T 191, 163-165) One of the witnesses described the male as being skinny or lanky and six feet tall (or, at least "a little bit taller" than the victim, who was 5'5" [Vol. 9, T150]), with dark complexion ("almost like he could have been a minority or just kind of dark-skinned;" "maybe Spanish") and medium to long dark-colored wavy hair, with a long face and a big, long nose. (Vol. 9, T 137, 139-141, 145-146, 151, 182, 187)[1] The witness told the officer in one interview that the male companion had on a ball cap, but in another interview and at trial indicated that there was nothing on his head. (Vol. 9, T 141-142, 146, 184) Once in the park, the couple milled around for a while and was seen being approached by two other unidentified people. (Vol. 9, T 166-167, 168-169) About ten minutes later, the witness who was fishing in the nearby river heard the sound of rustling bushes for a couple of minutes and a moan coming from the park. (Vol. 9, T 169-171) He looked around, but did not see anyone, nor had

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[1] As contrasted to the description of the defendant at the time, of being 220 lbs. with a bald head and not having dark skin. (Vol. 9, T 117, 188) In court, the witness specifically indicated that he would not describe the defendant as looking like a minority. (Vol. 9, T 188)

he seen anyone leave the park. (Vol. 9, T 169-172) Becoming concerned for his safety, the fisherman stayed only for a couple more minutes before leaving. (Vol. 9, T 172-174) The witness recalled the time was between 12:30 - 1:00 a.m. when he got back to his car, about fifteen minutes away from his fishing site, and left the area. (Vol. 9, T 174) The witness was able to identify Chase as the woman he had seen, but was unable to identify the defendant as the man he had seen. (Vol. 9, T 177)

The next morning, June 24, 1993, at approximately 9:00 a.m., a city worker discovered the mostly nude body of Chase, lying in the bushes in Bean Park. (Vol. 9, T 48-49) Her shorts had been removed and were discovered some distance away. (Vol. 9, T 74-75, 78) Her shoes were placed by her head and her shirt was pulled down around her waist. (Vol. 9, T 74) Her knees were bent and her legs were slightly spread and there was a disturbance in the wood chips and dirt between them. (Vol. 9, T 74-75; Vol. 10, T 204, 206-207) A small amount of debris from the ground was on her stomach, but there was no trauma or any bruises or lacerations to her genitalia. (Vol. 9, T 74-75; Vol. 10, T 259) A disturbance was observed in the wood chips about thirty-two feet away from where the body was found, as if, according to the crime scene technician, the body had been dragged about nine feet, then a break, then another area of disturbance for another eight feet. (Vol. 9, T 76-77, 92-94)

Chase had a few faint bruises and minor abrasions, but most of the visible

injuries were caused by post-mortem ant bites. (Vol. 10, T 204-206, 223-230) There were no signs of any bleeding at the scene and the medical examiner testified that there was very little or maybe no bleeding at all from her scrapes. (Vol. 9, 62, 95; Vol. 10, T 251-257) The doctor also testified that a small amount ("certainly less than a teaspoon") of menstrual blood was present in the uterine cavity, indicating that Chase was at the end of her menses. (Vol. 10, T 230, 257-258) However, there was no evidence that any of this blood had run down her legs. (Vol. 10, T 258) Some plant debris was discovered in the deceased's vaginal area. (Vol. 10, T 215, 236-237) The doctor discovered some internal bruising on the left side of the neck and fractures of the cartilage in her neck. (Vol. 10, T 231-234) Some green plant matter was found in her trachea, which the doctor speculated could have been the result of her trying to inhale and catch her breath while she was face down in the vegetation. (Vol. 10, T 235-236) Death was caused by asphyxiated strangulation, wherein the blood vessels to her brain were occluded and the brain did not get enough blood to survive. (Vol. 10, T 238-241) Chase would have lost consciousness and, within minutes, become anoxic (when the brain "hasn't gotten enough blood flow" and the "important areas" of survival "are . . . compromised" "whether the pressure was released or not"). (Vol. 10, T 240-241) If the circumstances surrounding her death had been different, according to the medical examiner, Chase could have died of atherosclerosis (fatty deposits) of

her coronary arteries or from the excessive amount of cocaine discovered in her blood stream. (Vol. 10, T 260) The presence of a small amount of semen was found on a vaginal swab from the victim as well as from the plant material recovered from her vaginal area. (Vol. 10, T 317)

Police received contacted and interviewed David Gallamore, the shift desk manager at the CITA mission, where the defendant was living. (Vol. 9, T 107-108, 127-128) He told police that both the defendant and William Deering had missed the 11:00 p.m. bed check at the mission on June 23, 1993, which meant that the men were not permitted to stay at the mission for the next three nights. (Vol. 9, T 109-110) Gallamore saw Deering at about 12:30 a.m. on June 24th, who showed up at the mission inquiring about the defendant. (Vol. 9, T 109-110) After Deering left, about twenty minutes passed when Thorp returned to the mission, inquiring about Deering. (Vol. 9, T 111-112) According to Gallamore, Thorp "was covered in blood on his shirt and pants," "a lot of blood on him," and had "busted knuckles" with bruises and scratches on them, all of which he indicated came from a fight he had gotten into at the nearby Burger King. (Vol. 9, T 111-112. 120-121) Deering and Thorp both had the smell of alcohol on their breath, which also precluded them from staying at the mission. (Vol. 9, T 115-116) Gallamore described Thorp as being stocky, "approximately 220 pounds," and never even close to being skinny. (Vol. 9, T 117)

Thorp was bald. (Vol. 9, T 117) Deering, on the other hand, was skinny, approximately 5' 8" tall, tanned, with dark, long hair. (Vol. 9, T 118; ***see also*** Vol. 9, T 147) Gallamore never saw Deering again after that night. (Vol. 9, T 118)

A year later, based on the information Investigator Sarver received from the hypnotically-refreshed recollection of the fisherman and from Gallamore, Sarver crafted an affidavit, which included select, tailored "facts" (e.g., that both Thorp and Deering matched the description given of the victim's male companion, when neither did) and material omissions (e.g., the fact that much of the information came during a hypnosis session, did not include an accurate description of Thorp, and failed to mention the fact that, while the defendant was covered in blood, the victim had not bled much, if any, from the small abrasions), and secured a search warrant to obtain samples of both Thorp's and Deering's blood. (Vol. 9, T 128-129, 134, 137, 139-141, 143-145, 145-146, 151, 182, 187) DNA profiling tests (RFLP) indicated a match between the DNA of the defendant and that found on the plant debris retrieved from Chase's vaginal area and excluded that of William Deering. (Vol. 10, T 352, 354) DNA testing of the vaginal swabs revealed the presence of bacteria, making the test uninterpretable. (Vol. 10, T 349-350) This material was sent to the Indian River Crime Lab for further testing, using a different DNA testing procedure (PCR), which Daniel Nippes, chief criminologist, indicated was from a single donor and matched the

DNA of the defendant. (Vol. 11, T 416-418, 420)

Some time later, Investigator Sarver contacted Timothy Bullock, a one-time cell-mate of the defendant after the defendant had been incarcerated for the unrelated death of a housemate (to which he ultimately pleaded no contest to second degree murder). (Vol. 9, T 132-133; Vol. 11, T 499, 504; Vol. 12, T 658, 660-667) Bullock claimed that the defendant had confided in him that he and another person had taken a "hooker" under the bridge, and "did her" and that he had gotten "messy" with her blood from "doing her." (Vol. 11, T 500-501) Over the defendant's objection as to being speculative, the former cell-mate was permitted to opine that, by the phrase "did her," the defendant meant that he had killed the prostitute. (Vol. 11, T 500-501)

