IN THE SUPREME COURT OF FLORIDA

BILLY LEON KEARSE,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 90,310
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
_____	)	

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant was the defendant and Appellee was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida. In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R" Record on Appeal,

“T” Trial Transcript

"SR" Supplemental Record

STATEMENT OF THE CASE

Appellant, Billy Leon Kearse, was charged by indictment with premeditated murder R2. Appellant was also charged with one count of robbery R4. Jury selection began on October 14, 1991. Appellant was found guilty of first-degree murder as charged R343. Appellant was found guilty of robbery as charged R343. The trial court sentenced Appellant to death for the murder R369. The trial court departed from the recommended guideline sentence and sentenced Appellant to life in prison for the robbery R351-352. A timely notice of appeal was filed R371.

This Court affirmed Appellant’s conviction, affirmed his life sentence, and vacated his death sentence and remanded for a new sentencing R401-424. Kearse v. State, 662 So. 2d 677 (Fla. 1995). This Court issued its mandate on December 11, 1995 R400.

The penalty phase occurred on December 9, 1996. The jury recommended a sentence of death R575. On March 24, 1997, the trial court sentenced Appellant to death and filed its sentencing order R706-09. A timely notice of appeal was filed R696. This appeal follows.

STATEMENT OF THE FACTS

The relevant facts are as follows: On January 18, 1991, Appellant had just driven with Rhonda Pendleton to pick up a pizza when problems with the car began to occur T1934-36,1838-40. Appellant then drove in the wrong direction on a one-way street T1936,1839. Officer Danny Parrish arrived and asked Appellant for identification T1940, 1842. Appellant gave Parrish several alias names which did not match any driver's license history T1940,1843. Appellant was ordered to place his hands on the car T1971. A scuffle ensued and Appellant grabbed Parrish's weapon and fired fourteen shots T1947,1859,1571-72. Nine shots struck Parrish and four shots struck his bullet-proof vest T1694. The police checked the license plate and determined that the car was registered to an address in Ft. Pierce T1399-1401. Appellant was arrested at that time T1412-13. Appellant confessed that he shot Parrish after a struggle had ensued T1571-72.[1]

Emily Baker, the licensed mental health counselor, testified that in 1981 she worked with abused, neglected, and ungovernable children T1990-1997. A petition for ungovernability was filed against Appellant due to poor school attendance and behavioral problems at school T2000,2002. Appellant was committed to youth hall which was set up like an orphanage-type home T2002. Appellant was released to the supervision of his mother under the Suspected Child Abuse and Neglect Program (SCAN) T2002. Appellant's mother, Bertha Kearse, enrolled in home parenting form July 26, 1981 to March 17, 1982. It was feared that Appellant was running away from an abusive situation T2004. There were concerns that Appellant was being abused T2013. Bertha Kearse acknowledged that she

[1] These guilt facts relating to the shooting are essentially identical to the facts laid out in this Court in its earlier decision in Kearse v. State, 662 So. 2d 677 (Fla. 1995).

was whipping Appellant every day T2014. Mrs. Kearse had a really limited interaction with Appellant T2014. The Kearse family was dysfunctional and because of alcohol and abuse, Appellant had to fend for himself T2015. Appellant was leaving home because his mother was buying beer and was fighting with her boyfriend T2016. Appellant became scared due to this T2016. Appellant was beaten by his mother throughout his upbringing T2018. Mrs. Kearse participated in the SCAN Program at a superficial level to get the authorities off her back T2018. There was not a lot of change in her parenting skills or behavior T2018.

Baker testified that Appellant started coming to the attention of the delinquency system T2022. His crimes were primarily burglaries and petty theft. There was not a lot of aggressive behavior T2024. The aggression was only in the context of someone being aggressive to him T2024. Appellant was in the situation of wanting to be with older boys even if it was just in the context of being boosted through a window by them. In other words, something they called “kiddie burglaries” T2025. It was the situation of a little skinny kid being boosted through a window by older boys T2026. Appellant was retained in kindergarten and the first grade. Functionally, he was slow T2026. When he was seven years old his math score was .3 which was at a kindergarten level T2027. Dr. Desai did a psychiatric report in 1987. Desai evaluated Appellant when he was in middle school T2028. Appellant would listen to his mind -- telling him what to do right and what to do wrong T2028. This showed an early sign of some sort of auditory hallucination process or disassociative process where the emotions separate from the person T2028-29. Abused children sometimes disassociate T2029. Appellant heard his mind talk to him and this is consistent with other evaluations T2029. Appellant came from a pretty dysfunctional family T2029.

When Appellant was in the fourth grade he was reading at approximately a first grade level T2031. When he was thirteen years, seven months, he was reading at the first grade level and overall performing at a second grade level T 2031. During 1985 and 1986 he was administratively placed in the sixth grade at St. Lucie School T2031. The records of what the teachers said was consistent with someone who is severely and emotionally handicapped T2033. In the schoolroom there was no doubt that Appellant was operating at a retarded level T2033. At the age of thirteen Appellant was functioning at a third or fourth grade level T2034. Appellant was failing all subjects in school and it was again recommended that he be placed in the severely disturbed program T2034. In March, 1987, Appellant was placed in a full-time emotionally handicapped program T2034. Various test scores showed that Appellant had the equivalent IQ score of 69 T2037. Appellant would be administratively advanced through school because the school could not keep a person behind a grade merely because they could not read or write T2038-40.

Baker testified that the other children that had attitudes which would not surprise her if they kill but that Appellant was not that type of person T2045. Appellant was not violent in the sense that he would perform an unprovoked attack, but he was hyperactive T2045-46. Appellant got in some fights but he was not mean or violent T2046. At the age of eight or nine, Appellant would stay out all night to get away from the drinking and his family T2055. Twenty-five percent of the daily beatings he received were for things he did not do T2055. Sometimes he was being beaten naked while in the bathtub T2055. At the age of seven or eight, Appellant’s punishment would include being forced to walk around the block naked while people in the street would be

laughing at him T2056. Appellant's mother would beat him with an extension cord and coathangers T2056. These were not spankings T2056. Appellant's mother was also beaten as a child with extension cords T2057. By the time Appellant had reached the age of ten, his mother started locking the doors when he went out so he would either have to sleep in a car or behind someone's house and get up in the morning T2060. Appellant began running away from home at the age of six due to drinking and abuse T2060. It was typical for Appellant's mother to drink two or three six-packs of beer T2061. Appellant started drinking at the age of four or five T2061. He was taking marijuana at the age of twelve and thirteen T2061. Appellant's stepfather also had a drinking problem T2063. Alcohol created a violent atmosphere in the house T2063. Appellant's mother would send him to the store to buy liquor T2064. Appellant would be beaten by a gang for the money on the way to the store T2064. Then Appellant's mother would beat him for losing the money T2064. Appellant was twice hit by a car and received a fractured ankle at age 10 or 12 T2075. As an infant Appellant fell into a bucket of bleach T2076. Appellant also fell out of a window onto his head T2076. Appellant almost drowned three times T2076. The friends of Appellant's mother would have sex with Appellant T2077. He was molested by at the age of 12 by a sixteen-year-old T2077. Appellant would not get involved in fights unless he was backed into a corner T2085. The record of this information comes from a reliable source T2086. Appellant has a panic disorder T2095. Baker is an expert in panic disorders T2066. In 1981, Dr. Kushner found a number of problems related to brain damage T2121. Appellant has a short term auditory memory and his long-term auditory memory was less than adequate T2121. Appellant has poor fine motor skills T2122. He has very poor planning

efficiency T2122. He has poor common sense which is typical of a child who has low intellectual capacity and brain damage T2122. He has a borderline to low average intelligence range and learning disabilities consistent with fetal alcohol syndrome T2123. The Wechsler Intelligence Test showed a verbal IQ of 74 and a full-scale IQ of 78 T2124. Appellant's deficits are consistent with brain damage T2125. Because of the damage Appellant tends to be impulsive T2125. Appellant does not have the ability to reason clearly and to look at his options T2125. The damage he suffered could be from injury, accident, or prenatal issue T2130.

Sharon Kraft testified that she had a masters degree in rehabilitation counseling and educational guidance T1763. Kraft handled Appellant's referral at Englewood Center T1764. Appellant had to repeat both the first and second grades for severely emotionally handicapped children T1765,1768. Appellant's problems got worse with the passage of time T1768. Kraft came into contact with Appellant on a daily basis T1769. Appellant's mother never responded to requests for her to come in T1770. Appellant's mother never participated in any programs designed to assist Appellant T1771. Appellant was very small for his age and appeared to be a neglected child T1771. Appellant responded favorably to a structured environment T1774. All of Appellant's grades were D's and F's T1777. Appellant was a follower T1777. Appellant had a problem concentrating T1777. Appellant was overly active and could not screen out noises like ordinary children T1778. He was tested in 1984 and the tests revealed that he was not functioning at a level that he was supposed to T1781. In the seventh grade, Appellant was functioning at a third grade level T1782. At the age of thirteen he was functioning at the level of an 8-year-old T1782. As time passed the gap

in his dysfunction was getting greater T1782. Appellant took the wide range achievement test T1783. Appellant scored at .8 percentile which is the bottom 1 percent of all students who take the test T1785. It is rare to see a test score that low T1786. It appeared that Appellant was functioning at a retarded level T1786. Appellant was moved through the grade system because there was a policy that you can not continuously retain a child T1787. Appellant was passed administratively T1787. Kraft has had some of her former students sentenced to the death penalty and it never surprised her when she heard their names T1788. But Kraft was surprised when she heard that Appellant had killed someone, it was inconsistent with the person she knew T1789. Appellant did have behavioral problems while at school T1793-1800. However, the records do not change Kraft's opinions T1802. Appellant was having a lot of problems T1802. Appellant appeared hungry all of the time, malnourished and neglected T1803. Appellant would constantly run away from home because he felt safer in the streets than at home T1803.

Kurt Kraft was a teacher at the Englewood Center which is a program for severely emotionally disturbed children T1757. Englewood is a special center set up for students classified as being severely emotionally disturbed T1757. Appellant was smaller in size than students his age and had learning disabilities T1759. Appellant made very little gains academically T1759. Appellant was emotionally handicapped T1760. Appellant was emotionally dysfunctional T1760. Appellant appeared to be at a retarded level T1760.

Danny Dye was the dean of the St. Lucie School in 1985 T1822. Appellant was in school there at that time T1823. It was a school for severely emotionally disturbed children T1823. The maximum number of students was 25-30 T1823. Appellant was classified as a severely

emotionally disturbed child T1823. The school is closely supervised--a highly structured setting T1824. Appellant's mother was not concerned with the problems that Appellant was having at school T1825. Appellant appeared to be a neglected child T1826. He was usually dirty and smelled bad occasionally T1826. It is fair to say that he was not getting significant support from home T1826. Appellant came from an impoverished background T1827. Appellant tried very hard and wanted to please his teachers. He gave them very little trouble T1828. Appellant did not malinger and did the best he could with his intellectual abilities T1828.

Dr. Fred Petrilla, a licensed clinical psychologist, was declared an expert in the field of psychology T2138,2144. Petrilla evaluated Appellant and spent 20 hours with Appellant T2146. Petrilla gave Appellant the WAIS-R test which measures intelligence in 1991 and recently T2153. In 1991, Appellant had a verbal IQ of 75 T2155. This test indicates that Appellant was having a lot of difficulty receiving, integrating, and sequencing information given to him T2155. The test in 1983 showed a verbal IQ of 74 T2155. The tests were a red flag indicating a probability of something going on as far as emotional problems, neuropsychological dysfunctioning, and/or the likelihood of brain dysfunctions T2156. Appellant is very distractable and had problems concentrating T2158. Appellant tends to act up because he is frustrated by learning problems T2158. Appellant performed poorly on the vocabulary skills portion of the test which means he was probably culturally deprived, was not stimulated at home and was not learning at school T2158. His overall IQ was 79 T2159. A symbol digit modality test is a test to indicate suggestibility of a cerebral brain dysfunction T2159. A score of 100 is in the 50 percentile T2163. Appellant

scored 33 T2163. For someone Appellant's age the average score is 54 T2164. Within a reasonable degree of psychological probability the test suggested a probability of brain dysfunction T2164.

Petrilla testified that Appellant has a breakdown involving memory and concentration areas of the brain particularly the temporal lobes T2168. Appellant has very poor memory and verbal skill and very, very poor attention and concentration skills T2170. Duress would aggravate Appellant's problems T2170. More problems would occur because he is excitable and a lack of skills are detrimental to him T2170. More than two or three word statements tend to confuse Appellant T2171. People with Appellant's problems become insecure, indecisive, easily lead and then they get distractable and take things personally T2172. They overreact to situations and do not act in a manner which conforms to the situation T2172. When Appellant took the tests at the age of eighteen his reading and spelling skills were at the recognized level of a third grader T2174. Petrilla administered the entire Halstead-Reitan test T2176. The left lobal test showed a mild brain dysfunction T2179. The test was readministered in 1991 T2183. Appellant did better this time T2183. Both test scores, in 1991 and 1996, showed mild brain dysfunction, almost moderate particularly affecting the left hemisphere T2185.

Dr. Petrilla testified that there is no question that Appellant has auditory problems evidenced since the age of eight T2187. Three different intelligence tests by three different people since Appellant was eight years old all basically turned out the same T2188. The Firo-B test, Rodan test show that Appellant is very unsure of himself, very insecure, very indecisive, misinterprets information and will react compulsively when confronted T2192. The MMPI-2 test in 1991 showed that Appellant was very impulsive T2194. The test did not suggest malinger-

ing T2194. Appellant is oversensitive, tends to react without thinking and there is no doubt that the test shows that Appellant reacts without thinking T2195.

Dr. Petrilla tesified that tests show that Appellant has learning disabilities T2201. The brain dysfunction appears to be developing over time; it has been long-standing T2201. This conclusion is based on test results, developmental history, home environment, psychological and psychiatric tests T2202. Dr. Petrilla finds that the killing was committed when Appellant was under an extreme emotional distress and he is still under an extreme emotional distress T2202. Also due to Appellant's dysfunction he was incapable of conforming his conduct to that which is required by law at the time of this killing T2203-04. Within a reasonable degree of psychological probability Appellant suffers from brain dysfunction T2208. A person can have brain injury and the CT scan or MRI showing that he is normal T2225. The brain dysfunction results in emotional problems coupled with abusive environment plus growing up on the streets without any father led to the conclusion that there was substantial impairment.

Donna Lipman, a neuropharmacologist, deals with the effects of drugs on the nerves and the brain T2239. Lipman was declared an expert in the field of neuropharmacology T2244. Lipman testified that Appellant had a pervasive neurodevelopmental problem from a very early age T2247. Lipman had to consider fetal alcohol insult while Appellant was in the uterus T2247. Lipman learned that Appellant's mother drank while pregnant T2248. She was a very small lady T2248. By calculations her blood alcohol content would vary between 160 and 170 mm per deciliter T2248. 100 is considered DUI in some states T2248. Appellant did not have fetal alcohol syndrome T2249. He did not meet the criteria

T2250, but Appellant did have hyperkinetic behavior as a child and throughout his life T2250. Other things are indicative of neurological complaints one of which is fetal alcohol effect which is a milder form of fetal alcohol syndrome T2250. Appellant was underweight at birth and small through his early years as a child T2250. This is consistent with fetal alcohol effect T2250.

