IN THE

SUPREME COURT OF FLORIDA

LANCELOT ARMSTRONG,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 78,180

INITIAL BRIEF OF APPELLANT

RICHARD L. JORANDBY
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15th Judicial Circuit of Florida
Criminal Justice Building
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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 Seventeenth Judicial Circuit, in and for Broward 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

"1SR" Supplemental Record (received August, 1992)

"2SR" Second Supplemental Record (received March, 1993).

STATEMENT OF THE CASE

Appellant, Lancelot Armstrong, was charged by indictment with one count of premeditated murder; one count of attempted premeditated murder; and one count of robbery (R2061). Jury selection began on April 8, 1991. At the close of the state's case, Appellant moved for judgment of acquittal (R1640-41). Appellant's motion was denied (R1643). Appellant was found guilt of murder in the first degree as charged (R2370). Appellant was found guilty of attempted murder in the first degree as charged (R2372). Appellant was found guilty of robbery (R2374). The jury recommended the death penalty (R2414). The trial court sentenced Appellant to death for the murder (R2420,2427-28). The trial court departed from the recommended guideline sentence of 7-22 years (R2418) and sentenced Appellant to life imprisonment for the attempted murder (R2423) and life imprisonment for the robbery (R2426). The life sentences are to run consecutively (R2428). A timely notice of appeal was filed (R2437).

STATEMENT OF THE FACTS

GUILT PHASE

The relevant facts are as follows:

In the early morning hours of February 17, 1990, Ruel Allen received a call from Appellant (R1298-99). Appellant told Allen that he needed someone to go with him to Church's Chicken (R1300). Appellant said that he received a call from a girl who works there saying he could come in and take some money from the store (R1300). Appellant told Allen that all he had to do was take the money from the manager and that he did not have to use a gun and shots would not be fired (R1315). Allen understood that it would be a set up; an "inside job" (R1316). Allen told Appellant that he was sleeping and was not interested (R1301).

Katrina Thomas testified that she worked at Church's Chicken on Broward Boulevard (R627). On February 12, 1990, at approximately ten minutes after two a.m., two men drove their car (a blue Toyota Camry) up to the drive-through window (R629). Thomas told them that the store was closed (R629). One of the men asked if he could speak to Kay (R631). Thomas then told Kay Allen that there were two men who wanted to talk to her (R631). Kay Allen responded, "Oh my God. Oh shit" (R631) Allen unlocked the door and let the men inside (R631). Allen told one of the men to leave and that she would "beep" him (R633). Allen then went to the back room of the store and began counting the money (R634-35). The two men remained in the store (R633). Thomas observed the two men whispering (R636). Thomas then went to the back office to tell Allen (R636). Allen returned to the front and Appellant whispered something to

her (R636). Appellant and Allen went into the car outside (R636). After punching out, Thomas walked by the car and said goodbye to Allen (R638).

Nora Whitehead was a cashier at Church's Chicken on the morning of February 17, 1990. Whitehead testified that when Kay Allen was told that someone was there to see her, Allen said, "Oh no. He has got to go" (R646). Allen told Appellant, "Go and I will beep you later" (R646). Allen went to the back office where the night receipts were located (R648). She was there for fifteen minutes when Appellant asked for her again (R648). Allen came to the front and said she was finished (R649). Allen then began talking with Appellant and they walked outside into the car (R649). The other employees punched out at approximately 2:58 a.m. and left (R651). Whitehead stayed inside with the second man (R651-52). He looked a little perturbed as if ready to go (R652). Whitehead walked outside and told Allen that she needed her check (R654). Whitehead returned inside (R654). Whitehead saw Appellant open the car door as if he was going to get out and Allen reached over and grabbed him more or less trying to calm him down (R654). Whitehead then left (R655).

Kenegral Allen, also known as Kay Allen, testified that she was the assistant manager at Church's Chicken and part of her responsibility was closing up at night (R673-74). Allen met Appellant in 1988 (R684). They dated approximately a dozen times and formed a relationship (R684). She saw Appellant two or three times between that time and February 16, 1990 (R687).

Allen testified that she saw Appellant on the afternoon of February 16, 1990 (R687-88). Appellant and Allen talked for a while (R693,697). Allen later went to work at Church's Chicken and in the early morning was told someone was there to see her (R698). After being told that the person was in a blue Toyota, Allen knew that it had to be Appellant (R699). Allen let Appellant inside the store (R699). She had let him in the store on other occasions (R699). They spoke for a while and she told him she had to close out the register (R699). Allen closed out the register and counted the money in the office (R700-01). Allen returned to talk with Appellant (R701). Appellant said he was going to let his friend inside and waved for him to come inside (R701). The friend, Wayne Coleman, came inside (R703,709). Allen and Appellant went outside to the car to talk (R703-704). They had been talking for approximately fifteen minutes when Appellant reached under the seat and pulled out a gun (R705). Appellant asked Allen to go inside like nothing is happening and get the money and bring it out (R706). Allen said, "no" (R706). She said there was not enough money to go to jail over (R706). After sitting for a while, Allen told Appellant he would have to kill her or whatever (R709). Appellant placed the gun back under the seat (R709). They continued talking and Appellant said, "See that guy in there, he is all for it" (R709).

Allen testified that while she was in the car other employees were leaving and said goodbye (R710). Allen was in the car with Appellant for approximately 45 minutes to an hour (R712). After talking some more, Appellant signalled to Coleman (R713). Coleman

came to the car and Appellant told him that Allen was not cooperating with him (R713). Coleman went to the passenger's side and pulled a gun and said, "Bitch, get out of the car" (R714). Allen got out of the car and paced around (R714-15). Coleman then said you want to play rough or something (R715). Appellant said, "Kay, just do what he says" (R715).

Allen testified that the three of them went inside the restaurant (R716). One of the men told her to get the money (R716). She said she couldn't because she didn't have her keys (R716). Appellant went over the glass at the top of the counter and proceeded to unlock the side door to the kitchen (R718). Coleman pushed Allen inside and told her to open the safe (R719). She told him she couldn't (R720). Coleman told her to cut off the lights (R720). While he looked away, she pressed the silent alarm (R720). She then cut off all the lights (R720).

Allen testified that Coleman told her to get in the office (R723). Coleman pointed a gun at her head (R723). Allen opened the safe (R722). She put the money in a box that was on the counter (R722-23). Allen gave Coleman the money because she thought he was going to kill her (R723). Coleman told Allen to lay face down behind the stove (R723). He then told her to get up because he needed her (R724). Coleman said security was outside (R724). Allen got in front of Coleman (R724). He opened the side door (R724). Allen saw one police officer standing close to the front and another officer standing in the front (R724). Allen didn't see anyone else (R725). Coleman was holding the door open (R743). Allen was two feet in front of Coleman when he fired a

shot (R743). Allen then hit the floor and crawled under a table (R744). Coleman fired more shots (R744). Allen heard a machine gun being fired (R744). She heard continuous shots being fired (R744). Allen saw Coleman running back and forth firing from the kitchen area (R745). Coleman ran outside the front door (R745, 778). As he was running he fired a couple of shots (R778). Coleman returned after approximately 30 seconds (R778). There were no shots after he returned (R778). Coleman remained for 2 or 3 seconds to get the box with the money and then he left (R778). Allen then heard the car speed off (R746).

Deputy Robert Sallustio testified that on February 16, 1990, he was advised by the dispatcher that there was a silent alarm at 3551 West Broward (R788). Sallustio arrived at the scene. He didn't notice anybody at the north or west side of Church's Chicken (R791). Sallustio made contact with Deputy John Greeney who was also at the scene (R792). Sallustio walked around the border of the property (R792). Greeney advised that he had a blue vehicle in front of Church's (R793). Sallustio could see the vehicle (R793). Sallustio saw Appellant in the driver's seat of the vehicle (R793,800). Greeney told Appellant to exit the car (R797). Appellant said that he was waiting to pick up his girlfriend who was the manager of Church's Chicken (R797). Greeney again told Appellant to exit the car (R798). Appellant asked whey they were bothering him (R798). By the time Appellant exited the car Sallustio was fifteen feet away with his gun trained on him (R798,803). Appellant put his hands on top of the car (R799).

Sallustio testified that Greeney patted Appellant down (R803). Sallustio observed movement inside Church's (R803). He saw a door open 2 to 3 feet and noticed a black female out of the corner of his eye (R804). Sallustio started to motion toward her when he heard Greeney yell, "Keep you hands back on the car" (R804). Sallustio averted his attention to Greeney and within a split second felt a round hit his chest (R804). Sallustio looked back toward Church's and saw glass breaking from another round (R804). When the second round came from Church's Sallustio felt his wrist go limp (R806). The round hit him in the wrist (R806). He saw a muzzle flash and saw a suspect he later identified as Wayne Coleman inside (R804). Sallustio fired 4 to 5 rounds at Coleman (R804). Sallustio then heard gun shots coming from the vehicle (R806). He felt one round hit him in the foot and another hit him in the back (R806). Sallustio fell to the ground (R806).

Sallustio testified that he was able to see a pair of legs when looking under the car (R807-08). He also observed Greeney laying on his back (R808). Sallustio got up to his knees and fired four or five shots at the legs he had seen by the car (R808-09). Sallustio then noticed Coleman running out of Church's (R809). Coleman was shooting at Sallustio as he ran (R809). Sallustio fired his remaining rounds at Coleman (R809). Coleman ran directly to the driver's side of the vehicle where Greeney was (R809). Sallustio retrieved a gun from his ankle holster and fired two rounds toward the vehicle (R810). Sallustio then heard several rounds of semi-automatic weapon fire (R858). Sallustio then went to the back of the building (R810). Sallustio noticed Appellant

running around the corner chasing him (R810). Sallustio looked around the corner and fired at Appellant (R810-11). Sallustio did not see Appellant with a weapon (R854). Sallustio again looked around the corner and fired again when he noticed that Appellant was running away (R812). Sallustio assumed that he had shot Appellant because he was running away (R859). Sallustio then retrieved his radio and called for help and advised that Greeney was injured (R812).

Sallustio testified that when he had testified in front of the Grand Jury he could not identify the suspect that he believed had chased him (R815). In the Grand Jury testimony Sallustio remembered being chased by a man in white pants (R842-43). Appellant was wearing dark pants, not white pants (R842-43).

Deputy Ben Williams testified that he heard the dispatch and proceeded to Church's Chicken (R592-93). Williams saw Sallustio at the northeast corner of the store (R594). Greeney was laying face up in the parking lot (R595). Greeney was dead (R595). Williams checked Church's for suspects (R595). Williams heard a female screaming under one of the tables (R596). She was saying, "Don't shoot me. Don't shoot me" (R596). Williams searched her and continued to check the rest of the store (R597). Sallustio's gun was found at the southeast corner of the store (R607).

Deputy David Favarulo testified that when he arrived at the scene he saw Greeney laying on the ground (R891). Greeney didn't have a pulse (R892). Favarulo noticed shell casings around Greeney (R894). Favarulo tried to get information from Sallustio to alert others as to what occurred (R904). The only information given was

that a blue Toyota, a black male in a tweed sweater were involved (R904). Favarulo got no further details from Sallustio when he met with him the next Saturday (R905).

Detective James Kammerer testified that he arrived at Church's at approximately 4:20 a.m. and processed the interior of the building (R1044-5). Kammerer found a total of seven fragments and three projectiles (R1058). There was a footwear impression on top of a table (R1070). A bullet found in the widow frame could have ricocheted or come from the inside of Church's (R1104). Kammerer also examined a vehicle at Mac's Towing at Dania the next day. Kammerer collected what appeared to be blood stains from the driver's seat, the armrest, the roof, the rocker panel, and numerous areas about the driver's side of the vehicle (R1074). Four projectile holes on the passenger side of the car were discovered (R1078). The vehicle was a Toyota with tag number HES-89E (R1079).

Bruce Ayala, an expert in the field of glass fracture pattern analysis, testified that he examined the large store front window and the bullet holes in that window (R1352). One projectile struck the inside surface and passed outside (R1354). There were four other holes passing from the outside to the inside (R1354). There was no way to tell when the bullets hit (R1356).

Charles Edel, who worked for the Broward County Sheriff's Office on February 17, 1990, testified that he responded to the scene at 4:08 a.m. (R948). Edel collected 28 shell casings from the scene (R951). Eighteen were brass casings (R951). Ten were aluminum casings (R951). The casings from Sallustio's weapon were

brass (R996). The maximum distance of ejection of a casing should be 2½ feet (R994). Edel had no explanation why one of the aluminum casings was on the west side when all other casings were located on the east side (R999). A revolver was found at the east side of the building (R961). There were four spent cartridges inside and one live round (R959). Edel also noticed that Deputy Greeney's flashlight appeared to have been struck by a projectile (R965). Edel was present at Deputy Greeney's autopsy (R968). There was a hole in the right breast pocket of Greeney's shirt (R970). There was a hole in the left shoulder area (R970). There was also a searing on the right epaulet (R970).

George Duncan testified as an expert in the field of DNA profiling (R1228). Duncan received numerous blood samples from Detective Kammerer (R1229). Duncan could not extract DNA, or could not get a DNA print, from any of these samples (R1232-34), with the exception of a sample that was represented to have come from the driver's seat of a car (R1231). The sample matched the blood of Jack Greeney from the Broward County Sheriff's Office (R1231).

Tom Mesick, an expert in the field of latent fingerprint examination, testified that a print found in the Toyota with tag number HES89E belonged to Appellant (R1450-51). A blood print on the window tinting of the Toyota belonged to Appellant (R1453). A number of firearm forms had Appellant's prints on them (R1457-61). A map had Wayne Coleman's thumb print on it (R1455). Mesick received 32 prints of value from Church's Chicken (R1467). There was one print of Coleman's inside Church's (R1468).

Ernest Hamm, an expert in footwear track identification, testified that in his opinion the footwear track made on the table inside Church's Chicken was probably made by State's Exhibit 149 (R1544).

Patrick Garland, an expert in the fields of firearms identification and ballistics, testified that he examined Deputy Sallustio's 9 millimeter handgun, his revolver, and the shell casings and bullet fragments found at Church's Chicken (R1584-1639). Garland determined that 15 of the casings found at the scene had been fired from Sallustio's 9 millimeter pistol (R1596). There were four casings that had been fired from Sallustio's revolver (R1594). Garland determined that another 9 millimeter semi-automatic weapon fired the 10 aluminum casings and 3 brass casings found at the scene (R1597-98). Three other casings found in the Toyota with tag number HES89E were also fired from the same pistol (R1599). Garland determined that four casings taken from the rear seat of the Toyota were .38 caliber and had been fired from a revolver (R1612-13). Two .38 caliber casings found in Appellant's apartment had been fired from the same revolver (R1613-14). Three of the fragments found inside Church's Chicken had been fired from a .38 revolver, but not from Sallustio's revolver (R1603-04).

Garland testified that the bullet removed from the pocket of Sallustio's shirt was a 9 millimeter which was fired through a pistol with the same characteristics as an Intertech-9 (R1614). That front portion of Sallustio's vest contained a fired bullet inside the fabric (R1616). The bullet was fired from the same pistol as the bullet that was removed from Sallustio's pocket

(R1617). The bullet removed from Sallustio's back was also fired from the same pistol (R1619). Garland also determined that the two bullets found in Deputy Greeney's body (State's Exhibits 43 & 44) also were fired from the same pistol (R1620-21). All the bullets that Garland had from Sallustio were fired from the same weapon (R1636). Garland also examined Greeney's shirt and found two bullet holes (R1622). There was a hole to the left shoulder area which had residue consistent with a shot coming from six to nine inches (R1622-23). A hole to the pocket had no residue (R1622-23). There was no indication that this shot came from a close distance (R1635). There was residue to the right epaulet which was consistent with a shot from six to nine inches (R1623).

Richard Valentine testified that on January 14, 1990, Appellant purchased a 9 millimeter semi-automatic from the AB Pawn and Gun Shop where he worked (R1549-53). Valentine doesn't remember if there was someone with Appellant when he purchased the gun (R1553-54).