At the penalty phase of the trial, Thorp admitted to having consensual sex at some time with Chase, but denied killing her. (Vol. 12, T 731) He testified that, as a result of his use of cocaine coupled with alcohol, he would occasionally black out and not remember things. (Vol. 12, T 725) He was drunk and had taken cocaine on the night that Chase died. (Vol. 12, T 724-725) Thorp expressed remorse for his lifestyle, wherein he had started drinking at the age of 14 and becoming an alcoholic and a drug addict, using marijuana, cocaine, and LSD. (Vol. 12, T 713-714, 730-731) His parents testified that Gary, a good child who was always in severe pain due to cerebral palsy, only became a problem after he started drinking and became addicted to both alcohol

and drugs, suffering from compulsive behavior. (Vol. 12, T 681, 686, 689, 693-695, 699, 701-702) The main influence in his life was the pain. (Vol. 12, T 687) At one point in his life, Thorp received drug treatment and was again trying to quit while living at the CITA mission. (Vol. 12, T 694-695, 717, 723) His mom and dad also recounted that, born three months premature, Gary had been forced to live in a hospital incubator for the first three months of his life, without his parents' loving touch, and that the painful cerebral palsy caused him to lead an abnormal childhood, crying all the time from the pain and unable to join the other children in their games and sports. (Vol. 12, T 680-688, 699-702)

Thorp quit high school in his junior year to go to work (subsequently receiving his GED) and had excellent work habits, which included work as a chef and the manager of a restaurant, and which continued at the CITA mission, where he impressed the director of the mission so much that he became the director's right-hand man, always volunteering for additional work. (Vol. 12, T 672-676, 690-697, 707-708, 710, 719-722) Thorp was known as a hard worker who got along well with everyone. (Vol. 12, T 672-676) He volunteered for missions of mercy, distributing Christmas gifts to migrants and seeking to help those around him with their problems and depression. (Vol. 12, T 726-727) However, being around others with drug problems took its toll on him, and he again succumbed to alcohol and drugs. (Vol. 12, T 723-

724)

SUMMARY OF ARGUMENT

Point I. The trial court erred in denying the motion to suppress evidence obtained following a search warrant which was supported by an affidavit containing material falsehoods and omissions. Such an affidavit cannot legally support a warrant. When the falsehoods are excised and the material omissions included, no probable cause would issue on the basis of the affidavit.

Point II. The evidence was insufficient as a matter of law to support a conviction for premeditated or felony murder. The only evidence in existence merely shows that the defendant had sexual relations with a known prostitute sometime before her death.

Point III. The court improperly allowed a lay witness to testify as to his conjecture regarding what the defendant meant by a particular statement. This opinion testimony improperly invaded the province of the jury.

Point IV. Impeachment of one of the state's key witnesses was unconstitutionally precluded. The defendant must be permitted to examine a witnesses credibility.

Point V. The trial court improperly granted a state challenge for cause of a potential juror, where the juror merely expressed some general concerns that the death sentence not be applied in every case and that he would want to closely examine the

evidence before deciding on guilt or the ultimate punishment.

Point VII. The trial court erred in making its findings of fact in support of the death sentence where the findings were insufficient, where the court failed to consider appropriate mitigating factors, where the court erroneously found inappropriate aggravating circumstances, and where a comparison to other capital cases reveals that the only appropriate sentence in the instant case is a life sentence.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS EVIDENCE OF THE DEFENDANT'S BLOOD WHERE THE EVIDENCE WAS OBTAINED ON THE BASIS OF A SEARCH WARRANT SUPPORTED BY AN AFFIDAVIT WHICH CONTAINS MATERIAL FALSEHOODS AND OMITS MATERIAL FACTS IN VIOLATION OF THE DEFENDANT'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 12, OF THE FLORIDA CONSTITUTION.

Suppression is the "appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or should have known was false except for his reckless disregard of the truth." ***United States v. Leon***, 468 U.S. 897, 923 (1984); ***Franks v. Delaware***, 438 U.S. 154 (1978); ***State v. Van Pieterson***, 550 So.2d 1162 (Fla. 1st DCA 1989); ***Griffith v. State***, 532 So.2d 80 (Fla. 3rd DCA 1988); ***State v. Beney***, 523 So.2d 744 (Fla. 5th DCA 1988). The same is true where the affiant omits a material fact from the affidavit filed in support of the probable cause determination. ***State v. Van Pieterson***, ***supra***; ***United States v. Lueth***, 807 F.2d 719 (8th Cir. 1986). Here, the affiant, Investigator Sarver, either deliberately or recklessly crafted the affidavit to include falsehoods and to omit

material facts which would have affected the magistrate's probable cause determination. With the false statements redacted and the material omissions included, a substantial possibility exists that the magistrate's determination of probable cause would have been different. Thus, suppression of the blood sample and DNA tests results is warranted.

As argued by trial counsel, the affidavit in support of the search warrant reveals a multitude of false statements, including: the conclusion that Thorp and Deering both matched the description given by a witness of the man seen in the company of Chase (skinny or lanky dark-skinned male, possibly a minority, with long, dark hair, a long face, and a big, long nose), when, in fact, they did not (Thorp was stocky, approximately 220 pounds, and fair-skinned, with a bald, or partially bald head, and does not have a long face or big, long nose; Deering was shorter than the description and, while somewhat darker complected than Thorp, could not be described as appearing to be a minority) (Vol. 6, R 854, 858, 893, 895-896, 902, 930, 942); the misstatement that, at the time of the murder, Thorp had hair consistent with the witness's description (Vol. 6, R 856), when, in fact, Thorp's head was shaved; the false statement that the witness heard "an obvious struggle" (Vol. 6, R 855), when he, in fact, only heard the bushes rustling; the misstatement that the moans the witness heard were "muffled screams" and "a woman's voice" (Vol. 6, R 854-855), when

there was no evidence of such claims; and the alleged statements of Deering and Thorp that they had been in a fight at the park (Vol. 6, R 856), when the correct version was that they had been in a fight at the Burger King, a completely different location from the killing. When these falsehoods are redacted, as case law indicates they must be, the affidavit fails to provide probable cause for the issuance of the warrant. ***See United States v. Leon***; ***Franks v. Delaware***; ***State v. Van Pieterson***, ***State v. Beney***, ***supra***; ***Schmid v. State***, 615 P.2d 565 (Alaska 1980).

Material facts known to the officer which would negate probable cause, but which were conveniently omitted from the affidavit include: the fact that much of the information in the affidavit came from a hypnosis session with the witness (Vol. 6, R 867-918), which facts are inherently unreliable, ***see Stokes v. State***, 548 So.2d 188 (Fla. 1989); ***Bundy v. State***, 471 So.2d 9, 18 (Fla. 1985); while the witness at one time (during the hypnosis session) indicated that the man wore a ball cap, he contradicted that statement in both his earlier statement to the police and within the hypnosis session as well (Vol. 6, R 902); the fact that the witness had seen a photo of the defendant and could not identify him as Chase's companion (Vol. 6, R 962); the omitted fact that, while the defendant had a substantial amount of blood on him (which he claimed was from a fight with a man at a Burger King), the victim did not bleed from her minor external injuries. As noted above, material omissions of fact

will alter the magistrate's probable cause determination and result in suppression of the evidence. ***State v. Van Pieterson***, ***supra***; ***United States v. Lueth***, ***supra; People v. Aston***, 703 P.2d 111 (Cal. 1985). Further, omission of conflicting statements of a witness will provide a basis for a finding of insufficient probable cause to support the warrant. ***Van Pieterson***, ***supra*** at 1164.

The affidavit also contains information to which no reliable source is given, to-wit: the allegation that Thorp was frequently in the area of Bean Park (Vol. 6, R 855); the allegation that Thorp had said he despised prostitutes (Vol. 6, R 855); and the allegation that Thorp frequently wore ball caps (Vol. 6, R 856). Facts without information concerning the source and reliability thereof will not support a probable cause determination. ***Van Pieterson***, ***supra at 1164-1165. See also Griffith v. State***, 532 So.2d 80 (Fla. 3rd DCA 1988); ***Vasquez v. State***, 491 So.2d 297 (Fla. 3rd DCA 1986); ***State v. Novak***, 502 So.2d 990 (Fla. 3rd DCA 1987); ***Rowe v. State***, 355 So.2d 826 (Fla. 1st DCA 1978).