Lipman testified that educationally Appellant was subnormal. His IQ did not increase appropriately with age as it should T2251. Appellant had a pervasive developmental disability from infancy T2251. He was underweight, premature, and small through his early life T2251. Thus, Appellant met the criteria for fetal alcohol effect T2251. Lipman testified that the brain is most vulnerable during the third trimester of pregnancy T2252. For the final few weeks of gestation the brain massively accelerates development and it is during that period that alcohol is most toxic to the brain T2252. The history of testing in this case shows a dysfunction of the brain T2254. Lipman looked at the three scans, the MRI, the PEC scan and the SPEC scan T2254-55. There was some suggestion of damage to the left side T2256. The SPEC scans are suggestive of low flow in the middle brain bits of the brain but nothing definitive T2257. Lipman testified that insults of the brain can be rehabilitated although it is recommended that rehabilitation attempts occur before at age 6 T2258. No one ever took such actions in this case T2258. The school records and psychological records are all consistent with fetal alcohol effect T2259. That is drinking progressively during pregnancy, hyperactivity, intelligence not increasing with age appropriately T2259. Hyper response to stress and impulsiveness may be explained by fetal alcohol effect T2262. Appellant's fear impulsiveness is apparent T2267. Appellant does not think about his actions he

just explodes T2268. The explosions are consistent with the history T2271.

Lipman conferred with neuropsychologists and psychologist T2289. One of those was Dr. Lawrence Levine T2290. Levine told Lipman about Appellant's IQ score of about 80 which was subnormal for people in the age of 20-25 T2291. Appellant scored in the 50th percentile for a 9½ year old child T2291. On the California Verbal Learning Test Appellant gave a below-normal performance T2291. Levine said the tests were consistent with brain dysfunction T2293. Lipman also consulted with Alan Freidman, the author of the MMPI T2294. Friedman indicated that Appellant answered the questions honestly T2295. Appellant had a test score of 13 and 10 which is below the majority of the sample of males with disabilities T2296. As many as 25% of Friedman's psychiatric patients achieve higher scores T2297. Appellant scored 90 on the Goldberg Score Scale T2300. A score greater than 60 indicates psychoticism and stress is likely to push others away T2300. Fetal alcohol effect relates to damages to the infant's brain while fetal alcohol syndrome relates to obvious bone deformity T2304.

Peggy Jacobs testified that she is the defendant's aunt T1807. Appellant was born when his mother was 15 or 16 years old T1811. Appellant's mother drank alcohol a lot when she was pregnant with the defendant T1812. She constantly drank to excess T1812.

Earnest Jacobs is Appellant's uncle who testified that Bertha drank a lot when she was pregnant T1814-17. Bertha was approximately 15 when Appellant was born T1817. Mr. Jacobs saw Appellant fall out of a window and do foolish things T1817. Appellant had fallen out of the window while sneaking out of the house T1818. Appellant would sleep under Mr. Jacobs' car T1819.

Betty Butler is Appellant's aunt T1978. Butler testified that Appellant's mother did not know how to show appropriate affection T1980-81. Appellant's mother would discipline Appellant by beating him T1981. This happened often T1981. Appellant developed physically and emotionally later than others T1983. He could not talk like other small kids his age could talk T1983. He had slurred speech T1983. He could not tie his shoes T1984. He could not understand what he was being told T1984. Appellant tried to learn but could not T1985. When he could not learn he would get disappointed and give up and T1986. At some point in time he just started running in the streets for days on end T1986. This happened consistently T1987. It appeared that Appellant was emotionally affected by the fact that his father was not around where his two brothers had their biological fathers around T1988. Appellant fell out of a window more than one time T1989.

Bertha Kearse testified that she was Appellant's mother T1971. Mrs. Kearse was 15 years old when Appellant was born T1971. Appellant was born October 26, 1972 T1972. Mrs. Kearse heard that Appellant's biological father was dead T1974. She last heard from him when Appellant was two years old T1974. Mrs. Kearse testified that she was drinking when she was pregnant T1974. She drank a lot T1974. Mrs. Kearse life was working and drinking T1976. Mrs. Kearse testified that she could not afford prenatal care while pregnant T1977.

Daniel Martel is a forensic neuropsychologist T2335. Martel opined that Appellant was not suffering from extreme mental or emotional distress at the time of the crime T2369. Nor was Appellant unable to conform his conduct to the requirements of the law and he did appreciate the criminality of his conduct T2369. There is no evidence of any mental disorder or any panic disorder T2370. Fetal alcohol effect is

not a mental disorder T2370. Martel's opinion is based on Appellant's birth weight being normal, the fact that Appellant wanted to walk early and the fact that Appellant wanted to talk normally T2374. These developmental features are inconsistent with fetal alcohol effect T2374. Martel believed that Appellant was a big kid T2375. Martel found that it was a difficult call to tell whether there was brain damage T2376. Appellant has some areas of weaknesses but not brain damage T2376. Martel recognizes that he was limited in performing tests on Appellant. T2377. Dr. Petrilla did more extensive testing T2377. Martel found the test scores to be within the normal range and two tests showed that Appellant was mildly impaired T2380. Appellant does suffer from pseudo dementia, that is, depression T2381. Appellant does not have brain damage; he just does not apply himself in school T2386. Appellant also has an antisocial personality disorder T2389. Martel testified that the system tried to reach out to Appellant but he pushed away T2395. Appellant has an antisocial personality which includes impulsiveness and a reckless disregard for others T2399. Appellant does not meet the mental mitigation circumstances because he has no history of a severe mental disorder other than his conduct as a child T2402. Martel testified that Friedman was not a great expert in the MMPI T2408. Martel did not speak with any of the defendant's family members or relatives T2442-43. Martel recognized that reasonable clinical practitioners often disagree and their disagreements can be reasonable T2444. Martel did not look at the defendant's birth records T2458. He has no idea for what Appellant's weight at birth was T2460. Martel testified that teachers documented that Appellant never tried in school T2470. It was not just Appellant's capacity that prevented him from learning but it was his lack of willingness to learn that prevented him

from learning T2472. Martel testified that none of his teachers said that Appellant was operating at a retarded level T2473. Appellant's tests scores were low because he did not try T2474.

SUMMARY OF THE ARGUMENT

1. The crime in this case occurred in St. Lucie County. When the case was tried for the guilt phase, Appellant had waived his constitutional right to be tried where the crime occurred. After this Court had vacated Appellant's death sentence and ordered a new sentencing proceeding, Appellant sought to withdraw his waiver of venue in St. Lucie County. The trial court ruled that Appellant could not withdraw his waiver. This was error.

Appellant had a right to withdraw his waiver of the constitutional right to have his case where the offense occurred. The law is clear that it is an abuse of discretion to deny the withdrawal of the waiver of a constitutional right unless the withdrawal is made in bad faith or if there would be harm to the public. In this case the withdrawal of the waiver was not made in bad faith nor would there be any harm to the public by holding the new sentencing proceeding where the offense occurred.

In addition, resentencing proceedings are de novo on all issues. Thus, Appellant would have had the choice of having the new proceeding where the offense occurred. This case must be reversed and remanded for a new sentencing.

2. Appellant objected to the compelled mental health evaluation. The triggering event for a compelled mental health evaluation under Rule 3.202(a) is the state's filing of a written notice of intent to seek the death penalty within 45 days of the arraignment. In this case the state failed to file its written notice within 45 days of arraignment.

Moreover, the state failed to file its notice within 45 days of this Court's mandate for resentencing which arguably could be deemed equivalent to an arraignment for the purposes of resentencing. Because the triggering event for a compelled mental evaluation never occurred -- the timely filing of a notice of intent to seek the death penalty -- it was error to grant the state's motion to compel a mental health examination over Appellant's objection.

3. Appellant moved for a continuance on the ground that he needed to depose and investigate the background and be ready to rebut the testimony of two state witnesses who had only recently been listed as witnesses by the state. In fact, as of three days prior to the penalty phase, it was not possible to adequately depose the state witnesses. The trial court noted that the case was not ready to be tried due to the newly listed witnesses, but denied the continuance on the ground that Rule 3.202 contemplated that capital proceedings would be done without preparation. The trial court did not deny the continuance because it was not needed. It is an abuse of discretion to deny a reasonable continuance due to the recent listing of a witness. The trial court erred in denying the continuance.

4. The death penalty is not proportionally warranted in this case.

5. For a meaningful appellate review, mitigating circumstances must be expressly evaluated, and the weighing process detailed, by the trial court in its written sentencing order. In this case the trial court did a summary evaluation of 34 mitigating circumstances in this case. This cause must be reversed and remanded for resentencing.

6. The trial court erred in failing to evaluate the nonstatutory mitigating circumstances of emotional or mental disturbance.

7. The penalty phase was moved to Indian River County from St. Lucie County. The prosecutor in this case had just been elected a judge by the voters of Indian River County. It was error to deny Appellant's motion to disqualify this prosecutor.

8. Appellant filed a motion to prohibit the prosecutor from arguing that the jury should show Appellant the same mercy that he showed the victim. The prosecutor told the jury that the bottom line as to whether Appellant should live should be that the jury should give Appellant the same mercy he gave the victim. Such argument is improper and prejudicial.

9. Appellant was denied a fair and reliable sentencing where the jury was repeatedly told that the Florida Supreme Court had affirmed his conviction and was also told by the prosecutor that the Florida Supreme Court had sent the case back for a recommendation of death.

10. There was clear evidence of jury misconduct in that a number of jurors discussed the case amongst themselves in violation of the trial court's order not to do so. The trial court erred in denying Appellant's motion for leave to interview the jurors.

11. It was error to conduct pretrial conferences in Appellant's absence. Appellant's absence from the hearings was not harmless.

12. The trial court erred in granting a state's challenge for cause of a prospective juror who had conscientious scruples against the death penalty, but who did not have an unyielding conviction and rigidity against the death penalty.

13. Appellant challenged prospective jurors Barker and Foxwell for cause. Barker could not consider a life sentence unless she could be assured that there would be no possibility of a conjugal visit in the

future. Foxwell placed a strong burden on Appellant at sentencing. It was error to deny the cause challenges.

14. The compelled mental health evaluation constitutes a one-sided rule of discovery in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

15. The compelled mental health evaluation violated the ex post facto clauses of the United States and Florida Constitutions.

16. Appellant was subjected to a compelled mental health evaluation by a prosecution expert in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

17. The instruction on victim impact evidence in this case told the jury to consider victim impact evidence, but did not inform the jury how such evidence was to be used. The instruction gave open-ended discretion to the jury on how to use the evidence. The instruction gives undue importance to victim impact evidence by highlighting it to the jury. It was error to give the instruction.

18. The trial court failed to exercise its discretion in evaluating age as a mitigating circumstance.

19. The trial court erred in considering the aggravating circumstance that the capital felony was committed while Appellant was engaged in the commission of the crime of robbery where it was based on the same aspect of the offense as other aggravating circumstances.

20. The trial court found the aggravating circumstance that the capital felony was committed while Appellant was engaged in the commission of the crime of robbery. It was error to find that circumstance in this case.

21. The state presented photographs showing surgical scars on the victim and presented detailed evidence of the victim’s injuries. The

introduction of this highly prejudicial evidence denied Appellant due process and a fair, reliable sentencing.

22. Electrocution is cruel and unusual.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO HAVE THE NEW PENALTY PHASE IN THE COUNTY WHERE THE OFFENSE OCCURRED.

A. The Trial Court Abused Its Discretion In Denying Appellant's Withdrawal Of The Waiver Of His Constitutional Right To Be Tried In The County Where The Offense Occurred.

The offense for which Appellant was to be sentenced occurred in St. Lucie County R2. Appellant had earlier waived his constitutional right to be tried in St. Lucie County. Appellant was tried and and received a jury recommendation in Indian River County. After the recommendation, venue was returned to St. Lucie County for the final sentencing hearing. On appeal this Court vacated Appellant's sentence of death and remanded this case to St. Lucie County for a new penalty phase R400-425.

The case was returned to St. Lucie County where all pretrial hearings were held. Appellant argued that venue was in St. Lucie County and alternatively sought to withdraw his earlier waiver. On June 21, 1996, Appellant sought to withdraw his earlier waiver of his constitutional right to be tried where the offense occurred -- in St. Lucie County T79-80. The state objected. The trial court indicated that there was no problem having a St. Lucie courtroom available T90-91, and he could not see why Appellant could not receive a fair trial in St. Lucie County T93. The trial court deferred ruling and the hearing was reset. On August 26, 1996, Appellant again sought to withdraw his waiver of venue T111. Appellant personally indicated that he wanted to be tried in St. Lucie County T114-115. The trial court ruled that Appellant had previously waived his right to venue by originally seeking

a change of venue and could not withdraw the waiver T121-122.[2] The penalty phase was held in Indian River County.

The Florida Constitution is clear that the accused has a constitutional right to be tried where the offense occurred:

> Florida's Constitution gives a defendant the right to be tried in the county where the crime took place.

State v. Stephens, 608 So. 2d 905, 906 (Fla. 5th DCA 1992); Bundy v. State, 455 So. 2d 330, 338 (Fla. 1984) (constitutional right under article I, section 16); O'Berry v. State, 36 So. 440, 444 (Fla. 1904) (concluding that constitutional right to be tried where crime occurred was "important right" which "must not be treated lightly" and change of venue constituted reversible error); Rhoden v. State, 179 So. 2d 606, 607 (Fla. 1st DCA 1965) (this constitutional right should be jealously guarded); Collins v. State, 197 So. 2d 574 (Fla. 2d DCA 1967).

This Court has noted the "doubtful validity" of conducting the trial at a venue other than the placed where the crime occurred without the consent of the defendant:

> The defendant has the constitutional right to a trial where the offense occurred and a change of venue granted without an appropriate motion or the consent of the defendant is of doubtful validity. *North v. State*, 65 So. 2d 77 (Fla. 1952), *aff'd North v. Florida*, 346 U.S. 932, 74 S.Ct. 376, 98 L.Ed.2d 423 (1954). *See also Ward v. State*, 328 So. 2d 260 (Fla. 1st DCA 1976).

Stone v. State, 378 So. 2d 765, 768 (Fla. 1980). It has also been noted that the right to be tried where the offense occurred is ancient and inseparable from the jury system:

> ... the defendant's right to jury trial in the county where the offense was committed is as old as the jury system

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[2] On December 9, 1996, Appellant again renewed his motion for venue in St. Lucie County and the trial court again denied the motion T169-170.

> itself, and is inseparable historically and doctrinally from that system. It is a right carefully included in the constitutional of the original states of this union, written there by colonists who rebelled at the idea of prosecutors carrying citizens away for trials in far places, where they were strangers. Florida's Constitution assures the Liberty Countians, as it has assured all our forebears since 1885, that they will be tried at home, by a jury of their own county, for crimes allegedly committed at home; that they will be tried abroad only for crimes committed abroad. There is but one constitutional exception to the rule, namely, "the impossibility of securing an impartial jury in that county." *Hewitt v. State*, 43 Fla. 194, 199, 30 So. 795, 796 (1901)....

Beckwith v. State, 386 So. 2d 836, 838 (Fla. 1st DCA 1980).