Raul Vila, an associate medical examiner of Broward County, testified that he examined the body of Deputy Greeney (R917). The cause of death was multiple gun shot wounds (R930). The examination showed two gunshot wounds (R918). One gunshot wound was to the front of the neck (R918,921). This wound was fatal in itself (R927). There was some stippling around the wound (R921). This was indicative of an intermediate range shot (R921). Greeney was alive when he received this wound (R927). The other gunshot wound was to the front shoulder region (R919). This wound was fatal in itself (R930). This wound was not consistent with somebody

standing over somebody and firing down (R929). It was more consistent with someone being hunched over and somebody standing in front of them (R930). The wound to the left shoulder did not have stippling (R923). However, from examination of Greeney's shirt, Vila opined that the shot was from the same distance as the neck shot (R923-24).

Vila also testified that there were also abrasions to the left side of Greeney's head (R919). The abrasions were consistent with Greeney hitting his head (R920). The abrasions are consistent with Greeney hitting his head against the side of the car (R935). Vila also noted a graze wound on the lower part of Greeney's ear (R919). There was a soot-like deposit in the ear (R919). This would be indicative of a very close-range gunshot from several inches to a couple of feet (R920). It is possible that the soot in the ear was the result of another gunshot wound (R939). There was also a shot through the epaulet consistent with a shot from a distance (R936).

Mauricio Diamieda, a surgeon at Broward General Hospital, testified that on February 17, 1990, he came into contact with Deputy Sallustio (R864). Sallustio had bullet injuries to his left forearm and to his back (R865). A bullet also struck Sallustio's vest but did not penetrate his chest (R865).

Vincent Karag, a surgeon, was called in to perform surgery at Union Hospital in Cecil County, Maryland (R1037). Karag removed two bullets from Appellant's arm (R1040). One bullet was close to the bone and the other bullet was located approximately one-half inch away (R1040).

Deputy Michael Fraley testified that he found a light blue Toyota Corolla with tag number HES89E at Northwest 5th Court at 8:40 a.m. on February 17, 1990 (R880-83).

Deputy Clayton Jenkins testified that he went to Northeast 5th Court at 9:35 a.m. on February 17, 1990, and observed money on the ground near the Toyota (R1275). Jenkins found $143.94 altogether (R1276). Jenkins had also examined Sallustio's shirt (R1282). Jenkins found three holes in the shirt and found a bullet in the right breast pocket although there was no sign of entry (R1283).

Detective Richard Engels testified that he examined the blue Toyota at Northwest 5th Court (R1324). The car had a broken right front tire, a bullet hole in the window, and a few bullet holes in the front fenders (R1324). A gun bag was on the passenger's seat (R1326). Three spent aluminum 9 millimeter casings were found in the vehicle (R1330). Four spent .38 caliber casings were found in the back seat (R1334). A total of $340.94 in change and $193.00 in currency was found in the rear of the car (R1342-43).

Vincent Rozier testified that on February 17, 1990, he was in his front yard at 5120 Northwest 38th Avenue selling rock cocaine when he heard shots coming from the beach (R1378-79). Two men ran up to him (R1381-82). Rozier identified one of them as Appellant (R1383) Appellant asked Rozier to take him to the hospital (R1381). Appellant carried what looked like a chrome and brown machine gun (R1382). The other man had what looked like a big handgun -- a revolver (R1382). Rozier agreed to take them to the hospital (R1384). Rozier went into his house and told his mother

that some friends had gotten in trouble and needed a ride to the hospital (R1386). The three men left (R1387).

Rozier testified that Appellant wanted to go to North Lauderdale instead of to the hospital (R1387). Rozier took the men to North Lauderdale (R1387). They stopped at a two-story apartment (R1389). Appellant went inside for approximately fifteen minutes (R1389). In a deposition Rozier indicated that Appellant got out of the car with nothing and Coleman got the guns and went inside (R1396-97). Appellant had taken his gun with him (R1389). Coleman then went inside (R1390). When the men returned, Appellant had changed clothes (R1390). The men then drove to Miami (R1390). After they arrived, Rozier gave Coleman his phone number (R1392). The next day one of the men called Rozier's house at 10:00 a.m. (R1392). The voice on the phone told Rozier that the police had found the car (R1393). Rozier testified that he did not see any blood or guns, clothing, or anything in his car (R1395). Rozier testified that he was contacted by the police two weeks later and that they beat him up (R1404-06). Rozier was arrested by the police and told that if he did not tell them what was going on he would be charged as an accessory (R1405). Rozier testified that he had read and heard about what had occurred at Church's Chicken (R1405).

Ruel Allen testified that Appellant came to his house on the morning of February 17, 1990 (R1301-02). Allen asked Appellant what had happened (R1302). Appellant said he had been shot (R1302). Appellant explained that he went to Church's and took the money (R1303). He then went outside and the guy with him was

shooting at the police and the police shot at them (R1303,1319). Appellant got shot and he returned a shot (R1303,1319). Appellant did not say he shot a police officer (R1317). Appellant made a phone call (R1304-05). Appellant then left.

Yvonne Hutchinson testified that she met Appellant in December of 1989 (R1108). They began sharing an apartment the next January (R1109). On February 16, 1990, Hutchinson, Wayne Coleman, and Appellant went to dinner (R1115-16). Appellant later gave Coleman a ride and returned to watch TV with Hutchinson (R1116). At 5:00 a.m., Hutchinson received a phone call from Appellant (R1117). Appellant said that a police officer had been shot and that she shouldn't panic (R1118). Appellant asked her to get his things ready until he arrived (R1118). Hutchinson placed Appellant's clothes and shoes in suit cases and three garbage bags (R1119). Wayne Coleman and Appellant arrived two hours later (R1120). Coleman had a weapon at the kitchen table (R1129). It was covered with blood and Coleman was trying to clean it off (R1129). The gun was grayish-green (R1131). The gun had a clip (R1136). Hutchinson asked Appellant what had happened to her car and Appellant said that he was out with his friends and was asked to step out of the car by a police office and when he did the officer pulled a gun on him (R1123-24). Appellant stated that the officer had pulled the trigger of his gun and he had turned to the side and the bullet missed him (R1124). Appellant then pulled his gun, took a couple of steps, then he said one of them got shot (R1124). Appellant told Hutchinson that the car got shot up and he gave it to one of his friends to take somewhere (R1128). Appellant told her that if

police asked what happened to the car to tell them it was stolen (R1128). Hutchinson reported the car stolen the same day (R1128). Appellant dressed his arm (R1132). Appellant got his belongings and left with Coleman (R1131). They were in the apartment approximately two hours (R1131).

Hutchinson testified that she later received a call from Appellant (R1132). He told her that Doris was coming to pick her up (R1132). Doris gave Hutchinson a ride to her house (R1133). It was approximately 9:30 a.m. (R1133). Coleman and Appellant were there (R1133). Appellant told Hutchinson that he was leaving and for her not to worry (R1134). Hutchinson did not hear from Appellant again (R1135). Hutchinson testified that on the day she was arrested the police came to her house and treated her "real bad" (R1140). They threatened her (R1140). Hutchinson was afraid and scared (R1141). The police told her that if she helped they would let her go (R1141).

Doris Harvard testified that she worked as a leasing agent at Century Lakes apartments (R1558). Harvard rented an apartment to Appellant and Yvonne Hutchinson (R1559). At approximately 8:00 a.m. on February 17, 1990, Wayne Coleman and Appellant came to Harvard's residence (R1562). Appellant told her he had been shot (R1566). Harvard asked what happened (R1567). Appellant explained that someone had tried to rob him (R1567). Coleman brought brown garbage bags from the car into the bedroom (R1568). Guns were taken out of the bag (R1569). One looked like a .357 handgun and the other looked like a machine gun (R1569). The guns were unloaded and the ammunition was placed in a bag (R1569-70).

Coleman and Appellant left with the bag containing the guns (R1571). They returned in three to five minutes (R1571). Harvard didn't see the bag when they returned (R1571).

Harvard testified that she had picked up Yvonne Hutchinson and drove her back to Harvard's residence where Coleman and Appellant were located (R1574). Coleman brought a briefcase inside (R1572). Harvard took Hutchinson back to Century Apartments and Harvard stayed there to work (R1576). Harvard never saw Coleman or Appellant again (R1578).

On February 18, 1990, Wayne Coleman and Appellant were stopped in a white Toyota Camry in Cecil County, Maryland (R1366,1411). Coleman and Appellant were taken into custody. Coleman had $203.78 on his person (R1479). Appellant had just under a thousand dollars (R1418,1480). There was a gun receipt for a 9 millimeter pistol purchased on January 14, 1990, in Appellant's wallet (R1418). The trunk of the vehicle contained a small black bag which contained Appellant's identification (R1486). A receipt for 9 millimeter ammunition was also in the bag. (R1487). A briefcase in the trunk contained Coleman's identification.

A search of the residence of Doris Harvard showed a map of Washington, D.C., on the bedroom floor (R1489-90). The map had stains on it (R1490). The phone number of Vincent Rozier's house was written on the back of the map (R1493). There was a receipt for a .38 Taurus inside a briefcase found inside the bedroom (R1493).

PENALTY PHASE

John Clough, an assistant clerk at the Dorchester District Court in Boston, Massachusetts, identified a certified copy of conviction charging Appellant with assault and battery of a child under the age of 14 (R1833). The date of the conviction was January 29, 1985 (R1834). Clough testified that such a conviction is a felony offense (R1834).

Rose Flynch testified to the details of the assault and battery which occurred January 12, 1985, when she was fourteen years old (R1838-48).

Pastor Leebert Kelly testified that he is a minister of religion and lives in Kingston, Jamaica (R1859-60). As the pastor of the church which sponsored the school Appellant attended, Kelly got to know Appellant as a student (R1862-63). Appellant found it difficult to read which affected his studies, but he attempted to do his best (R1864). Appellant had dyslexia (R1865). He was handicapped in terms of scholastic ability (R1864). Despite this, Appellant was a good student, who was very attentive, well-mannered and well-behaved (R1865). Appellant was interested in other students and his brothers and sisters (R1865). Appellant was also interested in his school and the church (R1865).

Nevel Barrett owns a bakery and restaurant in Boston, Massachusetts (R1870). Barrett testified that he hired Appellant to do some carpentry work (R1872). Appellant's work was excellent (R1872). Barrett would call Appellant whenever he had problems (R1872).

Sylvia Hamilton testified that she adopted Appellant as her grandson in 1984 because his mother was ill (R1875). Hamilton knew Appellant to be a carpenter and always called him when there was work needed to be done (R1875). Appellant does good carpentry work and does plumbing work that a plumber could not do (R1877). Appellant would do whatever Hamilton asked him to do, such as take her to the store or to church (R1877).

Anthony Clarke testified that he had asked Appellant for a carpentry job in Boston (R1881). Appellant trained Clarke to become a carpenter (R1881). Clarke worked for Appellant for three and one-half (3½) years (R1881). It had been very difficult to find a job at that time (R1882). Clarke was able to support himself and his mother due to working for Appellant (R1882). When Appellant moved away, Clarke no longer worked as a carpenter and decided to sell drugs (R1882). While Clarke worked for Appellant he did not sell drugs (R1882). Clarke testified that Appellant had had an impact on his life (R1883).

Lavern Myles, Appellant's brother, testified that he and Appellant grew up together in Jamaica (R1887). During this time Appellant would take Myles to school and would give him money to buy school supplies and a uniform (R1888). Appellant also helped his other brothers and sisters in the same way (R1888). He also taught them carving (R1888). Appellant was not the oldest child, but he was more of a father than the oldest brother (R1888). Myles looked at Appellant as his father (R1889). After Appellant left Jamaica things changed (R1889). The family could not help with the necessary supplies (R1889). Appellant later sent money (R1890).

Marcel Foster, a health assistant in Massachusetts, testified that Appellant is his brother (R1893). Foster considered Appellant more of a father because of the way he looked out for the children (R1893). Appellant would tell Foster the people he was associating with were no good (R1893). Looking back, Foster realized Appellant was correct (R1893). Appellant would push Foster to do things he didn't want to do, such as staying home and helping their grandmother who wasn't very healthy (R1894). Appellant would help out financially and taught Foster trades (R1894). Foster feels that Appellant had an impact on his completing his education (R1894).

Arlene Foster, Appellant's sister, testified that she lived with Appellant in Jamaica and has spent the last seven years in the United States (R1888-89). Appellant helped her financially with her education (R1899). Without his help, she could not have gone to school (R1899). Foster helped Appellant with his reading and writing because he could not do it himself (R1900). Appellant wanted to learn to read and write (R1900). Appellant was a father figure (R1900).

Adrien Lawson testified that she met Appellant, had a relationship with him, and they now have an eight month old child (R1903). Appellant did building maintenance, carpentry, and fixing things on a full-time basis (R1904). Lawson did clerical work for Appellant (R1904). The business was doing well (R1904). Appellant worked day and night (R1904). He treated Lawson very well and provided for her (R1905). Appellant would give her a couple hundred dollars every two weeks or so (R1908).

Dorrett English, Appellant's mother, testified that Appellant is 27 years old and was born in Jamaica (R1909-10). English is a nurse (R1913). Appellant was born with a hematoma as a result of a very difficult delivery (R1913). He had a hematoma on one side of his head for months after the birth and at five months old he had a resulting brain hemorrhage (R1913). When Appellant was eight months old he had aspiration when he was bitten by a neighbor's child (R1913). English explained that Jamaica during that time period was not medically advanced (R1917). Later when Appellant came to the United States, English took him to Massachusetts General Hospital for evaluation for a critical functional evaluation (R1917). The hospital tried to help, but there was no insurance coverage and the treatments had to stop because English could not afford them (R1917).

English testified that Appellant is dyslexic (R1916). English testified that dyslexia might be from the birth hematoma and brain hemorrhage which might have cause a lesion in his brain (R1917). When Appellant was 10 years old he lost two of his fingers while cutting cane to eat (R1913). He accidentally got his fingers chopped off (R1913). English got married to a man that was not Appellant's father (R1915). Appellant saw English repeatedly physically abused (R1915). English was beaten so badly that she could not move (R1915). Appellant acted as a doctor and came to her aid (R1915). Appellant also helped her financially, spiritually, and emotionally (R1915). Appellant also was a father-type figure to the younger children and would act as the disciplinarian (R1913). One time, when his younger brother did not obey English,

Appellant spoke to him and the brother stabbed him in the back resulting in Appellant almost dying twice (R1914). Appellant was in intensive care for a long time (R1914).

English testified that she emigrated to the United States in 1978 because she was seeking a better future (R1910). She left her children with her mother (R1911). Although Appellant was not the oldest child, he was a father for his brothers and sisters because he was the most responsible and caring (R1911). Appellant was a craftsman and would sell his crafts (R1911). Appellant learned carpentry and taught the younger kids the skills of the trade (R1916). When Appellant emigrated to the United States in 1984, he gave the young kids the work because they did not have a high school diploma and could not find work (R1916). Appellant taught them carpentry and plumbing (R1916). He put them to work and paid them while he taught them (R1916). While he lived in Boston, Appellant worked with Abrams Management Company and did carpentry work on the side (R1922-23). Appellant has contributed $9,000.00 for English's home since 1984 (R1923). Appellant has been supporting English (R1924). Appellant's sister would not have been able to complete school if it weren't for Appellant (R1924). Appellant moved to Florida three years ago (R1924). English came to visit (R1924). Appellant was forming a corporation and needed the assistance of other people who could read contracts (R1924). Appellant worked various jobs repairing houses and was doing well (R1925). Appellant attended church (R1926).

SUMMARY OF THE ARGUMENT

1. The trial court formulated its sentencing decision and prepared the sentencing order prior to giving Appellant the opportunity to be heard with regard to the appropriate sentence. This was reversible error.

