IN THE SUPREME COURT OF FLORIDA

RICHARD HENYARD, JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 84,314

APPEAL FROM THE CIRCUIT COURT
IN AND FOR LAKE COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

On February 16, 1993, the grand jury in and for Lake County, Florida returned an indictment charging Appellant, Richard Henyard, Jr., with three counts of armed kidnapping in violation of Sections 787.01(1) and 775.087(1), Florida Statutes (1993), one count of sexual battery with the use of a firearm in violation of Section 794.011(3), Florida Statutes (1993), one count of attempted first-degree murder in violation of Sections 782.04(1)(a)1 and 777.04(1), Florida Statutes (1993), one count of robbery with a firearm in violation of Section 812.13(2)(a), Florida Statutes (1993), and two counts of first-degree murder in violation of Section 782.04(1)(a), Florida Statutes (1993). (R9-11) Numerous pretrial motions were filed including the following: a motion for change of venue filed February 3, 1994. (R162-310); three separate motions to suppress Appellant's statements. (R800-3,804-6,826-33); two motions to exclude the use of DNA evidence at trial. (R1094-98,1099-1108); a motion for

additional preemptory challenges or in the alternative to declare Section 913.08(1)(a), Florida Statutes (1993) unconstitutional. (R365-68,369-72); written objections to the standard jury instructions on premeditated murder and a request for a special instruction thereon. (R321-28); a written objection to the standard jury instruction on reasonable doubt. (R333-40); and numerous motions to declare Section 921.141, Florida Statutes (1993) unconstitutional. (R428-31,432-43,444-51,452-71,472-74) Appellant also filed specific motions asking that individual aggravating circumstances be found unconstitutional: prior violent felony (R475-81), great risk to others (R483-89), in the course of a felony (R490-96), avoiding arrest (R497-504), pecuniary gain (R505-11), heinous, atrocious and cruel (R512-27), and cold, calculated and premeditated. (R528-543)

Defense counsel further filed a motion to withdraw on behalf of the Public Defender's Office alleging that the office formerly represented several state witnesses. (R560-61,609-611) Following hearings on the above motions, the trial court denied the motion for change of venue (T2581-99,1009), overruled the objections to the standard jury instructions (T2611-18,2622-26), denied the request for additional peremptories with leave to renew and denied the motion to declare Section 913.08(1)(a), Florida Statutes (1993) unconstitutional (R2651-55), and denied all the motions to declare the death penalty statutes unconstitutional. (R2688-2718) Following a hearing on the motion to suppress Appellant's statements, the trial court

granted the motion to suppress as to the statements made to T.H. Poole (T2896), but denied the remaining two motions to suppress. (T3145-77,3352) The trial court further denied both motions to exclude the DNA testimony. (T2900-2) The trial court also denied the motion to withdraw filed by the Office of the Public Defender. (T2744-48)

Appellant proceeded to jury trial on the charges on May 23, 1994, with the Honorable Mark J. Hill, Circuit Judge, presiding. (T1-2066) Following deliberations, the jury returned a verdict finding Appellant guilty as charged of all offenses. (T2061-63; R1318-26) The penalty phase of the trial began June 2, 1994. (T2069-2556) Prior to commencement, defense counsel moved to preclude imposition of the death penalty pursuant to Tison v. Arizona and Enmund v. Florida. (T2069-72) No further objected to the state presenting evidence of a prior juvenile adjudication for the offense of armed robbery as an aggravating circumstance. (T2073-78) The trial court overruled both objections and the penalty phase commenced. Following deliberations, the jury returned an advisory recommendation that Appellant be sentenced to death by a vote of 12 to 0. (T2553; R1345-46) Appellant filed a timely motion for a new trial (R1362-73) which was denied. (R1445)

On August 19, 1994, Appellant again appeared before Judge Hill for sentencing. (R3203-3235) Judge Hill adjudicated Appellant guilty of all offenses and sentenced him to six consecutive life sentences for the non-capital offenses and death

for each of the capital offenses. (R1456-84; T3229-30) Judge Hill filed his written findings of fact in support of the death sentence on the same date. (R1491-1515)

Appellant filed a timely Notice of Appeal on August 26, 1994. (R1521-22) Appellant was adjudged insolvent and the Office of the Public Defender was appointed to represent him on appeal. (R1519,1551)

STATEMENT OF THE FACTS

MOTION TO SUPPRESS

On the morning after the killings of the Lewis girls, Annie Neal was at the Winn Dixie Supermarket when she encountered a police officer whom she knew previously. (T2933) The officer, Adam Donaldson, knew that Neal had worked as an informant for the police department before so he called to her and told Neal that the police could use her help and that there might be some money in it for her. (T3086,2933) Donaldson told Neal to keep her ears open to see if she could learn anything. (T3089,2941) Neal left the Winn Dixie and met up with Appellant who previously had asked Neal whether she had heard about the preacher lady being dead. (T2940) Neal told Appellant that although the children were dead, the lady was still alive, and Appellant acted nervous. (T2940) Neal suggested to Appellant that they go out and investigate and try to get the reward. (T2933) Appellant later asked Neal to drive him to the police station so he could tell them what he knew. (T2934)

Sergeant Wayne Perry of the Eustis Police Department was at the station when Appellant arrived and told Perry that he was present when the children were killed, but that he did not do it. (T2948) Perry escorted Appellant into the station but did not place him under arrest or handcuff him. (T2948) Appellant was not forced but he was also not reluctant to go with Perry. (T2949) Perry then turned Appellant over to an investigator from the FBI. (T2949) Special Agent Donald Dowd was advised that

Appellant had come to the police station with information about the crime. (T2955) Dowd had no intent to arrest Appellant but merely to listen to him, so he talked with Appellant in an interview room at the Eustis Police Department in the presence of Special Agent Wickline and Eustis Police Investigator Hart. (T2955-56) The interview began at approximately 1:05 p.m. at which time Agent Dowd did not advise Appellant of his rights since he had come in voluntarily and Dowd had no information that Appellant was involved in the offense. (T2956-57) However, almost from the beginning of the interview, Dowd suggested to Appellant that he could be charged as an accessory after the fact. (T2979; Defense Exhibit #1, p. 4) At one point, Appellant asked if he could go home soon and reiterated his desire to leave. (T2997; Defense Exhibit #1, pp. 31-32) It was not until after Appellant asked to leave, that Agent Dowd informed him of his Miranda Rights. (T2979,2997; Defense Exhibit #1, pp. 32-34) This occurred at 1:30 p.m. (Id.) The initial interview continued and Appellant again indicated that he wanted to go to his aunt's house. (T2999; Defense Exhibit #1, p. 51) This initial interview lasted until 4:49 p.m. (T2986)

After the first interview, Appellant was turned over to Special Agent Robert Tippett of the Florida Department of Law Enforcement who conducted a computer voice stress analysis examination on Appellant. (T3011,3028-43; Defense Exhibit #3) Although Appellant had signed a consent form for Tippett, Tippett was never informed that Appellant had previously requested that

he be taken to his aunt's house. (T3032,3037) Following the voice stress analysis exam, Appellant was interviewed a third time by Special Agent Robert O'Connor, of the Florida Department of Law Enforcement in the presence of William Gross, Assistant State Attorney, and Scott Barker of the Eustis Police Department. (T3012; Defense Exhibit #2) This interview began at 6:37 p.m. with Officer O'Connor informing Appellant of his rights and obtaining a waiver from Appellant. (T3012-14; Defense Exhibit #3, pp. 3-6) When informed of his rights, Appellant asked that if he signed the waiver did that mean that Mr. Gross had to leave. (Defense Exhibit #3, p. 5) Appellant was told no and when asked by Mr. Gross if Appellant wanted him to stay, Appellant replied yes. (Defense Exhibit #3, p. 5) Mr. Gross then asked if Appellant knew who he was to which Appellant replied that he did not. When Gross told him that he was a prosecutor, Gross had to inform Appellant what that meant. (Defense Exhibit #3, pp. 5-6) At one point in the interview, Appellant stated that "I can't go no more, man." But was urged by Gross to "Take it to the end. Take it to the end. Talk to me." To which Appellant stated once again, "I can't do it no more, man." (Defense Exhibit #3, pp. 23-24; T3022) Gross then changed the topic and continued the interview.

GUILT PHASE OF THE TRIAL

Sometime after 4:00 a.m. on January 31, 1993, several officers from the Eustis Police Department responded to a residence at 1311 Jules Court in response to a call concerning a

woman who had been raped and shot. (T1132,1143,1155) When they arrived, the officers encountered Dorothy Lewis sitting on the front door step in a white dress with dried blood on it. (T1133, 1143) Although Ms. Lewis was obviously upset, she was coherent and told the police that she had been shot and raped. (T1134) Over objection, Ms. Lewis described her assailants as two black males. (T1138) One of the assailants was not too tall, had a medium complexion, a muscular build, dark clothing, and a stocking hat. (T1138) The second assailant was described as being a bit taller, had a medium complexion, and wore a light colored workout suit with a hood. (T1138) Photographs were taken of Ms. Lewis and she was then airlifted to the Orlando Regional Medical Center in Orlando. (T1144,1139) When informed of the call, Officer John McKimmey reported to Officer Mike Walsh that he had previously responded to an area near Hicks Ditch Road in response to a report of a woman covered with blood. (T1123, 1130) This occurred at 1:24 a.m. but when McKimmey arrived, he was unable to locate anyone. (T1124) McKimmey did find a girl's coat lying by the side of the road which he left on the ground. (T1127-29) Several officers went to Hicks Ditch Road to search the area and located the child's jacket and a garage door opener. (T1157-58) Blood was located in three distinct patterns on the ground near the road. (T1190) Although some footprints were located near the blood stains, no photographs nor impressions were taken of the prints. (T1225-29) A further search of the area resulted in the location of the bodies of two children in

the grassy weeds. (T1163,1188) At a distance of more than 1200 feet north of the area where the bodies were found, a large blood stain was located. (T1195,1232) A videotape of the scene was made and shown in court. (T1166,1178-80) On the videotape, there were footprints near the bodies but these footprints were never examined. (T1180,1227-30)

On February 1, 1993, Dr. Janet Pillow conducted an autopsy on both of the victims. (T1248) The cause of death for Jasmine Lewis was a single gunshot wound through the left eye which entered into the skull. (T1254,1259) Jamilya Lewis suffered a single gunshot wound to the top of the head which travelled straight down. (T1264,1270) Although both victims had slight scratching and abrasions on their bodies, Dr. Pillow stated that these could have been caused postmortem and as a result of being dragged into the bushes. (T1277,1263-64,1253-54) Dr. Pillow stated that both victims were rendered immediately unconscious upon being shot and felt no pain after losing consciousness. (T1278,1285)

Dorothy Lewis was taken to the Orlando Regional Medical Center where she was examined by Dr. Julia Martin who conducted a rape examination on her. (T1612-16) Ms. Lewis was being prepared to go into surgery for gunshot wounds so Dr. Martin took vaginal swabs, blood samples, and saliva samples for the rape test. (T1617,1625-26) A comparison of these samples showed the presence of semen in the vaginal swabs which when compared to Appellant's DNA, provided for a match in a statistical

probability of 1 in 809 million persons. (T1682-85) Dr. Louis Harold, a general surgeon at ORMC, examined Dorothy Lewis and determined that she had one gunshot wound to the forehead just above the bridge of her nose between her eyes. (T1756-57) Ms. Lewis also had a second wound in her upper lip which hit her teeth and then entered her upper jaw. (T1757) Ms. Lewis had surgery to repair the tear in her brain membrane and it was determined that a bullet had fractured her skull. (T1770) Ms. Lewis had told Dr. Harold that she wrestled with her assailant and tried to get a gun from him and that's how she got shot in her leg. (T1781)