Appellant had the right to withdraw his waiver of the constitutional right to be tried where the offense occurred. A withdrawal of such a waiver should be exercised liberally in favor of a defendant. Pangburn v. State, 661 So. 2d 1182, 1189 (Fla. 1995). A trial court abuses its discretion if it denies the withdrawal of a waiver of a constitutional right unless it is shown that the withdrawal was not made in good faith or would cause some real harm to the public. Floyd v. State, 90 So. 2d 105, 106 (Fla 1956); Pangburn v. State, 661 So. 2d 1182, 1189 (Fla. 1995). A state may not constitutionally prohibit a defendant's withdrawal of a waiver of a constitutional right. Stevens v. Marks, 383 U.S. 234, 86 S.Ct. 788, 15 L.Ed.2d 724 (1966); Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

In Floyd, supra at 106, the defendant moved to withdraw his waiver of a constitutional right (to a jury trial) and this Court held that the withdrawal should only be denied where it appears that real harm will be done to the public or the withdrawal is not made in good faith or is made for the purpose of delay. In Floyd this Court held that it was an abuse of discretion to deny the defendant's withdrawal of the waiver

because the state or trial court would not be inconvenienced by the withdrawal of the waiver:

> In denying the motion to withdraw the waiver, the court stated that since the defendant was, at the time of arraignment, represented by counsel the waiver of trial by jury would not be set aside. There was nothing to show that the State or the court would be inconvenienced in any way, or that any valid ground, within the rule we have adopted above, existed for denying the motion. It was not shown that justice would have been delayed or impeded....
>
> We think the denial of the motion to withdraw the waiver was an abuse of discretion under the facts and circumstances of this case.

90 So. 2d at 107. In Cochran v. State, 383 So. 2d 968 (Fla. 3d DCA 1980) again there was an abuse of discretion because the withdrawal of the waiver had not been shown to be in bad faith:

> Here, the motion for withdrawal of waiver was filed and ruled upon approximately two months before scheduled trial date. There was nothing to indicate an attempt to delay nor was the good faith of the defendant questioned.
>
> * * *
>
> Cochran's motion for withdrawal of her waiver of jury trial should have been granted and that the denial was an abuse of discretion. In so ruling on this point, we need not consider the other issues raised on appeal.
>
> The trial court's ruling on defendant's motion to withdraw her waiver of jury trial is reversed, and the case is remanded for a new trial by jury.
>
> Reversed and remanded.

383 So. 2d at 969. The abuse of discretion for denying the withdrawal of a waiver has also been applied to penalty phase proceedings in capital cases as demonstrated by Pangburn v. State, 661 So. 2d 1182 (Fla. 1995) (withdrawal of waiver of jury at penalty phase). In Pangburn, this Court noted that discretion on ruling on the withdrawal of the waiver of a constitutional right "is to be exercised liberally

in favor of granting a defendant's request to withdraw." 661 So. 2d at 1189. In Pangburn, the trial court denied the withdrawal based on the wrong standard and this Court held that it was an abuse of discretion to deny the withdrawal because the withdrawal was not shown to have been made in bad faith nor would there have been substantial harm by granting the withdrawal. 661 So. 2d at 1189. In Pangburn, the refusal to permit the withdrawal of the waiver required a new penalty phase proceeding. Likewise, the refusal to allow withdrawal of the waiver in this case was an abuse of discretion and a new penalty phase is required.

In this case it cannot be said that Appellant's withdrawal of his waiver of the constitutional right to be tried where the crime occurred was made in bad faith or would cause any harm to the public, court or state. The trial court never found that there would be any delay or inconvenience in keeping the penalty phase in St. Lucie County.[3] In fact, keeping the penalty phase in St. Lucie County where the crime occurred would do the opposite. All participants in the case were from St. Lucie County. None were from Indian River County. Keeping the penalty phase in St. Lucie County certainly would be more convenient and cause less disturbance than moving the case away from the St. Lucie witnesses, St. Lucie attorneys, and St. Lucie trial judge to Indian River County. The trial court never found that there would be any harm by having the penalty phase in St. Lucie County. Nor is there any evidence to support any harm by having the penalty phase in St. Lucie County. The state cannot legitimately claim that harm would occur because of an inability to seat a fair and impartial jury in St. Lucie County. Where the defendant challenges a venue other than where the

[3] All proceedings in this case prior to the actual selection of the penalty phase jury were in St. Lucie County where the crime occurred.

crime occurred due to the state's claim that an impartial jury cannot be seated, an actual attempt to seat the jury in the county where the crime occurred must first be tried to show such harm. Beckwith v. State, 386 So. 2d 836, 839 (Fla. 1st DCA 1980); Stone v. State, 378 So. 2d 765, 768 (Fla. 1980). "The state cannot be damaged in any way by a persevering attempt to empanel a jury, and the attempt may be successful...." Id. Moreover, there is nothing in the record to show that a fair and impartial jury could not be seated in St. Lucie County. Almost six years had passed between the time of the offense and the new penalty phase.[4] This passage of time was more than sufficient to create a cooling off period to ameliorate any concerns regarding possible community prejudice. See Patten v. Yount, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984) (passage of time between first and second trial is highly relevant fact); Willie v. Maggio, 737 F.2d 1372, 1387 (5th Cir. 1984) (passage of 2 years between murder and Willie's second penalty hearing dissipated unfair prejudice); Wisconsin v. Duquette, Sr., 542 N.W.2d 237 (Wis.App. 1995) (lapse of 6 years); Swindler v. Lockhart, 885 F.2d 1342, 1348 (8th Cir. 1989) (7 months). Appellant realized that the passage of time had ameliorated any concerns he had about venue and he wanted to be sentenced in the community where he was raised -- in St. Lucie County where the offense occurred.

In addition, it must be noted that Appellant would naturally wish to have venue in the county where the crime occurred (St. Lucie) as opposed to Indian River County due to the racial differences in the make-up of the two counties. The present case involves the death of a white police office at the hands of a black man. Indian River County

[4] The offense occurred on January 18, 1991 R2.

has a much smaller black population in comparison to St. Lucie County.[5] Racial make-up of counties has been a legitimate concern in evaluating venue. State v. Lozano, 616 So. 2d 73, 76 (Fla. 1st DCA 1993) (where defendant is Hispanic, it was error to move venue to Leon County where the population of Hispanics was low in comparison to the Hispanic population in the county where the offense occurred (Dade)). Obviously, Appellant would rather have the penalty phase in the county where the crime was committed than in Indian River County.

In addition, Appellant believed that the state had an unfair advantage in having the new penalty phase in Indian River County due to the fact that the person who would represent the state had been recently elected as a judge by the people of Indian River County. See Point VI*I*, *supra*. *It cannot be said that Appellant was not acting in good faith of withdrawing his waiver of the constitutional right to have the penalty phase in the county where the offense occurred. It was error to deny the withdrawal of the waiver.*

B. Resentencing Proceeds De Novo

As noted above, it was error to deny Appellant's withdrawal of his waiver. In addition, the venue for Appellant's resentencing should have been in St. Lucie County because resentencings proceed de novo on all issues. This Court has made it clear that resentencings proceed de novo:

> Resentencing should proceed de novo on all issues ... a prior sentence, vacated on appeal, is a nullity.

Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986); King v. Dugger, 555 So. 2d 355, 358 (Fla. 1990). Thus, after reversal for a new penalty

[5] St. Lucie County has a black population of 16.3%, while Indian River County has a black population of 8.6%. 1990 U.S. Census Data.

phase in this case, the venue should be in St. Lucie County. For example, in Nunes v. Margate General Hosp., Inc., 435 So. 2d 916, 917-18 (Fla. 4th DCA 1983), the right to a jury trial had been waived and there was a subsequent reversal on appeal. The appellate court held that the defendant should be afforded the opportunity to make the choice anew as to have a jury or non-jury trial. The case of Simpson v. State, 418 So. 2d 984 (Fla. 1982) also demonstrates this point. Willie Simpson killed a police officer in Palm Beach County. 418 So. 2d at 984 (Delray Beach). The trial was moved to Duval County. 418 So. 2d at 984. Simpson was convicted and he appealed to the Florida Supreme Court. Id. Simpson's conviction was reversed on appeal and a new trial was ordered. 418 So. 2d at 987. The new trial took place in the county where the crime occurred -- Palm Beach County. Simpson v. State, 474 So. 2d 384 (Fla. 4th DCA 1985) (Simpson convicted for second degree murder). Another example is the case of Gore v. State, 475 So. 2d 1205 (Fla. 1985) where the murder occurred in Indian River County but venue was moved to Pinellas County. A resentencing was later ordered. The de novo sentencing occurred in Indian River County where the crime occurred. Gore v. State, 706 So. 2d 1328 (Fla. 1997).

Likewise, where this case was reversed and sent back for a de novo penalty phase Appellant should again have the choice of having a new penalty phase where the crime occurred (St. Lucie County). This cause must be reversed and remanded for a new penalty phase.

POINT II

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO A MOTION TO COMPLY WITH A MENTAL HEALTH EXAMINATION WHICH FAILED TO COMPLY WITH RULE 3.202 OF THE FLORIDA RULES OF CRIMINAL PROCEDURE.

Appellant was arraigned in 1991. He was later convicted and sentenced to death. On appeal a new sentencing proceeding was ordered. The mandate for the resentencing issued on December 14, 1995 R400. Florida Rule of Criminal Procedure 3.202 became effective on January 1, 1996. The state filed a notice of intent to seek the death penalty on June 4, 1996 R487. Appellant objected to the compelled mental examination on the ground that the state failed to timely file its notice of intent to seek the death penalty within the 45 days required by Rule 3.202 SR3. Noting that the rule became effective on January 1, 1996, the trial court overruled Appellant's objection SR23. This was error.

As Rule 3.202(a) makes clear, the triggering event for a compelled mental examination is the state's filing of a notice of intent to seek death within 45 days of arraignment:

> (a) Notice of Intent to Seek Death Penalty. The provisions of this rule apply only in those capital cases in which the state gives written notice of its intent to seek the death penalty within 45 days from the date of arraignment. Failure to give timely written notice under this subdivision does not preclude the state from seeking the death penalty.

(emphasis added).[6] Obviously, the state failed to file its written notice within 45 days of arraignment. Even if it is argued, contrary to the express wording of the statute, that the date of the arraignment should not be used because the rule was not in effect at that time, the state's notice of intent to seek death was still untimely. The state never filed its notice within 45 days of this Court's mandate (December 14, 1995) for resentencing which arguably could be deemed equivalent to an arraignment for the purpose of resentencing. Nor did the state file the notice within 45 days of the effective date of the rule on January 1, 1996 -- which requires the filing to be within 45 days. Instead, the state's notice was filed in June of 1996 which was clearly untimely under any calculation.

Because the triggering event for a compelled mental evaluation never occurred -- the timely filing of a notice of intent to seek the death penalty -- it was error to grant the state's motion to compel a mental health examination over Appellant's objection. This cause must be remanded for a new resentencing.

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[6] As noted above, the failure to file such a notice within 45 days does not preclude the seeking of the death penalty -- it merely precludes a compelled mental examination.

POINT III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR CONTINUANCE.

This case was set for sentencing on December 9, 1996. On November 30, 1996, Appellant was notified by the state of its witnesses -- Dr. Martell and Dr. Mayberg R575;T172. The prosecution represented that Dr. Martell would not examine Appellant until December 6, 1996 R538-39. On December 3, 1996, Appellant filed for a continuance in order to depose the witness and research his background and to be ready to address or rebut his testimony R545-547. Appellant renewed his motion for continuance on hearings on December 3, 1996, and December 6, 1996 SR25-26,30;T204. Appellant's motions were denied SR30,214-215. On the day of the penalty phase, December 9, 1996, Appellant renewed his motions for continuance, or alternatively to strike Drs. Martell and Mayberg as witnesses, and informed the court that he had been ready to go to trial but needed to prepare for the added witnesses before he could give his opening statement to the jury:

> MR. UDELL: ... We're seeking a continuance because they have only recently listed their witnesses. We're ready. In the

absence of these witnesses who were just listed, we're ready. Now I'll be real surprised if you ask Mr. Mirman, and he knows whether I've delayed these tests being done, I think he'll be the first to tell you Mr. Udell's run up and down St. Lucie County two dozen times in the last month getting orders to transport. These SPECT scans, the PET scans, the MRI's just don't get done magically when you've got an inmate. Especially one under these circumstances. We have tried to get this done quicker than we did. It wasn't our fault. The last test got canceled because it was set a month ago. Literally Billy -- literally Billy was in the car on his way down to have the test in Miami when we get a call from Miami saying that the barium or whatever it is that they inject him with is in Tampa and it's raining and the plane can't take off. So we literally had to get on the phone to the sheriff's office and say, turn around. We haven't delayed this. We have done everything we could to get these tests done in a timely fashion and, in fact, they're all done. I don't doubt that they have been prejudiced by the fact that, well, they couldn't ask Lipman what's your opinion because he hasn't seen some of the test results. It sounds like they're asking for a continuance, too....

And even if it's true that we haven't given them something which they're entitled to which we haven't, it doesn't change the fact that Mr. Kearse is being prejudiced. His lawyer is to be picking a jury on a capital case and has no idea what to tell this jury what the State's witnesses are going to say.

Judge, I ask you for a week, we'll do it during Christmas, we'll do it at night, but I need to know, I need to take the deposition of Dr. Martell and Dr. Mayberg before we pick the jury, before we do opening statement, and before I can do what I need to research their background, what they have published, what they have testified to before so I can ask them questions at deposition. Not in trial for the first time. I don't want to inform this jury, for first time take Dr. Martell through 1,500 pages, ask which ones he relied on to effect his opinion, I want to know that now.

Judge, personally the last thing I want to do is continue this case. I've cleared my calendar for these two weeks, did nothing but this case for the last two weeks, I've done nothing but lose sleep for the last two weeks. I want to try this case as much as anybody and I think Mr. Kearse is entitled to competent Counsel, effective Counsel and therefore request either one, either continue the case and/or alternatively strike Dr. Mayberg and Dr. Martell as witnesses. Nothing further.

T201,204-05. The trial court recognized that normally a case is not ready to be tried where there is a newly listed witness because there is a right to depose the witness and prepare for his testimony, but Rule 3.202 contemplated everything being done without preparation and denied the continuance:

> THE COURT: I recognize that normally an issue such as this where there's an examination by a new doctor and the right to depose that doctor and then get rebuttal witnesses and then to depose them might normally mean that the case wasn't ready for trial. But again, as I say, the fact that this rule contemplates all of this being done rapidly.... But I seem -- what I seem to be hearing both sides hearing they want more and they want to do more. So as far as I can see, there is no grounds for continuance on the expert testimony issue.

T212-13. The trial court did not deny the continuance because it was not needed.

The general rule is that granting or denying a motion for continuance is within the discretion of the trial court. Wike v. State, 596 So. 2d 1020 (Fla. 1992). However, it is an abuse of discretion to deny a short and reasonable continuance due to the opposing party's recent disclosure of a witness. Brown v. State, 426 So. 2d 76 (Fla. 1st DCA 1983); Smith v. State, 525 So. 2d 477 (Fla. 1st DCA 1988).