The state attorney even admitted that the statements in the affidavit concerning the ball cap should be redacted (Vol. 1, R 155), and the court found that there were inconsistencies which must be removed (but finding that even with the offending materials redacted, the affidavit still supported a probable cause determination). (Vol. 1, R 169)

However, when all of these reckless falsehoods and unreliable and unattributed statements are redacted from the affidavit and the material omissions are added to the factors to view for probable cause, the inescapable conclusion is that there was simply no probable cause on which to issue the search warrant for the defendant's blood. A materially correct and substantiated affidavit could contain only the following: the defendant lived at the CITA mission, which was in the general location of the homicide, but he was not there around the approximate time Chase was killed; while the defendant had a substantial amount of blood on his clothes (which he stated was from a fight with a man at the Burger King restaurant), Chase died of strangulation and had not bled from her injuries; a witness had heard rustling in the bushes and a moan at Bean Park where Chase, a prostitute who engaged in consensual sex for money to support her cocaine habit, had been seen in the company of a man whose description did not even closely resemble that of Thorp or Deering. Where is the probable cause in these facts to believe that Thorp was involved in the murder of Sharon Chase?

A constitutionally correct version of the affidavit, without the deliberate or reckless falsehoods and unsupported matters, and with the material omissions included, will not support the issuance of the search warrant. The blood drawn from the defendant and the resulting DNA test results must be suppressed under the federal and Florida constitutions.

POINT II.

THE CONVICTION FOR FIRST-DEGREE MURDER VIOLATES THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BECAUSE THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT THE GUILTY VERDICT.

The trial court erred by denying the appellant's motion for judgment of acquittal because the state's evidence is legally insufficient to support a guilty verdict; the proof fails to exclude the reasonable possibility that someone other than Gary Thorp killed Sharon Chase. Similarly, while there is evidence that the defendant had a sexual encounter with the prostitute-victim at some point prior to her death, it is insufficient to show nonconsensual sexual battery at the time she was killed and thus cannot establish felony-murder and that theory should not have been permitted to go to the jury. As such, this Court must vacate his conviction.

The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. ***In re Winship***, 397 U.S. 358, 364 (1970). This Court has long held that one accused of a crime is presumed innocent until proved guilty beyond and to the exclusion of a reasonable doubt. It is the responsibility of the State to carry this burden. ***Cox v. State***, 555 So.2d 352 (Fla. 1989). When the State relies upon purely

circumstantial evidence to convict an accused, the courts have always required that such evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. ***Davis v. State***, 90 So.2d 629, 631 (Fla.1956); ***McArthur v. State***, 351 So.2d 972 (Fla.1977). Circumstantial evidence must lead "to a reasonable and moral certainty that the accused and no one else committed the offense charged." ***Hall v. State***, 90 Fla. 719, 720, 107 So. 246, 247 (1925). Circumstances that create nothing more than a strong suspicion that the defendant committed the crime are not sufficient to support a conviction. ***Williams v. State***, 143 So.2d 484 (Fla.1962); ***Davis***; ***Mayo v. State***, 71 So.2d 899 (Fla.1954).

Indeed, one of this Court's functions in reviewing capital cases is to see if there is competent substantial evidence to support the verdict. ***Cox v. State***, ***supra*** at 353; ***Williams v. State***, 437 So.2d 133 (Fla.1983). When evidence of guilt is circumstantial, a special standard of review of the sufficiency of the evidence applies:

> The law as it has been applied by this Court in reviewing circumstantial evidence cases is clear. A special standard of review of the sufficiency of the evidence applies where a conviction is wholly based on circumstantial evidence. *Jaramillo v. State*, 417 So.2d 257 (Fla.1982). Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. *McArthur v. State*, 351 So.2d 972 (Fla.1977); *Mayo v. State*,

> 71 So.2d 899 (Fla.1954). The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, we will not reverse.
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> * * *
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> [However, a] motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. *See Wilson v. State*, 493 So.2d 1019, 1022 (Fla.1986). Consistent with the standard set forth in *Lynch* [*v. State*, 293 So.2d 44 (Fla.1974)], if the state does not offer evidence which is inconsistent with the defendant's hypothesis, "the evidence [would be] such that no view which the jury may lawfully take of it favorable to the [state] can be sustained under the law." 293 So.2d at 45 (Fla.1974). The state's evidence would be as a matter of law "insufficient to warrant a conviction." Fla. R. Crim. P. 3.380.

State v. Law, 559 So.2d 187, 188-189 (Fla. 1989).

The evidence of Thorp's guilt is entirely circumstantial; the case entirely rests upon the DNA evidence (which, again, is only indicative of a sexual encounter sometime prior to her death) and the testimony of a cell-mate that Thorp admitted that "we did a hooker," whatever that phrase is speculated to mean. (***See also Point III***, ***infra***.)

DNA evidence, it is submitted, is like fingerprint evidence; it is merely a

variety of circumstantial evidence. ***Jaramillo v. State***, 417 So.2d 257 (Fla. 1982); ***Mucherson v. State***, 696 So.2d 420, 422 (Fla. 2nd DCA 1997). Proof that the defendant's DNA was found in the minute amount of semen inside of the prostitute-victim's body, just like fingerprint evidence, is insufficient to convict for first degree murder (including the sexual battery felony-murder theory) unless the state has shown that the semen could only have been deposited by Chase's killer at the time of the murder. Where fingerprints are used to establish identity, "the circumstances must be such that the print could have been made only at the time the crime was committed." ***Tirko v. State***, 138 So.2d 388 (Fla. 3rd DCA 1962); ***Jaramillo***, ***supra***; ***Williams v. State***, 247 So.2d 425, 426 (Fla. 1971) (fingerprint evidence showed only that defendant had been at crime scene, not when he was there). Where the state fails to show that the fingerprints could only have been made at the time the crime was committed, the defendant is entitled to a judgment of acquittal. ***Sorey v. State***, 419 So.2d 810, 812 (Fla. 3rd DCA 1982); ***State v. Hayes***, 333 So.2d 51, 54 (Fla. 4th DCA 1976).

Here, as in the cases reversing conviction based solely on fingerprint evidence, where the defendant may have had consensual sex with Chase at some time other than the time of the prostitute's murder so as to explain the presence of his DNA discovered inside her, the hypothesis of innocence related by the defense must be

accepted as true unless contradicted by other proof showing the defense version to be false. ***See Amell v. State***, 438 So.2d 42, 44 (Fla. 2nd DCA 1983); ***Sorey v. State***, ***supra*** at 814. Thus, in the words of ***State v. Law***, ***supra*** at 189, "the evidence would be such that no view which the jury may lawfully take of it favorable to the state can be sustained under the law." The state's evidence is as a matter of law insufficient to warrant a conviction.

The evidence showed that Sharon Chase was, regrettably, a prostitute who sold her body in order to sustain her cocaine habit. It was the defense hypothesis that Thorp had engaged in a consensual sexual encounter with the victim sometime before she met with her killer and died. In fact, the state's own evidence contradicts its theory of the killing. The state worked on the presumption that Chase was killed in the exact location she was discovered while she was being raped by her killer (based upon the disturbance in the wood chips and indentation in the ground between her legs) and that Thorp, with her blood all over him, had killed her. However, the state's own witnesses gave a completely different version. The crime scene technician indicated that there was evidence that Chase's body had originally been near where her shorts were found, some thirty feet away from where her body was discovered and that it had been dragged some distance (based on drag marks in the mulch). (Vol. 9, T

76-77, 92-94) The medical examiner, who found no trauma to the victim's genitalia,[2] opined, based on the plant material discovered in her throat, that she had been face down in the plant vegetation when strangled, rather than the state's version of her being killed and raped at the location and in the position she was found. (Vol. 10, T 235-236, 259) The blood on the defendant is inconsistent with the known facts of the murder as testified to by the medical examiner, that Chase did not bleed on her attacker. (Vol. 10, T 251-257; ***see also*** Vol. 9, T 62, 95) And we cannot forget that the man seen in the company of Chase prior to her murder does not at all match the appearance of the defendant. (Vol. 9, T 117, 137, 139-141, 145-146, 151, 182, 187, 188)

Thus, the state cannot support its theory of the murder. Instead, the evidence supports the hypothesis that the murder did not occur at the location of the body. It also supports the defense hypothesis that Thorp did not kill or rape her, but rather had had consensual sex with the prostitute some time earlier. ***See Williams v. State***, 247 So.2d at 426 (it showed only that the defendant had been with the victim, not *when* he was there). The fact of the defendant's DNA inside of her squares with the defense's reasonable hypothesis of innocence and the state has not offered evidence which is

[2] Thus, this case differs from those in which there was evidence of a sexual battery as shown by the trauma to the genitalia and the wounds. ***Contrast Taylor v. State***, 583 So.2d 323, 328-329 (Fla. 1991); ***Holton v. State***, 573 So.2d 284, 290 (Fla. 1990).

inconsistent with this hypothesis. ***State v. Law***; ***Sorey***; ***Amell***, ***supra***. While the circumstances of the DNA may have created a suspicion that the defendant committed the crime, they are not sufficient to support this conviction. ***Williams v. State***, ***supra at*** 143 So.2d 484; ***Mayo***, ***supra***.

> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, it is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. ***Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.***

Davis v. State, 90 So.2d 629, 631-32 (Fla. 1956) (emphasis added). The state failed to prove the identity of the killer and did not prove a sexual battery as an underlying felony to felony murder; the defendant's conviction for first degree murder must be reversed.

POINT III.

THE TRIAL COURT ERRED IN PERMITTING A STATE WITNESS TO TESTIFY TO HIS OPINION AS TO WHAT DEFENDANT MEANT BY HIS WORDS, IMPROPERLY INVADING THE PROVINCE OF THE JURY AND RESULTING IN A DENIAL OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY JURY AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, AND 22, OF THE FLORIDA CONSTITUTION.

During a trial, counsel introduces evidence of relevant facts by offering testimony from witnesses as to facts about which they have personal knowledge. As recognized in Section 90.604, Florida Statutes, if a witness does not have personal knowledge of a fact, he or she may not testify to the fact. It is the province of the jury to decide between conflicting facts, to draw inferences from the facts, and to reach the factual conclusions in the trial. Generally, witnesses may not testify in terms of opinion or inferences. It is the function of the jury to draw those inferences or opinions. Ehrhardt, ***Florida Evidence***, §701.1 (1998 Edition). Here, the trial court allowed the witness, Timothy Bullock, over defense counsel's objection, to invade that province of the jury by speculating as to what the defendant meant by his admission that, "We *did* a hooker." (Vol. 11, T 500-501) Such conclusions of the testifying witness were improper and violated Thorp's constitutional rights under the

federal and Florida constitutions to due process and a trial by jury.

Bullock was properly permitted to testify to his observations, what he saw and heard -- that Thorp told him that, "We did a hooker." (Vol. 11, T 500-501) However, the state went impermissibly forward, inquiring as to what the witness believed Thorp meant by the phrase "*did* a hooker," and receiving the Bullock's devastating conjecture that Thorp meant they had killed her, rather than just having sex with her. (Vol. 11, T 500-501)

A witness' testimony of what he saw or observed is relevant; but "when it leaves this field and enters into that of opinion or supposition, it invades the province of the jury." ***Scott v. Barfield***, 202 So.2d 591, 594 (Fla. 4th DCA 1967). Thus, the trial court must not allow such improper speculation, since one witness' guesses or assumptions about facts cannot constitute relevant evidence that would reasonably support the factual conclusion. ***Holden v. Holden***, 667 So.2d 867 (Fla. 1st DCA 1996); ***Dept. of Labor & Employment, Div. of Workers' Compensation v. Bradley***, 636 So.2d 802, 809 (Fla. 1st DCA 1994) (assumptions of witnesses do not constitute reliable evidence); ***Drackett Products Co. v. Blue***, 152 So.2d 463, 465 (Fla. 1963) (testimony consisting of guesses, conjecture or speculation are clearly inadmissible).

Under Section 90.701, Florida Statutes, before a lay witness may testify in the

form of inference and opinion, the party offering the testimony must establish that "the witness cannot [otherwise] readily, and with equal accuracy and adequacy, communicate what he has perceived to the trier of fact" and that the witness' "use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party." ***Kight v. State***, 512 So.2d 922, 929 (Fla. 1987). Here, although it may have been Bullock's subjective view that the defendant meant they had killed the prostitute, rather than the equally plausible inference that they had simply had sex with her, "this is not the type of lay opinion testimony which is admissible under section 90.701." ***Kight v. State***, ***supra*** at 929. The state here, as in ***Kight***, failed to establish that the witness could not have otherwise communicated his perceptions – what he heard the defendant actually say – to the jury without the improper interpretive slant given by the witness to the words. This witness was wrongly asked his conclusions or understandings of the intention or meaning of the accused, instead of being questioned simply as to the defendant's acts and words, and leaving the jury to draw therefrom their conclusions as to his meaning. ***Hodge v. State***, 26 Fla. 11, 7 So. 593, 595 (1890). The witness must be confined in his testimony to a statement of facts, leaving it to the jury to draw the proper inferences as to what was the party's meaning. ***Branch v. State***, 96 Fla. 307, 118 So. 13, 15 (1928).

In ***Dixon v. State***, 13 Fla. 636 (1869), the Florida Supreme Court ruled that a

witness would not be allowed to give his understanding of the meaning of words used in declarations of the accused. This holding is precisely on point for the instant case.

It was not for Bullock to decide what the defendant meant by the term “did.” Rather, that was a job for the jury to decide on their own, without Bullock’s personal speculative commentary of their meaning. The jury already had all of the facts from the witness; they did not require, and should not have suffered, the irrelevant theories of the witness. With such inappropriate conjecture before the jury, the defendant did not receive a fair trial. Reversal for a new trial is required.

<u>POINT IV</u>.

THE TRIAL COURT ERRED IN PRECLUDING IMPEACHMENT OF A STATE'S KEY EXPERT WITNESS WITH EVIDENCE WHICH DIRECTLY RELATED TO THE WITNESS' CREDIBILITY AND WHICH MATERIALLY AFFECTED THE WEIGHT WHICH THE JURY SHOULD GIVE HIS OPINION TESTIMONY.

The state called as an expert witness Mr. Dan Nippes, chief criminologist of the Indian River Crime Lab, to testify to results and his opinions of DNA (PCR) testing linking Thorp to Sharon Chase. (Vol. 11, T 386-422) The state offered Nippes to the court and the jury as a witness qualified to give expert opinion testimony in the field of forensic serology (specifically in DNA testing using the PCR method), eliciting testimony from the criminologist on his educational background and his criminology and lab analyst career, including the fact that he had been DNA testing for quite some time, and had testified in various criminal courts on thirty-five occasions on the subject of the DNA testing. (Vol. 11, T 386-392) The defense sought to examine the analyst regarding an incident where he had conducted DNA (PCR) testing and had testified in a capital case as to the defendant's DNA match. (Vol. 11, T 392-402) In that case, ***Murray v. State***, 692 So.2d 157 (Fla. 1997), this Court had ruled that Nippes had "misled the court as to the general acceptance of the PCR method of DNA testing in the relevant scientific community," and had questioned his qualifications as

an expert in this area. ***Murray***, ***supra***, at 164. The trial court refused to allow the defendant to voir dire the alleged expert regarding this information. (Vol. 11, T 392-402) This testimony was relevant to allow the jury to adequately weigh the analyst's opinion, especially in light of the testimony elicited by the state as to the witness' years of experience and the number of times the criminologist had been qualified as an expert in the PCR method of DNA testing. In the proffer of the excluded testimony, the analyst vehemently disagrees with this Court's ruling in ***Murray***, claiming that he did not mislead the court; postulating again that the NRC had accepted the PCR method of DNA testing in 1992 (just as he had falsely opined in ***Murray***), and had in their 1996 manual accepted it again, stating the same thing ("this, to me, says that it was fine in 1992 and we're saying it's fine in 1996"). (Vol. 11, T 395-397, 400-401)

The trial court's curtailment of defense inquiry into matters regarding impeachment of the analyst's knowledge, expertise, and opinions constituted a deprivation of his absolute and fundamental right to cross-examine a witness against him, as guaranteed by the Sixth Amendment of the federal constitution and Article I, Section 16, of the Florida Constitution. ***Coco v. State***, 62 So.2d 892 (Fla. 1953). ***See also*** Section 90.608 (1), Florida Statutes (1997). This is especially true here in a capital case, where this crucial witness' testimony resulted in a conviction for first degree murder, condemning the appellant to die in the electric chair. ***Coxwell v.***

State, 361 So.2d 148 (Fla. 1978).