Dorothy Lewis testified that on the evening of January 30, 1993, she drove her mother's blue Chrysler Fifth Avenue to the Winn Dixie store at 9:50 p.m. with her two daughters. (T1810-11) Ms. Lewis parked in line with the door to the Winn Dixie in the second space facing the building and noticed nothing unusual. (T1813-14) There were some people sitting on a bench beside the door when Ms. Lewis went in. (T1814) Ms. Lewis was in the store for approximately fifteen minutes and left with two bags of groceries. (T1815) As Ms. Lewis left the store she did not notice anyone on the bench. (T1817) Ms. Lewis unlocked the door and put her children in the front passenger seat, closed and locked the door, and walked around behind the car. (T1817) She then noticed a person staring at her and coming towards her, and this caused Ms. Lewis to wonder what he was doing. (T1817) Before Ms. Lewis got to the driver's side door, the man pulled up

his shirt and showed Ms. Lewis a gun and said, "Get in the car and don't say a word." (T1817) Ms. Lewis asked if she could get her babies out of the front seat, to which the man replied in the affirmative. (T1817-18) The man then motioned to another person on the sidewalk and said, "Hey man this is the one," or "we have one." (T1818) The man came over from the sidewalk and got into the driver's seat. (T1818) Ms. Lewis' children climbed over the front seat into the back and the man with the gun got into the front passenger seat. (T1818) Ms. Lewis had never seen either of these men before that night. (T1818) The older of the two men was driving and asked Ms. Lewis questions about the car such as where the lights were. (T1819) They drove out of the parking lot and down the road and the children started to cry because they were scared. (T1819) The younger man yelled at Ms. Lewis to make the children shut up. (T1818) Ms. Lewis tried to explain that they were scared but the man insisted that she keep them quiet so Ms. Lewis told the children to quit crying and they did. (T1819) Ms. Lewis was unsure where they were going and noted that the younger man told the driver which way to go. (T1819) Ms. Lewis was sitting between her two children and kept her left hand on the door handle hoping to be able to open it so that they could jump out of the car. (T1820) Ms. Lewis told Jamilya if she said jump to do it, but she never got the opportunity. (T1820) At one point when the driver turned, Ms. Lewis' hand flew up and one of the men told her to get her hand off the door, that that type of thing will make him hurt her.

(T1820) The car finally came to a stop on a dirt road. The driver got out and ordered Ms. Lewis to get out of the car. (T1824) The man put Ms. Lewis on the trunk, took off her undergarments, and raped her telling her, "Bitch open your legs and act like you want it." (T1824) The younger man got out of the car and appeared to be playing with himself as he told the older guy, "Man, hurry up, I want to do it, hurry up." (T1825) Ms. Lewis begged them not to do this in front of the girls, but the older man said, "Bitch shut up." (T1825) Seeing the gun sitting on the trunk, Ms. Lewis reached for it while the older one was raping her, but the younger man grabbed the gun and said, "Bitch you're not going to get this gun," and put it on the ground. (T1825) After the older man finished, the younger man raped Ms. Lewis. (T1826) After the younger man was finished, the older man grabbed Ms. Lewis off the trunk and told her to sit on the grass. (T1826) Ms. Lewis reminded the man that, "You said if I did what you told me to do that we wouldn't get hurt." (T1826) Ms. Lewis was pushed to the ground and the older man shot her in the knee. (T1827) Thinking she was about to be shot again, Ms. Lewis started struggling for the gun and does not remember getting shot again. (T1828-29) The next thing that Ms. Lewis remembers is walking down a dirt road and hiding in the bushes every time a car came by. (T1829) She finally made it to a house, knocked on the door, and told the person she had been shot and raped and needed help. (T1829) Ms. Lewis stayed at the house until the police came and when they did she told them what

happened and that the assailants still had her children. (T1829)

Luther Reed testified that one night in January, Appellant stayed at his home. (T1550) While Reed was fixing dinner, Appellant went into his bedroom and took a gun that he had. (T1551) Earlier in the week before the murders, Appellant showed Wilbert Pew a gun that Pew tried to buy but Appellant would not sell it to him. (T1345-46) On Saturday, at approximately 3:00 p.m., Appellant asked Pew if he was going to help him with a "jack" which was a robbery. Pew told Appellant that he had to think about it. (T1346) Later that night, when Pew saw Appellant again, they talked about the jack and Pew tried to convince him to go after a drug dealer, but Appellant said he needed a car. (T1347) Pew could not talk Appellant out of it so he and Emmanuel Yon went to Pew's house. (T1348) Earlier that day, as well as the night before, several persons saw Appellant with the gun that was used in the killings. (T1321,1330-31,1448) Appellant told several persons that he wanted to go to a club in Orlando, and wanted to go see his father in south Florida so he needed to get a car. (T1333) Appellant's plan was to steal the car and whoever owned the car would be killed and put into the trunk. (T1333) However, Shenise Hayes admitted that she never told this to anyone before, including the police, who asked her to write down what she knew. (T1334-40)

Bryant Smith testified that on Saturday night he was at his home when a blue car pulled up with Emmanuel Yon driving, Alfonsa Smalls in the back seat and someone in the front seat

that he had never seen before. (T1373) This person was identified as Appellant. (T1383) When the car stopped, Yon started bragging, "They had them a bitch." (T1374) Smith expressed disbelief to which Yon said, "No man we did, and we stole us a car too." (T1374) When Smith continued disbelief, Yon grabbed a pair of panty hose, held them up, and said, "Man look here, we had us a bitch man." (T1376) Appellant then told Smith that he had to "burn the bitch" because she tried to go for his gun. (T1378) Smalls confirmed that Appellant wasn't joking and Appellant opened the glove box and showed the gun to Smith. (T1378) No one mentioned the children. (T1384)

On Saturday night at approximately 9:15 p.m., Barbara Bradford went to the Winn Dixie with her son. (T1403,1412) While there, Bradford and her son saw Emmanuel Yon who was Bradford's sister's stepson. (T1404,1412) Yon was there with Appellant and Alfonsa Smalls. (T1404) Yon asked Bradford for a ride home which she gave him. (T1404-8) When Bradford left the Winn Dixie, Appellant and Smalls were still there standing by the bench. (T1408)

Just before 10:00 p.m., Lynette Tschida left work and went directly to the Winn Dixie to pick up a few items. (T1416-17) Two men were sitting on a bench as she walked into the store. (T1418) When Tschida left the store the two men got up from the bench, one walked ahead of her and the other behind her, as she headed towards her car. (T1419) The man ahead of her went to the end of the bumper of her car, turned around, and

stood. (T1419) Tschida did not turn around but quickly got into the car and locked the doors. (T1420) As Tschida drove away, both men headed back towards the benches. (T1423)

On Sunday morning, Linda Miller met Appellant at a laundromat and Appellant asked her if she had heard about the preacher lady that was killed. (T1473-74) At some point, Appellant asked Miller for a ride which she agreed to. (T1476) They stopped at the Winn Dixie to get detergent and while there, Miller and Appellant learned that, although the children had died, the preacher lady was still alive. (T1477) Appellant wanted to know if the woman could identify anyone. (T1478) Appellant then asked her to take him to Alfonsa Smalls house where he talked to Smalls. (T1483) After that Appellant asked Miller if she would take him to the police station, which she did. (T1484) Later the police called Miller and asked if they could come to her house and get Appellant's jacket. (T1484)

Approximately 11:35 p.m. Saturday night, Appellant came to the home of Colinda Smalls and asked for Emmanuel Yon who was staying there. (T1456-57) Yon went out and spoke with Appellant for a few seconds and then came in. (T1457) While he was waiting for Yon, Appellant came inside the house where Smalls noticed that he had blood on his hands. (T1458) Smalls asked Appellant what happened, to which Appellant replied that he had scraped himself with a knife. (T1458) Smalls saw no blood on Appellant's clothes or jacket. (T1458) Yon and Appellant left and Yon and Alfonsa Smalls returned to the house about 3:15 a.m.

(T1459) Smalls was wearing different clothes than he had on the night before. (T1460) A search of Alfonsa Smalls' house revealed a firearm found in Smalls' bedroom. (T1304) This gun was identified as the gun taken from Luther Reed the previous week. (T1544,1549-50) A comparison of this gun to the bullets removed from the victims prove that the gun was the weapon used to commit the crimes. (T1586) A fingerprint found on a juice can located in the Lewis car was identified as being Appellant's. (T1568) None of the other prints lifted from the car were able to be identified as Appellant's. (T1564-68)

Nancy Rathman, a forensic serologist at the FDLE in Orlando, testified as to the DNA analysis she conducted. (T1644-53) On Appellant's blue jean jacket, three of the blood stains were examined and tested consistently with the blood of Jamilya Lewis. (T1674-78) One spot of blood on Appellant's shorts tested positive for Jamilya's DNA. (T1678-79) A spot of blood found on Appellant's socks was consistent with Jasmine's blood. (T1681) An analysis of the blood stains found on Alfonsa Smalls' clothing matched the DNA analysis for Dorothy Lewis, Jamilya Lewis, and Appellant. (T1691-95) Ms. Rathman testified that there are variations in everyone's blood and that in this particular case the differences were there but limited to one percent. (T1716-20) Given the statistical possibility of differences, Ms. Rathman acknowledged that one tester could match the DNA sample while another tester could exclude the same. (T1728) None of the testing that Rathman did permits an opinion

as to who shot Jamilya and Jasmine Lewis. (T1747)

PENALTY PHASE AT THE TRIAL

Dorothy Lewis testified that while they were being driven by Appellant and Smalls, she began praying by calling out Jesus' name. (T2090) The driver of the car responded, "You might as well stop calling Jesus, this isn't Jesus, this is Satan." (T2091) A petition for delinquency charging Appellant with the commission of the offense of robbery with a weapon when he was fourteen was admitted into evidence over objection. (T2100) However, Jeffrey Pfister, an attorney who represented Appellant on the 1989 robbery charge, testified that the facts of that crime revealed that Appellant was nothing more than a lookout at the store where the offense occurred. (T2210-15) Appellant was not armed and was the least culpable of the three individuals charged with the offense. (T2212) Leroy Parker, a blood stain pattern analyst, testified that an analysis of the clothing that Appellant and Smalls wore revealed that Smalls pants had splashed or dropped blood on them which, in Parker's opinion, got there while the body was being dragged. (T2166-67) On the jacket and shorts of Appellant, there was back splatter blood from when the wound was inflicted. (T2168) In order for this blood to be present in such a configuration, Parker opined that Appellant had to be within four feet of the victim. (T2169) However, Parker did say that the splashed or dropped blood on Smalls' pants could obliterate any back splatter that was present on Smalls' pants. (T2191) Parker could offer no opinion with

any degree of certainty that Appellant shot either victim. (T2199)

Michael Graves, an attorney, was recognized as an expert in regard to sentencing guidelines. (T2226) Graves had calculated what Appellant's guidelines sentence would be based on the convictions and determined that he would receive a life sentence, which the Department of Corrections would treat as a true life sentence, and therefore Appellant would never be released from custody. (T2226-33) Graves also testified that because of Alfonsa Smalls' age he cannot get the death penalty. (T2234)

Appellant was born June 26, 1974. (T2408) Appellant's mother and father were not married and Appellant's father left two weeks after he was born. (T2256) Appellant's mother was sick a lot during her pregnancy and drank constantly while she was pregnant with Appellant. (T2409-10) Appellant's father tried to see Appellant off and on when his work would permit him to. (T2257) His father lost contact with Appellant around 1980 when Appellant's mother took him away. (T2258) Appellant's mother began doing drugs when Appellant was two years old. She did this in front of Appellant. (T2411) Appellant had a skin problem when he was growing up. (T2411) At some point Appellant's mother could not deal with Appellant so he stayed with his godmother a lot. (T2412) Appellant would run away constantly to Jackie Turner's house. (T2414) Appellant's mother's heavy drinking and drug use was verified by Jacqueline