2. Appellant requested that the jury be given a special jury instruction limiting consideration of duplicate aggravating circumstances. The trial court denied the requested instruction. This was error. Castro v. State, 597 So. 2d 259 (Fla 1992).

3. The trial court separately found and weighed the aggravating circumstances that the "victim was a law enforcement officer engaged in the performance of his official duties" and the offense was committed to "avoid arrest." These circumstances were based on the same aspect of the offense. It was error to consider and weigh them as separate aggravating circumstances.

4. Appellant presented and argued a number of non-statutory mitigating circumstances in this case. These circumstances were uncontroverted. It was error to fail to find these non-statutory mitigating circumstances.

5. Appellant presented and argued a number of non-statutory mitigating circumstances in this case. The trial court failed to address any of these circumstances in its sentencing order. This was error.

6. Where a key prosecution witness, Kenegral Allen, admitted to testifying falsely to material facts at trial Appellant must be given a new trial or alternatively a new sentencing hearing.

7. Death is not proportionally warranted in this case.

8. Dr. Antoinette Appel testified to Appellant's history of intercranial bleeding. It was error to deny Appellant's request to be allowed a Magnetic Resonance Imaging examination.

9. Appellant was denied due process and a fair and reliable sentencing due to the introduction of inadmissible victim impact information.

10. Despite very serious allegations during a motion to discharge Appellant's court-appointed counsel, the trial court failed to conduct an adequate inquiry. This was error.

11. It was error to overrule Appellant's objections and to permit the prosecution to elicit inadmissible evidence under the guise of refreshing recollection.

12. The trial court erred in failing to release, or review in camera, grand jury testimony.

13. The unreliable identification made by Deputy Sallustio should have been suppressed.

14. It was error to admit hearsay statements into evidence over Appellant's objections.

15. Irrelevant bad character evidence was introduced by the state over Appellant's objection. This was error.

16. It was error to deny Appellant's requested instruction that mitigating evidence does not have to be found unanimously.

17. The instruction on reasonable doubt denied Appellant due process and a fair trial.

18. The trial court erred in allowing the state to proceed on a felony-murder charge without proper notice.

19. Appellant was denied due process and a fair sentencing where the jury's sense of responsibility was minimized.

20. The trial court erred in failing to adequately define non-statutory mitigating circumstances as requested by Appellant.

21. It was error to fail to instruct the jury on the correct burden of proof for the sentencing phase.

22. Mr. Malavenda needed co-counsel to help him try this case and he requested the court to appoint co-counsel. It was error in this case not to appoint co-counsel.

23. Florida's death penalty is unconstitutional.

24. The aggravating circumstances used in this case are unconstitutional.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FORMULATING ITS SENTENCING DECISION PRIOR TO GIVING APPELLANT AN OPPORTUNITY TO BE HEARD AS TO SENTENCING.

The trial court formulated its sentencing decision and prepared the sentencing order prior to giving Appellant the opportunity to be heard with regard to the appropriate sentence. This was reversible error and denied Appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and under Article I, Sections 2, 9, 16, and 17 of the Florida Constitution.

In the present case the trial court received the jury's recommendation and ordered a pre-sentence investigation (PSI) on May 9, 1991 (R1954). The case was immediately set for imposition

of sentence on June 20, 1991 (R1954).[1] At the imposition of sentence defense counsel asked the trial court if he was going to be able to talk about the PSI (R2034). The trial court did not answer the question (R2034). Instead, the trial court began the imposition of sentence by asking Appellant and his mother to approach the bench (R2034). The trial court also asked members of the victim's family to approach the bench at this time (R2034-35). The trial court then proceeded to read from the final sentencing order (R2035-37,2429-30).[2] Included within the order being read was the fact that after receiving the jury recommendation the trial court had recessed as to allow for a period of thoughtful reflection (R2036,2430). When the trial court reached the part of the sentencing order dealing with the PSI, the defense attorney was permitted to object to the PSI (R2037). Defense counsel then addressed and objected to the aggravating circumstances (R2038-39). Defense counsel presented additional evidence (R2041). The prosecutor then argued that the appropriate sentence was death (R2047). The trial court then continued to read verbatim from the final sentencing order which had imposed the death penalty (R2051-58,2430-36). The sentencing order was then filed in open court (R2429).

Clearly, the trial court's formulating and preparing the final sentencing order prior to allowing defense counsel to be heard is

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[1] No other hearings regarding the sentence were scheduled in this case. A hearing that dealt only with a motion for new trial occurred on June 18, 1991 (R1955-2004).

[2] A comparison of the final sentencing order with the transcript shows that the trial court was reading verbatim from the order (R2035-37,2429-30).

improper. Spencer v. State, 18 Fla. L. Weekly S162, S163 (Fla. March 18, 1993). In Spencer, this Court reaffirmed that both sides must be permitted to present arguments and additional evidence prior to the hearing where the final sentencing order is read and contemporaneously filed. Specifically, the procedure to be used is to hold a hearing to allow both sides to present argument and to challenge or rebut such things as the PSI and then to recess for the trial court to reflect and consider the appropriate penalty and then to set forth a separate hearing to impose the sentence and to contemporaneously file the sentencing order:

> In *Grossman*, we directed that written orders imposing the death sentence be prepared prior to the oral pronouncement of sentence. However, we did not perceive that our decision would be used in such a way that the trial judge would formulate his decision prior to giving the defendant an opportunity to be heard. We contemplated that the following procedure be used in sentencing phase proceedings. First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. Second, after hearing he evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then, in accordance with section 921.141, Florida Statute (1983), the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order. such a process was clearly not followed during these proceedings.

Spencer v. State, supra, at S163 (emphasis added).

The above procedure was not used in the instant case. Instead, defense counsel was given the opportunity to be heard only at the hearing for imposition of sentence at which the trial court read and filed its final sentencing order which had already been prepared. In other words, there was no opportunity to be heard until after the trial court had formulated its sentencing decisions. In fact, the trial court's sentencing order shows that after receiving the jury recommendation, but before hearing defense argument and receiving additional evidence, the trial judge recessed the proceeding to consider the appropriate sentence after "a period of thoughtful reflection" (R2036,2430). Clearly, such a recess for thoughtful reflection as to the appropriate sentence should occur only after the hearing which gives the parties an opportunity to be heard before the trial judge and not before such a hearing:

> ... First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard ... second, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence.

Spencer, supra, at S163 (emphasis added). The trial court's careful reflection and formulation of its sentencing decisions prior to Appellant having an opportunity to be heard denied Appellant due process and a reliable sentencing. Fifth, Sixth, Eighth, and Fourteenth Amendments, United States Constitution; Article I, Sections 2, 9, 16, and 17, Florida Constitution. This cause must be reversed and remanded for a new sentencing.

POINT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED LIMITING INSTRUCTION ON THE CONSIDERATION OF DUPLICATE AGGRAVATING CIRCUMSTANCES.

The jury in this case was instructed to consider the aggravating circumstances that the offense was: (1) committed for the purpose of avoiding lawful arrest,[3] and (2) the victim was a law enforcement officer engaged in the lawful performance of his duties.[4]

Appellant requested that the jury be given the following instruction limiting consideration of duplicate aggravating circumstances:

> The prosecution may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are supported by a single aspect of the offense, you may only consider that as supporting a single aggravating circumstance.

(R2382,1791-92). The trial court denied the requested limiting instruction (R1792).[5]

In Castro v. State, 597 So. 2d 259 (Fla. 1992), this Court held that while it was not error to instruct the jury on all the aggravating factors, it was error not to give a special instruction limiting consideration of circumstances that could double:

> In the present case, defense counsel objected to the jury's being instructed on both factors

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[3] § 921.141(5)(e), Fla. Stat. (1989).

[4] § 921.141(5)(j), Fla. Stat. (1989).

[5] The trial court erroneously denied the instruction believing it to be covered by the standard instruction (R1792).

and also requested the following special instruction be given:

> The state may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are supported a single aspect of the offense, you may only consider that as supporting a single aggravating circumstance. For example, the commission of a capital felony during the course of a robbery and done for pecuniary gain relates to the same aspect of the offense and may be considered as being only a single aggravating circumstance.

> The court refused the instruction on the authority of *Suarez*. However, *Suarez* did not involve a limiting instruction, but only the question of whether in that case it was reversible error when the jury was instructed on both aggravating factors. When applicable, the jury may be instructed on "doubled" aggravating circumstances since it may find one but not the other to exist. A limiting instruction properly advises the jury that should it find both aggravating factors present, it must consider the two factors as one, and thus the instruction should have been given.

597 So. 2d at 261. Thus, it was error to deny Appellant's requested instruction.[6]

The error cannot be deemed harmless in this case. In Valle v. State, 581 So. 2d 40 (Fla. 1991), this Court held that the aggravator of killing a law enforcement officer engaged in the performance of his lawful duties was proven by the killing of the police officer to "avoid arrest":

> Similarly, in this case the aggravating factor that the victim was a law enforcement officer who was murdered while performing his official

[6] The requested instruction in this case was identical to the instruction that it was held error not to give in Castro v. State, 597 So. 2d 259, 261 (Fla. 1992).

> duties is not an entirely new factor, and Valle is not disadvantaged by its application. At the time Valle committed this crime the legislature had established the aggravating factors of murder to prevent lawful arrest and murder to hinder the lawful exercise of any governmental function or the enforcement of laws. §§ 921.141(5)(e), (g), Fla. Stat. (1977). By proving the elements of these two factors in this case, the state has essentially proven the elements necessary to prove the murder of a law enforcement officer aggravating factor.

581 So. 2d at 47. Certainly, the killing of Officer Greeney while he was engaged in the performance of his duties and the killing of Officer Greeney to avoid arrest was based on the same aspect of the crime. Without the requested instruction, the jury could have found the two aggravating circumstances mentioned above and considered them independently and separately even though they were based on the same aspect of the offense -- that Appellant avoided arrest by killing a law enforcement officer. In fact, the prosecutor urged the jury to consider these duplicative aggravators as separate aggravating circumstances.[7] Obviously, failure to give

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[7] [PROSECUTOR]: ... The third aggravating circumstance that I'd like to discuss with you, and I submit to you based on the testimony and the evidence that has been introduced has been proven beyond a reasonable doubt, is that the capital felony, to-wit: the killing of Deputy Greeney, the murder was committed to avoid arrest and to avoid, as Judge Coker will read, to avoid a lawful arrest and to escape from lawful custody.

There is no question that John W. Greeney was killed to avoid arrest to eliminate any witness against him to-wit: Jack Greeney, the deputy. There is no question that's been proven beyond a reasonable doubt.

And the fourth one, I submit to you based on the testimony and the evidence has been proven

the instruction limiting consideration of the aggravating circumstances which double could have influenced the jury's recommendation and thus would not be harmless.

In addition, any error that could influence the jury in its consideration of aggravating circumstances, would not be harmless due to the significant mitigating circumstances present in this case. A number of circumstances are present which this Court has recognized as mitigating. For example, Appellant had a number of problems during childhood. These problems included dyslexia which Appellant suffered from as a child and remains with him today (R1865,1917). The dyslexia had an impact on his development (R1864). See Ford v. Strickland, 696 F.2d 804, 813 (11th Cir. 1983) (fact that defendant was bright young man "frustrated by dyslexia" was mitigating). Appellant also had fingers cut off at the age of ten years (R1913). As a child, he was stabbed in the back and almost died (R1914). Finally, Appellant was born with a hematoma on one side of his head and at the age of five months he had a resulting brain hemorrhage (R1913). When eight months old, he had aspiration when bitten by a neighbor's child (R1913). These problems affected Appellant throughout his life and constitute valid mitigating circumstances.

> beyond a reasonable doubt and it speaks for itself is that the individual killed during this capital felony was a law enforcement officer, struck down during the course of his official duties, to-wit: Deputy John W. Greeney, III.

(R1933-34) (emphasis added).

Due to Appellant's problems and handicaps, other children teased him and made fun of him (R2041). See Reilly v. State, 601 So. 2d 222, 223 (Fla. 1992) (among the mitigating factors presented was the fact "the defendant has had a physical problem with an eye muscle ... resulting in some uncaring persons taunting him"). The fact that despite these problems Appellant tried to achieve, is a further mitigating circumstance. See Dolinsky v. State, 576 So. 2d 271, 275 (Fla. 1991) (Dolinsky had good qualities and had "at least to some extent overcome serous adversities").

Although Appellant may not have had complete control over his life, he acted to help and positively impact the lives of others. For example, Appellant took Anthony Clarke under his wing and taught him carpentry and Clarke went to work with Appellant (R1881-82). Appellant gave Clarke opportunity and training without which Clarke would sell drugs (R1881-82). Clarke testified that Appellant had an impact on his life (R1883). Similarly, Appellant helped support his brothers and sisters (R1888,1894,1899,1924). Appellant also pushed his brother to do things he didn't want to do such as staying home to help with their grandmother who wasn't very healthy (R1894). Appellant was also a hard worker who helped the members of his family to obtain educations (R1888,1894,1899, 1924). This is mitigating. Maxwell v. State, 603 So. 2d 490, 492 (Fla. 1992); Fead v. State, 512 So. 2d 176, 179 (Fla. 1987).

In addition, as a child Appellant was present when his mother was repeatedly physically abused (R1915). This has been found to be a mitigating circumstance. Burger v. Kemp, 483 U.S. 790, 107 S.Ct. 3114, 3123 (1992) (mother beaten in defendant's presence by

stepfather). It should also be noted that Appellant acted as a doctor and came to his mother's aid after she was abused and unable to move (R1915). See Evans v. Cabana, 821 F.2d 1065, 1071 (5th Cir. 1987) (fact that defendant cared for his mother was mitigating).

Evidence also showed that Appellant could help others in prison and could be productive in prison through his skills in plumbing, carpentry, and other artistic abilities (R1887,1881, 1916). This is mitigating. Maxwell v. State, 603 So. 2d 490, 492 (Fla. 1992) ("might be productive within a prison setting"); Fead v. State, 512 So. 2d 176, 179 (Fla. 1987) ("could be a productive farm worker within the state prison system"); Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669 (1991) ("future conduct if sentenced to life in prison"); Lamb v. State, 532 So. 2d 1051, 1054 (Fla. 1988).

Other factors could be considered mitigating factors such as the fact that Appellant was a good prospect for rehabilitation,[8] the fact that the alternative sentence in this case was life without parole,[9] the fact that the codefendant received a life sentence,[10] Appellant was religious,[11] and the fact that due to lack

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[8] See Maxwell, supra.

[9] See Jones v. State, 569 So. 2d 1234, 1239 (Fla. 1990) (alternative harsh sentence of two twenty-five year minimums was possible mitigation because it might cause jury to decline to recommend death sentence).

[10] See Caillier v. State, 523 So. 2d 158 (Fla. 1988). It should be noted that co-defendant Coleman was sentenced to life in prison.

[11] See Harmon v. State, 527 So. 2d 182, 189 (Fla. 1988).

of insurance coverage Appellant failed to receive the treatment and care he required (1865,1926,1917).[12]

With all the significant mitigating circumstances for the jury to consider and the existence of aggravating factors which are duplicative, combined with the prosecutor's urging the jury to consider these duplicative factors as three separate and independent aggravators, it cannot be said beyond a reasonable doubt that the error of denying the requested limiting instruction was 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 III

THE TRIAL COURT ERRED IN SEPARATELY AND INDEPENDENTLY FINDING AND WEIGHING AGGRAVATING FACTORS WHICH WERE DUPLICATIVE.

The trial court found the circumstance that the "victim was a law enforcement officer engaged in the performance of his official duties"[13] separately and independently from the aggravating circumstance that the offense was "committed for the purpose of preventing a lawful arrest"[14] (R2431). The finding and weighing of both circumstances separately and independently of each other was error.

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[12] See Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982) (defendant "had been deprived of the care, concern, and paternal attention that children deserve").

[13] § 921.141(5)(j), Fla. Stat. (1989).

[14] § 921.141(5)(e), Fla. Stat. (1989).