In Smith, supra, the Court noted that there is a palpable abuse of discretion where a continuance is denied which infringes on counsel's right and opportunity to investigate and also noted that adequate time to investigate is a right "inherent in the right to counsel":

> The common thread running through those cases in which a palpable abuse of discretion has been found, is that defense counsel must be afforded an adequate opportunity to investigate and prepare any applicable defense. *Loren v. State*, 518 So. 2d at 346; *Brown v. State*, 471 So. 2d 9 (Fla. 1983), disapproved on other grounds by *Bundy v.* State, 471 So. 2d 9 (Fla. 1985)*; Harley v. State*, 407 So. 2d 382 (Fla. 1st DCA

1981). Adequate time to prepare a defense is a right that "is inherent in the right to counsel."

525 So. 2d at 479.

In Smith, ten days prior to sentencing the defendant was notified through discovery of the intent to use psychologist Dr. Trisha Biggers as a witness. 525 So. 2d at 478. Smith sought a continuance at sentencing in order to depose Biggers and investigate her report. 525 So. 2d at 478-79. The trial court denied the continuance noting that 9 days was sufficient for a deposition and the continuance had only been requested on the day of sentencing. 525 So. 2d at 479. The appellate court held that the trial court had abused its discretion in denying the continuance noting that the defense had been given but 1 day of actual notice that Dr. Biggers would be called as a witness and that there was insufficient time to adequately depose and investigate Dr. Biggers and her findings. 525 So. 2d at 480. The error was deemed harmful where the trial court's sentencing decision could have been influenced by Dr. Biggers. 525 So. 2d at 480.

In this case, the denial of the continuance was even more important than in Smith. In this case Appellant moved for continuance 3 days before sentencing; whereas Smith moved for a continuance on the day of sentencing. In this case, Appellant only received the supple-mental discovery listing two experts 3 days prior to sentencing; whereas Smith had 10 days notice. Moreover, in this case the expert would not even examine Appellant until 3 days prior to trial R538-39. In this case, Appellant never received any actual notice that Dr. Martell was going to be called as a witness;[7] whereas Smith had at least a one day notice.

[7] In fact, the state's other expert, Dr. Mayberg, was never called as a witness in this case.

In this case the continuance was needed to fully depose and investigate Dr. Martell who the state relied on for rebutting the two important statutory mitigating circumstances. In other words, the continuance in this case meant the difference between life and death whereas in Smith the continuance was the possible difference in a departure sentence of approximately 5 years. Appellant is entitled to at least the same right to adequate investigation of a state expert in a death penalty case as Smith had in a case involving a lesser sentencing situation.

In Brown v. State, 426 So. 2d 76, 80 (Fla. 1st DCA 1983), the Court also noted the importance of the right to investigate and that "it is founded on constitutional principles of due process and cast in the light of notions of a right to a fair trial." *In Brown, the defense was not informed of a hypnosis session until 3 days before trial. 426 So.2d 81. Defense counsel did not have an opportunity to depose the police hypnotist until the day before trial. 426 So. 2d at 81. The appellate court held that due process demanded a fairer means to prepare a defense and particularly noted the importance of investigating experts:*

> Surely, due process demands that counsel be afforded a fairer means by which to prepare his defense to this critical evidence. In discussing the use of information gained from scientific techniques that has been placed into evidence, Professor Paul C. Giannelli of Case Western Reserve University, notes:
>
> > Effective cross-examination and refutation presuppose adequate notice and discovery of the evidence the opposing party intends to introduce at trial.... Securing the services of experts to examine evidence, to advise counsel, and to rebut the prosecution's case is probably the single most critical factor in defending a case in which novel scientific evidence is introduced.
>
> Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later,* 80 Colum.L.Rev. 1197, 1240, 1243 (1980).

426 So. 2d at 81.

The Court held it was a palpable abuse of discretion to deny the motion for continuance. 426 So. 2d at 81.

Likewise, it was an abuse of the discretion to deny Appellant's motion for continuance. The denial of a continuance denied Appellant due process and a fair and reliable sentencing in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

POINT IV

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). Because death is a unique punishment, it is to be imposed only "for the most aggravated, the most indefensible of crimes." State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973).

The nature of the instant killing does not make it one of the most aggravated and indefensible of crimes to warrant the death penalty. Appellant went out, not looking for trouble or to commit a crime, to get a pizza on the night of the incident. Appellant was stopped on a routine traffic matter. He panicked. Appellant and the officer struggled for the officer's gun. Appellant, still in a panicked state, shot the officer. The victim's status as a police officer does not justify the death penalty. Songer v. State, 544 So. 2d 1010 (Fla. 1989). The killing in this case was, if anything, less aggravated than the killing of police officers in other cases where the death sentence was vacated and life was imposed. See Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988) (defendant took hostages and stated that he would shoot the police, when the police arrived the defendant killed two officers); Brown v. State, 526 So. 2d 903 (Fla. 1988) (defendant ordered out of car by officer, as officer tried to cuff the defendant, the defendant jumped him and the two men struggled, the defendant shot the officer who then said "please don't shoot", defendant then killed the officer with two shots -- life imposed); Washington v. State, 432 So. 2d 44 (Fla. 1983) (defendant pointed gun at officer and told him to freeze, defendant then fired four bullets into officer). Nor does the fact that the victim was shot multiple times set the instant offense apart from other capital cases so as to call for the death penalty. See

Robertson v. State, 611 So. 2d 1228 (Fla. 1993); Shere v. State, 579 So. 2d 86, 89 (Fla. 1991) (one shot fired, then 5 or 6 shots, then 2 shots to head and one to the heart); McKinney v. State, 579 So. 2d 80 (Fla. 1991) (7 gunshot wounds plus 2 lacerations). While the nature of the killing certainly does not excuse the crime, it is clear that the manner of the crime is not the most aggravated type for which the unique punishment of death is reserved.

In addition, the quality of the mitigators and aggravators shows that, in comparison to the other cases, the death sentence is not proportionally warranted. Although there were two aggravating circumstances found by the trial court in this case,[8] the trial court found that one was so insignificant that it essentially had no weight. In finding the aggravator that the crime was committed during the commission of a robbery, § 921.141(5)(d), the trial court noted only that technically did Appellant's actions constitute a robbery and that the weight of this circumstance was diminished because the taking was not a planned activity such as occurs in a purse snatching or holdup:

> The evidence shows that Defendant forcibly took Office Parish's service pistol, turned that weapon on the officer and killed him. Even though the Defendant may have been motivated by his desired to avoid arrest when he took the gun, the incident still constituted a robbery under the definition of that offense. The taking was not incidental to the killing. The Supreme Court so ruled in the prior appeal and also found that this circumstance did not constitute doubling. The Court finds that this aggravator has been proven beyond a reasonable doubt. Its weight, however, is diminished somewhat as stealing the officer's pistol was "not a planned activity" such as occurs in a purse snatching or a holdup. While technically defendant's actions constituted robbery, the reality is that defendant took the

[8] The trial court found the aggravators that the offense was during the commission of a felony and the law enforcement aggravators which were merged into one aggravator R706-707.

> weapon to effect the killing and then kept it to conceal the fingerprints and other evidentiary matters is presented.

R706 (emphasis added). As the trial court also noted, the taking of the gun was to shoot the officer which in turn was to avoid being arrested. While this Court had held that this technically does not double with the aggravator of avoid arrest, in practical terms the reason to take the gun (i.e. the robbery) was to avoid arrest. In practical terms this during the course of a robbery aggravator is so intertwined and so part of the avoid arrest aggravator that it deserves no additional consideration. There is only one real aggravating circumstance in this case -- that Appellant panicked and grabbed an officer's gun and shot him while the officer was trying to arrest him. This one rapid incident reflects the total aggravation in this case. There was a lifetime of mitigation leading up to this incident. Under the totality of the circumstances, it cannot be said that this is one of the most aggravated and least mitigated cases for which the death penalty is reserved.

In addition, this Court has consistently held that one aggravating circumstance will not support a death sentence where mitigating circumstances are present. E.g. Clark v. State, 609 So. 2d 513 (Fla. 1992); McKinney v. State, 579 So. 2d 80, 85 (Fla. 1991); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); Songer v. State, 544 So. 2d at 1011; Smalley v. State, 546 So. 2d 720, 723 (Fla. 1989); Rembert v. State, 445 So. 2d 337 (Fla. 1984). Because one aggravating circumstance only technically existed, the same rule should apply in this case. Appellant's life should not be lost on the basis of a technicality which creates an aggravating circumstance.

The mitigation in this case was substantial, it cannot be said that this is an unmitigated crime for which the death penalty is reserved. The evidence showed that the offense was committed while Appellant was

under the influence of a mental or emotional disturbance. Emily Baker, an expert in panic disorders T2095, testified that Appellant suffers from a panic disorder T2095. Appellant does not have the ability to reason clearly and look at his options T2125. Due to deficits consistent with brain damage, Appellant tends to be impulsive T2125. Dr. Petrilla testified that duress aggravates Appellant's problems T2170. More problems occur because he is excitable and a lack of skills are detrimental to him T2170. People with Appellant's emotional and mental problems do not act in a manner which conforms to the situation which they are placed in T2172. Appellant tends to react without thinking T2195.

In addition, Appellant's age was 18 years, 3 months, but his emotional and functioning level was much less. Throughout his life Appellant essentially functioned at a retarded or near retarded level T1786,2033,2037,2124,2155. Appellant went to schools for severely emotionally handicapped children T2034,1757,1823, because he was severely emotionally handicapped T1760,2033. Even at this level of school he was administratively advanced rather than being advanced due to learning T2038-40,1765,1768. At the age of 13, Appellant was functioning at a third for fourth grade level T2034. Appellant even had to repeat both the first and second graded for severely emotionally handicapped children T1765,1768. At the age of 13, Appellant was functioning at the level of an 8 year old T1782. As time passed, Appellant's dysfunction was increasing T1782. Appellant took a wide range achievement test which he scored at the bottom 1 percent T1785. Appellant had a lot of difficulty receiving, integrating, and sequencing information given to him T2155. When Appellant was eighteen years old he had the reading and spelling skills of a third grader T2174. In

summary, Appellant's emotional and functioning level was much less than an 18 year old.

In addition, the trial court found 33 non-statutory mitigating circumstances some of which are very significant R708-709. These include mitigators 5 and 7-39 proposed by the defense R691-692, which include but are not limited to, the following. "Defendant's behavior at trial was acceptable" which is important. "Low IQ impulsive and unable to reason abstractly" and "Mildly retarded and functioned at a third or fourth grade level." These are important mitigating factors.

The trial court accepted as mitigation that "The defendant was severely emotionally handicapped" and has "Mental, emotional and learning disabilities." Obviously, this is very powerful mitigation.

The trial court also found that Appellant had a "Difficult childhood", an "Impoverished background" and an "Improper upbringing." The difficult/abusive childhood offers an insight as to what went on in Appellant's life and how it resulted in tragedy. In Hegwood v. State, 575 So. 2d 170 (Fla. 1991), this Court recognized how very significant this type of mitigation can be:

> A great part of Hegwood's ill-fated life appears to be attributable to his mother, described by witnesses as a hard-drinking, lying drug addict and convicted felon who tended to abandon her children and who turned Hegwood in and testified against him, apparently motivated by the reward money offered in this case. Based on the mental health expert's testimony the jury may have believed that Hegwood was mentally or emotionally deficient because of his upbringing.

575 So. 2d at 173. This evidence is even more mitigating because it shows how Appellant could have become mentally and emotionally deficient due to his upbringing. Appellant never had anyone to show him how to deal with difficulties properly. The trial court found as mitigation that Appellant was "Raised in a dysfunctional family". In other words,

Appellant was never provided the emotional support from his parents that was required to evolve into a healthy individual. This is further borne out by the trial court's finding as mitigation that Appellant had an "Alcoholic mother" and that there was "Neglect by mother."

The trial court also found that Appellant's "Father died when Defendant was young and he grew up without a male role model" and thus there was "No opportunity to bond with [his] natural father." This Court has recognized this as mitigating. Sinclair v. State, 657 So. 2d 1138 (Fla. 1995).

The trial court also accepted as mitigation in this case that Appellant was "subjected to physical and sexual abuse" and that he suffered "Childhood trauma."

Finally, the trial court found that Appellant "was malnourished" and that his "Mother gave up on Defendant at an early age and raised himself in the streets" as mitigating factors in this case. The mitigating factors in this case take this case from the arena of the most aggravated and least mitigated for which the death penalty is reserved.[9]

In Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988), this court held that the presence of the two statutory mental mitigating factors plus the defendant's low emotional age lifted the case from the

[9] Other mitigating circumstances found by the trial court that are not mentioned above include: "Defendant came from a broken home and raised in poverty"; "Socially and economically disadvantaged"; "Severely emotionally disturbed child"; "Delayed developmental milestones"; "Impoverished academic skills"; "Impaired memory"; "Slow learner and needed special assistance in school"; "Developmentally learning disabled"; "Poor auditory short-term memory"; "Lower verbal intelligence"; "Deficits in visual and motor performance"; "Impaired cognitive flexibility"; "Impaired problem solving ability"; "Difficulty with perceptual organizational ability and poor verbal comprehension."

"unmitigated" cases that the death penalty is reserved for and reduced the sentence to life imprisonment:

> Thus, the trial judge's findings of the mitigating circumstances of extreme emotional or mental disturbance, substantially impaired capacity to conform conduct, and low emotional age were supported by sufficient evidence. In contrast, the aggravating circumstances of heinous, atrocious and cruel, and cold, calculated and premeditated are conspicuously absent. Fitzpatrick's actions were those of a seriously emotionally disturbed man-child, not those of a cold-blooded, heartless killer. We do not believe that this is the sort of "unmitigated" case contemplated by this Court in *Dixon*. Indeed, the mitigation in this case is substantial.

512 So. 2d at 512. Likewise, Appellants actions were the result of a panicked, severely emotionally handicapped 18-year-old, and not those of a cold-blooded, heartless killer. As additional reasons for holding death to be disproportionate this Court has found the defendant's dysfunctional family life, which included beatings and neglect, combined with youth and immaturity effectively make the death penalty proportionally unwarranted. Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988). Like in Livingston, Appellant had a very dysfunctional family life. Appellant was abandoned at the age of three, his mother rejected him causing him to be malnourished and roaming the streets foraging for himself T1986,2015. When his mother did attend to Appellant, it was through beatings with an extension cord and coat hangers T2056. Like in Livingston, Appellant was young and his intellectual functioning was marginal. Appellant's chronological age was 18 years, 3 months, but his functioning age was much less. Throughout his life Appellant functioned at a retarded level and tested low intellectually. At the age of 8, Appellant had a verbal IQ of 74 and a full scale score of 78 T2124. At the age of 13, Appellant tested at the age of 5 to 8 T1782. At the age of 18, Appellant scored lower

than 99% of his age group in tests measuring his ability to integrate information T1785. The record is replete with other tests and findings as to Appellant's functioning well below his chronological age T1765,1768,1782. As mentioned above, Appellant's brain dysfunction and emotional handicaps combined to create a mental or emotional disturbance. This is not one of the most unmitigated cases for which the death penalty is reserved. Appellant's death sentence must be vacated.

POINT V

THE TRIAL COURT ERRED IN FAILING TO EXPRESSLY EVALUATE THE MITIGATION IN ITS SENTENCING ORDER.

In its written sentencing order the trial court did a summary evaluation of 34 mitigating circumstances as follows:

> Items 6 through 39 are a laundry list of factors that essentially relate to defendant's difficult childhood and his psychological and emotional condition because of it. While the Court finds that the greater weight of the evidence does not establish fetal alcohol effect -- or organic brain damage, there was evidence regarding the remaining conditions and the Court has considered individu-ally and will give some weight to each of these suggested factors.