Turner. (T2284) Ms. Turner kept Appellant from the age of ten months until he was three years old, at which time Appellant went back to his mother where he stayed until he was eleven. (T2285) Appellant would run away and come back to Turner's house frequently until finally Turner called Appellant's father to come and get him. (T2285) Appellant's father came and picked him up and took him back with him to Pahokee where Appellant stayed with his father and his girlfriend. (T2262) Appellant stayed for two weeks but resented his father's girlfriend so Appellant's father brought him back to Jackie's house for a week. (T2263) Appellant eventually went back with his father where he stayed until he was approximately fifteen and a half years of age. (T2264) Appellant's father worked seventy to ninety hours a week and had little time for his son. (T2264-66) Edna MacClendon, a teacher at Pahokee Middle School, taught Appellant for one year and was his home room advisor. (T2251) She testified that Appellant could not register in school because no parent would come to register him. (T2252) Appellant hung around for more than two weeks and was never a discipline problem. (T2252) Appellant had a tendency to hyperventilate and on several occasions MacClendon took Appellant to the clinic. (T2252)

Dr. Jethro Toomer, a licensed psychologist, interviewed Appellant twice in jail for a period of several hours. (T2302-5) Dr. Toomer also spoke with Appellant's mother and his godmother Jackie Turner. (T2305) Dr. Toomer administered a whole battery of psychological and intelligence tests and determined that

Appellant's IQ is 85 which registers in the below average range of intellectual functioning. (T2310) The tests also revealed that Appellant has problems in visual motor coordination and with his visual motor perception. (T2318) Dr. Toomer interpreted the results that indicated that Appellant had a good deal of insecurity and impulsivity, which means that he often acts without foresight and without any contemplation of the consequences. (T2318) Appellant has a mild learning disability. (T2319) On the Carlson psychological test, Appellant tested high for chemical abuse and for thought disturbance. (T2321) In the area of self-esteem, Appellant scored nearly one hundred percent which indicates an extremely low level of self-esteem. (T2322) In the area of anti-social tendencies, Appellant scored seventy-eight percent. (T2322) Dr. Toomer noted that Appellant has little control over these items on the testing scale. (T2323) The testing also revealed that Appellant functions on the level of a thirteen-year-old child. (T2340) It was Dr. Toomer's opinion that the lack of nurturing in Appellant's life resulted in him manifesting personality, emotional and psychological deficiencies. (T2341) Appellant is unable to project the consequences of his behavior and on the night of the offense, Dr. Toomer felt that Appellant was unable to appreciate the criminality of his conduct. (T2349) Although he suffered emotional disturbance and impairment, Dr. Toomer felt that the impairment was not extreme. (T2350-51) It was further Dr. Toomer's opinion that Appellant did not know whether his actions

were right or wrong because he was not functioning at a level where determination of this was relevant. (T2357)

SUMMARY OF THE ARGUMENTS

POINT I: The trial court erred in denying Appellant's timely request for a change of venue. The crime in the instant case, generated persistent and highly prejudicial media coverage. Virtually every member of the potential jury venire was familiar with the facts of the crime. In view of the fact that the crime occurred in a small rural community, a change of venue was constitutionally required to insure that Appellant was given a fair trial by an impartial jury.

POINT II: The trial court committed reversible error by granting the state's excusal for cause of a juror who simply stated that he would give great weight to a statutory mitigator in determining the penalty to be imposed. The trial court committed further error in refusing to excuse for cause a juror who believed the death penalty was appropriate for every first-degree murder, a juror that would require the defendant to testify, and another juror who believed that the defendant was "probably guilty" even before the trial began. These errors by the trial court resulted in Appellant receiving an unfair trial.

POINT III: The trial court erred in denying Appellant's motions to suppress his statements made to police officers where the evidence clearly shows that Appellant desired to stop the interrogation and the officers simply ignored this request. Since the Florida Constitution provides greater protections for an accused under Article I, Section 9, then does the United States Constitution under the Fifth Amendment, the

failure to honor Appellant's requests to cease the interrogation rendered such statements inadmissible.

POINT IV: The trial court erred in permitting the state to present evidence of DNA testing done by the Florida Department of Law Enforcement where the state failed to present a proper predicate to insure the reliability of such testing. The FDLE testing procedures do not meet the minimum requirements accepted by the scientific community and thus, the reliability of its testing procedures is questionable at best. The evidence should have been disallowed.

POINT V: Error was committed during the guilt phase of Appellant's trial when the state was permitted, over objection, to tell the jurors that if the evidence of aggravators outweighed the mitigators then as a matter of law the jury recommendation had to be for death. Such statement ignores the jury's inherent pardon power and in essence instructs the jury that they may not consider the element of mercy in their deliberations. The prosecutor further committed error in closing argument when he implied that Appellant had denied committing the sexual battery of Dorothy Lewis when in fact the prosecutor was himself present during an interrogation of Appellant wherein he specifically admitted that he had committed the rape. Such misstatement of fact was misleading to the jury and completely undermined the theory of defense. These comments by the prosecutor constituted reversible error.

POINT VI: It was error to permit the state to elicit

from a police officer testimony regarding statements made to him by Dorothy Lewis where such statements were inadmissible hearsay. Because the statements were made several hours after the event occurred, the admission does not fall under either the spontaneous statement or the excited utterance exceptions to the hearsay rule.

POINT VII: The trial court erred in overruling Appellant's objections to the standard jury instructions in the guilt phase. The standard jury instruction on premeditated murder is deficient in that it does not include the statutory element of "premeditated design." The standard jury instruction on reasonable doubt is unconstitutional because it tells the jurors that as long as they have an "abiding conviction of guilt" a conviction is possible even if there is a reasonable doubt. The standard jury instruction does not clearly tell the jurors what is meant by "reasonable doubt." Finally, the failure of the trial court to grant Appellant's request for a special verdict as to the theory of guilt was error since such evidence is necessary where it impacts directly on the sentencing of the accused.

POINT VIII: The trial court erred in permitting the state to present improper evidence during the penalty phase. A prior juvenile commitment is inadmissible to prove the aggravating factor of prior violent felony. Thus, its admission is improper as it does not tend to prove any aggravating factor. Similarly, testimony that was permitted from a blood splatter expert and from Dorothy Lewis was inadmissible since it did not

directly relate to any aggravating factor. The evidence was thus inadmissible and highly prejudicial, and rendered the jury's recommendation unreliable.

POINT IX: The standard jury instruction on the aggravating factor of heinous, atrocious and cruel is unconstitutionally vague and overbroad. It does not reflect the caselaw as generated by this Court and does not in any way limit the jury's application of the factor. The requested jury instruction by defense counsel below was a correct statement of the law and more fully instructed the jury as to what this Court has determined to be the cases where the HAC factor is applicable. The improper instruction on HAC rendered the advisory verdict unreliable.

POINT X: The death penalty is improper in the instant case because it is based in part on aggravating factors that are not proven beyond a reasonable doubt. The capital crimes were not committed for the purpose of pecuniary gain where they were not an integral step in obtaining some sought-after gain. Similarly, the capital murders committed by a single gunshot do not fit the definition of heinous, atrocious and cruel. There was absolutely no evidence to show that either Appellant or his codefendant intended the victims to suffer unnecessarily or that the murders were accompanied by any additional torturous actions. The death sentence must be vacated.

POINT XI: The death sentence in this case must be vacated because it is not proportionately warranted. Although

there exist two aggravating factors, the magnitude of the mitigating evidence far outweighs these two aggravators. Because Appellant functions at a lower age level then the arguably more culpable actor, who as a matter of law cannot receive the death penalty, Appellant's death sentences are disproportionate.

ARGUMENT

POINT I

APPELLANT WAS DENIED A FAIR TRIAL BY AN IMPARTIAL JURY, GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, WHEN THE TRIAL COURT DENIED HIS TIMELY REQUEST FOR A CHANGE OF VENUE.

On February 3, 1994, defense counsel filed a motion for change of venue and attached to his motion numerous copies of media articles which detailed the facts of the instant crime.[1]

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[1] Defense counsel contended that the intense media coverage so saturated the residents of Lake County so as to prevent a fair trial. These articles continued steadily from the time of the crime to the time of the trial, which was more than a year later. (R162-310,1132-96,1248-65) Samples of the headlines of the various media accounts include:

"They [the victims] Were Beautiful Children" (R178)

"Police Say Suspects Show No Remorse" (R179)

"[Appellant's] Grandfather Says: 'I don't feel for him' [Appellant]" (R180)

"Fear Strikes Neighborhood" (R183)

"Mother Is Surviving On Faith" (R184)

"Threats Force Jail To Isolate Suspect" (R193)

"How Could It Happen?" (R201)

"A Devout Woman's Ordeal At The Hand Of 'Satan'." (R204)

"Cops: Tests Tie Suspects To Murder." (R210)

"Accused Killer Remains Under 15-Minute Suicide Watch At Jail" (R222)

"Grand Jury Takes Up Eustis Family Shootings; Police Say 2 Teens Admitted Abducting The Lewis Family, But Each Has Accused The Other Of Killing The 2 Young Sisters." (R251)

"Dear Eustis Residents" (editorial) (R262)

"Lawyers Move To Suppress Confession By Henyard" (R1133)

The trial court denied the motion for change of venue on February 23, 1994. (T2581-99) Defense counsel renewed the motion for change of venue during jury selection, but the trial court again denied it. (T1009)

In Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), the United States Supreme Court held that Sheppard was denied his right to a fair trial for the second-degree murder of his wife because of the trial court's failure to protect Sheppard from the massive, pervasive and prejudicial publicity that attended his prosecution. In Sheppard, an affirmative fundamental duty on behalf of the trial court was recognized to ensure that a fair trial by an impartial jury was had for both parties. The Court stated:

> From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communication and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the

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"Death Penalty Ruled Out In Smalls Case" (R1136)

"Lawyer: Move Trial To Ensure Fairness; Richard Henyard's Attorney Says The Case Has Been Publicized Too Much In Lake County To Find Impartial Jurors." (R1147)

"Horror Moved Many To Help; Dorothy Lewis' Loss A Year Ago Caused Eustis Residents And Others To Reassess Life In Lake County And Its Future." (R1148)

"Judge OKs Eustis Confession; Henyard's Statements Allowed In Murder Trial" (R1167)

"Defense Asks For Trial To Be Moved" (R1182)

> balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judges should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised sua sponte with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered.

Sheppard, 384 U.S. at 362. This Court, in Singer v. State, 109 So.2d 7 (Fla. 1959), recognized the difficulty of preserving to one accused of a crime a trial by a fair and impartial jury has increased in direct proportion to the admirable progress made by the various news media in increasing the range, intensity and effectiveness of the gathering and dissemination of news of events. Thus, this Court took care to make clear "that every trial court in considering a motion for change of venue must liberally resolve in favor of the defendant any doubt as to the ability of the State to furnish a defendant a trial by fair and impartial jury." Id. at 14. In McCaskill v. State, 344 So.2d 1276 (Fla. 1977), this Court adopted the test set forth in Kelley v. State, 212 So.2d 27 (Fla. 2d DCA 1968) for determining whether or not to grant a change of venue. According to that test, determination must be made as to whether the general state of mind of the inhabitants of a community is so infected by

knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their mind and try the case solely on the evidence presented in the courtroom. Applying this test in Manning v. State, 378 So.2d 74 (Fla. 1979), this Court reversed and remanded for a new trial with instructions that the trial court grant the motion for change of venue. In Manning, the victims were Sheriff deputies who were well liked in a relatively rural county in Florida. The Public Defender's Office was granted permission to withdraw from representing Manning because of their friendship with the officers involved. Nearly every potential juror was familiar with the case. Under these facts, this Court ruled that the motion for change of venue should have been granted.