The fundamental right to confrontation includes the opportunity to cross-examine witnesses, affording the jury the occasion to weigh the credibility, demeanor, ability, and veracity of the witness. ***Davis v. Alaska***, 415 U.S. 308 (1974); ***Barber v. Page***, 390 U.S. 719 (1968); ***Pointer v. Texas***, 380 U.S. 400 (1965); ***Coco v. State***, ***supra***; ***Baker v. State***, 150 So.2d 729 (Fla. 3d DCA 1963). ***See also*** Section 90.608 (1) (d), Florida Statutes (1997).

In ***Davis v. Alaska***, ***supra***, the Supreme Court of the United States held that the right to cross-examination includes as its essential ingredient the right to impeach one's accusers by showing bias, impartiality, and lack of ability, and by discrediting the witness:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but ***the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.***

415 U.S. at 316 (emphasis added).

Whenever any witness takes the stand, he ipso facto places his credibility in issue, whether he is a lay witness or an expert witness. ***Mendez v. State***, 412 So.2d

965 (Fla. 2d DCA 1982); ***Baxter v. State***, 294 So.2d 392 (Fla. 4th DCA 1974). A full and fair cross-examination of a witness upon the subjects opened by the direct examination is an absolute right. ***Coco v. State***, ***supra***. Limiting the scope of cross-examination in a manner which keeps from the fact-finder relevant and important facts bearing on the trustworthiness of crucial prosecution testimony constitutes "error of the first magnitude." ***Davis v. Alaska***, 415 U.S. at 318; ***Truman v. State***, 514 F, 514 F.2d 150 (5th Cir. 1975); ***Williams v. State***, 472 So.2d 1350, 1352 (Fla. 2d DCA 1985); ***Mendez v. State***, ***supra***;
Williams v. State, 386 So.2d 25 (Fla. 2d DCA 1980).

The proposed voir dire examination of Mr. Nippes directly related to his credibility and trustworthiness. A finding by this Court that the analyst was not properly an expert in this particular field and had mislead the court in a prior, similar case bears directly on his ability to render an accurate opinion in the instant case. Thus, it is highly relevant and material information which the jury, as fact-finders, should have in order to determine the weight to be given Mr. Nippes "expert" opinion in the instant case. The state's case could "stand or fall on the jury's belief or disbelief" of his testimony. ***Napue v. Illinois***, 360 U.S. 264, 269 (1959).

Courts have held that evidence indicating a witness' actions in other, similar situations pertaining to the issues in the case are relevant items for cross-examination

and impeachment of the witness by a defendant. ***Mendez v. State***, ***supra***; ***Ivester v. State***, 398 So.2d 926 (Fla. 1st DCA 1981). Questioning concerning his ability to accurately and truthfully render an expert opinion was a proper and vital line of inquiry which was highly relevant to the credibility of Nippes' testing procedures, expertise, and opinions in the instant case, which the defendant should have been allowed to reveal to the jury.

> [T]o make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.

Davis v. Alaska, 415 U.S. at 318. Moreover, the barred examination here was directly relevant to an inquiry under ***Frye v. United States***, 293 F. 1013, 1014 (D.C. Cir. 1923), to test the general acceptance of the PCR method of DNA testing in the scientific community. ***See Murray***, ***supra***; ***Ramirez v. State***, 651 So.2d 1164 (Fla. 1995).

The right of full cross-examination is absolute; its denial here easily constitutes reversible error. ***Coxwell v. State***, ***supra***. A new trial is required.

POINT V.

THE TRIAL COURT ERRED IN PERMITTING TESTIMONY OF THE PCR METHOD OF DNA TESTING WHERE THE STATE FAILED IN ITS BURDEN OF PROOF TO ESTABLISH THAT SUCH METHOD OF TESTING WAS GENERALLY ACCEPTED IN THE RELEVANT SCIENTIFIC COMMUNITY, IN CONTRAVENTION OF THE DEFENDANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE FEDERAL AND FLORIDA CONSTITUTIONS.

The trial court admitted evidence of the PCR method of DNA testing, without hearing any evidence under ***Frye v. United States***, 293 F. 1013, 1014 (D.C. Cir. 1923), whether the PCR method of DNA testing had gained acceptance in the scientific community. The court precluded defense counsel from delving into this inquiry (***see*** Point IV, ***supra***). The proffered voir dire examination indicated that the state's "expert" (***see*** Point IV, ***supra***) utilized the same source as he had in ***Murray v. State***, 692 So.2d 157 (Fla. 1997) to opine again that said methodology had gained general acceptance in the scientific community.

However, this Court in ***Murray*** held that the state had not proven, based on this misleading testimony, that such scientific test was admissible into evidence. Thus, the evidence must be excluded here, just as it was in ***Murray***, ***supra***. While two of the three area with which this Court expressed problems in ***Murray*** have arguably

been cured in this case (by using a database with which the analyst was familiar and by how he performed the tests and the basis for his conclusions), the third prong of the test is still lacking – showing of the general acceptance of the evidence in the scientific community. Nippes reiterated in the proffer the same misleading information as he had in ***Murray***, that the NRC had accepted the PCR testing as reliable in 1992, and added that the newest report in 1996 contained the same language which he interpreted (contrary to this Court's reading in ***Murray***) as accepting the scientific test. (Vol. 11, T 396, 401)

If the NRC report contains merely the same language as it did in 1992, as the "expert" claimed it did, then, under ***Murray***, ***supra***, the test still is not admissible now, since the state has failed in its burden to meet the ***Frye*** standard. ***See also Ramirez v. State***, 651 So.2d 1164, 1168 (Fla. 1995). The PCR test results should have been excluded. Reversal is required.

POINT VI.

THE DEATH SENTENCE MUST BE REVERSED UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, 17, AND 22, FLORIDA CONSTITUTION WHERE THE COURT IMPROPERLY EXCUSED FOR CAUSE A POTENTIAL JUROR.

In a capital case, it is reversible error to exclude for cause a juror who can follow his or her instructions and oath in regard to the death penalty. ***See Farina v. State***, 680 So.2d 392, 396 (Fla. 1996); ***Gray v. Mississippi***, 481 U.S. 648 (1987); ***Davis v. Georgia***, 429 U.S. 122 (1976). The relevant inquiry is whether a juror can perform his or her duties in accordance with the court's instructions and the juror's oath. ***Gray***, 481 U.S. at 658. The record shows that Juror Congrove was qualified to serve:

> MR. CRAIG [prosecutor]: Now, in the most general terms, Mr. Congrove, how do you feel about the death penalty?
>
> MR. CONGROVE: Uncertain, to tell you the truth.
>
> MR. CRAIG: Okay. If we lined up all the people who say that they are in favor of the death penalty on one side of the room and all the people who say that they are opposed to the death penalty on the other side of the room, would you be in that room at all, or

would you tend to be closer to one side than the other?

MR. CONGROVE: I would probably weigh out a little bit more on the pro death penalty side.

MR. CRAIG: Would you -- or do you believe -- this is a personal belief that I'm asking about. Do you believe that death is the appropriate penalty for some first degree murders?

MR. CONGROVE: Yes.

MR. CRAIG: And can you accept that death is not the lawful penalty for all first degree murders?

MR. CONGROVE: Yes.

MR. CRAIG: You agree that it is appropriate for some but not for others?

MR. CONGROVE: Certainly.

* * * * * *

MR. CRAIG: Would you have any difficulty putting your name to a verdict recommending the death penalty, if after you had heard everything and deliberated with your fellow jurors and followed the Court's instruction, you felt that it was the appropriate thing to do in accordance with the law?

MR. CONGROVE: Well, honestly, I would have to state that in past, involving the death penalty, I said that I could not deliver that type of a penalty. So to be truthful, I guess I would have to say I have a moral dilemma with the death penalty.

MR. CRAIG: Let me ask it this way, Mr. Congrove. Well, first off, have you been ---have you sat on a case involving a murder before?

MR. CONGROVE: No.

MR. CRAIG: So you're basing your --- I hesitate to use the word your opinion, it's just an opinion. Based upon your views that you've gotten through media and such on cases that have been reported, is that what we're taking about?

MR. CONGROVE: Not speculation, based on my raw, gut feeling of what I've felt, seen, hearing about involving the death of a life as a judgment.

MR. CRAIG: So you made a judgment that in your opinion the death penalty was not appropriate in some circumstance where it has been imposed?

MR. CONGROVE: I guess I'm just saying it would be difficult to persuade me to go in favor of the death penalty. I see the reason for the death penalty. And I can see myself being open to certain situations, perhaps, more easily being open is not the right word, but more acceptable, perhaps. But it would have to be an extreme situation, I feel.