It is improper to consider both aggravating factors when they are based on the same aspect of the offense. Bello v. State, 547 So. 2d 914, 917 (Fla. 1989); Oats v. State, 446 So. 2d 90, 95 (Fla. 1984) ("these two circumstances must be considered individually when the only evidence that the crime was committed for pecuniary gain was the same evidence of the robbery underlying the capital crime").

In this case the state's theory was that Appellant avoided arrest by shooting Deputy Greeney -- a law enforcement officer engaged in the performance of his official duty. Obviously, the killing of "a law enforcement officer in the performance of his official duties" aggravator and the killing of a law enforcement officer to "avoid arrest" are based on the same aspect of the crime. See Valle v. State, 581 So. 2d 40, 476 (Fla. 1991). The independent consideration and weighing of the aggravators based on the same aspect of the offense was error.

In addition, the trial court also considered the fact that the instant offense involved a robbery in evaluating two separate aggravating circumstances -- (1) § 921.141(5)(d), Florida Statutes (1989), the killing occurred during a robbery (R2431), and (2) the robbery (even though contemporaneous with the killing) constitutes a prior violent felony (R2430). Utilization of this single aspect of the crime (i.e. that a robbery occurred) in two different aggravators is improper.

The error cannot be deemed harmless where it had the potential of interfering with the weighing process directed by statute. Improper consideration of an aggravating circumstance clearly

affects the weight to be given the aggravating circumstances. There was substantial mitigation found by the trial court. It cannot be said beyond a reasonable doubt that the improper consideration of an aggravating circumstance may not have played a role in tipping the scale against the substantial mitigating circumstances. 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 IV

THE TRIAL COURT ERRED IN FAILING TO FIND THE NON-STATUTORY MITIGATING CIRCUMSTANCES WHICH WERE UNCONTROVERTED.

The trial court failed to find non-statutory circumstances which were presented by defense counsel, or otherwise evident from the record, and which were supported by unrebutted evidence. The failure to find the mitigating circumstances violates Article I, Sections 9 and 17 of the Florida Constitution and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. Resentencing is required.

A court must find as a mitigating circumstance those factors "reasonably established by the greater weight of the evidence." Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). "The rejection of a mitigating factor cannot be sustained unless supported by competent substantial evidence refuting the existence of the factor." Maxwell v. State, 603 So. 2d 490, 491 (Fla. 1992).

The trial court found that there were no mitigating circumstances in this case:

> In summary, the Court finds that of the aggravating circumstances, four were applicable in this case. As to mitigating circumstances, none may be applied to this case.

(R2434). This was error in light of the non-statutory mitigating circumstances presented which were not controverted as explained below.

1. Significant physical problems during childhood

Appellant had a number of problems during childhood which affected him throughout his life. These problems were uncontroverted. For example, Appellant suffered from dyslexia as a child and this problem remains with him today (R1865,1917). This has been recognized as a mitigating circumstance. See Ford v. Strickland, 696 F.2d 804, 813 (11th Cir. 1983) (defendant was bright young man "frustrated by dyslexia"). Appellant was born with a hematoma on one side of his head and at the age of five months he had a resulting brain hemorrhage (R1913). Appellant had aspiration when bitten by a neighbor's child when he was eight months old (R1913). He also had fingers cut off at the age of ten years (R1913). Finally, as a child he was stabbed in the back and almost died (R1914).

Childhood problems have been recognized as significant mitigating circumstances. Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988) ("childhood trauma has been recognized as a mitigating factor"). This evidence was uncontroverted and it was error to fail to find this as a mitigating factor.

In addition, related to this factor is the fact that due to Appellant's problems and handicaps other children teased him and made fun of him. This has been recognized as mitigating. See

Reilly v. State, 601 So. 2d 222, 223 (Fla. 1992) (among the mitigating factors presented was the fact "the defendant has had a physical problem with an eye muscle ... resulting in some uncaring persons taunting him"). A further mitigating circumstance in this regard is the fact that Appellant tried to achieve despite his handicaps and problems. See Dolinsky v. State, 576 So. 2d 271, 275 (Fla. 1991) (Dolinsky had good qualities and had "at least to some extent overcome serious adversities"). It was error for the trial court not to find the uncontroverted mitigating evidence.

2. Appellant helped others and had a positive impact on others.

The evidence was undisputed that Appellant helped support his brothers and sisters (R1888,1894,1899,1924). Appellant also pushed his brother to do things he didn't want to do such as staying home to help care for their grandmother (R1894). Appellant was also a hard worker who helped the members of his family to obtain educations (R1888,1894,1899,1924). This type of evidence has been recognized as mitigating. See Maxwell v. State, 603 So. 2d 490, 492 (Fla. 1992) ("Maxwell was a hard worker who helped members of his family and others"); Fead v. State, 512 So. 2d 176, 179 (Fla. 1987) ("Fead was a hard worker and provided for the members of his family and children"). A prime example of this is where Appellant taught Anthony Clarke carpentry and Clarke went to work with Appellant (R1881-82). Clarke testified that Appellant had an impact on his life (R1883). Appellant gave Clarke opportunity and training without which Clarke would sell drugs (R1881-82).

3. As a child, Appellant was present when his mother was abused and would come to her aid.

It was undisputed that as a child Appellant was present when his mother was repeatedly physically abused (R1915). The trauma of experiencing such an event has been recognized to be a mitigating circumstance. Burger v. Kemp, 483 U.S. 790, 107 S.Ct. 3114, 3123 (1992) (mother beaten in defendant's presence). Appellant acted as a doctor and came to his mother's aid after this abuse (R1915). This has been recognized as mitigating. Evans v. Cabana, 821 F.2d 1065, 1071 (5th Cir. 1987) (fact that defendant cared for his mother was mitigating). It was error for the trial court not to find these uncontroverted mitigating circumstances.

4. Appellant could be productive in prison

Appellant argued and presented evidence that he could help others in prison and could be productive in prison through his skills in plumbing, carpentry, and other artistic abilities (R1887, 1881,1916). This is mitigating. Maxwell v. State, 603 So. 2d 490, 492 (Fla. 1992) ("might be productive within a prison setting"); Fead v. State, 512 So. 2d 176, 179 (Fla. 1987) ("could be productive farm worker within the state prison system"); Skipper v. North Carolina, 476 U.S. 1, 106 S.Ct. 1669 (1991) ("future conduct if sentenced to life in prison"); Lamb v. State, 532 So. 2d 1051, 1054 (Fla. 1988). It was error to fail to find this undisputed mitigating circumstance.

5. Appellant is a good prospect for rehabilitation

This has been recognized as a mitigating circumstance. Maxwell v. State, 603 So. 2d 490, 492 (Fla. 1992) ("family and friends feel he is a good prospect for rehabilitation" was valid

mitigating factor). It was error not to find this mitigating circumstance.

6. The co-defendant received a life sentence

Appellant argued that this was a mitigating factor (R1943). Even if Appellant's theory of defense is totally without merit, it cannot be disputed that Wayne Coleman's actions of shooting at the police officers, while Appellant was unarmed and in custody, initiated the violence in this case. Without Coleman's actions there would be no violence on the night of the incident. Coleman received a life sentence. This could be considered a mitigating circumstance. See Caillier v. State, 523 So. 2d 158 (Fla. 1988).

7. The alternative sentence is life imprisonment without the possibility of parole

Appellant argued that the alternative sentence of life imprisonment without the possibility of parole is a mitigating circumstance. Anything that might cause one to decline to impose the death penalty constitutes a mitigating circumstance. See Jones v. State, 569 So. 2d 1234, 1239 (Fla. 1990). Thus, the fact that a defendant would received an alternative harsh sentence greater than life with a possibility of parole after 25 years has been recognized as mitigating. Id. (alternative harsh sentence of two twenty-five year minimums was possible mitigation).

8. Appellant is religious

Appellant argued and presented undisputed evidence of this factor (R1942,1865,1926). This has been recognized as a mitigating circumstance. See Harmon v. State, 527 So. 2d 182, 189 (Fla. 1988). It was error not to find this uncontroverted circumstance.

9. Appellant failed to received the care and treatment he required

It is undisputed that Appellant's mother tried to get Appellant the treatment and care he needed, but she was unable to do so because of a lack of insurance coverage (R1927). This has been recognized as a mitigating factor. See Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982) (defendant "has been deprived of the care, concern, and paternal attention that children deserve").

It was error for the trial court to fail to find the uncontroverted mitigating circumstances. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). The failure to find these circumstances violates Article I, Sections 9 and 17 of the Florida Constitution, and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. Appellant's sentence must be vacated and the cause remanded for a new sentencing.

POINT V

THE TRIAL COURT ERRED IN FAILING TO CONSIDER THE NON-STATUTORY MITIGATING CIRCUMSTANCES IN ITS SENTENCING ORDER.

Defense counsel argued as non-statutory mitigating circumstances that: Appellant can be productive in prison (R1945); Appellant could help and teach others in prison (R1946); the killing was not planned (R1943); the alternative sentence is life imprisonment without parole (R1944); the codefendant received a life recommendation (R1943). In the written sentencing order the trial court totally failed to address these mitigating circumstances. The trial court errs when it does not "expressly evaluate in its written order" the mitigating circumstances argued by the

defense. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990); Smith v. McCormick, 914 F.2d 1153, 1166 (9th Cir. 1990) (sentencing court must "explicitly discuss in its written findings all relevant mitigating circumstances"); Maxwell v. State, 603 So. 2d 490 (Fla. 1992) ("every mitigating factor apparent in the entire record" must be considered and weighed); Article I, Sections 9 and 17, Florida Constitution; Fifth, Eighth, and Fourteenth Amendments, United States Constitution.

POINT VI

APPELLANT MUST BE GIVEN A NEW TRIAL OR ALTERNATIVELY A NEW SENTENCING HEARING WHERE KENEGRAL ALLEN ADMITTED SHE HAD LIED ABOUT MATERIAL FACTS DURING THE TRIAL.

During the motion for new trial after the jury recommendation, Kay Allen testified that she had lied about several material facts during trial. The trial court denied Appellant's motion for a new trial (R1986). This was error.

A material error or misstatement in the testimony of a witness for the prosecution constitutes ground for a new trial. Bell v. State, 90 So. 2d 704 (Fla. 1956). In the instant case Kay Allen admitted to lying about several material facts. She admitted that she lied at trial when saying Appellant had a gun and had put it at her side (R1976). She admitted that Appellant never produced any gun (R1977). She admitted that she lied during trial when she said that Appellant ordered her out of the car to get the money (R1982). She admitted that she lied during trial when she said that Appellant told Coleman to take her out of the car (R1982). Finally, she admitted that she lied when she testified that Fitzgerald Jones was the father of her children (R1965). She

admitted that Appellant was the father of her twins (R1967,1969). Allen also testified that there was no way Appellant could be guilty due to the order of the gunfire (R1970).

The matters Kay Allen lied about were crucial to the state's case. Allen was a key witness. The prosecution specifically used the facts Allen admitted to lying about in its closing argument (R1679-80), including the lie that Appellant had pulled a gun on Allen (R1679). The prosecutor specifically referred to Allen's statement about the gun and her testifying about the father of her children as proof that she was honest:

> [Prosecutor] ... I mean, who told you about her relationships, and who fathered her children, and what she did, and what she talked about in the car about the guns? She did. I mean, did she appear to be a dishonest person to you?

(R1677) (emphasis added). Kay Allen testified that these very things the prosecutor used to prove her honesty were in fact lies. Under these circumstances, a new trial should be granted.

To make matters worse, Kay Allen testified that she had told the prosecutor, and a counselor provided by the state attorney's office, the truth about Appellant being the father of her children (R1967-68). She also told them that she thought Appellant was innocent (R1970). She also told the counselor provided by the state that she didn't recall some of the statements in her deposition (R1971). Allen was told that she had to memorize her deposition (R1971). The prosecution's knowing use of false testimony in itself requires reversal.

The perjured testimony was independently prejudicial as to the penalty proceedings where the false information relayed by Kay

Allen could be used by the jury in determining Appellant's culpability and in determining its sentencing recommendation. 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 were violated. This cause must be remanded for a new trial or alternatively for a new sentencing proceeding.

POINT VII

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 crimes." State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973).

The nature of the instant offense does not make it one of the most aggravated and indefensible crimes to warrant the death penalty. The offense 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 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).

Appellant did not go out looking to kill or do any violence. In fact, the state's evidence at best shows in Appellant's mind the taking would be without any violence. The state presented evidence on the day of the incident that Appellant told Ruel Allen that he received a call from a girl at Church's Chicken saying that he could come in and take some money from the store (R1300). Appellant told Allen that all he had to do was take money from the manager and that he did not have to use a gun and shots would not be fired (R1315).

Corroborating this evidence was other state evidence. Kay Allen was the night manager at Church's and her duty was to close the store (R673-74). She was also Appellant's girlfriend for a period of time (R684).[15] Kay Allen and Appellant had met and talked earlier on the day of the incident (R690). Kay Allen's reaction to Appellant's arriving before the other employees had left was an exclamation, "Oh my God. Oh shit" (R631), rather than a mere comment that her ride had arrived early. Allen told Appellant to leave and she would "beep" him later (R633). This is when the Appellant intended the theft. However, Wayne Coleman changed when Allen decided not to cooperate (R713). Coleman then called her a "bitch" and talked about playing rough (R714-15). Wayne Coleman pointed a gun at her head to get her to open the safe

[15] Allen did not admit to the extent of this relationship until the motion for new trial she admitted that Appellant was the father of her children (R1967,1969).

(R723). It was Wayne Coleman who would start shooting at police when Appellant was in custody (R804). It is clear that Appellant went to the store that night thinking Allen would help, and not intending to use violence. Where Appellant did not intend violence to occur, it can hardly be said that this was beyond the norm of capital felonies this Court has seen.

It is also noteworthy that Wayne Coleman received a life sentence. It was undisputed that Coleman's actions initiated the tragedy. Coleman fired the first shots. The police had Appellant in custody when Coleman began shooting at the police (R804). But for Coleman's actions, there would have been no killing.[16] Death for Appellant is disproportionate where Coleman received a life sentence. See Scott v. Dugger, 604 So. 2d 465 (Fla. 1992) (death not proportionate for Scott where co-defendant, although not the triggerman, was involved in joint conduct during robbery).

In addition, the quality of the mitigators and aggravators shows that the death sentence is not proportionally warranted. The mitigation in this case was substantial. It cannot be said that this is an unmitigated crime for which the death penalty is reserved. Appellant had a number of problems which have impacted him throughout his life. Appellant suffers from dyslexia (R1865, 1917) which impacted his development (R1864). As a child he had fingers cut off and was stabbed in the back and almost died

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[16] It should also be noted that it was undisputed that Coleman first fired from the store and these bullets struck Sallustio in the chest and wrist (R804,806). Firearms expert Patrick Garland testified that the bullets that struck Sallustio were fired from the same gun that fired the bullets that killed Deputy Greeney (R1617,1620-21,1636).

(R1913,1914). Due to Appellant's problems and handicaps, other children teased and made fun of him (R2041). Despite these problems, Appellant tried to achieve.

Although Appellant may not have had complete control over his life, he acted to help and positively impact the lives of others. Appellant impacted Anthony Clarke by taking him under his wing and teaching him carpentry (R1881-82). Clarke went to work with Appellant and this averted Clarke from selling drugs (R1881-82). Appellant pushed his brother to do things he didn't want to do such as staying home to help with their grandmother who wasn't very healthy (R1894). Appellant was also a hard worker who helped the members of his family to obtain educations (R1888,1894,1899,1924).

One specific set of circumstances demonstrates both Appellant's troubled childhood and his wanting to help others. As a child Appellant was present when his mother was repeatedly physically abused (R1915). Appellant would act as a doctor and come to his mother's aid after she was abused (R1915).

One important mitigating factor to be considered in deciding proportionality is the potential for productive functioning in prison. Evidence showed that Appellant could help others be productive in prison through teaching his skills in plumbing, carpentry, and other artistic abilities (R1887,1881,1816).