In the instant case, the offense occurred in rural Lake County in the town of Eustis. Nearly every person called on the venire had knowledge of the crime. Out of the first seventy-five jurors chosen the court struck thirty-three. Both the defense and the state used all their peremptory challenges and, in fact, were granted an additional peremptory challenge by the trial court. A review of the voir dire proceedings clearly revealed that virtually the entire community had some familiarity with the offense in question. The victims were young children and their mother was particularly well-liked in the community. The pretrial publicity in the instant case was not merely factual accounts of the case. Rather, a review of the articles reveal that they were directed to the fears of the community at large.

One editorial, in particularly, from the Orlando Sentinel entitled "Dear Eustis Residents" (R262) urged the citizens not to let all the attention that has been garnered by the events make them give up hope on their community. With such articles as pervasive as they were, the instant case is easily distinguishable from the situation in Copeland v. State, 457 So.2d 1012 (Fla. 1984), where this Court found no error in the denial of a motion for change of venue where pretrial publicity was largely factual, rather than emotional, in nature and mainly occurred around the time of the crime and the investigation, several months before the trial. Certainly that is not the situation in the instant case. The newspaper accounts continued from the day of the incident all the way through to the day of trial. Such publicity was pervasive and highly emotional in nature. Appellant's motion for a change of venue, timely made and timely renewed during jury selection, should have been granted. The failure to grant the motion for change of venue requires this Court to reverse Appellant's convictions and sentences and remand for a new trial.

POINT II

APPELLANT'S CONVICTIONS AND SENTENCES MUST BE REVERSED UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION DUE TO SERIOUS ERRORS WHICH UNDERMINE THE CONFIDENCE IN THE FAIRNESS AND IMPARTIALITY OF THE JURY.

Perhaps the greatest protection guaranteed to citizens by the state and federal constitutions is the right to an impartial jury. A biased juror denies the basic rights to Due Process, a fair trial, an impartial jury and a reliable sentencing recommendation in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16, 17 and 22 of the Florida Constitution. This type of error is not subject to a harmless error analysis. Sullivan v. Louisiana, 508 U.S. ___, 113 S.Ct. ___, 124 L.Ed.2d 182 (1993).

In the instant case, Appellant asserts that error was committed during jury selection when the trial court erroneously granted a state challenge for cause to Juror Schrock (T424) and denied the challenges for cause by the defense to Jurors Parsell, Ellickson, and Buchanan. (T1019-20) As to Juror Schrock, the state successfully moved to challenge the juror for cause on the grounds that he would not vote for the death penalty. However, what Mr. Schrock said during his examination was that the age of the defendant would prevent him from recommending death. (T390-96) In this regard, Mr. Schrock was merely stating that the

mitigating factor of the age of the defendant would weigh so heavily in his mind that he would tend to vote for life. This is a perfectly acceptable way to think. The age of a young defendant is a statutorily recognized mitigating factor that must be considered and weighed very heavily. This was recognized by the United States Supreme Court in Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1981), wherein the Court stated that "the chronological age of a minor is itself a relevant mitigating factor of great weight." 455 U.S. at 116. In fact, if a potential juror would state that they would in all cases refuse to consider the age of a young defendant in mitigation, this would be grounds for excusal. As it was, Mr. Schrock merely stated that he would follow the law and in his opinion would give great weight to the statutory mitigating factor of age. While this statement most probably would result in the state exercising a peremptory challenge to Mr. Schrock, it was not grounds for excusing him for cause. It must be noted that in the instant case the state exhausted all of their peremptory challenges and in fact exhausted the additional peremptory challenge which the trial court gave to each side. Thus, the erroneous excusal for cause of Juror Schrock cannot be deemed harmless.

With regard to the three jurors sought to be excused for cause by the defense, Juror Parsell, a former policeman, stated that he believed that the death penalty should be imposed for every person convicted of first-degree murder. (T536-46) Juror Ellickson stated that he would want to hear from the

defendant during trial even though the law is such that the accused has an absolute right not to testify. (T270-81) Finally, Juror Buchanan stated that, in his opinion, the defendant was probably guilty. (T231-44) Defense counsel timely moved to excuse each of these three jurors for cause but was denied. Ultimately, defense counsel used a peremptory challenge on each of the jurors in question.

This Court has held that "a juror is not impartial when one side must overcome a preconceived opinion in order to prevail." Hill v. State, 477 So.2d 553, 556 (Fla. 1985). Ellickson was objectionable because he required the defense to prove innocence contrary to the constitutional mandates that the prosecution bears the burden of proving guilt. See Patterson v. New York, 432 U.S. 197, 210 (1977) (Prosecution bears burden of proving all elements of the offense charged.) Juror Parsell who stated that he believed death was appropriate for everyone convicted of first-degree murder was unqualified since he was predisposed to impose the death penalty upon conviction without regard to hearing evidence in mitigation. See Moore v. State, 525 So.2d 870, 872 (Fla. 1988) (When a reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause.) Juror Buchanan was similarly unqualified to serve since he had already formed his opinion that Appellant was guilty without having heard any evidence whatsoever. As this Court noted in Singer v. State, 109 So.2d 7,

23-24 (Fla. 1959):

> [I]f there is a basis for any reasonable doubt as to any jurors possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at trial he should be excused on motion of a party, or by the court on its own motion.

That each of the jurors may have ultimately stated that they would follow the law does not dispel the reasonable doubt that they, in fact, could be impartial:

> A juror's assurance that he or she is able to remove any opinion, bias, or prejudice from his or her mind, and decide the case solely on the evidence adduced at trial, is not determinative of whether that juror should have been excused for cause. (citation omitted)
>
> We have no doubt that a juror who is being asked leading questions is more likely to "please" the judge and give the rather obvious answers indicated by the leading questions, and as such these responses alone must never be determinative of a juror's capacity to impartially decide the cause to be presented.

Price v. State, 538 So.2d 486, 489 (Fla. 1989).

Recently in Bryant v. State, 20 Fla. L. Weekly S164 (Fla. April 13, 1995), this Court reversed a capital conviction in part because the trial court refused to excuse a juror for cause who believed that death was appropriate for every first-degree murder conviction. This Court stated:

> However, the record reflects that prospective juror Pekkola did not possess the requisite impartial state of mind. Pekkola indicated that he was a strong supporter of the death penalty,

> and believed that if someone is guilty of first-degree murder the appropriate penalty is the death penalty and that a life sentence is too lenient. Although Pekkola stated that he could follow the court's instructions, his other responses were sufficiently equivocal to cast doubt on this. Thus, the court erred in denying Bryant's challenge for cause of this prospective juror.

Id. This is the same situation which existed below with regard to Juror Parsell.

Each of the three jurors who were subject to the motions to strike for cause were clearly unqualified to sit as jurors. Defense counsel should not of had to "waste" a peremptory challenge on these individuals. Once again it must be noted that Appellant exhausted all of his peremptory challenges, sought and was granted an additional peremptory challenge which was also exhausted. It must also be underscored how nearly every member of the venire was familiar with the facts in the instant case. (See Argument - Point I) Under these circumstances, the refusal of the trial court to grant the motions to excuse the three jurors for cause was clear error requiring this Court to reverse Appellant's convictions and sentences and remand for a new trial.

POINT III

IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS TO SUPPRESS HIS STATEMENT WHERE THE EVIDENCE CLEARLY SHOWED THAT APPELLANT DESIRED TO STOP THE INTERROGATION, WHICH REQUEST WAS NEVER HONORED.

Appellant filed a pretrial motion to suppress statements made to the police on January 31, 1993, on the grounds that such statements were involuntary and taken in violation of his Fifth Amendment right and his rights under the Florida Constitution. (R800-3) A hearing was conducted on the motion. (T2925-3177) During this hearing, it was established that Appellant voluntarily went to the Eustis Police Department on January 31, 1993. (T2948) When Appellant arrived, he told one of the officers that he had been present when the children were killed but that he did not do it. (T2948) Appellant was then taken to the investigating officers where he was questioned. (T2948-54) At the time that Appellant was initially interviewed, he was not a suspect in the crime, but rather, was an individual who had indicated to the police that he had information about the crime. (T2954-55) The officer at the time of the initial interrogation had no intent to arrest Appellant, but just to listen to him. (T2955) The first interrogation began at 1:05 p.m. Because Appellant had come in voluntarily, he was not advised of his Miranda rights. (T2956) However, on Page 4 of

the transcript of the initial interrogation, the officer told Appellant that "for starters" he was an accessory after the fact to the crimes. (Defense Exhibit #1, p. 4) Despite this conclusion on the part of the officer, he still did not give Appellant his Miranda rights. However, Appellant soon tired of the interrogation and asked to go home. The following exchange took place:

> MR. HENYARD: Can I go home soon, man?
>
> MR. HART: Soon. You know how these federal people are, though. They're not like us local boys.
>
> MR. HENYARD: That's why I just wanted to talk to Murnice.
>
> MR. HART: Well, the same thing would happen if you wanted to talk to Murnice, Murnice wouldn't talk to you. It's these boys.
> You've seen the violence on the TV's recently, okay? So just -- just play it straight with these boys, that's all you've got to do. I'll be right back.
>
> FBI AGENT: All right.
>
> FBI AGENT: Well, I want you to, you know, be here when (Inaudible.)
>
> FBI AGENT: Okay.
>
> FBI AGENT: Just hold on a second. (Inaudible).
>
> MR. HENYARD: Excuse me, sir. How long and I gonna have to stay here?
>
> FBI AGENT: Huh?
>
> MR. HENYARD: How long do I have to stay here?

FBI AGENT: Ah, just a few more minutes.

(Defense Exhibit #1, pp. 31-32). The officers responded to this request, by reading Appellant his Miranda rights. When the officers next asked Appellant if he would be willing to take a polygraph test, Appellant initially answered that he would not do so without the presence of his aunt. When told that his aunt could be contacted but she could not be sitting next to him, the following exchange took place:

> MR. HENYARD: Then I won't take it. I want my auntie sitting right beside me when I take it.
>
> FBI AGENT: Well, let me just tell you -- let me tell you this. Any results of that are only for our benefit. You can't use them in Court. If you flunk it flat, we can't use it in Court but at least we'll know whether you're telling us the truth or not, okay? We'll know whether you're telling us the truth or not and we'll leave it alone, okay? It's just our -- it'll help us. It's an investigative tool we cannot use in Court. I promise you, we cannot use it against you in Court and we'll explain that to your aunt. Okay?

Shortly after that exchange, Mr. Henyard clearly requested that the officers take him to his aunt's house:

> MR. HENYARD: Take me to my auntie's house.
>
> FBI AGENT: We're going to have your aunt come down here.
>
> MR. HENYARD: Ya'll (Inaudible.)
>
> FBI AGENT: Yeah, we're going to have --
>
> MR. HENYARD: Superbowl, man. I'm

missing my game.

FBI AGENT: Well, it's 6:00. You've got a couple of three hours yet. I mean, you're equivocating a Superbowl to two kids, two innocent children being killed?

MR. HENYARD: I can tell you something. I ain't going to say that I don't care them two children got killed, but I ain't did it, so why worry about it? I ain't killed them children so I ain't got nothing to worry about.

FBI AGENT: Okay. (Inaudible.)

MR. HENYARD: Something told me not to come down here.