MR. CRAIG: Would these feelings that you have interfere in any way with your consideration of the evidence and the law as it would apply to the guilt of the person? And let me put that question in another way.

Up to this point I've been talking about a hypothetical situation where the person has already been found guilty. Well, let's assume the person has not been found guilty yet and you're deliberating and determining the issue of guilt. Knowing in the back

of your mind, as you do now, that if the person is convicted of first degree murder that person may receive the death sentence, and irrespective of what you do, it's a train you may not be able to stop, because, first off, the jury would be making a recommendation on sentence, that recommendation does not have to be unanimous, and the decision is ultimately with the Court. So, with that hypothetical in mind, would your feelings cause you some difficulty in considering a verdict of first degree murder?

MR. CONGROVE: Interesting question. It certainly isn't one that I have been confronted with before. I think, on the first hand, the answer is really in two parts, I think separate, I believe. The trial decision of guilty or innocence, and the aggravating and mitigating circumstances the death penalty phase. I think the question, to rephrase it from you would be, would I be more likely to look for reasonable doubts of guilt?

MR. CRAIG: Okay. Let me suggest this to you. We recognize, and the Court earlier gave you an instruction that the State's burden of proof, both on the guilt or innocence issues in the case, and also on the existence of aggravating factors, is a burden of beyond and to the exclusion of a reasonable doubt. Do you feel, because we're talking about a case involving the ultimate penalty here, that you would be inclined to hold the State to some higher degree of proof in the presentation of the evidence?

MR. CONGROVE: Well, I think that's basically rephrasing what I said.

MR. CRAIG: Is that basically what we're saying here?

MR. CONGROVE: Yes, I think there's an adequate rephrasing, yes.

MR. CRAIG: You do have some concern about that?

MR. CONGROVE: To be honest, I do.

* * * * *

MR. STUDSTILL: Please the Court.

Mr. Congrove, I think you indicated a while ago that -- and maybe I stand corrected, you can correct me -- but I believe you indicated that you felt like your predisposition, or your opinion about the death penalty might make it difficult for you to reach a verdict in the guilt and innocence phase of this case? Did you say that you thought maybe it might make it difficult?

MR. CONGROVE: I don't think I necessarily meant to imply that directly. But yes, in thinking about what I'm saying, that's correct.

MR. STUDSTILL: Well I'm just going to ask you something else. I might beat the dead horses for a little bit if I might do so. Do you think your opinions right now on capital punishment would substantially impair you performance in doing what you're supposed to do as your duty, as the Court gives it to you, as a matter of law, in the determination of guilt or innocence of this defendant?

MR. CONGROVE: I would have to say yes.

MR. STUDSTILL: Okay. Then I take it, Mr. Congrove, that the fact you start off by saying you're uncertain, although you think that there could be in

some instances, in some instances the death penalty might be deserved and you could impose it in some instances, is that correct?

MR. CONGROVE: (Nods head.)

MR. STUDSTILL: Okay. So since you haven't heard the evidence in this case, you haven't heard the evidence in this case. And the understanding that in every single case of first degree murder, the death penalty should not be imposed you agreed with that proposition I take it?

MR. CONGROVE: I'm sorry?

MR. STUDSTILL: In every --

MR. CONGROVE: Do I say that in every case the death penalty should not be imposed?

MR. STUDSTILL: In every single case.

MR. CONGROVE: I would prefer that not be the case ultimately.

MR. STUDSTILL: Did I understand that -- in other words, you don't think that the death penalty should be imposed in every single case of first degree murder?

MR. CONGROVE: That's going to be difficult to do because as I've said I think there are some I know of, I accept, but not for every case. And in most cases, if not at all, I would find myself having a dilemma of trying to be that person sentencing that other person to death. Which therefore, I disagreed with the previous question, that if restating that, that might cause me to weigh some situations differently,

> knowing that would be the ultimate outcome or the ultimate decision to be rendered.
>
> MR. STUDSTILL: Mr. Congrove, let me ask you this question. Since you haven't heard the evidence in this case, and that's number one, obviously you haven't heard the evidence of the case.
>
> MR. CONGROVE: I'm not familiar with it either, no.
>
> MR. STUDSTILL: Okay. Even though you haven't heard it, now this may be the same question over again but I feel compelled to ask you, even though you haven't heard it, you feel that your opinion of the death penalty would preclude you from being a fair and impartial juror in the guilt and innocent phase of this proceeding, is that correct?
>
> MR. CONGROVE: I would like to think that it wouldn't, but I can see through speculation that being a possibility.
>
> MR. STUDSTILL: Even though you say that even though in some instances you entertain the notion that in some instances the death penalty might be appropriate?
>
> MR. CONGROVE: Yeah. But I've also got my own preformed opinions to what those situations might be.

(Vol. 16, JS 105-106, 110-114, 115-118)

This examination is remarkably similar to that in the case of ***Farina v. State***, ***supra***, wherein this Court vacated the death sentence and remanded for a new penalty

phase before a new jury because of the improper excusal for cause of one of the potential jurors. In ***Farina***, ***supra*** at 397-398, this Court ruled:

> The ***Davis*** Court established a per se rule that requires the vacation of a death sentence when a juror who is qualified to serve is nonetheless excused for cause. ***See generally Davis***; ***see also Gray***, 481 U.S. at 659, ***Davis***, 429 U.S. at 123, (Rehnquist, J., dissenting). The ***Davis*** Court relied on an earlier case in which the Court held that "'a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.'" ***Id***. at 122, (quoting ***Witherspoon v. Illinois***, 391 U.S. 510, 522,(1968)).
>
> In this instance, we are bound by the decisions of the United States Supreme Court. In ***Chandler v. State***, 442 So.2d 171, 173-75 (Fla.1983), this Court relied on ***Davis*** to vacate death sentences when two jurors were dismissed for cause over the defendant's objection. We found that "at least two of the venire members for whom the State was granted cause challenges never came close to expressing the unyielding conviction and rigidity regarding the death penalty which would allow their excusal for cause under the ***Witherspoon*** standard." ***Id***. at 173-74.
>
> A review of Hudson's voir dire questioning reveals that while Hudson may have equivocated about her support for the death penalty, her views on the death penalty did not prevent or substantially impair her from performing her duties as a juror in accordance

> with her instructions and oath. She was qualified to serve under the ***Witherspoon-Witt*** standard. Thus, we find that the trial court erred in granting the State's challenge for cause, and Farina's death sentence cannot stand.

As in ***Farina***, a review of Congrove's voir dire questioning reveals that while he may have equivocated about his support for the death penalty, his views did not prevent or substantially impair him from performing his duties as a juror in accordance with his instructions and oath. He stated that he could envision circumstances wherein he could find the death penalty justified and would want to be absolutely certain that the defendant was proven guilty and deserving of the ultimate penalty. Surely, this is what we expect, nay, desire, of all jurors.

The trial court therefore abused its discretion when it excused Congrove for cause. ***Farina v. State***, ***supra***. Such an erroneous exclusion is not subject to a harmless error analysis. ***Id***.; ***Gray***, 481 U.S. at 668. Thorp's death sentence must be vacated and the case remanded for a new sentencing proceeding.

POINT VII.

THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES, EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, AND FAILED TO PROPERLY FIND THAT THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §17 OF THE FLORIDA CONSTITUTION.

The sentence of death imposed upon Gary Thorp must be vacated. The trial court found an improper aggravating circumstance, failed to consider (or gave only little weight to) highly relevant and appropriate mitigating circumstances, and improperly found that the aggravating circumstances outweighed the mitigating factors. These errors render Thorp's death sentence unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution.

A. The Trial Judge Considered Inappropriate Aggravating Circumstances.

It is well established that aggravating circumstances must be proven beyond a reasonable doubt by competent, substantial evidence. ***Martin v. State***, 420 So.2d 583 (Fla. 1982); ***State v. Dixon***, 283 So.2d 1, 9 (Fla. 1973). The state has failed in this burden with regard to at least two of the aggravating circumstances found by the trial court, that of heinous, atrocious, or cruel; and during the course of a sexual battery. The court's findings of fact, based in part on matters not proven by substantial, competent evidence beyond a reasonable doubt, and on erroneous findings, do not support these circumstances and cannot provide the bases for the sentence of death.