R709.

In Hudson v. State, 23 Fla. L. Weekly S71, 72 (Fla. Feb. 5, 1998), this Court explained that summary analysis of mitigation was improper and that because the weighing process had not been detailed in the written sentencing order, this Court could not perform a meaningful review of the sentencing order:

> As Hudson alleges in his second issue, this summary analysis of both statutory and nonstatutory mitigation plainly does not evaluate in writing the evidence presented or explain the

reason for the trial court's weighing of the mitigation evidence. Thus, this sentencing order is in violation of our *1990* decision in *Campbell v. State,* 571 So. 2d 415 (Fla. 1990). We repeat here the sentencing requirements we reiterated in *Walker v. State*, 22 Fla. L. Weekly S537 (Fla. Sept. 4, 1997):

> Since the ultimate penalty of death cannot be remedied if erroneously imposed, trial courts have the undelegable duty and solemn obligation to not only consider any and all mitigating evidence, but also to "expressly evaluate in [their] written order[s] each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence." *Campbell*, 571 So. 2d 367, 371 (Fla. 1995) (reaffirming *Campbell* and establishing enumerated requirements for treatment of mitigating evidence).
>
> This bedrock requirement cannot be met by treating mitigating evidence as an academic exercise which may be summarily addressed and disposed of. To clarify *Campbell*:
>
> > This evaluation must determine if the statutory mitigating circumstance is supported by the evidence and if the nonstatutory mitigating circumstance is truly of a mitigating nature. A mitigator is supported by evidence if it is mitigating in nature and reasonably established by the greater weight of the evidence. Once established, the mitigator is weighed against any aggravating circumstances. It is within the sentencing judge's discretion to determine the relative weight given to each established mitigator; however, some weight must be given to all established mitigators. *The result of this weighing process must be detailed in the written sentencing order and supported by sufficient competent evidence in the record. The absence of any of the enumerated requirements deprives this Court of the opportunity for meaningful review.*
>
> *Ferrell*, 653 So. 2d at 371 (emphasis added). Clearly then, the "result of this weighing process" can only satisfy *Campbell* and its progeny if it truly comprises a thoughtful and comprehensive analysis of any evidence that mitigates against the imposition of the death

> penalty. We do not use the word "process" lightly. If the trial court does not conduct such a deliberate inquiry and then document its findings and conclusions, this Court cannot be assured that it properly considered all mitigating evidence. In such a situation, we are precluded from meaningfully reviewing the sentencing order. *Id*. Since that is precisely the case here, we must vacate the sentence of death and remand for proper evaluation and weighing of all nonstatutory mitigating evidence....

This Court vacated Hudson's death sentence because there had not been a sufficiently detailed written evaluation given to Hudson's childhood and family background.[10]

In this case there was even less analysis of 34 mitigating factors which related to, but not limited to, such items as Appellant's low *IQ and inability to reason abstractly; Appellant's being a severely emotionally handicapped person; his impoverished background and neglect by his mother; Appellant's being malnourished and living on the streets; and the fact that Appellant had been subjected to abuse. As noted above the trial court merely performed a summary analysis of these mitigating circumstances.*

Jackson v. State, 22 Fla. L. Weekly S690, 692 (Fla. Nov. 6, 1997), is another good example of the failure to explain the mitigating factors

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[10] The evaluation was as follows:

> There was testimony concerning defendant's earlier years and family background and, though unfortunate, the court finds that this testimony did not establish anything substantial or extraordinary. It was established by the evidence, however, that the defendant cooperated with the police in locating the body of the victim and the court finds this to be a single non-statutory mitigating circumstance.

23 Fla. L. Weekly at S72.

where the trial court merely lists the mitigators before accepting or rejecting them:

> *The sentencing order also fails to adequately address the nonstatutory mitigating circumstances. The order merely lists the nonstatutory mitigators before rejecting them. The order should address the relevant testimony and explain why the experts' testimony, in conjunction with the testimony of Jackson's family and friends, does not support the nonstatutory mitigators the court rejects. Additionally, because the court rejects the statutory mental mitigators, the order should explain why the evidence offered by the experts does not amount to nonstatutory mental mitigation.*
>
> *To ensure meaningful review in capital cases, trial courts must provide this Court with a thoughtful and comprehensive analysis of the mitigating evidence in the record.*

22 Fla. L. Weekly at S692. In the present case, the trial court did not even bother to list the mitigators before summarily giving them some weight.

More importantly, in Jackson, supra, this Court explained that because the trial court rejected the statutory mental mitigating circumstances its "order should explain why the evidence offered by the experts does not amount to nonstatutory mental mitigation." 22 Fla. L. Weekly at S692. In the present case, the trial court emphasized that he was rejecting any emotional or mental disturbance because it was not "extreme" R708.[11] However, the trial court never explained if or why the evidence demonstrated nonstatutory mental mitigation as he is required to do as exemplified by Jackson. The trial court's order denied Appellant's rights under the Fifth, Sixth, Eighth and Fourteenth

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[11] Specifically, the trial court indicated:

> "While the experts who testified disagreed, the court finds that any mental or emotional disturbance was not "extreme" R708.

Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

This cause must be remanded for resentencing.

POINT VI

THE TRIAL COURT ERRED IN FAILING TO EVALUATE THE NONSTATUTORY MITIGATING CIRCUMSTANCE OF EMOTIONAL OR MENTAL DISTURBANCE.

In Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990) this Court held it was error to restrict the mitigating circumstance of emotional or mental disturbance by use of a modifier such as "extreme" despite its presence in the statutory language:

> Florida's capital sentencing scheme does in fact require that emotional disturbance be "extreme." However, it clearly would be unconstitutional for the state to restrict the trial court's consideration solely to "extreme" emotional disturbances. Under the case law, any emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say. *Lockett; Rogers.* Any other rule would render Florida's death penalty statute unconstitutional. *Lockett*.

568 So. 2d at 912.

In Jackson v. State, 22 Fla. L. Weekly S690, 692 (Fla. Nov. 6, 1997), this Court further explained that because the trial court rejected the statutory mental mitigating circumstances its "order should explain why the evidence offered by the experts does not amount to nonstatutory mental mitigation." 22 Fla. L. Weekly at S692.

In the present case, the trial court emphasized that he was rejecting any emotional or mental disturbance because it was not

"extreme" R 708.[12] However, the trial court never explained if or why the evidence demonstrated nonstatutory mental mitigation as he is required to do as exemplified by Jackson. The trial court's order denied Appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

This cause must be remanded for resentencing.

[12] Specifically, the trial court indicated:

> "While the experts who testified disagreed, the court finds that any mental or emotional disturbance was not "extreme" R708.

POINT VII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISQUALIFY THE PROSECUTOR.

As noted in Point I, over Appellant's objections the penalty phase was not held in St. Lucie County where the crime occurred. The penalty phase was held in Indian River County. The prosecutor (David Morgan) who would be trying the penalty phase had been elected a judge by the voters of Indian River County only a few weeks prior to the penalty phase. Appellant moved to disqualify Judge Morgan from prosecuting the penalty phase due to the fact that he would be advocating to his constituents who had recently elected him T143-146. The trial court denied the motion T149. This was error.

This Court has indicated that the appearance of impropriety may require the disqualification of the prosecutor from a case and that such disqualification is to be determined on a case-by-case basis:

> Bogle argues that, under these circumstances, the trial judge erred in allowing the state attorney's office of the Thirteenth Judicial Circuit to prosecute him at the second penalty phase proceeding.... We have stated that the appearance of impropriety created by certain situations may demand disqualification, we have evaluated such situations on a case-by-case basis.

Bogle v. State, 655 So. 2d 1103, 1105 (Fla. 1995).

In the present case there certainly would be an appearance of impropriety by allowing Judge Morgan to prosecute the penalty phase to voters who had recently elected him to the bench. There is an appearance of impropriety by having Judge Morgan argue to his

constituents that Appellant be sentenced to death. In being a newly elected judge in Indian River County, Judge Morgan carried a certain status in the eyes of the community. In the eyes of the jury, a judge carries the aura of being impartial and aloof from an interest in the outcome of the proceedings. Due to the jury's view of the judge, judges cannot do anything that can be construed as advocacy in a case:

> The very status of the judge as interrogator inevitably means that the answers given by the witness will assume an importance in the mind of jurors otherwise lacking if counsel instead asked the questions.

Moton v. State, 659 So. 2d 1269, 1270 (Fla. 4th DCA 1995). It has been particularly noted how juries see a person who is a judge as someone who is highly credible:

> Any remarks and comments that the judge makes are listened to closely by the jury and are given great weight. Because of the credibility that the comments are given and because they would likely overshadow the testimony of the witnesses themselves and of counsel....

Ehrhardt, Florida Evidence, 1998 edition, § 106.1, p.33. A jury, viewing judges as neutral, would not believe that their newly elected judge would be asking them to sentence a person to death unless it was the right thing to do. This fact is particularly worrisome where a jury's recommendation is deemed to be the conscience of the community and one of the elected leaders of the community is advocating death. Jurors "serve as democratic representatives of the community, expressing the community's will regarding the penalty to be imposed." Stevens v. State, 613 So. 2d 402, 403 (Fla. 1992). The trial court constitutes an elected neutral official of the community and, as such, Judge Morgan's advocacy for the death penalty has an appearance of impropriety in this case.

In addition, the appearance of impropriety can have a negative impact on the adversary system in addition to the defendant's confidence in the system:

> Our adversary system hangs on the slender threat of the integrity of the lawyer. Weaken or damage that threat or the confidence that the people repose in it and the system is destroyed. That very integrity is perhaps the single most important ingredient in the moral fiber of the lawyer. It must never be breached or compromised. The lawyer makes the system work and without him and his functions the system would collapse. Nor can the system survive when its judges fail to embody integrity, impartiality and justice. In this regard, the burden on judges exceeds that on lawyers to avoid even the appearance of impropriety.
>
> * * *
>
> What confidence in the impartiality of the judiciary will a defendant in a criminal case have when he appears before the judge knowing that as a lawyer the judge secretly conferred with the prosecutor in a case which was being defended by his firm and counseled the prosecutor on how to obtain a conviction in that very type of case? Will he not, with some reason, feel that the judge's sympathies are still with the prosecutor?

In re Speiser, 445 So. 2d 343, 344-345 (Fla. 1984) (Ehrlich, J., dissenting). Likewise, what confidence in the integrity of the adversary system could the public and Appellant have when Appellant is being prosecuted by a man who has recently been elected judge by the people who are going to pass judgment on whether Appellant is going to live or die.[13]

Finally, even elected judges who have not yet taken the bench have the responsibility to conduct themselves to avoid any appearance of impropriety, to further confidence in the integrity of the adversary system, and to close out their activities so as to promote these goals.

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[13] See Cannon 2A of the Code of Judicial Conduct (A judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary).

In re Davey, 645 So. 2d 398 (Fla. 1994); In re Speiser, 445 So. 2d 343 (Fla. 1984). Thus, Judge Morgan had the responsibility of not taking on new adversarial functions once he had been elected judge.[14] This is especially true in a capital case. Judge Morgan should have given the case to his co-counsel to try instead of prosecuting the penalty phase himself.

Appellant was denied due process and a fair and reliable sentencing in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

For the reasons stated in this point, Appellant's death sentence must be reversed and this cause remanded for a new penalty phase.

POINT VIII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AFTER THE PROSECUTOR MADE IMPROPER AND INFLAMMATORY REMARKS WHICH RENDERED THE PENALTY PHASE UNFAIR AND VIOLATED

[14] Cannon 5G of the Code of Judicial Conduct dictates that a judge shall not practice law. See also In re Piper, 271 Or. 726, 534 P.2d 159 (1975) (reprimand of judge who continued law practice by finishing work undertaken previously). Again, an elected judge's conduct falls under the Code of Judicial Conduct. In re Piper, supra; Cannon 7E (successful candidate).

APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 17 OF THE FLORIDA CONSTITUTION.

It is axiomatic that a prosecutor may not make statements calculated to arouse passions and prejudice. Viereck v. United States, 318 U.S. 236, 247, 63 S.Ct. 561, 566, 87 L.Ed.2d 734 (1943). As the United States Supreme Court stated long ago:

> [W]hile [the prosecuting attorney] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

The Supreme Court's admonition applies with particular force in a capital sentencing proceeding: "Because of the surpassing importance of the jury's penalty determination, a prosecutor has a heightened duty to refrain from conduct designed to inflame the sentencing jury's passions and prejudices." Lesko v. Lehman, 925 F.2d 1527, 1541 (3d Cir.), cert. denied, 502 U.S. 898, 112 S.Ct. 273, 116 L.Ed.2d 226 (1991); see also Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984) ("it is of critical importance that a prosecutor not play on the passions of a jury with a person's life at stake"), cert. denied, 471 U.S. 1107, 105 S.Ct. 2344, 85 L.Ed.2d 858 (1985). As this Court repeatedly has stated, arguments "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985); see also Garron v. State, 528 So. 2d 353, 359 (Fla. 1988) (when "comments in closing argument are intended to and do inject

elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument").

Appellant filed various motions to preclude the prosecution from making inflammatory, prejudicial remarks to the jury -- specifically seeking to prohibit the prosecutor from comment that the jury should show the defendant the same mercy he showed the victim R483-484.

However, the prosecutor directly told the jury that the bottom line is that they were seeking justice for the victim and the jury should give Appellant the same mercy he showed the victim in deciding whether he should live:

> MR. MORGAN: ... We are here because the Defendant wants to live, even though he denied that right to Officer Parrish. The bottom line, Ladies and Gentlemen, is we're here seeking justice on behalf of Officer Danny Parrish. A voice we're going to bring from you six years ago demand justice. We are here asking you to show this Defendant the same mercy he showed Officer Parrish, except in this courtroom it will be in accordance with the law.

T 1149. Appellant moved for a mistrial which was denied T 1150-1151.

Clearly, the prosecutor's remarks were improper and highly prejudicial. Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Richardson v. State, 604 So. 2d 1107 (Fla. 1992). *In Rhodes, this Court said, regarding a similar plea by the prosecutor:*

> *Finally, the prosecutor* concluded his argument by urging the jury to show Rhodes the same mercy shown to the victim on the day of her death. This argument was an unnecessary appeal to the sympathies of the jurors, calculated to influence their sentence recommendation.

Id. at 1206.

In Richardson, this Court, citing Rhodes, agreed that "the state committed error in asking the jury to show Richardson as much pity as he showed his victim." Richardson, at 1109.

Such a comment, essentially asking the jury to disregard the law and recommend death simply amounted to prejudicial error in this case because it precluded the jury from rationally considering what recommendation they should make. Rutherford v. Lyzak, 698 So. 2d 1305 (Fla. 4th DCA 1997). Sentencing hearings naturally tend to evoke an emotional response from juries, and that is why the final decision on what punishment a defendant receives rest with the more experienced court. State v. Dixon, 283 So. 2d 1 (Fla. 1973). Thus, improper penalty phase closing arguments more readily become fundamentally wrong because jurors' sympathies and passions easily slip from their restraints, and find easy expression with a death recommendation. Such was the case here.

This cause must be remanded for a new sentencing free from prejudicial comments that the bottom line of the sentencing hinged on whether the jury showed Appellant the same mercy he showed the victim.