The initial interview continued until 4:49 p.m. Appellant next met with Officer Tippett who conducted a polygraph examination on him. (T2970; Defense Exhibit #3)

The final interrogation began at 6:37 p.m. and was conducted in the presence of William Gross, the assistant state attorney who prosecuted the case. (T2970; Defense Exhibit #2) At the beginning of the second interview Appellant was again advised of his Miranda rights. (T3012) After interrogating Appellant for some time, Appellant indicated that he couldn't continue:

A. I can't go no more, man.

Q. Take it to the end. Take it to the end. Talk to me.

A. Man, if you was there to see them kids. I can't do it no more, man.

MR. GROSS: Rick, can I change the subject? We'll talk about something else that's maybe a little bit easier for you to talk about, is that okay?

MR. HENYARD: Yeah.

MR. GROSS: I know this is difficult for you but it's important for us to get the facts as (Inaudible) as we can.

(Defense Exhibit #2, pp. 23-24) This final statement continued for several more hours.

In Owen v. State, 560 So.2d 207 (Fla. 1990), this Court reversed the defendant's convictions because it concluded that his confession was erroneously admitted into evidence, contrary to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Owen was convicted of burglary, sexual battery, and first-degree murder, and his confession was the "essence" of the state's case. Id. at 211. Owen never requested counsel, but because during his confession he said things like, "I don't want to talk about it" in response to questions about a particular detail of the crime, this Court reversed stating:

> The responses were, at the least, an equivocal invocation of the Miranda right to terminate questioning, which could be clarified. It was error for the police to urge appellant to continue his statement.

Subsequently, this Court decided Traylor v. State, 596 So.2d 957 (Fla. 1992), wherein it recognized:

> Under our federalist system of government, states may place more rigorous restraints on government intrusion than the federal charter imposes; they may not, however, place more restrictions on the fundamental rights of their citizens than the federal Constitution permits. [Citation omitted.]

Id. at 961. Traylor involved the admissibility of a confession and in that case, after discussing federalism and the fact that the Declaration of Rights in the Florida Constitution includes, in Article I, Section 9, a right against self-incrimination, this Court stated:

> Based on the foregoing analysis of our Florida law and the experience under Miranda and its progeny, we hold that to insure the voluntariness of confessions, the Self-Incrimination Clause of Article I, Section 9, Florida Constitution, requires that prior to custodial interrogation in Florida suspects must be told that they have a right to remain silent, that anything they say will be used against them in court, that they have the right to a lawyer's help, and that if they cannot pay for a lawyer one will be appointed to help them.
>
> Under Section 9, if the suspect indicates in any manner that he or she does not want to be interrogated, interrogation must not begin or, if it has already begun, must immediately stop.

Id. at 967 (emphasis added). Applying this law to the instant case, it is clear that on numerous occasions Appellant indicated his wish to stop the interrogation. If these were not unequivocal requests, at the very least they were equivocal requests which required the officers to do nothing more than clarify Appellant's intention. However, it is clear that the officers did not in any way honor this request, nor did they seek to clarify his request. Rather, the officers simply ignored Appellant's wishes and continued on with the interrogation. Such blatant disregard for the law cannot be tolerated. It must be

further emphasized that one of the interrogations was conducted in part by the assistant state attorney who prosecuted the case. His blatant disregard for the law is doubly reprehensible. The statement of Appellant should have been suppressed. Its admission into evidence cannot be deemed harmless error since the only evidence concerning the details of the crime came directly from these statements. This Court should reverse Appellant's convictions, remand for a new trial with directions to grant the motions to suppress.

POINT IV

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN PERMITTING THE STATE TO PRESENT EVIDENCE OF DNA TESTING.

Prior to trial, defense counsel filed two separate motions seeking to exclude evidence of DNA testing done by the Florida Department of Law Enforcement. (R1094-98,1099-1108) A hearing on the motion was held on May 20, 1994. (T2773-90,3242-43) The trial court denied the motion to exclude the DNA testimony. (T2900-2) As argued below, the DNA testing done by the Florida Department of Law Enforcement was unreliable because they failed to meet the minimum requirements accepted by the scientific community.

On August 5, 1990, the congressional Office of Technology Assessment (OTA) issued a report, almost two hundred pages in length, stating that forensic uses of DNA tests "are both reliable and valid when properly performed and analyzed by skilled personnel."[2] Subsequently, the National Research Counsel in 1992 published a report by its committee on DNA technology and forensic science, DNA Technology and Forensic Science (1992) (hereinafter NRC report). This report is a consensus statement of the scientific community on what constitutes scientifically

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[2] U.S. Congress, Office of Technology Assessment, Genetic Witness: Forensic Uses of DNA Tests, OTA-BA-438 at 7-8 (U.S. Government Printing Office, Washington, D.C., July, 1990)

reliable DNA methodology. In light of recent cases and consensus statements by the National Research Counsel on the appropriate methodology to be used for DNA typing, this Court must reverse. The Florida Department of Law Enforcement labs did not utilize the methodology generally accepted in the scientific community.

The purpose of the NRC report was to address the general applicability and appropriateness of the use of DNA technology in forensic science and the need to develop standards for data collection and analysis. As part of its recommendations, the NRC stated:

> The adequacy of the method used to acquire and analyze samples in a given case bears on the admissibility of the evidence and should, unless stipulated by opposing parties, be adjudicated case by case. In this adjudication, the accreditation and certification status of the laboratory performing the analysis should be taken into account.

NRC report at p. 23. As further noted by the NRC, "Courts should require that laboratories provide the DNA typing evidence have proper accreditation for each DNA typing method used." Id. at 17. In the instant case, the Florida Department of Law Enforcement lab is not accredited for DNA testing. (T3269) The NRC further stated that criterion used in determining whether there is a numerical match in DNA specimens must be objective, precise and uniformly applied. This is not present in the standards used by the FDLE lab.

In Ramirez v. State, 542 So.2d 352 (Fla. 1989), the prosecution introduced the testimony of a toolmark technician to

testify that a specific knife was the knife that killed the victim. This Court reversed for a new trial, stating:

> In reviewing the record, we find that no scientific predicate was established from independent evidence to show that a specific knife can be identified from the marks made on cartilage. The only evidence received was the expert's self-serving statements supporting this procedure.

Id. at 355. In rejecting the contention that the technician had co-authored a scholarly article supporting this technique, this Court ruled that an insufficient predicate had been laid for the admission of the testimony:

> ...The real issue is the reliability of testing methods which form the basis of the witness' conclusion.
>
> This Court, as most other courts, will accept new scientific methods establishing evidentiary facts only after a proper predicate has first established the reliability of the new scientific method. This point is illustrated by recent decisions of this Court. In Ramos v. State, 496 So.2d 121 (Fla. 1986), we reversed the appellant's conviction and remanded for a new trial because we found that no proper predicate was presented to establish the reliability of dog scent discrimination lineups. As in the instant case, the only evidence concerning the scent discrimination lineup's reliability was the testimony of the dog handler. We have previously rejected, because of an improper predicate of scientific reliability, hypnotically recalled testimony, Bundy v. State, 471 So.2d 9 (Fla. 1985), cert. denied, 479 U.S. 894, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986), and polygraph tests, Delap v. State, 440 So.2d 1242 (Fla. 1983), cert. denied, 467 U.S. 1264, 104 S.Ct. 3559, 82 L.Ed.2d 860 (1984)...

> Clearly, in the instant case, insufficient evidence exists to establish the requisite predicate for the technician's positive identification of the knife as the murder weapon.

In the present case, the only evidence of the reliability of the testing procedures used by FDLE came from Nancy Rathman, the serologist with FDLE who conducted the tests. This is a situation exactly like that presented in Ramos, supra. Nancy Rathman admitted that her lab was not accredited, not certified, and not licensed to do DNA testing. She also admitted that they do not have quality control procedures which have been recommended by the NRC report. (T2778)

This Court recently reaffirmed the tests for the admissibility of scientific evidence in Flanagan v. State, 625 So.2d 827 (Fla. 1993). This Court stated:

> We begin our analysis of the admissibility of the testimony with the basic principle that novel scientific evidence is not admissible in Florida unless it meets the test established in Frye v. United States, 293 F. 1013 (DC Cir. 1923). See Stokes v. State, 548 So.2d 188, 195 (Fla. 1989). Under Frye, in order to introduce expert testimony deduced from a scientific principle or discovery, the principle or discovery "must be sufficiently established to have gained general acceptance in a particular field in which it belongs." 293 F. at 1014.

625 So.2d at 828. The First District Court of Appeal applied this test to exclude DNA evidence. Vargas v. State, 640 So.2d 1139 (Fla. 1st DCA 1994).

Many of the courts around the country have expressed

the same basic analysis as Ramirez in terms of a showing of the reliability of the laboratory procedures as a predicate to the admissibility of the DNA evidence in a given case. These courts have consistently held that even if the theory of DNA is acceptable, there must be a sufficient predicate as to the reliability of the scientific evidence. United States v. Two Bulls, 918 F.2d 56, 61-62; rehearing en banc granted at 925 F.2d 1127 (8th Cir. 1991); appeal dismissed on death of the defendant; Ex Parte Perry, 586 So.2d 243, 249 (Ala. 1991); People v. Castro, 545 N.Y.S. 2d 985, 999 (Supp. 1989); People v. Pizarro, 12 Cal. Rptr. 2d 436, 449-50 (Cal. App. 5th Dis. 1992); State v. Houser, 490 N.W. 2d 168 (Neb. 1992). Pizarro is particularly instructive here. In Pizarro, the only expert that testified as to the validity of the two procedures run by the FBI was their own expert (Dr. Adams). 12 Cal. Rptr. at 451. The court rejected this type of self-serving expertise as qualifying as an independent predicate:

> Despite Dr. Adams' stellar qualifications, we do not believe his testimony standing alone establishes that the procedures employed by the FBI satisfy the requirements of Kelly/Frye. Prior to admitting testimony as potentially damaging as DNA forensic identification, the prosecutor should have been required to demonstrate through the testimony of at least one impartial expert witness that the protocols and/or procedures of the FBI were generally accepted within the scientific community as reliable.

Id. at 451.

In the present case, the only person who testified

concerning the reliability of the testing procedures done by FDLE was the FDLE employee herself. Where a person's very life depends upon such highly scientific evidence, it is not too much to require that the state prove the reliability of the testing procedures of such evidence. This was simply not done in the instant case. Rather, it appears that the trial court was somehow requiring the defense to prove that the testing procedures were not reliable. If this is so, the defense met its burden by showing that the FDLE was not in compliance with the recommendations of the NRC report. At the very least, this should have forced the state to bring in independent experts to testify as to the testing procedures of FDLE. Failing to do so, it was clear error to deny the defense motions to exclude the DNA testimony. Such evidence was critical as demonstrated by the prosecution's use of such testimony to argue that Appellant was the actual trigger person. Appellant is entitled to a new trial where such DNA testimony is ruled inadmissible.

POINT V

IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION, APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE OF IMPROPER PROSECUTORIAL COMMENTS MADE TO THE JURY.

During jury selection, the prosecutor told the potential jurors, "If the evidence of the aggravators outweighs the mitigators by law your recommendation must be for death." (T275,296,531) Defense counsel objected on the grounds that this misstated the law since the jury retains the inherent pardon power notwithstanding the strength of the aggravators and mitigators. The trial court overruled the objection. Subsequently, during closing argument in the guilt phase, the following exchange occurred:

> [By the Prosecutor]: You have to look at everything that is going on and see in that same story he is telling them, I never raped anybody.
>
> MR. JOHNSON: Could we approach the bench, your Honor?
>
> THE COURT: Sure.
>
> (WHEREUPON, the following proceedings were held outside the presence of the jury.)
>
> MR. JOHNSON: Your Honor, please, pursuant to that statement, at this time I would move --
>
> THE COURT: Statement of what?
>
> MR. JOHNSON: About in the statement he never said, "I raped Dorothy Lewis."

In that statement he did not, however, the state had another statement which they chose not to introduce. In that second statement he admitted raping Miss Lewis.