Other factors could be considered mitigating factors as such as the fact that Appellant is a good prospect for rehabilitation, the fact that the alternative sentence in this case is life without parole, the fact that the codefendant received a life sentence, Appellant is religious, and the fact that due to lack of insurance

coverage Appellant failed to receive the treatment and care he required (R1865,1926,1917). This is not one of the most unmitigated cases for which the death penalty is reserved.

Finally, Appellant realizes that the trial court found four aggravating circumstances. As explained in Points II and III, the aggravators dealing with killing a law enforcement officer to avoid arrest should count as one aggravator and not two. The prior felony aggravator and felony aggravator are related. The substantial mitigating circumstances present take this case from the group of the most unmitigated crimes for which the death penalty is reserved. Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988) (death not proportional despite fact 5 aggravators found and defendant killed two police officers); Livingston v. State, 565 So. 2d 1288 (Fla. 1988) (two aggravators); Jackson v. State, 575 So. 2d 181 (Fla. 1991) (death not proportional despite two aggravators including prior violent felony); Kramer v. State, 18 Fla. L. Weekly S266 (Fla. April 29, 1993) (death not proportional despite prior violent felony and HAC). The death sentence in this case violates Article I, Sections 9, 16, and 17 of the Florida Constitution and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

POINT VIII

THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR A MAGNETIC RESONANCE IMAGING EXAMINATION.

It has been recognized that a defendant has the right to present mitigating evidence.[17] However, this right has no significance unless the defendant has the right to properly investigate possible mitigating evidence. In the present case Appellant was denied the opportunity to properly investigate possible mitigating evidence where he was denied a Magnetic Resonance Imaging (MRI) test.

Appellant filed a motion requesting that he be allowed to have an MRI test performed on him (2SR473-73). Appellant represented to the trial court there was evidence that Appellant suffered from a brain tumor (1SR82,107). The trial court deferred ruling on the motion until after the competency examination (1SR92).

At the competency hearing Dr. Antoinette Appel testified to Appellant's history of intercranial bleeding and the fact that an MRI exam might provide the defense with additional useful information in this case:

> Q (Mr. Malavenda) Just one more question, Doctor. You mentioned something in your report regarding intercranial hematoma?
>
> A (Dr. Appel) That's correct.
>
> Q What were your feelings regarding that?
>
> A I certainly, I can report to you what I think has appeared in every report, and certainly his mother tells me this is true.

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[17] See Lockett v. Ohio, 438 U.S. 586, 608, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

> When he was an infant, and I believe it was approximately age five months, he was found in bed with blood on the sheet and so on, and was taken to a doctor, although no one seems to remember who or what hospital.
>
> And she was told that he had had some kind of intercranial bleeding. In view of the National Institute of Mental Health Longitudinal Study, high risk kids and high risk pregnancies that is very likely the cause of his inability to read and write. That's not an uncommon outcome.
>
> Q Based on that, do you have any opinion as to whether or not further examination such as MRI should be conducted?
>
> A It certainly would help. It would identify the nature of the deficit, depending on where it is, and whether or not it's silent or not. It might conceivably provide the defense with additional information that might lead to additional defenses. I can think of ways that that might be true.

(R125). After the hearing, defense counsel again requested permission to have an MRI test performed on Appellant (R147). The trial court stated that it would not make a difference and did not grant Appellant's motion (R147-48). This was error.

As noted in Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), when the state uses its power to proceed against an indigent defendant, that defendant should have the materials in order to present an adequate defense:

> This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judi-

> cial proceeding in which his liberty is at stake. * * * We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.

105 S.Ct. at 1092-93. This Court has recognized the importance of tests used by doctors in relation to a defendant's mental condition. See Mason v. State, 489 So. 2d 734 (Fla. 1986) (psychologist concluded "projective" test shows "possible brain damage" and since source of psychiatrist's information was unknown a risk exists that prior determinations were flawed as neglecting organic brain damage).

In Ake, the Court recognized that the right to materials to present a defense applies to a capital sentencing. 105 S.Ct. at 1096 ("We have repeatedly recognized the defendant's compelling interest in fair adjudication at the sentencing phase of a capital case"). Certainly, the mental history and condition of Appellant is a relevant factor at a capital sentencing.

Clearly, here Appellant was deprived of an MRI exam which Dr. Appel testified could explain the intercranial bleeding and which could be relevant. Such a deprivation of materials relevant to presenting a defense at the sentencing phase denied Appellant due process and a fair and reliable sentencing. Fifth, Sixth, Eighth, and Fourteenth Amendments, United States Constitution; Article I, Sections 2, 9, 16, and 17, Florida Constitution. This cause must be remanded for a new sentencing.

POINT IX

APPELLANT WAS DENIED DUE PROCESS AND A FAIR AND RELIABLE SENTENCING WHERE VICTIM IMPACT INFORMATION WAS BEFORE THE TRIAL JUDGE PRIOR TO SENTENCING.

In Payne v. Tennessee, 501 U.S. ___, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the Court overruled the holdings in Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) which barred evidence relating to the victim and impact of the victim's death on his or her family. However, Payne did not overrule the part of Booth barring "admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence." Payne, supra, 111 S.Ct. at 2611 n.2; Hodges v. State, 595 So. 2d 929, 933 (Fla. 1992).

In the present case there were numerous references as to what the victim's family believed to be the appropriate sentence. For example, one letter from the victim's family received by the trial judge[18] stated:

> Please see that the judge hears our recommendation for the ultimate penalty -- DEATH IN THE ELECTRIC CHAIR -- as soon as possible.

(2SR510). There were a number of other specific requests for the death penalty by the victim's family through testimony and letters during the sentencing phase (R2048-50;2SR509-513).

In addition, on two occasions the victim's family voiced opinions as to Appellant's character in that he was not perceived

[18] The trial judge acknowledged the letters (R2050).

as being remorseful during trial (R2049;2SR510).[19] Not only does this constitute improper victim impact evidence it is a prohibited reference to a non-statutory aggravating circumstance. Eg. Trawick v. State, 473 So. 2d 1235, 1240 (Fla. 1985).

As mentioned earlier, the introduction of the opinions of the victim's family violates the Eighth Amendment of the United States Constitution. In addition, the introduction of any victim impact information violates Florida law and the Florida Constitution.

The Florida Legislature has made clear in Section 921.141(5), Florida Statutes (1987), that aggravating circumstances are limited to those provided by statute; no others can be considered to support a death sentence. Purdy v. State, 343 So. 2d 4 (Fla.), cert. den., 434 U.S. 847 (1977); Grossman v. State, 525 So. 2d 833, 842 (Fla. 1988). No other statutes can abrogate this requirement. Floyd v. Bentley, 496 So. 2d 862 (Fla. 2d DCA 1986) (specific statute takes precedent over general statute). Thus, victim impact information must be excluded from capital sentencing proceedings.

Florida law has independently prohibited victim impact information. See Welty v. State, 402 So. 2d 1159 (Fla. 1981); Jones v. State, 569 So. 2d 1234 (Fla. 1990). The logic in preventing passioned, arbitrary decision making still applies in Florida. The Florida Constitution requires greater protection from arbitrary decision making in capital sentencing. See Tillman v. State, 591 So. 2d 167 (Fla. 1991) ("cruel or unusual punishment" provision

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[19] The victim's father testified during the sentencing phase that from watching Appellant's face during trial he did not seem remorseful and the judge should impose the death penalty (R2049). Two other relatives wrote that from reading newspapers they felt Appellant was not remorseful (2SR510).

required proportionality review); Pulley v. Harris, 465 U.S. 37 (1984) (proportionality review not mandated under Eighth Amendment).

The impact of the information cannot be deemed harmless. As mentioned in earlier points, there was significant mitigation in this case. In Jones v. State, 569 So. 2d 1234, 1239 (Fla. 1990), this Court spoke of the risk that victim impact information has on decision making:

> A verdict is an intellectual task to be performed on the basis of the applicable law and facts. It is difficult to remain unmoved by the understandable emotions of the victim's family and friends, even when the testimony is limited to identifying the victim. Thus, the law insulates jurors from the emotional distraction which might result in a verdict on sympathy and not on the evidence presented.

569 So. 2d at 1239. The same logic applies to judges in sentencing. See Patterson v. State, 513 So. 2d 1257, 1263 (Fla. 1987). Certainly, the emotionally charged opinions could have consciously or subconsciously influenced the judge in sentencing Appellant. After all, judges are not machines that can automatically disregard information. See Greene v. State, 351 So. 2d 941, 942 (Fla. 1977) ("a judge is not a computer"). Due to the violation of Article I, Sections 9 and 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution, Appellant's death sentence must be vacated and this cause remanded for resentencing.

POINT X

THE TRIAL COURT ERRED IN FAILING TO CONDUCT A SUFFICIENT INQUIRY INTO COUNSEL'S INEFFECTIVENESS WHEN APPELLANT MOVED TO DISCHARGE HIS COURT-APPOINTED COUNSEL.

During sentencing, despite a very serious allegation of ineffective assistance of counsel during a motion to discharge his court-appointed counsel, the trial court failed to inquire into the allegation of ineffective assistance of counsel. This constitutes reversible error. This cause must be remanded for a new sentencing hearing.

When a defendant complains about incompetency of his attorney, the trial court must make a sufficient inquiry to determine if reasonable cause exists to believe that counsel is not rendering effective assistance. E.g. Hardwick v. State, 521 So. 2d 1071 (Fla. 1988); Watts v. State, 593 So. 2d 198, 203 (Fla. 1992); Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973). The trial court must make an adequate inquiry of both the defendant and counsel. Perkins v. State, 585 So. 2d 390, 392 (Fla. 1st DCA 1991); Kearse v. State, 605 So. 2d 534, 536 (Fla. 1st DCA 1992). A defendant's request for new counsel for sentencing must be investigated, just as one prior to trial. Lockwood v. State, 608 So. 2d 133 (Fla. 4th DCA 1991).

In the instant case during sentencing, Appellant filed a written motion to discharge his court-appointed counsel (2SR493). The trial court asked Appellant if he wanted to speak to the motion (R1998). Appellant levied allegations that his counsel was not representing him properly (R2000). Specifically, Appellant alleged that there was a list of witnesses that were to come from Boston

to testify on this behalf, but they did not testify on his behalf because of his attorney (R2000). Appellant alleged that defense counsel did not even investigate all of these witnesses (R2000). This is a very serious allegation. If it was true that defense counsel had failed to investigate or present such witnesses, it would be reasonable cause to believe ineffective assistance was rendered. Yet, the trial court's only response to this serious allegation was that the trial attorney did the best he could do (R2002-03).[20] There was absolutely no inquiry of the defense attorney, or anyone else, as to whether these allegations were true. In other words, there was not a sufficient inquiry to determine whether there was reasonable cause to believe that the defense counsel was not rendering effective assistance.[21] See Kearse v. State, 605 So. 2d 534 (Fla. 1st DCA 1992); Perkins v. State, 585 So. 2d 390, 392 (Fla. 1st DCA 1991). The failure to sufficiently inquire is reversible error. Id. This cause must be remanded for a new sentencing hearing.

POINT XI

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO ELICIT INADMISSIBLE EVIDENCE UNDER THE GUISE OF REFRESHING ITS WITNESS'S RECOLLECTION.

Over Appellant's objections (R1126-28), the state was permitted to elicit from Yvonne Hutchinson that she had made out-of-court

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[20] If defense counsel had failed to investigate and produce the list of witnesses as alleged, he certainly was not providing effective assistance of counsel.

[21] Due to the lack of inquiry, Appellant's allegations went unrebutted and counsel should have been discharged and substitute counsel appointed. Hardwick v. State, 521 So. 2d 1071 (Fla. 1988).

statements that Appellant had stated he had shot a police officer (R1127). It was reversible error to admit such hearsay evidence under the guise of refreshing Hutchinson's memory.

During the direct examination of state witness Yvonne Hutchinson, the prosecutor tried to elicit that Appellant had made a statement that he had shot a police officer (R1125-28). However, Hutchinson testified that Appellant never mentioned shooting a police officer (R1127). Then, over Appellant's objections (R1125-28), the prosecutor elicited Hutchinson's out-of-court hearsay statements that Hutchinson had said Appellant had told her he shot a police officer:

> Q (By Mr. Satz) Okay. Here, I'd like to show you this statement. See if it refreshes your memory. Read it to yourself. Does that refresh your memory?
>
> A. No.
>
> Q That says the same thing as the other statement, doesn't it?
>
> A Yes.
>
> Q And it still doesn't refresh your memory?
>
> A No.
>
> Q Are you saying you didn't say it?
>
> MR. MALAVENDA: Judge, I am going to object. She's already said it doesn't refresh her memory.
>
> THE COURT: He asked another question.
>
> A I remember giving this statement, but I don't remember saying that he said that he shot a police officer.
>
> MR. MALAVENDA: Judge, I am going to object to that, and I would ask it to be stricken from the record.

THE COURT: If you will let me hear what's being said up here, maybe I can make a ruling. He asked her if she's saying she did not say that. Isn't that your question?

MR. SATZ: Yes, Your Honor, it is.

Q (By Mr. Satz) Are you saying you did not say that?

A No. I am saying I remember giving this statement, but I don't remember saying that he said that he shot the police officer.

THE COURT: She said she doesn't remember saying that.

MR. SATZ: Okay.

Q (By Mr. Satz) But it says that in both of these statements, right?

A Uh-huh.

Q Okay.

MR. MALAVENDA: Your Honor, I would ask that what she said be stricken from the record.

THE COURT: Motion denied.

(R1125-28) (emphasis added). As shown above, the prosecutor was able to get the hearsay statement of Hutchinson before the jury under the guise of refreshing her recollection.

It is error to reveal the contents of statements used to refresh recollection where the witness indicates that her recollection is not refreshed. Hill v. State, 355 So. 2d 116 (Fla. 4th DCA 1978). Here, despite Hutchinson indicating that her memory was not refreshed by the out-of-court statement, the prosecutor asked if her out-of-court statement indicated that Appellant had said he shot an officer. In addition, regardless of whether her memory was, or was not refreshed, it was error to place the contents of the statement before the jury. Hill, supra; Oliver v. State, 239

So. 2d 637 (Fla. 1st DCA 1970), decision quashed on other grounds, 250 So. 2d 888 (1971) (error to read witness questions and answers from prior statement); Auletta v. Fried, 388 So. 2d 1067 (Fla. 4th DCA 1980) (contents of report used to refresh recollection improperly before jury); Garrett v. Morris Kirschman & Co., 336 So. 2d 566, 569 (Fla. 1976) (evidence used to refresh recollection must be independently admissible). It is error to elicit the content of Hutchinson's out-of-court hearsay statement under the guise of impeachment. E.g. Hill, supra; Thompson v. United States, 342 F.2d 137, 140 (5th Cir. 1965); United States v. Davis, 551 F.2d 233, 235 (8th Cir. 1977).

The error cannot be deemed harmless. This is especially true where in closing argument the prosecutor relied on the contents of Hutchinson's out-of-court statements as proof that Appellant had shot the officer:

> Now, Yvonne Hutchinson, she doesn't remember. Remember she said, "I don't remember him saying he shot the police officer." Remember I showed her her statement for April 16, 1990, she said, "Yeah, but I don't remember saying it." I showed her her statement of April 18, 1990, and she says, "Yeah, I don't remember saying that."

(R1699-1700). This was used as evidence to show that Appellant shot the officer.[22] Where the prosecutor's closing statements

[22] The state's evidence showed that Coleman first fired from the store and this bullet struck Sallustio in the chest and wrist (R804). The state's firearm expert testified that the bullet that struck Sallustio in the chest was fired from the same gun that fired the bullet that killed Greeney (R1617,1620-21,1636). In addition, Sallustio's testimony identifying Appellant was the person chasing him was effectively impeached by his grand jury testimony in which he identified a person wearing white pants -- i.e. Wayne Coleman -- as the person who was chasing him (R842-43). Appellant wore dark pants (R842).

indicate reliance on the improper evidence, the error is not harmless. Hill v. State, 355 So. 2d 116, 117 (Fla. 4th DCA 1978). This cause must be remanded for a new trial.