This Court has defined the aggravating circumstance of heinous, atrocious, or cruel in ***State v. Dixon***, ***supra*** at 9:

> 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.

Recognizing that all murders are heinous, ***Tedder v. State***, 322 So.2d 980, 910 (Fla. 1975), this Court further defined its interpretation of the legislature's intent that the aggravating circumstance only apply to crime **especially** heinous, atrocious, or cruel.

> 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 tortuous to the victim.

State v. Dixon, ***supra*** at 9.

As this Court has stated in ***Santos v. State***, 591 So.2d 160, 163 (Fla. 1991), and ***Cheshire v. State***, 568 So.2d 908, 912 (Fla. 1990), this factor is appropriate only in torturous murders which exhibit a *desire* to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another. ***See***, ***e.g.***, ***Douglas v. State***, 575 So.2d 165, 166 (Fla. 1991) (torture-murder involving heinous acts extending over four hours). The present murder happened too quickly with no substantial suggestion that Thorp *intended* to inflict a high degree of pain or otherwise torture the victim. Accordingly, the trial court erred in finding this factor to be present.

While this Court has upheld this factor numerous times in cases involving strangulation, those cases involved facts specifically showing that the victims were acutely aware of their impending deaths and all involved torture and suffering beyond the fact of the strangulation. ***See***, ***e.g.***, ***Hildwin v. State***, 531 So.2d 124 (Fla. 1988); ***Thompkins v. State***, 502 So.2d 415, 421 (Fla. 1986).

The appellant submits that the state failed to meet its burden in this case. In

Rhodes v. State, 547 So.2d 1201 (Fla. 1989) the decomposing body of an approximately forty-year-old female, missing her lower right leg, was found in debris being used to construct a berm in St. Petersburg. The medical examiner determined manual strangulation to be the cause of death because the hyoid bone in the victim's throat was broken. Rhodes was interviewed by detectives, and during that and subsequent interviews, Rhodes gave different and sometimes conflicting statements to his interviewers, always denying that he raped or killed the victim. He subsequently offered to tell how the victim had died if he could be guaranteed he would spend the rest of his life in a mental health facility. Rhodes then claimed the victim died accidentally when she fell three stories while in a hotel. At trial three of Rhodes' fellow inmates at the jail were called as witnesses for the state. Each inmate testified that Rhodes admitted killing the victim.

The trial court in ***Rhodes*** found that HAC applied stating:

> That the murder of Karen Nieradka was especially heinous, atrocious and cruel in that the victim was manually strangled and the clumps of her own hair found in her clenched hands indicates the pain and mental anguish that she must have suffered in the process.

This court rejected the trial court's finding of the HAC aggravating circumstance stating:

> The trial court found the murder was especially heinous, atrocious, or cruel because the evidence suggested the victim was manually strangled. We note, however, that in the many conflicting stories told by Rhodes, he repeatedly referred to the victim as "knocked out"or drunk. Other evidence supports Rhodes' statement that the victim may have been semiconscious at the time of her death. She was known to frequent bars and to be a heavy drinker. On the night she disappeared, she was last seen drinking in a bar. In ***Herzog v. State***, 439 So.2d 1372 (Fla.1983), we declined to apply this aggravating factor in a situation in which the victim, who was strangled, was semiconscious during the attack. Additionally, we find nothing about the commission of this capital felony "to set the crime apart from the norm of capital felonies." ***State v. Dixon***, 283 So.2d at 9. Due to the conflicting stories told by Rhodes we cannot find that the aggravating circumstance of heinous, atrocious, and cruel has been proven beyond a reasonable doubt.

The facts and circumstances of the murder in ***DeAngelo v. State***, 616 So.2d 440 (Fla. 1993), are remarkably similar to the instant case. In ***DeAngelo***, the defendant struck the victim on the head, used manual strangulation, and then strangled the victim with a ligature. In rejecting the state request for the HAC aggravating circumstance this Court stated:

> This Court has previously stated that "it is permissible to infer that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the

> factor of heinousness is applicable." ***Tompkins v. State***, 502 So.2d 415, 421 (Fla.1986) Here, however, the trial court carefully considered the evidence and found that the State failed to prove beyond a reasonable doubt that Price was conscious during the ordeal. In reaching this conclusion, the trial court focused on the absence of defensive wounds, the lack of any evidence that there was a struggle, the presence of a substantial amount of marijuana in Price's system, and the medical examiner's testimony as to the possibility that at the time she was strangled Price was unconscious as a result of the pressure of the choking or as a result of a blow to her head. In certain limited circumstances where the aggravator is unquestionably established on the record and not subject to factual dispute, this Court will find an aggravator that the trial court has failed to find. (Citation omitted) Here, however, the existence of the heinousness aggravator is arguable given the conflicting evidence regarding Price's consciousness, and we will not disturb the trial court's finding.

The uncontroverted physical evidence presented in this case through the State's own witness, Dr. Wickham, was that the decedent could have lost consciousness within a short period of time. Further, as in ***Rhodes*** and ***DeAngelo***, ***supra***, the victim here was shown to have consumed a quite large amount of cocaine (so much so that the medical examiner opined that had it not been for the strangulation, the cause of death could have been the excessive cocaine in her system). (Vol. 10, T 260) There was no external bleeding, and, aside from some faint bruising and minor scrapes, no

external injuries which would have evidenced any beating or torture. While the trial court in its sentencing order suggested that a strangulation death is per se HAC, the above-cited cases show that a strangulation death requires something above and beyond a simple choking. ***Contrast*** those cases cited by the state in its sentencing memorandum wherein there were additional factors showing torture and consciousness of imminent death. The state presented absolutely no testimony from the medical examiner to support any conclusion that there was excessive pain or torture involved here. There was no testimony she was acutely aware of impending death. As such, the state has failed to prove this factor beyond a reasonable doubt. The conclusion of the trial court should be rejected.

Additionally, as argued in Point II, ***supra*** (the sufficiency of the evidence point), there was no evidence that this killing was committed during the course of a sexual battery. This Court is referred to that Point for the argument that the only evidence here is of some type of sexual encounter with a known prostitute, which could have been entirely consensual (and may not even have occurred during the killing, but could have been hours or days earlier). The jury should not even have been presented with this aggravator since, "A judge should instruct a jury only on those aggravating circumstances for which credible and competent evidence has been presented." ***Hunter v. State***, 660 So. 2d 244 (Fla. 1995). This aggravating factor

must be stricken and the case remanded for a new jury recommendation without the offending aggravator.

B. Mitigating Factors, Both Statutory and Non-Statutory, Are Present Which Outweigh Any Appropriate Aggravating Factors.

In ***Campbell v. State***, 571 So.2d 415 (Fla. 1990), this Court reiterated the correct standard and analysis which a trial court must apply in considering mitigating circumstances presented by the defendant. In ***Campbell***, the Court quoted from prior federal and Florida decisions to remind courts that the sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. ***See Eddings v. Oklahoma***, 455 U.S. 104, 114-115 (1982); ***Rogers v. State***, 511 So.2d 526 (Fla. 1987). Where evidence exists to reasonably support a mitigating factor (either statutory or non-statutory), the court must find as mitigating that factor. Once a factor is reasonably established, it cannot be dismissed as having no weight as a mitigating circumstance. ***Campbell***, ***supra***. For a trial court's weighing process and its sentencing order to be sustained, that weighing process must be detailed in the findings of fact and must be supported by the evidence.

It is submitted that the trial court's sentencing order here totally fails to meet this standard necessitated by the capital sentencing scheme. The trial court glossed

over the statutory and non-statutory mitigating factors and improperly rejected them.