We made our opening statement and our decision in this case predicated upon the Court's ruling and the state's arguments about introducing this evidence. Both of those statements. The state chose not to introduce those statements.

Mr. King and Mr. Gross both know that in that second statement he admitted raping Miss Lewis. Mr. King now is making a bad faith argument that he did not at all admit to raping Miss Lewis, when, in fact, Mr. King and Mr. Gross both know that he did, ultimately in the second statement, admit to raping Miss Lewis. That statement was not introduced before this jury, I understand that. But to argue that there is no evidence that he did not confess is simply a misstatement in light of what everybody here knows in this courtroom.

That is a bad faith argument. Mr. Henyard is entitled under the United States and Florida Constitutions, to a fair trial and Mr. King has simply made a misstatement with regard to what the real evidence in this case is and is now attempting, based upon our position which was predicated upon this Court's ruling on the suppression. To use that, and it is a misstatement. This record is full, it includes that second statement which shows that Mr. Henyard confessed to the rape.

For that reason, based upon Mr. Henyard's right to due process under the United States and Florida Constitution, the right to have a fair trial based upon fair evidence, I move at this time for a mistrial.

THE COURT: Mr. Nacke, his closing

argument said that Mr. Henyard voluntarily came in, you have his statement, he commented about his statement and how cooperative he was. It's only a fair comment. Mr. Nacke's final argument is he was a gentleman, he was cooperative, being totally honest with the police officers.

MR. KING: Your Honor, I would also like to point out for the record that what I said was in this statement he did not rape her. Referring directly to the statement that is in evidence. I didn't say he never said he didn't rape her, I said in this statement he was still lying about raping her. And I just think that needs to be clear in the record, that I was specifically referring to the statement that is in evidence.

THE COURT: He's clearly commenting on the statement that is in evidence.

MR. JOHNSON: I don't argue that the statement in evidence he did not admit to rape, but Mr. King knows that there is another statement in which he did admit and this jury is entitled to know the true situation in order for a fair trial to occur in this case.

THE COURT: I think the argument from the defense is ridiculous. Overruled.

(WHEREUPON, the bench conference was concluded and the proceedings continued as follows:)

CLOSING ARGUMENTS CONTINUE:

BY MR. KING:

MR. KING: We stopped while we were talking about the truthfulness of Mr. Henyard's statement. It's before you in evidence. And I was discussing with you the fact that in that same statement where they want you to believe what he says about not having shot the children,

> also in that same statement he denied what we know now to be true, and that is that he did, in fact, rape Dorothy Lewis.

(T1973-77)

Appellant asserts that the two comments by the prosecutor tainted the jury verdicts not only in the guilt phase but also in the penalty phase, so as to undermine the confidence in the jury verdict. The first statement by the prosecutor during the jury selection process, is a clear misstatement of the law. We do not have an automatic death penalty in Florida. However, the statement by the prosecutor that if the aggravating factors outweigh the mitigating factors the recommendation must be for death constitutes an automatic death penalty. This Court has recognized that a jury retains an inherent pardon power, in spite of the evidence. See State v. Wimberly, 498 So.2d 929 (Fla. 1986). If Florida juries are allowed to follow their consciences by finding defendants guilty of lesser included offenses even when the evidence has proved the greater offense beyond a reasonable doubt, then Florida juries certainly are allowed to follow their consciences when they know that the degree of certainty with which they voted the defendant guilty is not high enough for them to vote for a penalty of death. In Alvord v. State, 322 So.2d 533, 540 (Fla. 1975), this Court stated:

> Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned

> judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other case.

Additionally, the United States Supreme Court in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), held that a jury could constitutionally dispense mercy in a case deserving of the death penalty. Such arbitrary mercy does not make a death penalty statute unconstitutional. Despite these clear pronouncements by the United States Supreme Court and this Court, the prosecutor was permitted to tell the jury that in fact they could not exercise mercy if the aggravating factors outweighed the mitigating factors. Apparently, something unusual occurred in the jury deliberations since the advisory recommendation verdict forms contained three different vote totals, one, 10 to 2, which is crossed out and replaced with 11 to 1, which is in turn crossed out and then recorded 12 to 0. (R1345,1346) While we cannot speculate on what caused this to occur, it certainly could have been due to the fact that at least two of the jurors simply wanted to exercise mercy and recommend life, yet were reminded by the other jurors that the prosecutor had told them if the aggravating factors outweigh the mitigating they had to vote for death. The jury recommendation is certainly suspect given the improper statement of the law by the prosecutor.

The second comment by the prosecutor during closing arguments is similarly improper. As noted by trial counsel, the

state actively sought in pretrial motion hearings to gain the admissibility of Appellant's statements. Appellant gave three statements at the police station in one relatively continuous period of time. The third statement was made directly to the assistant state attorney prosecuting the case. During this third interrogation, the following occurred:

> Q. You didn't have sexual intercourse with her?
>
> A. Yeah.
>
> Q. You did?
>
> A. Uh-huh.
>
> Q. You know what that is?
>
> A. Uh-huh.
>
> Q. Tell me what it is.
>
> A. Having sex.
>
> Q. Yeah. Did you have sex with her?
>
> A. Uh-huh.
>
> Q. You did?
>
> A. Uh-huh.
>
> Q. Where? On the (Inaudible) on the back of the car?
>
> A. Uh-huh.
>
> Q. What happened? Did Junior have it first? Did Junior -- Junior raped her?
>
> A. Yeah.
>
> Q. Junior took her out of the car.
>
> A. Uh-huh.

Q. Took her back to the back of the car.

A. Uh-huh.

Q. Brought you her panties, her pantyhose and her shoes. You stayed in the car. A little while later, what happened?

A. And a little while later, he came back, put her in the car, he came and got in the car, asked me did I want to smoke some weed, I said, "Yeah, I'll smoke some weed." And me -- me and her and Junior got out, and Junior walked around there to the back, pulled the girl to the back. She leaned against the car. When I went around there, her dress was pulled up.

Have I got to say this on tape, man?

Q. Yeah.

A. Well, I went down there. Her dress was pulled up. Junior was standing behind the car. The gun was still laying on the trunk. I had sex with the lady. And as I was leaving, that's when she grabbed the gun. I grabbed the handle of the gun. She slid it, she ain't pull it straight up, like I said, she was sliding it. And like when she snatched it like she was trying to snatch the handle out my hand, that's when the trigger got pulled.

Q. Okay.

A. And like I said, I freaked out, and I shot two more times.

Q. Okay. Did you ejaculate? Did you come?

A. Uh-huh.

Q. Okay. Were you wearing a condom?

A. No.

Q. No. Do you know if Junior did?

A. I don't know.

Q. Talk to me.

A. I don't know.

Q. You definitely did not wear a condom?

A. Uh-huh.

Q. Okay. So you had sex with her and you think Junior had sex with her?

A. Uh-huh.

(Defense Exhibit #2, pp. 11-13; T2970) (Emphasis added.) Although defense counsel sought to suppress this statement, the trial court ruled against him. Thus, it was reasonable to expect the state to admit such statements into evidence. With this knowledge, defense counsel mapped out his trial strategy. This strategy was to admit that Appellant committed all of the offenses except for killing the children. In fact, this is extremely consistent with his total police statements. For whatever reasons, the state chose not to introduce the second and third statements. The reasoning behind this is somewhat suspicious. At any rate, the prosecutor's statement to the jury, basically calling the defendant a liar by intimating that he never admitted to the rape, was absolutely false. In Garcia v. State, 564 So.2d 124 (Fla. 1990), this Court reversed a conviction for first-degree murder and remanded for a new trial on grounds that the defense counsel was prohibited from

introducing evidence of payroll records which were offered to establish that Garcia was no longer employed at the time when a coworker allegedly overheard an incriminating statement made by him. The state successfully argued against the admissibility of such evidence at trial. While this Court noted that the exclusion was error, it further noted that the state compounded that error in its closing argument by falsely arguing to the jury:

> [Y]ou can't get the records. I wouldn't say we didn't look for them. You better believed we looked for them. The police looked for them but they simply didn't exist, and that's why you didn't hear any records in this courtroom, even though you heard testimony from a woman who alleged to have some.

Id. at 128-29) This Court clearly ruled that such fallacious arguments are improper. Likewise, in the instant case, the state was able to imply that Appellant never admitted to raping Dorothy Lewis, when in fact, the state knew that he had. Such false statement by the prosecutor is in direct violation of the oath of admission that all members must take before they are admitted to practice law in Florida. Nowitzke v. State, 572 So.2d 1346, 1354 (Fla. 1990). This Court must not tolerate such repugnant conduct on the part of the public prosecutors. Not only did this statement by the prosecutor impugn the credibility of Appellant, but completely undermined the theory of defense. While the prosecutor attempted to justify his statement by saying he was only referring to the statement in evidence, the comments to the jury were much broader than that. The state had control over

what statements they presented to the jury. To allow them to selectively pick the statements they want to present to the jury and then comment in essence that no other statements exist, is to subvert justice. This Court must reverse Appellant's conviction and remand for a new trial.

POINT VI

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN PERMITTING A POLICE OFFICER TO TESTIFY AS TO STATEMENTS MADE TO HIM BY DOROTHY LEWIS WHERE SUCH STATEMENTS WERE INADMISSIBLE HEARSAY.

During the testimony of Eustis police officer Adam Donaldson, the state elicited testimony of what Dorothy Lewis told him when he arrived at the scene. Appellant objected to this testimony on the grounds that it was hearsay, but the trial court allowed the testimony ruling that it was admissible under Sections 90.803(1) and (2), Florida Statutes (1993). (T1136-37) Officer Donaldson then recounted what Ms. Lewis had told him concerning her assailants including their description. Appellant asserts that the ruling by the trial court was incorrect.

Section 90.803(1), Florida Statutes (1993) provides for an exception to the hearsay requirements when a statement is a spontaneous statement describing or explaining an event made while the declarant was perceiving the event or immediately thereafter. Section 90.803(2), Florida Statutes (1993) provides that a statement is an exception to hearsay where it is an excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event. Neither of these exceptions apply to the situation below. The spontaneous statement exception requires that the statement be made while the declarant is perceiving the event or

immediately thereafter. A statement made after a person has had time to reflect upon what happened is not spontaneous. Jacobs v. State, 380 So.2d 1093 (Fla. 4th DCA 1980) (statement after declarant left accident scene not admissible absent showing declarant witnessed the event and statement was contemporaneous with the event). In the instant case, the statements made by Ms. Lewis were made several hours after the event occurred. They were not spontaneous but rather were answers to questions being asked of her by the police officer. They do not fall under the spontaneous statement exception.

To fall under the excited utterance exception, three elements are necessary: 1) there must be an event startling enough to cause nervous excitement; 2) the statement must have been made before there was time to contrive or misrepresent; and 3) the statement must be made while the person is under the stress of excitement caused by the event. State v. Jano, 524 So.2d 660 (Fla. 1988). The length of time between the event and the statement must be considered in determining whether the statement may be admitted under the excited utterance exception. Where such statement is made long after the occurrence of the startling event, it is not admissible as an excited utterance even though the declarant once again becomes excited during the course of telling about the occurrence. Id. at 663. One court has noted that statements made an hour after the event could not fall under the excited utterance exception to the rule. Smith v. State, 579 So.2d 906 (Fla. 5th DCA 1991). Again, in the instant

case, the statements by Ms. Lewis were made hours after the event occurred. They were not excited utterances but rather were answers to questions asked by the police officer.

The trial court's ruling allowing these obviously hearsay statements was clear error. The exceptions cited by the trial court were improper and thus the evidence was improperly admitted. Appellant is entitled to a new trial.

POINT VII

IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS TO STANDARD JURY INSTRUCTIONS IN THE GUILT PHASE AND IN DENYING HIS REQUESTED JURY INSTRUCTIONS.