In addition to the error being harmful in the guilt phase, it has independent harm in the penalty phase. The improper evidence identifying Appellant as the shooter may have distorted the jury's view of the culpability of Appellant without proper consideration of the substantial mitigation in this case. At the very least, Appellant's sentence must be reversed for a resentencing.

The improper evidence violated Appellant's rights to due process and confrontation pursuant to 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 XII

THE TRIAL COURT ERRED IN REFUSING TO ALLOW RELEASE, OR AT LEAST IN CAMERA REVIEW, OF THE GRAND JURY TESTIMONY.

Appellant moved for release or in camera review of the grand jury testimony in this case (2SR299-303,39-40). The trial court denied the motion (2SR40). The trial court's failure to grant release or in camera review of the grand jury testimony denied Appellant due process of law and the effective assistance of counsel pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The right to in camera review of otherwise confidential materials was extended by the United States Supreme Court in Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40

(1987). In Ritchie, the defendant, charged with sexual assault on his daughter, moved to have her Children and Youth Services file produced as it "might contain the names of favorable witnesses as well as other, unspecified exculpatory evidence." Id. at 995. The Supreme Court held the defendant was entitled to in camera review despite public policy reasons and specific statutes making the material confidential. 107 S.Ct. at 1001-02.

Miller v. Dugger, 820 F.2d 1135, 1136 (11th Cir. 1987) and Hopkinson v. Schillinger, 866 F.2d 1185 (10th Cir. 1989), modified 888 F.2d 1286 (10th Cir. 1989) (en banc) apply the principles of Ritchie to grand jury testimony. In Hopkinson, supra, the Court held the defendant was entitled to in camera review because "exculpatory evidence could have been presented" and in camera review preserves state confidentiality interests.

The trial court erred in failing to at least conduct in camera review of grand jury testimony for exculpatory materials. A new trial is required.

POINT XIII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS DEPUTY SALLUSTIO'S IDENTIFICATION OF APPELLANT.

Defense counsel moved to suppress Deputy Sallustio's identifications of Appellant as the person who had chased him (R186-87,1433). The trial court denied Appellant's motions (R187,1433). This was error.

As was clearly stated in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), the likelihood of misidentification violates a defendant's right to due process:

> It is the likelihood of misidentification which violates a defendant's right to due process.... Suggestive confrontations are disapproved because they increase the likelihood of misidentification.

93 S.Ct. at 381-82. The facts at the hearing to suppress clearly show the likelihood of misidentification. It was only a half year after the incident that Sallustio identified Appellant as the person who chased him (R174). Sallustio had been exposed to many media reports with Appellant's photograph before making this identification (R174,186). Although Sallustio tried to minimize his exposure to seeing Appellant in the media to "no more than 15 times" (R186), this clearly is significant especially in light of the length of time before he made his identification.

In addition, when in front of the grand jury at an earlier time, Sallustio testified that the second suspect, Wayne Coleman, was the person chasing him:

> Q [Mr. Malavenda] And yet when you testified in front of the Grand Jury, you still told them you didn't know who the person was that was chasing you, you told them it was the second suspect, Wayne Coleman?
>
> [request to show witness Grand Jury testimony]
>
> Q What does it say?
>
> A [Deputy Sallustio] I said the second suspect.
>
> Q Wayne Coleman, correct?
>
> A No.
>
> MR. SATZ: Right.
>
> THE WITNESS: <u>I said it was the second suspect</u>. At that time, I didn't know names of the suspects.

Q (by Mr. Malavenda) Okay. But isn't it time that you said the second suspect is the person in the business?

A That's correct.

Q Which would be Wayne Coleman, right?

A I guess so, correct.

(R183-84) (emphasis added). During trial Sallustio further explained that in his grand jury testimony that the person chasing him wore white pants and that Appellant wore dark pants (R842). Clearly, Sallustio's identification of Appellant was not reliable and the likelihood of misidentification was great. The identifications should have been suppressed. The misidentification of Appellant would be harmful in both the guilt phase and the sentencing phase of this case. This cause must be remanded for a new trial or alternatively for a new sentencing proceeding.

POINT XIV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S OBJECTION TO HEARSAY STATEMENTS THAT WERE INTRODUCED INTO EVIDENCE.

Over defense objections (R715,719), Kay Allen was permitted to testify to out-of-court statements made by Wayne Coleman. Among the statements were Coleman's assertion to Allen that he wanted the safe open (R719). Clearly, this out-of-court assertion constitutes hearsay and it was error to admit the statement over Appellant's objection.

The improper evidence cannot be deemed harmless as it asserts that Coleman wanted the safe open -- i.e. is evidence of a theft or robbery. The error denied Appellant his rights to confrontation and due process. Fifth, Sixth, and Fourteenth Amendments, United

States Constitution; Article I, Sections 9 and 16, Florida Constitution.

POINT XV

THE TRIAL COURT ERRED BY PERMITTING THE PROSECUTION TO INTRODUCE IRRELEVANT BAD CHARACTER EVIDENCE.

Over Appellant's objection (R755,664), the prosecution was permitted to present bad character evidence regarding a statement Appellant made over a year prior to the incident for which he was on trial. Specifically, the prosecution was permitted to elicit Kenegral Allen's testimony that at the end of 1988, or the beginning of 1989, Appellant had once said he "hated" police officers (R755).[23] It was reversible error to admit this irrelevant bad character evidence over Appellant's objection.

The allegation that Appellant hated police officers a year prior to the shooting was simply irrelevant to whether he committed the crimes charged. The prosecution's theory in this case was not that he went looking for police to kill because he "hated" them. Rather, the prosecution's theory was that police were shot at to avoid arrest. Consequently, use of a statement about hating police a year before was not relevant to the state's theory, but instead constituted irrelevant bad character evidence. The introduction of such evidence is reversible error. Bolden v. State, 543 So. 2d 423 (Fla. 3d DCA 1989) (Improper to admit evidence of a battery on a law enforcement officer one year before the incident in a case

[23] Allen testified that Appellant made this statement when a police officer was "behind" them (R756). Allen had earlier indicated that she did not take this statement seriously (R665).

involving battery on an officer. The evidence was obviously designed to show bad character).

In addition, it was error to overrule Appellant's objection to this evidence on the ground that the state had failed to file the written mandatory ten-day notice required by section 90.404 (b)(1) of the Florida Statutes (1989) (R669-70).

The trial court relied on State v. Escobar, 570 So. 2d 1343 (Fla. 3d DCA 199) to admit the statement (R753,670). This reliance is misplaced. In Escobar, the defendant gave a statement directly related to the police shooting for which he was charged. The defendant stated that if the police stopped him he was going to shoot them because "there was no way he was going to go back to jail." 570 So. 2d at 1344. At bar, Appellant's general attitude toward police did not constitute a direct threat that he was going to shoot a police officer. As stated earlier, the state's theory was not that Appellant decided to look for police officers to shoot because of a personal hatred toward them, rather the state's theory was that the shooting was to avoid arrest.[24]

Escobar is distinguishable for a second reason. The statement in Escobar came close in time to the shooting. In the present case Appellant's statement occurred more than a year prior to the shooting. Appellant's general attitude a year before was irrelevant to

[24] Whereas in Escobar the state's theory was that the shooting occurred consistent with the defendant's statement -- to avoid arrest.

his specific intent on the night of the incident.[25] It was error to introduce the bad character evidence.

This error cannot be deemed harmless. Irrelevant bad character evidence is presumed to be harmful. Keen v. State, 504 So. 2d 396, 401 (Fla. 1987). The error denied Appellant due process and a fair trial and sentencing. Art. I, §§ 9, 16, and 17, Fla. Const.; Fifth, Sixth, Eighth, and Fourteenth Amendments, U.S. Const.

POINT XVI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED JURY INSTRUCTION THAT MITIGATING EVIDENCE DOES NOT HAVE TO BE FOUND UNANIMOUSLY.

Appellant requested the following jury instruction:

> Each of you must individually consider the evidence presented in mitigation. If you personally find a piece of mitigating evidence to be credible, you must give it independent mitigating weight, regardless of the views of your fellow jurors.

(R2399,1799). The trial court denied the instruction (R1799). This was error.

It is well-settled that the jury must be prevented from believing their decisions as to finding mitigating circumstances must be unanimous. Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860 (1988). The lack of an instruction on this matter leaves the jury

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[25] In fact, the passage of over one year in time demonstrates that Appellant was not shooting the officer because he hated the police. A year's time is more than sufficient to shoot a police officer based on such hatred. However, the shooting did not occur until this particular incident and it was because of the incident and not because Appellant hated police.

without any indication that they can individually consider the mitigating factors:

> No instruction was given indicating what the jury should do if some but not all of the jurors were willing to recognize something about petitioner, his background, or the circumstances of the crime, as a mitigating factor.

Mills, supra, 108 S.Ct. at 1868. Consequently, it was error to deny Appellant's requested instruction. The error denied Appellant due process and a fair sentencing. Article I, Sections 2, 9, 16, and 17, Florida Constitution; Fifth, Eighth, and Fourteenth Amendments, United States Constitution. Appellant's sentence must be reversed and this cause remanded for a new sentencing.

POINT XVII

THE INSTRUCTION ON REASONABLE DOUBT DENIED APPELLANT DUE PROCESS AND A FAIR TRIAL.

The trial court instructed the jury that "A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt" (R1765). In Woods v. State, 596 So. 2d 156 (Fla. 4th DCA 1992), such an instruction was found proper. The court reached the merits notwithstanding that there was no objection to the instruction at trial. Bennett v. State, 173 So. 817 (Fla. 1937) approved reaching the merits of an instruction on reasonable doubt notwithstanding the lack of an objection. Woods was wrongly decided on the merits.

The Supreme Court has long disapproved instructions defining "reasonable doubt." Miles v. United States, 103 U.S. 304, 312, 26 L.Ed. 481 (1881). It has approved of only one definition of the term: in Holland v. United States, 348 U.S. 121, 140, 75 S.Ct. 127, 99 L.Ed. 150 (1954), while disapproving an instruction given

by the trial court, it wrote that "the instruction should have been in terms of the kind of doubt that would make a person hesitate to act". Hence, the following instruction approved in United States v. Turk, 526 F.2d 654, 669 (5th Cir. 1976):

> A reasonable doubt is a doubt based upon reason and common sense -- the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would not hesitate to act upon it in the most important of your own affairs.

It is safe to say that speculation and the force of imagination come into play when one is determining to act in the most important of one's affairs, and that a doubt founded on speculation or an imaginary or forced doubt will cause one to hesitate to act. Hence, our standard instruction is unconstitutional. Thus, in Haager v. State, 83 Fla. 41, 90 So. 812, 816 (1922), the court disapproved of an instruction that a reasonable doubt could not be "a mere shadowy, flimsy doubt," writing:

> Attempts to explain and define what is meant by "reasonable doubt" often leave the subject more confused and involved than if no explanation were attempted. The instruction may be given in such a manner, and with such an inflection of voice, as to incline the jury to believe that there is sufficient doubt to almost require an acquittal, and, in other instances, may be so given as to make the jury feel that they would be guilty of a dereliction of duty if they entertained any doubt of the prisoner's guilt.
>
> In the charge complained of, the court undertook to differentiate between "a mere shadowy, flimsy doubt" and "a substantial doubt." The jury may have understood the distinction, but we are unable to grasp its significance. Every doubt, whether it be reasonable or not, is "shadowy" and "flimsy," and it would be better if judges would give the usual charge

> on the subject of reasonable doubt without attempting to define, explain, modify, or qualify the words "reasonable doubt."

But in Smith v. State, 135 Fla. 737, 186 So. 203, 206 (1939), the court approved of an instruction using the "shadowy, flimsy doubt" versus "substantial doubt" phraseology without analysis and without any mention of Haager.[26]

Woods, supra, is also incorrect in another regard. There, discussing Cage v. Louisiana, 111 S.Ct. 328 (1990), it was written that Cage does not "... place in doubt the effort in the Florida instruction to assist a juror in evaluating the circumstances in which a doubt may not be reasonable." 596 So. 2d at 158. This applies an incorrect legal standard for determination of the adequacy of a jury instruction. The correct standard is whether there is "a reasonable likelihood" that the jury applied the instruction in an unconstitutional manner. Wilhelm v. State, 568 So. 2d 1, 3 (Fla. 1990); Estelle v. McGuire, 112 S.Ct. 475, 482 (1991). Further, the significant question is not whether a juror could understand that the law requires acquittal when there is a reasonable doubt, but whether the definition of reasonable doubt was improper. Hence, Woods was wrongly decided.

In view of the foregoing, the trial court gave an erroneous instruction relieving the state of its burden of proving guilt beyond a reasonable doubt. The instruction violated Appellant's right to due process and a fair trial in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution

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[26] For whatever reason, West Publishing Company assigned no key number to the discussion in Haager, which may explain this oversight in Smith.

and Article I, Sections 9 and 16 of the Florida Constitution. Accordingly, this Court should order a new trial.

The improper instruction was independently prejudicial as to penalty proceedings, for it resulted in the jury's use of an improper standard in determining the existence of aggravating circumstances in violation of Article I, Sections 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

POINT XVIII

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO PROCEED ON A THEORY OF FELONY-MURDER WHEN THE INDICTMENT GAVE NO NOTICE OF THE THEORY.

The indictment in this case only charged premeditated murder (R2061). Defense counsel filed a motion and argued to prohibit the use of a felony-murder theory due to lack of notice (R2147-49, 2SR40). The trial court denied this motion (2SR40). The jury was instructed on the theory of felony-murder. The lack of notice denied Appellant due process of law and the effective assistance of counsel pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

An indictment or information is required to state the elements of the offense charged with sufficient clarity to apprise the defendant what he must be prepared to defendant against. Russell v. United States, 369 U.S. 749, 763-69, 82 S.Ct. 1038, 8 L.Ed.2d 249 (1962); Government of Virgin Islands v. Pemberton, 813 F.2d 626 (3d Cir. 1987); Givens v. Housewright, 786 F.2d 1378, 1380-81 (9th Cir. 1986). In Givens, the Ninth circuit held that it was a Sixth

Amendment violation to allow a jury instruction and prosecutorial argument on murder by torture (under Nevada law analogous to Florida's felony-murder) where the information charged willful murder (analogous to Florida's premeditated murder). The failure to prohibit the felony-murder theory was harmful as there is virtually no evidence of premeditation. A new trial is required as we cannot know if one or more of the jurors relied on felony-murder.

POINT XIX

APPELLANT WAS DENIED DUE PROCESS AND A FAIR AND RELIABLE SENTENCING WHERE THE JURY INSTRUCTION GIVEN MINIMIZED THE JURY'S SENSE OF RESPONSIBILITY FOR THE SENTENCE APPELLANT COULD RECEIVE IN THIS CASE.

Appellant objected to minimizing the jury's sentencing recommendation by informing them that their verdict was advisory (R217-18). Despite the objection, the jury was continually told their function was advisory throughout this case. The trial judge first instructed the jury that, "It is the judge's job to determine what a proper sentence would be if the defendant is guilty" (R1770). The trial judge then explicitly informed the jury that the final responsibility as to the sentence rests solely with the judge, but the law requires an advisory sentence from the jury:

> THE COURT: ... The punishment for this crime is either death or life in prison without the possibility of parole. The final decision as to what punishment shall be imposed rests solely with the judge of this court.
>
> However, the law requires that you the jury render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.

(R1831) (emphasis added). The trial court later reemphasized this fact:

> THE COURT: Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his crime of murder in the first degree. As you have been told, the final decision as to what punishment should be imposed is the responsibility of the judge.

(R1947) (emphasis added). It was reversible error to minimize the jury's sense of responsibility in the sentencing.

In Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the United States Supreme Court held that the Eighth Amendment requirement of heightened reliability in capital sentencing is impermissibly compromised where the jury has been led to believe that the responsibility for determining the propriety of a death sentence rested elsewhere. Noting that its capital punishment decisions were premised on the assumption that a capital sentencing jury is aware of its "truly awesome responsibility", the Court wrote:

> ... the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

Caldwell v. Mississippi, supra (105 S.Ct. at 2641-42).

In Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986) and Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), the Eleventh Circuit determined that the Caldwell principle is applicable to the Florida sentencing scheme. A Florida capital defendant is entitled by law to a meaningful jury recommendation and in cases where a death sentence was predicated on a tainted jury death recommenda-

tion, this Court has not hesitated to reverse for a completely new penalty proceeding.[27] Recognizing the importance of the jury's penalty recommendation, the Eleventh Circuit in Adams v. Wainwright, supra (at 1530) concluded that the jury's role in Florida capital sentencing is "so crucial that dilution of its sense of responsibility for its recommended sentence constitutes a violation of Caldwell."[28] Misleading the jury into minimizing their sense of responsibility for the death sentence makes the sentence unreliable. See Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988).

Instructing that the final decision as to punishment rests with the trial court, violates due process and law and subjected to cruel and unusual punishment contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16, and 17 of the Florida Constitution.

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[27] See e.g., Patten v. State, 467 So. 2d 975 (Fla. 1985) (improper "Allen charge" given to deadlocked penalty jury); Robinson v. State, 487 So. 2d 1040 (Fla. 1986); Toole v. State, 479 So. 2d 731 (Fla. 1985) (inadequate jury instructions on penalty phase); Dragovich v. State, 492 So. 2d 350 (Fla. 1986) (improper cross-examination in penalty phase); Teffeteller v. State, 439 So. 2d 840 (Fla. 1983) (prosecutorial misconduct in penalty phase closing argument); Trawick v. State, 473 So. 2d 1235 (Fla. 1985); Dougan v. State, 470 So. 2d 697 (Fla. 1985) (improper evidence and argument).

[28] Unlike several western states under whose death penalty statutes the trial court is solely responsible for the capital sentencing decision, Florida has a "trifurcated" sentencing procedure in which the jury, the trial court, and this Court each plays a critical role. Every participant in the process -- each juror, the trial judge, and each member of this Court -- must consider the question of penalty as if a man's life depended on it; that is the essence of the Caldwell rule.

POINT XX

THE TRIAL COURT ERRED IN FAILING TO ADEQUATELY DEFINE NON-STATUTORY MITIGATING CIRCUMSTANCES.

Defense counsel moved the trial court to give a number of special jury instructions defining non-statutory mitigating circumstances which were applicable to this case. For example, defense counsel submitted a special written instruction explaining that the jury could consider: Appellant's early life (R1796,2389); Appellant's background (R1796,2391); whether the codefendant played a significant role (R1798-99,2397); and mitigating evidence can include any aspect of the defendant's background which creates a reasonable doubt whether death is the only appropriate punishment (R1792,2384); the life recommendation for the codefendant (R1794, 2387); Appellant's low self-esteem (R1803,2401); Appellant's good employment record (R1803,2401). The trial court denied all the special instructions (R1792,1795,1796,1798-99,1803). Failing to instruct on special non-statutory mitigating circumstances on motion of defense violates due process and the Eighth Amendment requirement that all mitigating evidence be considered in a death sentencing proceeding.

Abstract instructions relating to a defense theory are insufficient; such instructions must be "precise and specific rather than general and abstract." United States v. Mena, 863 F.2d 1522 (11th Cir. 1989). This is true even where standard jury instructions are involved. See Harvey v. State, 448 So. 2d 578, 580-81 (Fla. 5th DCA 1984) (error to blindly adhere to standard instructions as they are "no immutable postulates from Olympus"). Jurors will only be properly able to understand what specific non-

statutory mitigating evidence is being offered if they are given instructions on such evidence.

This Court has held that it cannot be presumed that a trial judge knows what mitigating circumstances are being offered. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). Likewise, a lay jury cannot be presumed to adequately understand what is being offered as mitigation without the proper instruction to guide it.[29] An attorney's argument will not substitute for a prior jury instruction. See Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA 1981).

Parker v. Dugger, 111 S.Ct. 731 (1991), also supports the proposition that juries must be told what the non-statutory mitigation is upon request. In Parker, the Supreme Court found the appellate review inadequate because this Court failed to consider the non-statutory evidence in declaring error harmless and finding the jury override valid. The Court noted the difficulty in defining non-statutory mitigation:

> Nonstatutory evidence, precisely because it does not fall into any predefined category, is considerably more difficult to organize into a coherent discussion; even though a more complete explanation is obviously helpful to a reviewing court, from the trial judge's perspective it is simpler merely to conclude, in those cases where it is true, that such evidence ... does not outweigh the aggravating circumstances.

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[29] Certainly, if a trial judge with training and experience needs guidance, a lay jury would require more guidance.

Parker, 111 S.Ct. at 738. It is error not to give the defendant's requested written instructions on possible mitigating circumstances. State v. Cummings, 389 S.E.2d 80 (N.C. 1990).[30]

Given the lack of clarity in defining non-statutory mitigation as recognized in Parker, putting this issue before the jury in lump form, with no instructions on what can mitigate, invites the jury to decide for itself what is mitigating. The refusal to instruct on the non-statutory mitigators rendered a reasonable probability of the jury ignoring relevant mitigating evidence contrary to the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9, 16, and 17 of the Florida Constitution.

POINT XXI

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE CORRECT BURDEN OF PROOF IN THE PENALTY PHASE.

Appellant requested the jury be instructed on the burden of proof for the penalty phase requires that the aggravating circumstances must outweigh the mitigating circumstances beyond a reasonable doubt (R1798,2394). The instruction was denied and the jury was instructed that the mitigating circumstances must outweigh the aggravating circumstances in order for a life sentence to be imposed (R1947,1949). Of course, due process requires that the

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[30] The Court in Cummings noted that because the non-statutory mitigating circumstances "were not presented on an equal footing" with the statutory circumstances the jury "could easily believe that the unwritten circumstances were not as worthy as those in writing." 389 S.E.2d at 81. It was also noted that "jurors, as well as all people, are apt to treat written documents more seriously than items verbally related to them. Had the circumstances been required to directly address each of them." Id.

state has the burden of proof. Arango v. State, 411 So. 2d 172, 174 (Fla. 1982). The instruction given in this case incorrectly states the burden of proof and thus violates Article I, Sections 9 and 17 of the Florida Constitution and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

POINT XXII

APPELLANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND TO EQUAL PROTECTION OF THE LAWS WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO APPOINT CO-COUNSEL.

Although our law authorizes appointment of co-counsel for indigents in a capital case,[31] although it had long been the practice in the Seventeenth Circuit to appoint co-counsel in capital cases (1SR83), although the Public Defender had provided Appellant the assistance of counsel and co-counsel prior to being removed for a conflict of interest (1SR16-17), and due to the complicated nature of the case, he needed co-counsel to be responsible for the penalty phase (R6,9), the trial judge refused to appoint co-counsel (2SR399,2SR41). The trial court denied the motion notwithstanding the fact that the prosecutor has co-counsel (1SR80).

The trial court erred. In the "interest of justice" and to ensure the right of effective assistance of counsel at trial on this capital offense, Appellant was entitled to two lawyers to defend his life. Cf. Butler v. Culver, 111 So. 2d 35 (Fla. 1959)

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[31] Section 925.035, Florida Statutes (1989) mandates, as to a public defender with a conflict on a capital case, that "it shall be his duty to move the court to appoint one or more members of The Florida Bar, who are in no way affiliated with the public defender."

(defendant not entitled to counsel pre-Gideon[32] except in "the interest of justice"). The interest of justice can require the appointment of counsel even before the Constitution recognizes the defendant's entitlement to such a privilege.

Appellant had two lawyers representing him when the public defender's office was appointed to his case but was denied that privilege when a conflict arose. This inequity denied Appellant his Constitutional guarantees to equal protection of the law. Constitutionally unfair treatment is afforded in capital cases when defendants represented by the public defender receive representation from two attorneys but indigent defendants with court-appointed counsel receive representation from only one attorney.

Current standards for effective representation of counsel mandate co-counsel be appointed in capital cases. Currently, and since 1731, South Carolina law has required two lawyers to be assigned to an individual facing a capital murder charge. Appeal of Akin County, 424 S.E.2d 503 (S.C. 1993). The New Jersey Public Defender routinely assigns two lawyers to represent each capital defendant to ensure adequate representation. State v. Oglesby, 585 A.2d 916, 928 (N.J. 1991), J. Handler, concurring. Both the National Legal Aid and Defender Association and the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases strongly advocate that in death cases two qualified trial attorneys should be assigned to represent an indigent defendant. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, Guideline § 2.1 (1988), STANDARDS FOR THE APPOINT-

[32] Gideon v. Wainwright, 372 U.S. 335 (1963).

MENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, Standard § 2.1 (National Legal Aid and Defender's Association 1987). Circuit courts around the state have begun to recognize this fact and to appoint two attorneys. Such is the practice in the Seventeenth Circuit from which this case originated (1SR83). See Stewart v. State, 420 So. 2d 862 (Fla. 1982) (the defendant had two attorneys diligently working on his case).

This Court has been a leader in directing trial judges to approve funds for defense counsel in capital cases. Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986). Makemson was cited with approval by the Supreme Court of South Carolina in Akin. The Sixth and Fourteenth Amendment compel the state to provide counsel to indigent criminal defendants and although the state is not required to provide unlimited funding, it must ensure that the defendant has competent counsel. The link between compensation and the quality of counsel remain too clear, Akin.

The trial court had the discretion and indeed the duty to appoint co-counsel in this case for by himself this defense attorney was unable to shoulder the awesome burden placed on an attorney in a capital case. Reversal is required for a new and fair trial where Appellant will be adequately and competently represented by two qualified criminal defense attorneys.

The denial of co-counsel deprived Appellant of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, 17, 21 and 22 of the Florida Constitution.

POINT XXIII

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Florida's capital sentencing scheme, facially and as applied to this case, is unconstitutional for the reasons set forth below.

1. The jury

a. Standard jury instructions

The jury plays a crucial role in capital sentencing. Its penalty verdict carries great weight. Nevertheless, the jury instructions are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict.

i. Felony murder

The standard jury instruction on felony murder does not serve the limiting function required by the Constitution and arbitrarily creates a presumption of death for the least aggravated form of first degree murder. In this regard, the following discussion of the premeditation aggravating circumstance in Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990) (footnote omitted) is especially pertinent:

> To avoid arbitrary and capricious punishment, this aggravating circumstance "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983) (footnote omitted). Since premeditation already is an element of capital murder in Florida, section 921.141(5)(i) must have a different meaning; otherwise, it would apply to every premeditated murder.

The same logic applies to the felony murder aggravating circumstance. It violates the teachings of Zant v. Stephens by turning

the offense of felony murder, without more, into an aggravating circumstance. It applies an aggravating circumstance to every first degree felony murder. Further, the instruction turns the mitigating circumstance of lack of intent to kill[33] into an aggravating circumstance. Hence, the instruction violates the Cruel and Unusual Punishment and Due Process clauses of the state and federal constitutions.

ii. Cold, calculated, and premeditated

The same applies to the "cold, calculated, and premeditated" circumstance. The standard instruction simply tracks the statute.[34] Since the statutory language is subject to a variety of constructions, the absence of any clear standard instruction ensures arbitrary application. See Rogers v. State, 511 So. 2d 526 (Fla. 1987) (condemning prior construction as too broad). Jurors are prone to like errors. The standard instruction invites arbitrary and uneven application. It results in improper application of the circumstance. Since the statutory language is subject to a variety of constructions, the standard instruction ensures arbitrary application. Since CCP is vague on its face, the instruction based on it also is too vague to provide the constitutionally required guidance. Any holding that jury instructions in

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[33] See Lockett v. Ohio, 438 U.S. 586, 608, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (death penalty statute unconstitutional where it did not provide for full consideration of, inter alia, mitigating factor of lack of intent to cause death).

[34] The instruction is: "The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." This instruction and the others discussed in this section are taken from West's Florida Criminal Laws and Rules 1990, at 859.

Florida capital sentencing proceedings need not be definite would directly conflict with the Cruel and Unusual Punishment Clauses of the state and federal constitutions. These clauses require accurate jury instructions during the sentencing phase of a capital case. See Cartwright, supra.

iii. Heinous, atrocious, or cruel

Pope v. State, 441 So. 2d 1073 (Fla. 1983) bars jury instructions limiting and defining the "heinous, atrocious, or cruel" circumstance. This assures its arbitrary application of in violation of the dictates of Maynard v. Cartwright, 108 S.Ct. 1853 (1988). Since, as shown below, this circumstance has not been applied by the courts consistently, there is every likelihood that juries, given no direction in its use, apply it arbitrarily and freakishly.

b. Majority verdicts

The Florida sentencing scheme is also infirm because it places great weight on margins for death as slim as a bare majority. A verdict by a bare majority violates due process and the Cruel and Unusual Punishment Clauses.

A guilty verdict by less than a "substantial majority" of a 12-member jury is so unreliable as to violate due process. See Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972), and Burch v. Louisiana, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979). It stands to reason that the same principle applies to capital sentencing so that our statute is unconstitutional because it authorizes a death verdict on the basis of a bare majority vote.

In Burch, in deciding that a verdict by a jury of six must be unanimous, the Court looked to the practice in the various states in determining whether the statute was constitutional, indicating that an anomalous practice violates due process. Similarly, in deciding Cruel and Unusual Punishment claims, the Court will look to the practice of the various states. See, e.g., Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), Thompson v. Oklahoma, 108 S.Ct. 2687 (1988), and Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). Among the states employing juries in capital sentencing, only Florida allows a death penalty verdict by a bare majority.

c. Florida allows an element of the crime to be found by a majority of the jury.

Our law makes the aggravating circumstances into elements of the crime so as to make the defendant death eligible. See State v. Dixon, 283 So. 2d at 9. The lack of unanimous verdict as to any aggravating circumstance violates Article I, Sections 9, 16, and 17 of the state constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal constitution. See Adamson v. Rickets, 865 F.2d 1011 (9th Cir. 1988) (en banc); contra Hildwin v. Florida, 109 S.Ct. 2055 (1989).

d. Advisory role

The standard instructions do not inform the jury of the great importance of its penalty verdict. In violation of the teachings of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) the jury is told that its verdict is just "advisory."

2. Counsel

Almost every capital defendant has a court-appointed attorney. The choice of the attorney is the judge's -- the defendant has no say in the matter. The defendant becomes the victim of the ever-defaulting capital defense attorney.

Ignorance of the law and ineffectiveness have been the hallmarks of counsel in Florida capital cases from the 1970's through to the present. See, e.g., Elledge v. State, 346 So. 2d 998 (Fla. 1977) (no objection to evidence of nonstatutory aggravating circumstance).

Failure of the courts to supply adequate counsel in capital cases, and use of judge-created inadequacy of counsel as a procedural bar to review on the merits of capital claims, cause freakish and uneven application of the death penalty.

Notwithstanding this history, our law makes no provision assuring adequate counsel in capital cases. The failure to provide adequate counsel assures uneven application of the death penalty in violation of the Constitution.

3. The trial judge

a. The role of the judge

The trial court has an ambiguous role in our capital punishment system. On the one hand, it is largely bound by the jury's penalty verdict under, e.g., Tedder v. State, 322 So. 2d 908 (Fla. 1975). On the other, it is considered the ultimate sentencer so that constitutional errors in reaching the penalty verdict can be ignored under, e.g., Smalley v. State, 546 So. 2d 720 (Fla.

1989). This ambiguity and like problems prevent evenhanded application of the death penalty.