POINT IX

REPEATEDLY INFORMING THE JURY OF THE FACT THAT AN APPELLATE COURT HAD AFFIRMED THE CONVICTION BUT HAD SENT THE CASE BACK FOR RECOMMENDATION OF A DEATH SENTENCE DEPRIVED APPELLANT OF A FAIR AND RELIABLE SENTENCING.

On 3 separate occasions the trial court informed the jury that Appellant had been found guilty by another jury and that an appellate court had reviewed his case and had remanded the case for resentencing

T304,523,1137. By emphasizing this instruction 3 times, the jury had the fact pounded in their heads that another jury had sentenced Appellant to death and that the case will be scrutinized by an appellate court.

However, probably the most egregious conduct occurred when the prosecutor followed the instruction by informing the jury that the Supreme Court had directed there "be a proceeding to recommend death":

> MR. COLTON: You heard what Judge Trowbridge said about the fact that this Defendant has been found guilty and the Supreme Court has affirmed that conviction, and has said that there should then be a proceeding to recommend death. Do you have any concern or problem about that?

T470 (emphasis added). It is outrageous to inform the jury that the Supreme Court has mandated that the jury recommend the death penalty. Such conduct clearly constitutes fundamental error. See Pait v. State, 112 So. 2d 380 (Fla. 1959) (comment about defense having right to appeal constitutes fundamental error).

The repeated emphasis of the instruction that an appellate court had reversed the case exacerbates the prosecutor's comments. Obviously, a jury should not be made aware, either directly or indirectly, of a prior jury's action or that there will be review by an appellate court. Moreover, the repeated emphasis that an appellate court will review the case also has the effect of suggesting a dilution of the final responsibility of the jury. See Blackwell v. State, 76 Fla. 124, 79 So. 731, 735 (Fla. 1918) (comment that -- if error is committed, Supreme Court will correct it -- reversed); Pait v. State, 112 S. 2d 380 (Fla. 1959) (comment that -- defense has right to appeal, but state doesn't -- fundamental error); United States v. Fiorito, 300 F.2d 424 (7th Cir. 1962); Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

While this Court recognized the instruction that was given in this case, it certainly did not condone the repeated emphasis of such an instruction. In fact, this Court recognized the impropriety of reemphasizing the prior jury action and potential of preconditioning a jury to bring a death recommendation through reemphasis. Hitchcock v. State, 673 So. 2d 859, 863 (Fla. 1996). More importantly, this Court has never condoned the outrageous prosecutorial conduct of telling the jury that the Supreme Court has mandated that they impose a recommendation of death. Appellant was denied due process and a fair and reliable sentencing in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution. This cause must be remanded for a new sentencing.

POINT X

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR LEAVE TO TO INTERVIEW JURORS.

After the jury made its sentencing recommendation, Appellant received information of juror misconduct. Appellant filed and argued a motion for leave to interview the jurors R674,674;T2703. The misconduct alleged was that two or more jurors had discussed the case among themselves outside of deliberations in violation of the trial court's instruction not to do so R674;T144,1698,2525,26583. The motion was supprted by a sworn affidavit from a witness who indicated that two

jurors had discussed the case at lunch and specifically referred to defense attorney Udell by stating, “I can’t believe Udell said that.” and “I watched his face -- that was a bad thing” R676-677. The trial court denied the motion T2704. This was error.

Due process required the trial court to grant Appellant’s motion for leave to interview the jurors to ascertain the degree of jury misconduct and the degree of prejudice from the misconduct. The refusal to permit the interview violated Appellant’s rights to due process and a fair and reliable sentencing. Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution.

In this case there is no doubt that jury misconduct occurred when jurors discussed the case outside the delibeations after they had specifically been instructed by the trial court not to do so R676-677; T1114,1698,2525,2683. It is reversible error for the trial court to not allow the defendant the opportunity to show prejudice from the jury misconduct. Lamar v. State, 583 So. 2d 771, 773 (Fla. 4th DCA 1991). An interview would be the only way to discern how many jurors were discussing the case outside deliberations in violation of the trial court’s order and the extent of the misconduct. However, due to the prohibition of an interview, the extent of the misconduct was left unresolved, leaving open the spectre that the misconduct may have influenced the fact-finding process. Due process requires that the misconduct not be ignored, especially in a capital case. This cause must be reversed for a new sentencing proceeding.

POINT XI

THE TRIAL COURT ERRED IN CONDUCTING PRETRIAL CONFERENCES IN APPELLANT'S ABSENCE.

The trial court erred in conducting two pretrial conferences in Appellant's absence. This denied Appellant's rights pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution; the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; and Florida Rule of Criminal Procedure 3.180.

Appellant was involuntarily absent from two pretrial hearings. The first took place on January 30, 1996. The trial court indicated for the record that Appellant was absent T2. The second hearing took place on June 21, 1996. Again, Appellant's absence was noted for the record T69.

The right to be present has been held to be a fundamental component of due process pursuant to Florida law and the United States Constitution. Francis v. State, 413 So. 2d 1175 (Fla. 1982); Turner v. State, 530 So. 2d 45 (Fla 1987); Coney v. State, 653 So. 2d 1009 (Fla. 1995); Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934). Florida Rules of Criminal Procedure 3.180(a)(3) requires the presence of the defendant at any pre-trial conference unless waived in writing. In addition, for any waiver to be effective there must be an inquiry demonstrating that the waiver of the defendant's presence is knowing, intelligent and voluntary. See Coney v. State, 653 So. 2d 1009, 1013 (Fla. 1995) ("court must certify through proper inquiry"); Turner v. State, 530 So. 2d 45, 49 (Fla. 1987) (defendant must be made aware of rights he was waiving to knowingly and intelligently waive); Butler v. State, *676 So. 2d 1034 (Fla. 1st DCA 1996). There was no valid waiver in the present case.*

There was no waiver of Appellant's presence in writing from the January 30, 1996 hearing. Subsequent to that hearing, there is a document that is represented to be a written waiver of Appellant's presence from all future pretrial proceedings that was filed in open court on February 6, 1996 R445;T30.[15] However, there was absolutely no inquiry of Appellant to verity that he had actually participated in any written waiver. More importantly, even if Appellant had participated in the written waiver, there was absolutely no inquiry of Appellant to ensure that he was knowingly, intelligently and voluntarily waiving his right to be present in all future proceedings. This type of inquiry is particularly important in Appellant's situation where he has a low IQ

[15] The name "Billy Kearse" is printed on the waiver which is not notarized R445.

and functions at an elementary school level. The trial court never inquired or informed Appellant of what types of hearings the future proceedings would entail. How could the trial court certify that Appellant's waiver was knowing, intelligent and voluntary without knowing whether Appellant understood the nature of the future hearings? Turner v. State, 530 So. 2d 45, 49 (Fla. 1987) (defendant must be made aware of rights he was waiving to knowingly and intelligently waive). Without a proper inquiry, it cannot be said that there was a valid waiver in this case.

At the January 30, 1996, pretrial conference the parties, in the absence of Appellant, discussed where venue would be in this case T18-23.[16] Most of the hearing on June 21, 1996, in the absence of Appellant, centered on whether the case wold be tried in St. Lucie County or Indian River County T79-101.

In Pomeranz v. State, 23 Fla. L. Weekly S8 (Fla. December 24, 1997), this Court held that it was error to conduct a pretrial conference involving discussions involving the moving of the trial from Martin county to St. Lucie County in the defendant's absence. 23 Fla. L. Weekly at S10. However, the error was harmless in Pomeranz because he fully consented to the move to St. Lucie County:

> At the June 4, 1993, conference, the trial court and counsel discussed the issue of moving the trial from Martin County to a more adequate facility in St. Lucie County.
>
> * * *
>
> However, we find that no prejudice occurred in this instance because while defendant counsel tentatively agreed to the move, no final decision was made on this issue until June 23, 1993, at a hearing attended by Pomeranz, at which time Pomeranz gave his consent to moving the trial to St. Lucie

[16] Appellant's attorney also waived Appellant's right to be tried within 90 days of the issuance of the mandate at this hearing T3.

> County. We therefore find that the error caused by Pomeranz' absence from the June 4, 1993, conference was harmless.

23 Fla. L. Weekly at S10 (emphasis added).

As in Pomeranz, in this case it was error to hold a pretrial conference on venue in Appellant's absence. However, unlike in Pomeranz, the error cannot be deemed harmless. Unlike in Pomeranz, Appellant did not consent to having the case tried where it was tried. Appellant sought to have the case in St. Lucie as opposed to where it was tried. Thus, the error cannot be deemed harmless as in Pomeranz.

Appellant's presence at these hearings was important. His presence would not have constituted a mere shadow of his attorney. The issue of where the trial was to take place was important. At the January 30, 1996, hearing prosecutor Colton informed the trial court that he wanted to make certain on the record that the venue for this case "will be here in St. Lucie County" T18. Mr. Colton used future tense in stating that venue would be in St. Lucie County. Prosecutor Morgan added that Appellant needed to be present and personally "forego the previous motion for change of venue" T20. Thus, Appellant's absence from the January 30, 1996, hearing cannot be deemed harmless since he would have been made aware of the prosecution's position that the case could be tried in St. Lucie County and would have been able to agree but for the fact he was not present. At the next hearing the prosecution would reverse its position and request that the case be in Indian River County.

Appellant's presence at the June 21, 1996, hearing would also be important. For example, at this hearing the state was to argue that Appellant "changed his mind about St. Lucie County" and thinks he can receive a fair trial there because he had been acquitted of another charge in St. Lucie County T83. The state was making an argument based

on what they believed Appellant was now thinking. If Appellant was present he could have addressed the issue of what he was thinking. One's reasoning for wanting to be tried in the community where the crime occurred and where he was raised all of his life could be subjective. See Francis v. State, 413 So. 2d 1175, 1179 (Fla. 1982) (absence for jury selection is not harmless due to the subjective types of input from a defendant in selecting the jurors to try him). Appellant may have wanted to be tried in the community where the crime occurred rather than in a foreign community such as Indian River county where the black population was extremely low in proportion to where the crime occurred and he was raised.[17] Again, Appellant's presence would have been important to explain his mindset which the state had sought to use against him in the venue discussion. Appellant's absence cannot legitimately be deemed harmless.

[17] See State v. Lozano, 616 So. 2d 73, 76 (Fla. 1st DCA 1993) (recognizing that racial makeup of community where defendant is to be tried may be a legitimate concern to a defendant).

POINT XII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S OBJECTION TO THE GRANTING OF THE STATE'S CHALLENGE FOR CAUSE AGAINST A PROSPECTIVE JUROR.

As this Court recently explained in Farina v. State, 680 So. 2d 392 (Fla. 1996), it is per se reversible error to exclude a qualified juror for cause and a juror in a capital case will not be deemed unqualified to serve simply because she voices conscientious or religious scruples against the infliction of the death penalty unless there is some unyielding conviction or rigidity which would make her unqualified to serve:

> 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*, 581 U.S. at 659, 107 S.Ct. at 2052; *Davis*, 429 U.S. at 123, 97 S.Ct. at 400 (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, 97 S.Ct. at 399 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 522, 88 S.Ct. 1770, 1777, 20 L.Ed.2d 776 (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.

680 So. 2d at 397-398 (emphasis added).

In Farina, the prospective juror had been removed for cause because of her feelings about the death penalty. The excusal for cause was held to be reversible error because the juror indicated that she would "try" to be fair and had not expressed an unyielding conviction and rigidity regarding the death penalty.

In the present case, prospective juror Jeremy expressed that she was no longer a proponent of the death penalty T385, and felt that before hearing any evidence she would likely not vote for the death penalty T387. However, Jeremy also explained that "I'm a law abiding citizen, I know I could follow the law" T387. When asked by the prosecutor whether the evidence could change he mind, Jeremy indicated that it was possible T387. At best, this shows that Jeremy had some conscientious scruples against the death penalty, but it falls short of the unyielding conviction and rigidity regarding the death penalty that was noted as the standard for cause excusal in Farina. It was error to grant the cause challenge over Appellant's objection T1093. The improper granting of the cause challenge denied Appellant due process and a fair jury at the penalty phase in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution. This cause must be remanded for a new sentencing. Farina, supra; Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976).

POINT XIII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S CAUSE CHALLENGES OF PROSPECTIVE JURORS BARKER AND FOXWELL.

Appellant challenged prospective jurors Barker and Foxwell for cause and the trial court denied these cause challenges T1089-90;1098-1100. It was error to deny the cause challenges. Appellant used all of his peremptory challenges and requested additional challenges and specifically pointed to objectionable jurors on the panel T1105-1108. His request was denied T1108. Appellant renewed all of his motions prior to the jury being sworn T1111. Jurors that Appellant had challenged for cause -- Walker, Aldrich, Matthews and Grass actually served on the jury. It was error to deny the cause challenges on Barker and Foxwell.

It is well-settled that if there is any reasonable doubt as to a juror's possessing the state of mind which will enable her to render an impartial verdict based solely on the evidence submitted and the law announced at trial, she should be excused. Singer v. State, 109 So. 2d 7, 22 (Fla. 1959); Hamilton v. State, 547 So. 2d 630, 632 (Fla. 1989). Close cases involving a challenge to the impartiality of a potential juror should be resolved in favor of excusing the juror rather than leaving doubt as to his or her impartiality. Phillips v. State, 572 So. 2d 16 (Fla. 4th DCA 1990); Longshore v. Fronrath Chevrolet, Inc., 527 So. 2d 922 (Fla. 4th DCA 1988). Appellant's challenges should have been granted.

Prospective juror Barker indicated that she would not consider a life sentence unless she could be assured that Appellant would have no possibility of a conjugal visit and there was no possibility of parole:

MS. BARKER: Oh, yes, I think so. I too had a very troubled night last night. I was -- wrestled with myself with a death penalty or life in prison without the hope of parole. I would have to be assured that the perpetrator would not be put into a prison where conjugal visits would be allowed or perhaps the fact that he could get out on a technicality. I am a proponent of the death penalty, I always have been. It isn't anything that I felt likely should happen. I could go both ways. As long as I was assured that there would be no chance of parole at any time, I could be swayed for life in prison.

MR. UDELL: Well, I don't think you're going to hear any evidence about that.

MS. BARKER: Excuse me?

MR. UDELL: I don't think anybody from the Department of Corrections is going go come in here and tell you the law or any of that. The law is, there are only two possible sentences in this case, death in the electric chair or life imprisonment without eligibility for release. The words, I can't change the words, I can't define them, they seem to speak for themself.

MS. BARKER: It's just that we do read about conjugal visits.

T883-84 (emphasis added).

Prospective juror Foxwell indicated that Appellant had been convicted and it was an unnecessary expense to go through sentencing again and that the defense would have to do "a lot of talking" before he could be convinced not to vote for imposition of the death penalty:

MR. FOXWELL: Agree with Mr. King on one thing here now. I don't understand Florida law as far as he's already been tried and convicted, I mean, why in the heck do we have to go through all this expense again to sentence him? I don't understand that. I just don't understand that.

* * *

MR. UDELL: ... Why are you for the death penalty? Again, I'm not questioning.

MR. FOXWELL: That's a horrible thing, taking a life. What could be any worse than that? Huh?

MR. UDELL: Probably nothing.

MR. FOXWELL: I can't.