Prior to trial defense counsel filed a written objection to the standard jury instruction on premeditated murder and a motion for corrected instruction on first-degree murder from a premeditated design (R321-28), a written objection to the standard jury instruction on reasonable doubt (R333-40), and a motion for special verdict as to the theory of guilt. (R318-20) These motions were denied. (T2611-18,2622-26,2609-11) These requests were renewed at the proper time and again denied. (T1883-1920,2045)

A trial court has a fundamental responsibility to give the jury full, fair, complete and accurate instructions on the law. Foster v. State, 603 So.2d 1312 (Fla. 1st DCA 1992). The standard jury instructions, though presumed correct, not always are. See Yohn v. State, 476 So.2d 123 (Fla. 1985) (standard jury instruction concerning law of insanity incorrect); Sochor v. Florida, 504 U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992) (standard jury instruction concerning especially heinous, atrocious or cruel statutory aggravating factor unconstitutionally vague); Jackson v. State, 648 So.2d 85 (Fla. 1994) (standard jury instruction on cold, calculated and

premeditated unconstitutional). As the Court noted in Steele v. State, 561 So.2d 638, 645 (Fla. 1st DCA 1990):

> While the standard jury instructions are intended to assist the trial court in its responsibility to charge the jury on the applicable law, the instructions are intended only as a guide and can in no wise relieve the trial court of its responsibility to charge the jury correctly in each case.

A. PREMEDITATED MURDER

Section 782.04(1)(a)1, Florida Statutes (1993) provides:

> The unlawful killing of a human being:
> 1. When perpetrated from the premeditated design to effect the death of the person killed or any human being;
>
> * * *
>
> is murder in the first degree and constitutes a capital felony, ...

In McCutchen v. State, 96 So.2d 152, 153 (Fla. 1957), this Court defined the "premeditated design" element of first-degree murder:

> A premeditated design to effect the death of a human being is a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide. The law does not prescribe the precise period of time which must elapse between the formation of and the execution of the intent to take human life in order to render the design a premeditated one; it may exist only a few moments and yet be premeditated. If the design to take human life was formed a sufficient length of time before its execution to admit of some reflection and deliberation on the part of the party entertaining it and the party at the time of the execution of the intent was

> fully conscious of a settled and fixed purpose to take the life of a human being, and that the consequence of carrying such purpose into execution, the intent or design would be premeditated within the meaning of the law although the execution followed closely upon formation of the intent. (Emphasis added).

See also Littles v. State, 384 So.2d 744 (Fla. 1st DCA 1980). In Owens v. State, 441 So.2d 1111, 1113 n. 4 (Fla. 3d DCA 1983), the court wrote:

> 'Premeditation' and 'deliberation' are synonymous terms, which, as elements of first-degree murder means simply that the accused, before he committed the fatal act, intended that he would commit the act at the time that he did, and that death would be the result of the act. [Citation omitted]. Deliberation is the element which distinguishes first and second degree murder. [Citation omitted]. It is defined as a prolonged premeditation so is even stronger than premeditation. [Citation omitted].

The standard jury instruction on first-degree murder does not explicitly state that "a premeditated design" is an element of first-degree murder. It provides:

> There are two ways in which a person may be convicted of first degree murder. One is known as premeditated murder and the other is known as felony murder.
>
> Before your can find the defendant guilty of first degree premeditated murder, the state must prove the following three elements beyond a reasonable doubt: 1. (Victim) is dead. 2. The death was caused by the criminal act or agency of (defendant). 3. There was a premeditated killing of (victim).
>
> "Killing with premeditation" is killing after consciously deciding to do so.

> The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.
>
> The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the premeditation at the time of the killing.
>
> If a person had a premeditated design to kill one person and in attempting to kill that person actually kills another person, the killing is premeditated.

The standard jury instruction unconstitutionally relieves the state of the burdens of proof and persuasion as to the statutory element of premeditated design. The only attempt in defining the premeditation element is "killing with premeditation" is killing after consciously deciding to do so. There is no mention of the requirement, under McCutchen, that the state prove "a fully formed and conscious purpose to take human life, formed upon reflection and deliberation," and that "the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequence of carrying such purpose into execution."

Additionally, the standard instruction relieves the state of the burdens of proof and persuasion as to the

requirement that the premeditated design be fully formed before the killing. While the standard instruction states that "killing with premeditation" is killing after consciously deciding to do so, it relieves the state of its burden by creating a presumption: "It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the premeditation at the time of the killing." Thus, the jury is told that it need only find premeditation at the time of the killing. Finally, it does not instruct the jury that the premeditated design element, carrying with it the element of deliberation, requires more than simple premeditation. The standard jury instruction on first-degree premeditated murder is unconstitutional. The trial court should have given the requested instruction on premeditated design.

B. A REASONABLE DOUBT INSTRUCTION

An improper instruction on reasonable doubt violates due process and is a structural defect whose use can never be harmless. Sullivan v. Louisiana, 508 U.S. ___, 113 S.Ct. ___, 124 L.Ed.2d 182 (1993); Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990).

The Supreme Court of the United States has long disliked instructions defining "reasonable doubt." Miles v. United States, 103 U.S. 304, 312 (1881). It has approved but one definition: in Holland v. United States, 348 U.S. 121, 140 (1954), disapproving one instruction, 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 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.

Speculation and imagination come into play when one determines to act in the most important of one's affairs. A doubt founded on speculation or an imaginary or forced doubt will cause one to hesitate to act. Thus, in Haager v. State, 83 Fla. 41, 90 So. 812, 816 (1922), this 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."

In Dunn v. Perrin, 570 F.2d 21 (1st Cir. 1978), the court, in reversing the petitioner's state court convictions, condemned the following jury instruction defining reasonable doubt:

> It does not mean a trivial or a frivolous or a fanciful doubt nor one which can be readily or easily explained away, but rather such a strong and abiding conviction as still remains after careful consideration of all the facts and arguments.

The court wrote that this instruction "was the exact inverse of what it should have been." Id. at 24. Although it is proper to instruct the jury that a reasonable doubt cannot be "purely speculative," a court is "playing with fire" when it goes beyond that. United States v. Cruz, 603 F.2d 673, 675 (7th Cir. 1979). It is improper to instruct that the government need not prove guilt "beyond all possible doubt." United States v. Shaffner, 524 F.2d 1021 (7th Cir. 1975). Further, an instruction equating a reasonable doubt with "a real possibility" has been condemned because it may "be misinterpreted by jurors as unwarrantedly shifting the burden of proof to the defense." United States v. McBride, 786 F.2d 45, 51-52 (2d Cir. 1986).

Jury instructions equating reasonable doubt with substantial doubt have been "uniformly criticized." Monk v.

Zelez, 901 F.2d 885, 889 (10th Cir. 1990). It is improper to define a reasonable doubt as "substantial rather than speculative." United States v. Rodriguez, 585 F.2d 1234, 1240-42 (5th Cir. 1978) (affirming conviction, but noting that a trial court using such an instruction "can reasonably expect a reversal."). An instruction that a reasonable doubt is a "substantial doubt, a real doubt" has been condemned as confusing by the Supreme Court. Taylor v. Kentucky, 436 U.S. 478, 488, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978).

The standard jury instruction on reasonable doubt is clearly unconstitutional. Although negative in its terms, it essentially equates the word "reasonable" with such condemned terms as "substantial" and "real." All doubts, whether reasonable or unreasonable, are necessarily founded on speculation and possibility. See Haager, supra. As the United States Supreme Court pointed out in In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), the constitution requires "a subjective state of certitude" before a defendant can be convicted. The absence of such a degree of certitude necessarily involves a degree of speculation and consideration of possibilities. The standard instruction forbids a not guilty verdict on the basis of a "possible" or "speculative" doubt, although possibilities and speculation can be reasonable and prevent the "subjective state of certitude" as required by Winship.

Further, the instruction provides "such a doubt must

not influence you to return a verdict of not guilty if you have an abiding conviction of guilt." This could reasonably be taken by jurors to mean that they should convict even where a reasonable doubt is found, so long as they have "an abiding conviction of guilt." Where a jury instruction is challenged, the question is not what the court thinks the instruction means "but rather what a reasonable juror could have understood the charge as meaning." Francis v. Franklin, 471 U.S. 307, 315-16, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) (emphasis supplied). Since the jury could have taken the "abiding conviction of guilt" standard as eliminating the requirement of proof beyond a reasonable doubt, the standard instruction is improper on that ground also. The standard instruction on reasonable doubt is unconstitutional.

C. SPECIAL VERDICT AS TO THEORY OF GUILT.

In Schad v. Arizona, 501 U.S. ___, 111 S.Ct. ___, 115 L.Ed.2d 555 (1991), the Court ruled that "on the facts of this case," due process did not require a special verdict as to the theory of first-degree murder accepted by the jury. It specifically did not decide the effect of a lack of a special verdict on the penalty determination. (Schad did not receive a death sentence.) The plurality wrote at Footnote 9:

"...Moreover, the dissent's concern that a general verdict does not provide the sentencing judge with sufficient information about the jury's findings to provide a proper premise for the decision whether or not to impose the death penalty ... goes only

to the permissibility of a death sentence imposed in such circumstances, not the issue currently before us, which is the permissibility of the conviction." At Footnote 4 of his dissent, Justice White noted that "the disparate intent requirements of premeditated murder and felony murder had life-or-death consequences at sentencing." See also United States v. McNeese, 901 F.2d 585, 605-6 (7th Cir. 1990) (approving use of special verdicts where information sought is relevant to sentencing).

The life-or-death import of a jury's findings on the theory of guilt requires special verdicts. We require special verdict findings whether an armed robber carried a firearm, or as to whether a burglar was armed, because of the effect of that finding at sentencing:

> The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode. To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply the enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury's historical function and could lead to a miscarriage of justice in cases such as this where the defendant was charged with but not convicted of a crime involving a firearm.

State v. Overfelt, 457 So.2d 1385, 1387 (Fla. 1984). The failure to require special verdicts in a capital case violates the

federal and state constitutions.

POINT VIII

IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION, APPELLANT'S DEATH SENTENCE IS INVALID BECAUSE THE JURY HEARD AND THE TRIAL COURT EXPRESSLY CONSIDERED HIGHLY PREJUDICIAL TESTIMONY WHICH DID NOT RELATE TO ANY STATUTORY AGGRAVATING CIRCUMSTANCE.

A. THE ROBBERY OF JULIA DELISLE IN NOVEMBER, 1989, WHICH RESULTED IN A JUVENILE ADJUDICATION RATHER THAN A CRIMINAL CONVICTION, WAS IMPROPERLY INTRODUCED AND CONSIDERED IN AGGRAVATION.

Aggravating factors are strictly limited to those enumerated by the Legislature. Elledge v. State, 346 So.2d 998, 1002-3 (Fla. 1977); Provence v. State, 337 So.2d 783, 786 (Fla. 1976). When a trial judge goes "beyond the proper use of statutory aggravating circumstances in his sentencing findings... the sentence of death cannot stand." Trawick v. State, 473 So.2d 1235, 1240 (Fla. 1985). Similarly, the introduction before the jury of evidence which does not properly relate to any statutory aggravating circumstance taints the jury's penalty recommendation. Trawick, 473 So.2d at 1240-41; Trotter v. State, 576 So.2d 691, 694 (Fla. 1990).[3]

In the instant case, prior to the commencement of the

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[3] Other cases in which the introduction of improper evidence in aggravation has resulted in reversal for resentencing before a new jury include Colina v. State, 570 So.2d 929 (Fla. 1990); Hill v. State, 549 So.2d 179 (Fla. 1989); Dragovich v. Florida, 492 So.2d 350 (Fla. 1986); Long v. State, 529 So.2d 286 (Fla. 1988); Robinson v. State, 487 So.2d 1040 (Fla. 1986); and Dougan v. State, 470 So.2d 697 (Fla. 1985).

penalty phase, defense counsel objected to the state presenting any evidence of a prior juvenile adjudication for armed robbery of Julia Delisle as an aggravating circumstance. (T2073-78) Defense counsel noted that a juvenile commitment is not the same as an adult conviction, and therefore should not be appropriately considered as an aggravating circumstance. Defense counsel further argued that in a non-capital situation, the juvenile adjudication could not be used against Mr. Henyard since it occurred more than three years previous to the commission of the instant offense. As authority for its admission, the state cited this Court's opinion in Campbell v. State, 571 So.2d 415, 418 (Fla. 1990). The trial court ruled that the state would be permitted to introduce evidence of the prior juvenile commitment. (T2078) Defense counsel later objected when this evidence was offered into evidence. (T2100)

In Campbell, supra, this Court dealt with the issue concerning the prior juvenile convictions in a terse manner:

> ...The court correctly found that Campbell was previously convicted of a felony involving the use or threat of violence. He cites no authority in support of his assertion that prior juvenile convictions cannot be considered in aggravation.