That our law forbids special verdicts as to theories of homicide and as to aggravating and mitigating circumstances makes problematic the judge's role in deciding whether to override the penalty verdict. The judge has no clue of which factors the jury considered or how it applied them, and has no way of knowing whether the jury acquitted the defendant of premeditated murder (so that a sentencing order finding of cold, calculated and premeditated murder would be improper), or whether it acquitted him of felony murder (so that a finding of killing during the course of a felony would be inappropriate).[35] Similarly, if the jury found the defendant guilty of felony murder, and not of premeditated murder, application of the felony murder aggravating circumstance would fail to serve to narrow the class of death eligible persons as required by the eighth amendment under, e.g., Lowenfield v. Phelps, 108 S.Ct. 546 (1988).

b. The Florida Judicial System

The sentencer was selected by a system designed to exclude Blacks from participation as circuit judges, contrary to the equal protection of the laws, the right to vote, due process of law, the prohibition against slavery, and the prohibition against cruel and

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[35] See Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989) (double jeopardy precluded use of felony murder aggravating circumstance where it appeared that defendant was acquitted of felony murder at first trial).

unusual punishment.[36] Because Appellant was sentenced by a judge selected by a racially discriminatory system this Court must declare this system unconstitutional and vacate the penalty. When the decision maker in a criminal trial is purposefully selected on racial grounds, the right to a fair trial, due process and equal protection require that the conviction be reversed and sentence vacated. See State v. Neil, 457 So. 2d 481 (Fla. 1984); Batson v. Kentucky, 476 U.S. 79 (1986); Swain v. Alabama, 380 U.S. 202 (1965). When racial discrimination trenches on the right to vote, it violates the Fifteenth Amendment as well.[37]

The election of circuit judges in circuit-wide races was first instituted in Florida in 1942,[38] before this time, judges were selected by the governor and confirmed by the Senate. 26 Fla.Stat. Ann. 609 (1970), Commentary. At-large election districts in Florida and elsewhere historically have been used to dilute the black voter strength. See Rogers v. Lodge, 458 U.S. 613 (1982); Connor v. Finch, 431 U.S. 407 (1977); White v. Regester, 412 U.S. 755 (1973); McMillan v. Escambia County, Florida, 638 F.2d 1239, 1245-47 (5th Cir. 1981), modified 688 F.2d 960, 969 (5th Cir.

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[36] These rights are guaranteed by the Fifth, Sixth, Eighth, Thirteenth, Fourteenth, and Fifteenth Amendments to the Federal Constitution, and Article I, Sections 1, 2, 9, 16, 17, and 21 of the Florida Constitution.

[37] The Fifteenth Amendment is enforced, in part, through the Voting Rights Act, Chapter 42 U.S.C., § 1973 et al.

[38] For a brief period, between 1865 and 1868, the state constitution, inasmuch as it was in effect, did provide for election of circuit judges.

1982), vacated, 466 U.S. 48, 104 S.Ct. 1577, on remand 748 F.2d 1037 (5th Cir. 1984).[39]

The history of elections of black circuit judges in Florida shows the system has purposefully excluded blacks from the bench. Florida as a whole has eleven black circuit judges, 2.8% of the 394 total circuit judgeships. See Young, Single Member Judicial Districts, Fair or Foul, Fla. Bar News, May 1, 1990 (hereinafter Single Member District). Florida's population is 14.95% black. County and City Data Book, 1988, United States Department of Commerce. In Broward County, there are 43 circuit judgeships, none of whom are black. Single Member Districts, supra. Blacks compromise 13.5% of the people in Broward County.

Florida's history of racially polarized voting, discrimination and[40] disenfranchisement,[41] and use of at-large election systems to minimize the effect of the black vote shows that an invidious purpose stood behind the enactment of elections for circuit judges in Florida. See Rogers, 458 U.S. at 625-28. It also shows that an invidious purpose exists for maintaining this system in Broward County. The results of choosing judges as a whole in Florida, establishes a prima facie case of racial discrimination contrary

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[39] The Supreme Court vacated the decision because it appeared that the same result could be reached on non-constitutional grounds which did not require a finding an intentional discrimination; on remand, the Court of Appeals so held.

[40] See Davis v. State ex rel. Cromwell, 156 Fla. 181, 23 So.2d 85 (1945) (en banc) (striking white primaries).

[41] A telling example is set out in Justice Buford's concurring opinion in Watson v. Stone, 148 Fla. 516, 4 So.2d 700, 703 (1941) in which he remarked that the concealed firearm statute "was never intended to apply to the white population and in practice has never been so applied."

to equal protection and due process in selection of the decision makers in a criminal trial.[42] These results show discriminatory effect which together with the history of racial bloc voting, segregated housing, and disenfranchisement in Florida violate the right to vote as enforced by Chapter 42, United States Code, Section 1973. See Thornburg v. Gingles, 478 U.S. 30, 46-52 (1986). This discrimination also violates the heightened reliability and need for carefully channelled decision making required by the freedom from cruel and unusual capital punishment. See Turner v. Murray, 476 U.S. 28 (1986); Beck v. Alabama, 447 U.S. 625 (1980). Florida allows just this kind of especially unreliable decision to be made by sentences chosen in a racially discriminatory manner and the results of death sentencing decisions show disparate impact on sentences. See Gross and Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan.L.R. 27 (1984); see also, Radelet and Mello, Executing Those Who Kill Blacks: An Unusual Case Study, 37 Mercer L.R. 911, 912 n.4 (1986) (citing studies).

Because the selection of sentences is racially discriminatory and leads to condemning men and women to die on racial factors, this Court must declare that system violates the Florida and Federal Constitutions. It must reverse the circuit court and remand for a new trial before a judge not so chosen, or impose a life sentence.

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[42] The results of choosing judges in Broward, 0 blacks out of 43 positions is such stark discrimination as to show racist intent. See Yick Wo v. Hopkins, 118 U.S. 356 (1886).

4. Appellate review

a. Proffitt

In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (Fla. 1976), the plurality upheld Florida's capital punishment scheme in part because state law required a heightened level of appellate review. See 428 U.S. at 250-251, 252-253, 258-259.

Appellant submits that what was true in 1976 is no longer true today. History shows that intractable ambiguities in our statute have prevented the evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt. Hence the statute is unconstitutional.

b. Aggravating circumstances

Great care is needed in construing capital aggravating factors. See Maynard v. Cartwright, 108 S.Ct. 1853, 1857-58 (1988) (eighth amendment requires greater care in defining aggravating circumstances than does due process). The rule of lenity (criminal laws must be strictly construed in favor of accused), which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose, Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980), is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979). Cases construing our aggravating factors have not complied with this principle.

Attempts at construction have led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious, or cruel" (HAC) circumstances making them unconstitutional because they do not rationally narrow the class of death eligible persons, or channel discretion as required by Lowenfield v. Phelps, 108 S.Ct. 546, 554-55 (1988). The aggravators mean pretty much what one wants them to mean, so that the statute is unconstitutional. See Herring v. State, 446 So. 2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting).

As to CCP, compare Herring with Rogers v. State, 511 So. 2d 526 (Fla. 1987) (overruling Herring) with Swafford v. State, 533 So. 2d 270 (Fla. 1988) (resurrecting Herring), with Schafer v. State, 537 So. 2d 988 (Fla. 1989) (reinterpreting Herring).

As to HAC, compare Raulerson v. State, 358 So. 2d 826 (Fla. 1978) (finding HAC), with Raulerson v. State, 420 So. 2d 567 (Fla. 1982) (rejecting HAC on same facts).[43]

Similarly, the "great risk of death to many persons" factor has been inconsistently applied and construed. Compare King v. State, 390 So. 2d 315, 320 (Fla. 1980) (aggravator found where defendant set house on fire; defendant could have "reasonably foreseen" that the fire would pose a great risk) with King v. State, 514 So. 2d 354 (Fla. 1987) (rejecting aggravator on same facts) with White v. State, 403 So. 2d 331, 337 (Fla. 1981) (factor

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[43] For extensive discussion of the problems with these circumstances, see Kennedy, Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L. Rev. 47 (1987), and Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making it Smaller, 13 Stetson L. Rev. 523 (1984).

could not be applied "for what might have occurred," but must rest on "what in fact occurred").

The "prior violent felony" circumstance has been broadly construed in violation of the rule of lenity. A strict construction in favor of the accused would be that the circumstance should apply only where the prior felony conviction (or at least the prior felony) occurred before the killing. The cases have instead adopted a construction favorable to the state, ruling that the factor applies even to contemporaneous violent felonies. See Lucas v. State, 376 So. 2d 1149 (Fla. 1979).

The "under sentence of imprisonment" factor has similarly been construed in violation of the rule of lenity. It has been applied to persons who had been released from prison on parole. See Aldridge v. State, 351 So. 2d 942 (Fla. 1977). It has been indicated that it applies to persons in jail as a condition of probation (and therefore not "prisoners" in the strict sense of the term). See Peek v. State, 395 So. 2d 492, 499 (Fla. 1981).

The "felony murder" aggravating circumstance has been liberally construed in favor of the state by cases holding that it applies even where the murder was not premeditated. See Swafford v. State, 533 So. 2d 270 (Fla. 1988).

Although the original purpose of the "hinder government function or enforcement of law" factor was apparently to apply to political assassinations or terrorist acts,[44] it has been broadly

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[44] See Barnard, Death Penalty (1988 Survey of Florida Law), 13 Nova L. Rev. 907, 926 (1989).

interpreted to cover witness elimination. See White v. State, 415 So. 2d 719 (Fla. 1982).

c. Appellate reweighing

Florida does not have the independent appellate reweighing of aggravating and mitigating circumstances required by Proffitt, 428 U.S. at 252-53. Such matters are left to the trial court. See Smith v. State, 407 So. 2d 894, 901 (Fla. 1981) ("the decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rest with the judge and jury") and Atkins v. State, 497 So. 2d 1200 (Fla. 1986).

d. Procedural technicalities

Through use of the contemporaneous objection rule, Florida has institutionalized disparate application of the law in capital sentencing.[45] See, e.g., Rutherford v. State, 545 So. 2d 853 (Fla. 1989) (absence of objection barred review of use of improper evidence of aggravating circumstances); Grossman v. State, 525 So. 2d 833 (Fla. 1988) (absence of objection barred review of use of victim impact information in violation of eighth amendment); and Smalley v. State, 546 So. 2d 720 (Fla. 1989) (absence of objection barred review of penalty phase jury instruction which violated eighth amendment). Use of retroactivity principles works similar mischief.

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[45] In Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977), this Court held that consideration of evidence of a nonstatutory aggravating circumstance is error subject to appellate review without objection below because of the "special scope of review" in capital cases. Appellant contends that a retreat from the special scope of review violates the eighth amendment under Proffitt.

e. Tedder

The failure of the Florida appellate review process is highlighted by the Tedder[46] cases. As this Court admitted in Cochran v. State, 547 So. 2d 928, 933 (Fla. 1989), it has proven impossible to apply Tedder consistently. This frank admission strongly suggests that other legal doctrines are also arbitrarily and inconsistently applied in capital cases.

5. Other problems with the statute

a. Lack of special verdicts

Our law provides for trial court review of the penalty verdict. Yet the trial court is in no position to know what aggravating and mitigating circumstances the jury found because the law does not provide for special verdicts. Worse yet, it does not know whether the jury acquitted the defendant of felony murder or murder by premeditated design so that a finding of the felony murder or premeditation factor would violate double jeopardy under Delap v. Dugger, 890 F.2d 285, 306-319 (11th Cir. 1989). This necessarily leads to double jeopardy and collateral estoppel problems where the jury has rejected an aggravating factor but the trial court nevertheless finds it. It also ensures uncertainty in the fact finding process in violation of the eighth amendment.

Our law in effect makes the aggravating circumstances into elements of the crime so as to make the defendant death eligible. Hence, the lack of a unanimous jury verdict as to any aggravating

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[46] Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) (life verdict to be overridden only where "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.")

circumstance violates Article I, Sections 9, 16, and 17 of the state constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Federal constitution. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc).

b. No power to mitigate

Unlike any other case, a condemned inmate cannot ask the trial judge to mitigate his sentence because rule 3.800(b), Florida Rules of Criminal Procedure, forbids the mitigation of a death sentence. This violates the constitutional presumption against capital punishment and disfavors mitigation in violation of Article I, Sections 9, 16, 17, and 22 of the state constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution. It also violates equal protection of the laws as an irrational distinction trenching on the fundamental right to live.

c. Florida creates a presumption of death

Florida law creates a presumption of death where but a single aggravating circumstance appears. This creates a presumption of death in every felony murder case (since felony murder is an aggravating circumstance) and every premeditated murder case (depending on which of several definitions of the premeditation aggravating circumstance is applied to the case[47]). In addition, HAC applies to any murder. By finding an aggravating circumstance always occurs in first degree murders, Florida imposes a presumption of death which is to be overcome only by mitigating evidence so strong as to be reasonably convincing and so substantial as to

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[47] See Justice Ehrlich's dissent in Herring v. State, 446 So. 2d 1049, 1058 (Fla. 1984).

constitute one or more mitigating circumstances sufficient to outweigh the presumption.[48] This systematic presumption of death restricts consideration of mitigating evidence, contrary to the guarantee of the Eighth Amendment to the Federal Constitution. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988); Adamson, 865 F.2d at 1043. It also creates an unreliable and arbitrary sentencing result contrary to due process and the heightened due process requirements in a death sentencing proceeding. The Federal Constitution and Article I, Sections 9 and 17 of the Florida Constitution require striking the statute.

6. Florida unconstitutionally instructs juries not to consider sympathy.

In Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988), reversed on procedural grounds sub nom. Saffle v. Parks, 110 S.Ct. 1257 (1990), the Tenth Circuit held that jury instructions which emphasize that sympathy should play no role violates the Lockett principle. The Tenth Circuit distinguished California v. Brown, 479 U.S. 538 (1987) (upholding constitutional instruction prohibiting consideration of mere sympathy), writing that sympathy unconnected with mitigating evidence cannot play a role, prohibiting sympathy from any part in the proceeding restricts proper mitigating factors. Parks, 860 F.2d at 1553. The instruction given in this case also states that sympathy should play no role in the process. The prosecutor below, like in Parks, argued that the jury should closely follow the law on finding mitigation. A jury would

[48] The presumption for death appears in §§ 921.141(2)(b) and (3)(b) which requires the mitigating circumstances outweigh the aggravating.

have believed in reasonable likelihood that much of the weight of the early life experiences of Appellant should be ignored. This instruction violated the Lockett principle. Inasmuch as it reflects the law in Florida, that law is unconstitutional for restricting consideration of mitigating evidence.

7. 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). 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 (1972) (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.

POINT XXIV

THE AGGRAVATING CIRCUMSTANCES USED AT BAR ARE UNCONSTITUTIONAL.

1. Felony murder

As already argued, this circumstance does not serve the limiting function required by the Constitution and arbitrarily creates a presumption of death for the least aggravated form of first degree murder. Further, it turns the mitigating circumstance of lack of intent to kill into an aggravating circumstance. Hence, it violates the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions.

2. Prior violent felony

As already noted, this circumstance has been broadly construed in violation of the rule of lenity. Further, construction has permitted juvenile adjudications of delinquency to satisfy this aggravating circumstance contrary to the usual construction of "conviction" as not including juvenile adjudications. See Campbell v. State, 571 So. 2d 415, 418 (Fla. 1990). Due to such a construction, the silence of the statute is used against the defense rather than the state. This manner of statutory construction is contrary to the Due Process and Cruel and Unusual Punishment Clauses.

3. Avoid Arrest

This factor is vague and prone to erroneous application. Further, like the above factor, it is susceptible to application

in cases where (as here) it should be merged with other aggravating circumstances.

4. Victim was Law Enforcement Officer

Like the above factors, this is susceptible to application to cases where (as here) it should be merged with other aggravating circumstances.

CONCLUSION

Based on the foregoing arguments, this Court should vacate Appellant's convictions, and vacate or reduce his sentences, and remand this cause for a new trial or grant relief as it deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 14th day of June, 1993.

Jeffrey L. Anderson
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