MR. UDELL: That's why we impose it as a possibility then.

MR. FOXWELL: That's why you got the death penalty. That's how I feel.

MR. UDELL: Is it --

MR. FOXWELL: Unless you change my mind, but you're going to have to do a lot of talking.

MR. UDELL: I hope not to. I find that the more I got to talk the worst case I got. Okay. Unlike the -- I like the other side to be doing all the talking and all the explaining on every case.

All things being equal, would it be fair to say that just knowing what you know as of now about the evidence you're going to hear, would it be fair to say that you're going to tend to recommend death under these facts based upon your feelings?

MR. FOXWELL: Well you've already told us he's been convicted. Now you got to convince us another way, right?

MR. UDELL: That's what I'm saying. If that's the way you feel, correct?

MR. FOXWELL: Yes.

T 703,709-710 (emphasis added).

It was error to deny Appellant's cause challenge to Barker where she could not vote for life unless she was assured there would be no conjugal visits and to Foxwell where he would automatically place a strong burden on Appellant and apply a presumption of death. The error denied Appellant due process and a fair jury at the penalty phase in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

POINT XIV

THE COMPELLED MENTAL HEALTH EVALUATION CONSTITUTES A ONE-SIDED RULE OF DISCOVERY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Florida Rule of Criminal Procedure 3.202 is in plain violation of the rule of Wardius v. Oregon, 412 U.S. 470, 474, 93 S.Ct. 2208, 2211-12, 37 L.Ed.2d 82 (1973) in that any discovery which a defendant is required to provide must require reciprocal discovery from the prosecution. Rule 3.202 requires the defendant to disclose his mental mitigation to permit the state to compel a mental examination:

> **(b) Notice of Intent to Present Expert Testimony of Mental Mitigation.** When in any capital case, in which the state has given notice of intent to seek the death penalty under subdivision (a) of this rule, it shall be the intention of the defendant to present, during the penalty phase of the trial, expert testimony of a mental health professional, who has tested, evaluated, or examined the defendant, in order to establish statutory or nonstatutory mental mitigating circumstances, the defendant shall give written notice of intent to present such testimony.
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> **(c) Time for Filing Notice; Contents.** The defendant shall give notice of intent to present expert testimony of mental mitigation not less than 20 days before trial. The notice shall contain a statement of particulars listing the statutory and nonstatutory mental mitigating circumstances the defendant expects to establish through expert testimony and the names and addresses of the mental health experts by whom the defendant expects to establish mental mitigation, insofar as is possible.

In Wardius, supra, the United States Supreme Court was faced with the constitutionality of a notice of alibi rule that required a defendant to give notice of alibi along with the place he claimed to be at the time of the offense and a list of alibi witnesses. 412 U.S. at 471. The statute, on its face, did not require the prosecution to list the witnesses it intended to call to rebut the alibi defense. Id. at 475. The Court held the statute to be unconstitutional. It stated:

> The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the state.

412 U.S. at 475-476 (footnote omitted).

The courts have relied on the Wardius principle to strike down various discovery schemes which were deemed to not give reciprocal rights to defendants. The federal courts have struck down the Illinois notice of alibi rule based upon Wardius. United States Ex Rel. Hairston v. Warden, Etc., 597 F.2d 604 (7th Cir. 1979); United States Ex Rel. Veal v. DeRoberts, 693 F.2d 642 (7th Cir. 1983). In Mauricio v. Duckworth, 840 F.2d 454 (7th Cir. 1988) the Court held a conviction to be unconstitutional where a trial court's discovery order required a defendant to list all of his witnesses but the prosecution did not list its rebuttal alibi witnesses. It stated:

> The trial court's discovery order, in effect, permitted the State access to information it did not also afford Mauricio, full reciprocity, as mandated by *Wardius*, cannot be said to have characterized the discovery process and consequently due process was denied.

840 F.2d at 459 (footnote omitted).

The Georgia Supreme Court recently overturned its prior decision giving the prosecution broader discovery rights than are given to defendants. Rower v. State, 264 Ga. 323, 443 S.E.2d 839 (Ga. 1994). The Georgia Supreme Court had previously held that the prosecution was entitled to discovery of scientific reports of all experts consulted by the defense. Sabel v. State, 248 Ga. 10, 282 S.E.2d 61 (Ga. 1981). However, the Georgia statute only required the prosecution to reveal reports which it intended to use at trial. OCGA § 17-7-211(b). In

Rower, supra, the Georgia Supreme Court held this imbalance to violate Wardius, supra. The Court stated:

> The discovery rights granted to the state under *Sabel* are not reciprocal, but are, in fact, greater than the statutory discovery rights granted to the defendant by OCGA § 17-7-211.
>
> While due process does not prevent a state from "experimenting with broad systems of discovery" in criminal cases, there must be "a balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. 470, 474, 93 S.Ct. 2208, 2211-12, 37 L.Ed.2d 82 (1973). We therefore hold that, with regard to scientific reports, the state is entitled to only those discovery rights specifically granted to the defendant by OCGA § 17-7-211. To the extent that *Sabel* conflicts with this holding, it is overruled.

443 S.E.2d at 842.

The discovery rule at issue here is clearly violative of Wardius in at least three respects.

(1) It requires the defendant to file written notice of his intent to present mental mitigation through the testimony of a mental health professional who has examined him. However, it does not impose any corresponding duty on the prosecution to declare its intent to present witnesses concerning any aggravating circumstance or in rebuttal to any mitigating circumstance.

(2) It requires the defendant to give a statement of particulars listing all statutory and non-statutory mental mitigating circumstances, if he intends to call a mental health professional who examined him. It does not require the prosecution to list what aggravators it intends to present. It does not require a statement of particulars as to aggravation or as to its rebuttal of mitigation. Indeed, the Florida Supreme Court has specifically held that the prosecution is not required to provide notice of the aggravators it intends to pursue. Menendez v. State, 368 So. 2d 1278, 1282 n.21. (Fla. 1978).

(3) It requires the defendant to list the mental health experts who have examined him and who he expects to establish mental mitigation. It does not impose any requirement on the prosecution to list any witnesses whether to support aggravation, to rebut mental mitigation, or to rebut any other type of mitigation.

Rule. 3.202 is exactly the sort of one-sided rule condemned in Wardius and its progeny. It provides discovery to the prosecution alone. It does not provide any reciprocal rights to the defendant. It requires a defendant to file a statement of particulars describing his statutory and non-statutory mental mitigation and to list the mental health professionals who he intends to call as witnesses. It does not require the prosecution to make any corresponding disclosures. This clearly violates Wardius and denies due process under the Florida and United States Constitutions. It also denies the unique need for reliability required in a capital case required by the Florida and United States Constitutions. Tillman v. State, 591 So. 2d 167 (Fla. 1991); Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

POINT XV

THE COMPELLED MENTAL HEALTH EXAMINATION VIOLATED THE EX POST FACTO CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.

Appellant also objected to the compelled mental health examination on the ground that it violated the ex post facto clauses of the United States and Florida Constitutions. It was error to overrule the objection and grant the state’s motion for the compelled mental examination.

The offense took place in January of 1991. Florida Rule of Criminal Procedure 3.202 became effective January 1, 1996. The application of Rule 3.202 to this case violated Article I, Sections 9 and 10 of the United States Constitution and Article I, Section 10 of the Florida Constitution.

The United States Supreme Court has stated the test for determining a violation of the Ex Post Facto Clause in Weaver v. Graham, 450 U.S. 24 (1981):

> "Two critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective ... and it must disadvantage the offender affected by it."

450 U.S. at 29.

Here, the rule at issue clearly fails under this test. It applies to events occurring after the offense and severely disadvantages Appellant. It severely burdens his presentation of mitigation. Under the current rule, in order to present mental mitigation through a mental health professional who had examined him, Mr. Kearse must outline his statutory and non-statutory mental mitigation, list the professional who examined him, and be subjected to a compelled mental health examination by a prosecution expert. None of these restrictions existed at the time of his alleged offense. This is a substantial disadvantage.

In Talavera v. Wainwright, 468 F.2d 1013 (5th Cir. 1972) the court struck down the retrospective application of a new rule making it harder to obtain a severance as violative of the Ex Post Facto Clause of the United States Constitution. The Court stated:

> "We think it sufficient to repeat without lengthy citation what is now an axiom of American jurisprudence: The Constitution prohibits a state from retrospectively applying a new or modified law or rule in such a way that a person accused of a criminal offense suffers any significant prejudice in the presentation of his defense."

Id. at 1015-1016.

The current rule far more severely impinges on the presentation of penalty phase than the rule at issue in Talavera had on a trial.

This Court has stated for a violation of the Ex Post Facto Clause of the Florida Constitution:

> In Florida, a law or its equivalent violates the prohibition against ex post facto law if two conditions are met: (a) it is retrospective in effect; and (b) it diminishes a substantial substantive right the party would have enjoyed under the law existing at the time of the alleged offense.

Dugger v. Williams, 593 So. 2d 180, 181 (Fla. 1991).

The Court in Williams went on to explain that a law may be ex post facto even if it is procedural in nature:

> it is too simplistic to say that an ex post facto violation can occur only with regard to substantive law, not procedural law. Clearly, some procedural matters have a substantive effect. Where this is so, an ex post facto violation also is possible.

Id. at 181.

This statute clearly diminishes "a substantial substantive right," i.e. the right to present mitigating evidence.

The application of Rule 3.202 to the case at issue would also violated Article I, Section 9 of the Florida Constitution. Article X, Section 9 states:

> **SECTION 9. Repeal of criminal statutes. --** Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.

This section forbids the retroactive application of an amended or repealed statute which affects "prosecution or punishment." State v. Pizzaro, 383 So. 2d 762, 763 (Fla. 4th DCA 1980); Skinner v. State, 383 So. 2d 767, 768 (Fla. 3d DCA 1980). This provision clearly affects both prosecution and punishment. It severely affects the presentation of

mitigation evidence. The application of this rule to Mr. Kearse violated both the Florida and United States Constitutions.

POINT XVI

APPELLANT WAS SUBJECTED TO A COMPELLED MENTAL HEALTH EXAMINATION BY A PROSECUTION EXPERT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The entire concept of compelled mental health evaluations for penalty phase violates the United States and Florida Constitutions. Ordering a compelled mental health evaluation, when a defendant seeks to introduce the testimony of a penalty phase mental health expert who has examined him, violates the Fifth and Sixth Amendments to the United States Constitution.

The Fifth Amendment to the United States Constitution provides, among other things, that "[n]o person ... shall be compelled in any criminal case to be a witness against himself[.]" Fifth Amendment, United States Constitution. It is very well-settled that this

protection applies to defendants facing penalty phase proceedings. Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). Thus, if Appellant's statements are compelled, then the above-quoted Fifth Amendment protection would have been violated in admitting into evidence Dr. Martell's testimony based upon such statements.

In addition, it cannot legitimatley be argued that by introducing mental health testimony at the penalty phase, Appellant had waived his Fifth Amendment privilege. There is a critical distinction between the use of expert mental health testimony as to competency or sanity and its use at a penalty phase. Courts have consistently recognized that insanity is an affirmative defense and that the states and Congress are to be given wide leeway in the definition of insanity and the burden of proof and persuasion as to insanity. The United States Supreme Court has held that it is constitutional for a state to require a defendant to prove his insanity beyond a reasonable doubt. Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 52 L.Ed.2d 1302 (1952). This has continued to be the law despite the general rule that the burden is on the prosecution to prove each element beyond a reasonable doubt. In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); see also discussion in United States v. Freeman, 804 F.2d 1574 (11th Cir. 1986). The Court in Leland also approved the right of the states to adopt different tests for insanity such as "right and wrong" or "irresistible impulse." 343 U.S. at 800. Indeed, this Court has flatly stated "there is no constitutional right" to plead insanity. Parkin v. State, 238 So. 2d 817, 822 (Fla. 1970).

Mitigating evidence in a capital case is treated differently. A defendant has a constitutional right to present evidence in mitigation of his sentence at a capital sentencing hearing. Sovereignties may not

limit the introduction of evidence in mitigation of sentence at a capital sentencing hearing by way of the express wording of a statute, Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), by restricted interpretations of statutes that allow such evidence on their face, Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), by evidentiary rule, Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979), by instructions to the jury, Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), by jury verdict form, Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988); McCoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990), or even by failure of the sentencer to give independent weight to circumstances that are presented, Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

A state can put few, if any, restrictions on the presentation and consideration of mitigation. A state has far greater leeway in the restriction and definition of the insanity defense. A state can narrowly define insanity but can not so narrowly define mitigation. Compare Leland, supra with Hitchcock, supra. This supports the conclusion that a compelled mental evaluation for penalty phase violates the Fifth and Sixth Amendments.

POINT XVII

THE TRIAL COURT ERRED IN GIVING THE JURY AN INSTRUCTION ON VICTIM IMPACT EVIDENCE.

Appellant objected that even if it is permissible to introduce victim impact evidence, it was improper to give the jury an instruction on victim impact evidence T2536-37. Appellant's objection was overruled T2537. The instruction on victim impact evidence violated the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

The jury was instructed on victim impact evidence as follows:

> Now you have heard evidence that concerns the uniqueness of Danny Parrish as an individual human being and the resultant loss to the community's members by the victim's death. Family members are unique to each other by reason of the relationship and role each has in the family. A loss to the family is a loss to both the community of the family and to the larger community outside the family. While such evidence is not to be considered as establishing either an aggravating or mitigating circumstance, you may still consider it as evidence in the case.

R2691-2692.

The flaw of the instruction is that it tells the jury to consider victim impact evidence without informing them as to use of such evidence. The instruction is vague as to how the jury is to use the evidence. Claims of vagueness in "capital punishment statutes are analyzed under the Eighth Amendment and characteristically asserted that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)." Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 1957-59 (1988). Similarly, in Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), the Court held "our cases further establish that an aggravating circumstance is invalid in this sense if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor."

In addition to giving open-ended discretion in the use of this evidence, the instruction gives undue importance to victim impact evidence by highlighting it to the jury. Hall v. State, 83 So. 513, 522, 78 Fla. 420 (Fla. 1919) ("It is improper to segregate [through instruction] ... any fact from all the material facts sought to be established, and by calling attention "to ... the fact it is given" undue importance ..."); Mills v. State, 625 S.W.2d 47 (Tex. App. 1981) (charge which singles out limited parts of evidence is error).

The prosecutor tried to justify the instruction by arguing that the proposition in the instruction had been lifted from caselaw. However, it is a mistake to lift statements from judicial opinions and to feed them to the jury in an instruction. See Bankers Multiple Line Ins. Co. v. Farish, 464 So. 2d 530, 533 n.3 (Fla. 1985) ("The fact that

a statement of reasoning may be set forth in a judicial opinion does not mean that it is a proper jury instruction); Wilhelm v. State, 568 So. 2d 1, 3 (Fla. 1990) ("when used in a statute as a valid inference does not mean that a jury instruction utilizing those words is also necessarily valid"); United States v. Burke, 781 F.2d 1234, 1240 (7th Cir. 1985) ("It is a mistake to lift language out of a passage such as this and insert it in a jury instruction. Language in judicial opinions is not meant to be given undigested to the jury").

It was error to give the instruction.

POINT XVIII

THE TRIAL COURT FAILED TO EXERCISE ITS DISCRETION IN EVALUATING AGE AS A MITIGATING CIRCUMSTANCE.