The court erroneously rejected the finding of "under the influence of extreme mental or emotional disturbance," §921.141 (b), Fla. Stat. (1993), failing to even instruct the jury on this factor, despite the defendant's request to do so (Vol. 12, T 737; Supp. Vol. 1, T 1295-1296); and "impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law," §921.141 (f), Fla. Stat. (1993), finding that the defendant later in the night did not appear to be overly intoxicated. But, drug addiction, intoxication and alcoholism have all been accepted as a basis for the statutory mitigating circumstance of extreme emotional or mental disturbance. ***See Kampff v. State***, 371 So.2d 1007 (Fla. 1979). It is an illness with which the defendant was trying to cope. He had been an alcoholic since age 14 and had been hospitalized previously for addiction and came to the mission seeking to get off of drugs and alcohol. (Vol. 12, T 681, 686, 689, 693-695, 699, 701-702, 713-714, 730-731) He would experience blackouts and could not remember things. (Vol. 12, T 725) Thorp was drunk on the night that Chase died; he had ingested cocaine as well. (Vol. 12, T 724-725) Testimony was unrefuted from his parents that Gary, a good child who suffered the painful affliction of cerebral palsy, started drinking at a very early age in an attempt to escape the agony of his debilitating disease, and, as a result of the drugs and alcohol, suffered from compulsive behavior, which clearly

could have contribute to the crime. (Vol. 12, T 699) The drug use and alcoholism did, in fact cause extreme mental or emotional disturbance for the defendant. In this case, clearly there is sufficient evidence to establish that Gary Thorp acted under extreme mental or emotional disturbance and was unable to conform his conduct to the requirements of the law. ***See also Nibert v. State***, 574 So.2d 1059 (Fla. 1990) (wherein the Court specifically held that the defendant's alcoholism and drinking at the time of the killing support a finding of extreme disturbance and substantial impairment, which requires a life sentence). ***See also Stewart v. State***, 558 So.2d 416 (Fla. 1990); ***Carter v. State***, 560 So.2d 1166 (Fla. 1990); ***Campbell v. State***, 571 So.2d 415 (Fla. 1990); ***Amazon v. State***, 487 So.2d 8 (Fla. 1986).

This evidence clearly establishes the presence of the two statutory mental mitigating circumstances, which should militate against a death sentence in favor of life. ***See Morgan v. State***, 639 So.2d 6, 13 (Fla. 1994); ***Songer v. State***, 544 So.2d 1010 (Fla. 1989); ***Kampff v. State***, 371 So.2d 1007 (Fla. 1979). ***See also Heath v. State***, 648 So.2d 660. 663 (Fla. 1994) (mitigator present due to defendant's consumption of alcohol and marijuana); ***Spencer v. State***, 645 So.2d 377 (Fla. 1994); ***Cardona v. State***, 641 So.2d 361, 363 (Fla.1994) (daily consumption of cocaine); ***Kramer v. State***, 619 So.2d 274 (Fla. 1993) (death sentence disproportionate where suffered from alcoholism and under influence of mental or emotional stress); ***Nibert v.***

State, 574 So.2d 1059 (Fla. 1990) (wherein the Court specifically held that the defendant's alcoholism and drinking at the time of the killing substantially support a finding of extreme disturbance and substantial impairment); ***Smalley v. State***, 546 So.2d 720 (Fla. 1989); ***Masterson v. State***, 516 So.2d 256 (Fla. 1987); ***Feud v. State***, 512 So.2d 176 (Fla. 1976); ***Ross v. State***, 474 So.2d 1170 (Fla. 1989); ***Norris v State***, 429 So.2d 688 (Fla. 1983). These mental mitigators, based on uncontroverted evidence of the disease of addiction, must be found; they are substantial, and militate in favor of a life sentence, especially where it was shown that Thorp was remorseful for his lifestyle and was attempting to improve. The court's failure to even consider them (and the failure to instruct the jury on factor (b) requires vacating the death sentence and either a life sentence or, at least, a remand for a new penalty phase.

The court also improperly rejected or gave very little weight to other appreciable nonstatutory mitigating circumstances. He had a disadvantaged childhood due to his premature birth and developmental delays caused by cerebral palsy; he had to wear leg braces throughout his childhood, further hindering his development and causing him to miss the social interaction so important in childhood. While the court found this factor, it incorrectly only gave it little weight, when it was shown to deserve much more. ***See, e.g., Nibert v. State***, ***supra***; ***Cooper v. State***, 581 So.2d 49, 52 (Fla. 1991).

It was undisputed that the defendant had exemplary work habits. From the time he quit high school, not to loaf, but to be gainfully employed, he maintained a fine record of employment. Testimony indicated that he worked as the mission director's right hand man, not for money, but for the satisfaction of helping. This factor was wrongfully rejected by the court simply because Thorp moved from place to place. But he was not a vagrant; everywhere he moved, he sought and obtained a good job, never living off of public assistance. ***See Smalley v. State***, ***supra***; ***McCampbell v. State***, 421 So.2d 1072 (Fla. 1982). His rich family background is a source of considerable mitigation, rather than the short shrift given it by the trial judge. ***Cooper v. State***, ***supra***; ***Carothers v. State***, 465 So.2d 496 (Fla. 1985).

The court improperly rejected the defendant's remorse for his lifestyle which led him down this path. The trial court's rejection of this factor (since the defendant continued to proclaim his innocence), impermissibly punishes a defendant for maintaining his innocence. Yet, this factor, it can be seen from all of the evidence, consumed the defendant in his desire to improve himself and get away from the lifestyle of drugs, alcohol, and crime which led to his predicament. ***Nibert v. State***, ***supra***.

The court summarily rejected the undisputed fact that the defendant was attempting to improve himself, by giving to others. The court ignored the undisputed

evidence of this factor, wrongly concluding that Thorp did no more than anyone else might. His work at the mission, distributing gifts to the needy, helping counsel others, who, like himself, were down on their luck prove the magnitude of this mitigator. He volunteered continually at the CITA mission, so much so that the director considered him his right-hand man. This factor was clearly established and must be afforded great weight. ***See Hooper v. State***, 476 So.2d 1253 (Fla. 1985) (served in Salvation Army); ***Bedford v. State***, 589 So.2d 245 (Fla. 1991) ***Campbell v. State***, ***supra***. This factor cannot be ignored.

Lastly, the court rejected the defendant's good prison record, which the courts have repeatedly held is entitled to weight in mitigation, solely because the defendant had a single disciplinary problem (making jailhouse alcohol) while awaiting trial in the county jail. This factor should be found and given weight, despite this one indiscretion. ***See Cooper v. State***, ***supra*** at 52 (factor given great weight despite single DR); ***Craig v. State***, 510 So.2d 857 (Fla. 1987); ***McCampbell***, ***supra***; ***Skipper v. North Carolina***, 476 U.S. 1 (1986).

Mitigating evidence must at least be weighed in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence. ***Hardwick v. State***, 521 So.2d 1071, 1076 (Fla. 1988). ***See also Campbell v. State***, ***supra***; ***Rogers v. State***, ***supra***. As this Court

stated in ***Santos v. State***, 591 So.2d at 164:

> The requirements announced in ***Rogers*** and continued in ***Campbell*** were underscored by the recent opinion of the United States Supreme Court in ***Parker v. Dugger***, ___ U.S. ___, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991). There, the majority stated that it was not bound by this Court's erroneous statement that no mitigating factors existed. Delving deeply into the record, the ***Parker*** Court found substantial, uncontroverted mitigating evidence. Based on this finding, the ***Parker*** Court then reversed and remanded for a new consideration that more fully weighs the available mitigating evidence. Clearly, the United States Supreme Court is prepared to conduct its own review of the record to determine whether mitigating evidence has been improperly ignored.
>
> Based on the record at hand, we are not convinced that the trial court below adhered to the procedure required by ***Rogers*** and ***Campbell*** and reaffirmed in ***Parker***.

Here, too, it does not appear that the trial court properly adhered to these correct procedures. When the trial court follows the formula set out in ***Campbell v. State***, ***supra***, it is without doubt that the only possible conclusion is that the state cannot support a sentence of death. The proper mitigating factors clearly outweigh the appropriate aggravating factors. The punishment must be reduced to life imprisonment, or, at least, sent back to the trial court for a new consideration that more fully weighs the available mitigating evidence.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the appellant requests that this Honorable Court reverse the judgment and sentence of death and, as to Point I, remand with directions to suppress the evidence, as to Point II, remand for discharge, as to Points III, IV, and V, remand for a new trial, as to Point VI, vacate the death sentence and remand for a new penalty phase, and as to Point VII, vacate the death sentence remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Gary Thorp, DC# 98369, Florida State Prison, P.o. Box 181, Starke, FL 32091, this 17th day of August, 1998.

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JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced CG Times, 14pt.

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JAMES R. WULCHAK
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