The power to exercise "judicial discretion" does not imply that a court may act according to mere whim or caprice. Carolina Portland Cement Co. v. Baumgartner, 99 Fla. 987, 128 So. 241, 247 (1930). As explained in Parce v. Byrd, 533 So. 2d 812 (Fla. 5th DCA) rev. denied, 542 So. 2d 988 (Fla. 1988) exercise of discretion requires a valid reason to support the choice between alternatives:

> [Judicial discretion] is not a naked right to choose between alternatives. There must be a sound and logical valid reason for the choice made. If a trial court's exercise of discretion is upheld whichever choice is made merely because it is not shown to be wrong, and there is no valid reason to support the choice made, then the choice made may just as well have been decided by a toss of a coin. In such case there would be no certainty in the law and no guidance to bench or bar.

533 So. 2d at 814 (e.s.). See also Thomason v. State, 594 So. 2d 310, 317 (Fla. 4th DCA 1992) (Farmer dissenting) quashed 620 So. 2d 1234 (Fla. 1993) ("Judicial discretion is not the raw power to choose between alternatives", nor is it "unreviewable simply because the trial judge chose an alternative that was theoretically available to him").

In reviewing death sentences great certainty is required to ensure that conclusions are based on proper grounds. Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 1866, 100 L.Ed.2d 384 (1988). The trial court denigrated age as mitigating based on Appellant's "sophistication" and

because he had been through the criminal justice system R708. However, the trial court gives absolutely no reasoning to support these bare conclusions or how they negate age as a mitigator for an 18 year old.

In Ellis v. State, 622 So. 2d 991 (Fla. 1993), this Court has recognized one group to which the age mitigating factor must apply -- people under 18 years of age. However, Ellis is not meant to automatically exclude all persons 18 years and older. In fact, it makes no sense to require the finding of this factor for a person of unusual maturity who is 3 months younger than Appellant, but to automatically exclude this factor for an intellectually and emotionally immature person as Appellant due to 3 months of age.

The trial court denigrated Appellant's being 18 years of age as the age mitigator due to his alleged "sophistication" R708. However, the trial court offered no reason supporting its conclusion that Appellant was sophisticated. This conclusion seems at odds with the nonstatutory type mitigation that the trial court found which showed that throughout his life Appellant essentially functioned at a retarded or near retarded level T2033,2037,2124,2155, and that he has "mental, emotional, and learning disabilities," was "severely emotionally handicapped" and was "mildly retarded and functioned at a third or fourth grade level." In sum, the trial court's order simply does not support the conclusion that a mildly retarded, emotionally handicapped 18 year old constitutes a mature sophisticated person.

The trial court also know that Appellant had been through the criminal justice system. However, this is absolutely unrelated to maturity or sophistication. In fact, it is more likely that an 18 year old will be involved with the criminal justice system due to a lack of maturity and responsibility in handling problems. This is no basis for

denigrating the age of 18 as a mitigating circumstance in this case. This is particularly true where Appellant had a mental and emotional age below that of an 18 year old. The failure to exercise discretion denied Appellant due process and a fair and reliable sentencing in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

POINT XIX

THE TRIAL COURT ERRED IN CONSIDERING THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS COMMITTED WHILE APPELLANT WAS ENGAGED IN THE COMMISSION OF THE CRIME OF ROBBERY WHERE IT WAS BASED ON THE SAME ASPECT OF THE OFFENSE AS OTHER AGGRAVATING CIRCUMSTANCES.

It was made clear in United States v. McCullah, 87 F.3d 1136 (10th Cir. 1996), that the same underlying conduct cannot be used to support more than one aggravating circumstance:

> By contrast, the aggravating factors alleged in this case, which are different than those in *Flores*, overlapped because they were predicated upon the same acts by McCullah -- namely, that McCullah identified the victim and drove him to the ambush site.
>
> * * *
>
> The same underlying conduct by McCullah -- again the act of driving the victim to the ambush site -- is used to support both factors.
>
> Additionally, although ingenious, the government never suggested that "scouting the intended victim and rehearsing the plan ... and actually bringing the particular murder victim to the planned murder site," were separate acts supporting the various aggravators. *See* Dissent at 1142. Driving the victim to the murder site (intentionally engaging in conduct intending the victim be killed) and driving the victim tot he murder site (engaging in conduct which creates a grave risk of death) is still the same conduct. Likewise, driving the victim to the murder site (intentionally engaging in conduct intending the victim be killed) and driving the victim to the murder site (intentionally killing in furtherance of a continuing criminal enterprise) overlap. The same act can be described several ways, but it is still the same act.

87 F.3d at 1138 (emphasis added). The Court also recognized that using factors based on the same conduct was especially improper in a "weighing" state:

> ... we cannot conclude that *Lowenfeld* lends any support to the contention that duplicative factors are acceptable. First, it should be noted that *Lowenfeld* did not involve a "weighing" statute but rather a threshold death-eligibility question, and the only duplication at issue was the duplication of an aggravating factor with an element of the

> offense itself. *Lowenfeld* essentially held that it is constitutional for a state to legislatively define a crime in such a way that an element of the crime is also a threshold aggravating factor, making any defendant convicted of the crime death-eligible. *Id*. at 246, 108 S.Ct. at 555. It is too much of a stretch to say that *Lowenfeld* supports the idea that the use of duplicative factors in a weighing statute is acceptable, especially in light of the critical distinction between weighing and nonweighing jurisdictions recognized by the Supreme Court in *Stringer v. Black*, 503 U.S. 222, 231-32, 112 S.Ct. 1130, 1137-38, 117 L.Ed.2d 367 (1992).

87 F.3d at 1138.

As shown by the trial court's order, in the present case the finding of a robbery was but a mere technicality:

> The evidence shows that Defendant forcibly took Officer Parish's service pistol, turned that weapon on the officer and killed him. Even though the Defendant may have been motivated by his desire to avoid arrest when he took the gun, the incident still constituted a robbery under the definition of the offense.... While technically defendant's actions constituted robbery, the reality is that defendant took the weapon to effect the killing and then kept it to conceal the fingerprints and other evidentiary matters it presented.

(R706), and that the sole reason for the robbery was to avoid arrest:

> **"b. The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. 921.141 (5)(c):**
>
> The evidence clearly shows that defendant's actions were taken for this purpose. There is no evidence that defendant carried any grudge against the officer, that the defendant planned the encounter, or that there was any reason to kill the officer other than the defendant's intention that he not be arrested."

R707.

Obviously, robbery was not the motive for Appellant's action. Rather, it was merely an aspect of his attempt to avoid arrest and hinder law enforcement. Where the commission of one aggravating circumstance is for the sole purpose of committing another aggravating circumstance, it

is reversible error to consider both aggravating circumstances separately. See, McCullah, supra; Cherry v. State, 544 So. 2d 184, 187 (Fla. 1989) (aggravating factor burglary doubled with pecuniary gain where "sole purpose for Cherry's burglary was pecuniary gain").

Here, the taking of the gun was committed solely for the purpose of committing the other aggravating factors of avoiding arrest and hindering the enforcement of laws. Thus, consideration of this aggravating circumstance separately was error. Where there was substantial mitigating evidence found, the improper consideration of this aggravating factor may have played a role in tipping the scale against the jury weighing the circumstance in favor of a life sentence. Thus, the error cannot be deemed harmless. The error denied Appellant due process and a fair, reliable sentencing contrary to Article I, Sections 9 and 17, of the Florida Constitution and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

POINT XX

THE TRIAL COURT ERRED IN CONSIDERING THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS COMMITTED WHILE APPELLANT WAS ENGAGED IN THE COMMISSION OF THE CRIME OF ROBBERY.

The trial court found the aggravator under § 921.141(5)(d), Florida Statutes (1989), that the capital felony occurred during the commission of a robbery R706. In this case, the trial court made new findings which were independent of the previous trial court’s findings. Thus, this issue is not controlled by the law of the case.

The trial court found that while Appellant's actions technically constituted a robbery, Appellant took the gun to effect the killing and the taking the gun was not the reason for the killing:

> The evidence shows that Defendant forcibly took Office Parish's service pistol, turned that weapon on the officer and killed him. Even though the Defendant may have been motivated by his desired to avoid arrest when he took the gun, the incident still constituted a robbery under the definition of that offense. The taking was not incidental to the killing. The Supreme Court so ruled in the prior appeal and also found that this circumstance did not constitute doubling. The Court finds that this aggravator has been proven beyond a reasonable doubt. Its weight, however, is diminished somewhat as stealing the officer's pistol was "not a planned activity" such as occurs in a purse snatching or a holdup. While technically defendant's actions constituted robbery, the reality is that defendant took the weapon to effect the killing and then kept it to conceal the fingerprints and other evidentiary matters is presented.

R706 (emphasis added).

The trial court's finding on this aggravator is remarkably similar to this Court's observation in Jones v. State, 580 So. 2d 143, 146 (Fla. 1991), where it was held that although the taking of a police officer's gun may have technically constituted a robbery, since the robbery was not the reason for the killing the aggravating circumstance that the capital offense was committed during the course of a robbery would not apply:

> ... the trial court found that five aggravating circumstances, ... 3) committed during a robbery.... Factors, 1, 2, and 4 and 5 are supported by the evidence. Number 3, however, is not. Taking the officer's service weapon, technically an armed robbery, was only incidental to the killing, not the reason for it. *See Parker v. State,* 458 So. 2d 750 (Fla. 1984), *cert. denied,* 470 U.S. 1088, 105 S.Ct. 1855, 85 L.Ed.2d 152 (1985).

580 So. 2d at 146 (emphasis added). Likewise, the taking of the officer's gun in this case was not the reason for the killing. In both

cases the robbery was not a planned activity. Thus, the robbery aggravator does not apply at bar.[18] The error cannot be deemed harmless where substantial mitigation was found by the trial court and the improper consideration of this aggravating factor may have played a role in tipping the scale against weighing the circumstances in favor of a life sentence. The error denied Appellant due process and a fair, reliable sentencing contrary to Article I, Sections 9 and 17, of the Florida Constitution and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

[18] To hold otherwise would permit the anomaly of consideration of an aggravator of snatching a pistol during the heat of a struggle, but not finding an aggravator in a more culpable situation where one consciously and purposely plans to arm oneself prior to the shooting.

POINT XXI

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO IRRELEVANT AND PREJUDICIAL EVIDENCE.

Over Appellant's objections T1681-82,1668-69,1674, the state was permitted to introduce irrelevant photographs of surgical scars of the victim (T1688) and to introduce evidence of the irrelevant details of the victim's injuries T1682-95. The introduction of this highly prejudicial evidence denied Appellant due process and a fair and reliable sentencing under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

While it is true that a photograph of the victim showing relevant injuries is generally admissible, Allen v. State, 340 So. 2d 536 (Fla. 3d DCA 1976), there are limits to a court's discretion in admitting such a photograph. One which has as its primary effect the inflaming of natural passions of ordinary persons to the extent that would likely interfere with dispassionate evaluation of the evidence or issues should not be admitted into evidence. Jackson v. State, 359 So. 2d 1190 (Fla. 1978). Use of such photographs in a prejudicial manner will result in reversal.

The graphic depiction of the procedure utilized by the medical examiner is one from which the jury can only be expected to have recoiled. The depiction of surgical scars is irrelevant to any legitimate issue in this case. It is so prejudicial that it may have tipped the balance against Appellant on the way the jury would evaluate the case.

The purpose of legitimate photographic evidence is to assistant the state in presenting its case to the jury. Such evidence should not

detract from the issues by inflaming the jury against the accused. A gory depiction resulting from the normal procedures of the medical examiner is not usually relevant unless the jury may have a morbid interest in the dissection of the corpse.

Where a photograph shows trauma not caused by the alleged acts of the accused, there must be a great necessity for such a potentially prejudicial photograph to be admissible. See Czubak v. State, 570 So. 2d 925 (Fla. 1990) (photo showed condition of body caused by factor (dogs) other than the criminal actions of the accused); Rosa v. State, 412 So. 2d 891 (Fla. 3d DCA 1982) (photograph included results of emergency procedures performed after the stabbing); Reddish v. State, 167 So. 2d 858, 863 (Fla. 1964) (photographs of bodies after their removal from the scene held irrelevant and unnecessary); Wright v. State, 250 So. 2d 333, 337 (Fla. 2d DCA 1971) (inflammatory photographs did not address the issue in the case -- namely who murdered the victim); see also Beagles v. State, 273 So. 2d 796, 798 (Fla. 1st DCA 1978) (photograph showing body removed from scene should not be admitted unless there is some particular relevance). The photograph of the surgical scars should not have been admitted.

In addition, the medical examiner's detailing of the injuries of the victim should not have been permitted. The prosecutor argued that the details of the injuries were necessary to show the force element of the robbery T1669. However, going into minute details of the injuries does not prove force. If there is even a case of unfair prejudice substantially outweighing probative value it is in this case where minute details of the massive injuries are presented to the jury to prove the force used to take a gun. In fact, none of the injuries that were reviewed dealt with the force used to take the gun. The force

Appellant used to obtain the gun was grabbing it during a struggle. Appellant did not shoot the victim and then take the gun. the only true reason to detail the injuries caused by the shooting after the robbery was to inflame the jury. This cause must be remanded for a fair and reliable sentencing.

POINT XXII

ELECTROCUTION IS CRUEL AND UNUSUAL.

Electrocution is cruel and unusual punishment in light of evolving standards of decency and the availability of less cruel but equally effective methods of execution. It violates the Eighth and Fourteenth

Amendments to the United States Constitution and Article I, § 17 of the Florida Constitution. Many experts argue that electrocution amounts to excruciating torture. See Gardner, Executions and Indignities -- An Eight Amendment Assessment of Methods of Inflicting Capital Punishment. 39 OHIO STATE L.J. 96, 125 n.217 (1978) (hereinafter cited, "Gardner"). Malfunctions in the electric chair cause unspeakable torture. See Louisiana ex rel. Frances v. Resweber, 329 U.S. 459, 480 n.2 (1947); Buenoano v. State, 565 So.2d 309 (Fla. 1990). It offends human dignity because it mutilates the body. Knowledge that a malfunctioning chair could cause the inmate enormous pain increases the mental anguish.

This unnecessary pain and anguish shows that electrocution violates the Eight Amendment. See Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In re Kemmler, 136 U.S. 436, 447 (1890); Coker v. Georgia, 433 U.S. 584, 592-96 (1977). A punishment which was constitutionally permissible in the past becomes unconstitutionally cruel when less painful methods of execution are developed. Furman v. Georgia, 408 U.S. 238, 279 (Brennan, J., concurring), 342 (Marshall, J., concurring), 430 (Powell, J., dissenting). Electrocution violates the Eighth Amendment and the Florida Constitution, for it has no become nothing more than the purposeless and needless imposition of pain and suffering. Coker, 433 U.S. at 592.

CONCLUSION

For the reasons stated in Point IV, Appellant respectfully requests this Court to vacate his death sentence and remand for imposition of a setnence of life. Based on the remaining Points, Appellant respectfully requests this Court to vacate his sentence of death and to remand for a new sentencing phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to SARA D. BAGGETT, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this _____ day of April, 1998.

_____
Of Counsel

IN THE SUPREME COURT OF FLORIDA

BILLY LEON KEARSE,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 90,310
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
_____	)	

A P P E N D I X

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