Id. at 418. What is important to note is that the opinion in Campbell gives no facts as to the nature of the conviction in Campbell and the status of Campbell at the time the conviction

was obtained.[4] However, this Court in Campbell, ignored its previous decision in Jones v. State, 440 So.2d 570 (Fla. 1983). In Jones the trial court, in its findings of fact in support of the death penalty, included under the aggravating factor of a previous conviction of a felony involving violence, juvenile commitments entered against Jones for concededly violent offenses. The trial court noted that these were not felony convictions since they resulted from juvenile prosecutions. Jones argued on appeal that these were improper considerations. This Court in rejecting Jones' contention, apparently agreed that the juvenile commitments were improper aggravating factors, but noted that the trial court's references to the juvenile record was, in effect, surplusage and had no conclusive bearing on the specific and independently valid findings of statutory aggravating factors. In the instant case, the state presented the juvenile commitment for robbery and relied upon it in exhorting the jury to return a recommendation of death. The trial court specifically relied upon it in his findings of fact in support of the death penalty. Therefore, the instant case is easily distinguishable from Jones.

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[4] In the pending case of Merck v. State, Case Number 83,063, this Court took judicial notice of the fact that the prior "juvenile" conviction in Campbell was in fact an adult conviction. That is, Campbell was tried as an adult although he was still a juvenile at the time. Appellant therefore requests this Court to take judicial notice of the same fact as well as the judicial notice previously given in Merck. See Fuller v. Williams, 393 So.2d 651 (Fla. 5th DCA 1981) [appellate court required to take judicial notice of the records of its own court].

Penal statutes, including statutory aggravating factors, "must be strictly construed in favor of the one against whom a penalty is to be imposed." Trotter v. State, 576 So.2d 691, 694 (Fla. 1990) (reversing for resentencing before a new jury, where trial judge and jury erroneously considered in aggravation the defendant's violation of community control). The aggravating factor at issue here provides:

> (5) Aggravating circumstances shall be limited to the following:
>
> * * *
>
> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

The statutory language is clear and unambiguous. In addition, however, caselaw also makes it clear that a conviction for the violent felony is a prerequisite for the admission of evidence to establish this aggravating factor. In Odom v. State, 403 So.2d 936, 942 (Fla. 1981), this Court wrote:

> The trial judge's written sentencing findings state that he considered Appellant's prior record, including numerous arrests and charges which did not culminate in criminal convictions. This Court has held that considerations must be limited to those provided for by the statute, and the information must relate to one of the statutory aggravating circumstances in order to be considered in aggravation. Evidence of past criminality, offered by the state for the purpose of aggravating the crime, is inadmissible unless it tends to establish one of the aggravating circumstances listed in section 921.141(5).

See also Dougan v. State, 470 So.2d 697, 701 (Fla. 1985); Harry v. State, 395 So.2d 170, 174-75 (Fla. 1980).[5]

Section 39.053(4), Florida Statutes (1993), expressly provides that "an adjudication of delinquency by a court with respect to any child who has committed a delinquent act or violation of law shall not be deemed a conviction; nor shall the child be deemed to have been found guilty or to be a criminal by reason of that adjudication; nor shall that adjudication operate to impose upon the child any of the civil disabilities ordinarily imposed by or resulting from conviction..." In State v. Cain, 381 So.2d 1361, 1363 (Fla. 1980), this Court stated that, while there is no common law right to be treated as a juvenile delinquent instead of a criminal offender:

> Under our Florida constitution, when authorized by law, a "child" as therein defined may be charged with a violation of law as an act of delinquency instead of a crime. Art. I, 15(b), Fla. Const. Therefore, a child has the right to be treated as a juvenile delinquent only to the extent provided by our legislature.

See also Johnson v. State, 314 So.2d 573, 576 (Fla. 1975) ("When authorized by law, a child in Florida may be charged with a

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[5] Contrast Walton v. State, 547 So.2d 622, 625 (Fla. 1989), holding that a conviction is not required to rebut a defendant's claim of the "no significant history of prior criminal activity" mitigator. "Once a defendant claims that this mitigating circumstance is applicable, the state may rebut this claim with direct evidence of criminal activity." Id. at 625. See also Quince v. State, 414 So.2d 185, 188 (Fla. 1982). In the instant case, Appellant never claimed this mitigator, choosing instead to specifically waive this factor. (T2131-32; R1128) Instead, the evidence of this prior robbery was submitted to the jury and considered by the trial court as an aggravating circumstance.

violation of law as an act of delinquency instead of a criminal act."); C.L.S. v. State, 586 So.2d 1173, 1177 n.9 (Fla. 4th DCA 1991) ("...a Chapter 39 proceeding does not lead to an order 'adjudicating guilt.' The order entered under Chapter 39 is properly termed 'an adjudication of delinquency.'"); D.R.W. v. State, 262 So.2d 701 (Fla. 3d DCA 1972) (judgment of delinquency is not a conviction of a criminal offense). Campbell, supra, as noted previously, involved an adult conviction obtained when the person was a juvenile. Consequently, Campbell was not entitled to the protections of Section 39.053, Florida Statutes (1993). No such impediment exists in the instant case. Plainly stated, the prior robbery commitment was irrelevant and inadmissible since it relates to no statutory aggravating factor. Rather, it serves only to create in the minds of the jury the fact that Mr. Henyard is a terrible person. The trial court's acceptance of this prior conviction and specific reliance upon it in his orders imposing the death penalty, render the death sentence in the instant case invalid.

B. THE JURY WAS INSTRUCTED ON IMPROPER AGGRAVATING FACTORS THUS RENDERING THE JURY RECOMMENDATION UNRELIABLE.

The introduction before the jury, and the consideration by the trial judge, of evidence which does not properly relate to any statutory aggravating factor taints both the jury's recommendation and the sentence. Trawick; Dougan. Here, the state cannot meet its burden of showing beyond a reasonable doubt that the erroneous admission and consideration of the evidence as to the prior juvenile commitment as well as the improper

instruction on the factually and legally unsupported aggravating circumstance of avoiding arrest could not have effected the jury's recommendation or the sentence imposed by the court. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). There was substantial mitigating evidence in this case, including Appellant's age of eighteen, the abuse and rejection he encountered throughout his childhood, his psychological problems and learning disabilities, and the possibility that the actual triggerman could not receive the death penalty.

In Long v. State, 529 So.2d 286, 293 (Fla. 1988), the state introduced evidence of a prior conviction for a Pasco County murder. The Pasco conviction was valid when it was introduced, but was subsequently reversed on appeal, thereby eliminating its proper use as an aggravating factor. This Court held that the elimination of the Pasco conviction required reversal for resentencing before a new jury even though there were other convictions of violent felonies presented during the penalty phase. This Court said, "We find we are unable to say there is no reasonable probability that the elimination of this factor would change the weighing process of either the jury or the judge, particularly in view of the mitigating circumstances." Id. at 293. It should be noted that aside from the prior convictions, there were three other aggravating factors found by the trial court in Long and that the jury's recommendation for death was 11 to 1.

In the instant case, there were other convictions for

violent felonies properly introduced at trial. However, these convictions were contemporaneous convictions achieved during the same criminal episode. Although these involved different victims, the fact that they were committed at the same time certainly lessens the strength of this aggravating circumstance.

Additionally, during penalty phase, the trial court instructed the jury that among the aggravating factors which the jury could consider included the fact that the crime for which the defendant is to be sentenced, was committed for the purpose of avoiding or preventing a lawful arrest. (R2542-43) However, in its findings of fact in support of the death penalty, the trial court did not find this aggravating factor applicable. (T1496,1504-5) During its closing argument, the state pointed out to the jury that in its opinion this aggravating factor of avoiding arrest was the third most important aggravating factor. (T2495-2497)

The law is clear that, unless the parties agree that the judge may instruct on all the factors, the jury must be instructed on only those aggravating and mitigating factors that are supported by the evidence. Roman v. State, 475 So.2d 1228, 1234 (Fla. 1985); Lara v. State, 464 So.2d 1173, 1179 (Fla. 1985). See also Standard Jury Instructions in Criminal Cases, 2nd Edition, Page 80 ["give only those aggravating circumstances for which evidence has been presented."]

This Court dealt with the improper instruction of the jury on an invalid aggravating factor in the case of Omelus v.

State, 584 So.2d 563 (Fla. 1991). In that case, the state stressed that three aggravating circumstances were clearly established by the evidence including that the murder was heinous, atrocious and cruel. The jury returned a recommendation of death. The trial court subsequently imposed the death penalty but did not find HAC. In finding that the trial court erred in instructing the jury that it could properly consider as an aggravating factor that the murder was HAC, this Court stated:

> Although the circumstances of a contract killing ordinarily justify the imposition of the death penalty, we are unable to affirm the death sentence in this case because given the state's emphasis on the heinous, atrocious, or cruel factor during the sentencing phase before the jury, the fact that the trial court found one mitigating factor, and the fact that the jury recommended the death sentence by an 8-4 vote, we must conclude that this error is not harmless beyond a reasonable doubt under the standard set forth in DiGuilio.

Id. at 567. The jury is presumed to have used this instruction and to have followed the law given it by the trial judge. Grizzell v. Wainwright, 692 F.2d 722, 726-27 (11th Cir. 1982), cert. denied, 461 U.S. 948 (1983). Indeed, as this Court noted in Riley v. Wainwright, 517 So.2d 656, 659 (Fla. 1987), "If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure."

C. THE TESTIMONY OF DOROTHY LEWIS AND LEROY PARKER DID NOT RELATE TO ANY SPECIFIC AGGRAVATING CIRCUMSTANCE AND THUS WERE INADMISSIBLE.

At the penalty phase, defense counsel specifically

objected to the testimony of Dorothy Lewis who was permitted to testify to the fact that Appellant, the driver, in response to Ms. Lewis' praying to Jesus, stated, "You might as well stop calling Jesus, this isn't Jesus, this is Satan." (T2091) Defense counsel objected to such testimony on the grounds that this statement is not relevant to any aggravating circumstance, Ms. Lewis could not state with certainty that the children actually heard this statement, and such statement was highly prejudicial. (T2087) The trial court overruled the objection. (T2089) Similarly, Leroy Parker, a blood stain pattern analyst, was permitted to testify concerning blood stains on the clothing of both Appellant and Alfonsa Smalls. (T2154-2200) Defense counsel specifically objected to any evidence concerning blood stain patterns on the grounds that it was not relevant to any aggravating circumstance. (T2159) The trial court overruled the objection and permitted the testimony. (T2159)

As has been noted before, the introduction before the jury of evidence which does not properly relate to any statutory aggravating circumstance taints the jury's penalty recommendation. Trawick v. State, 473 So.2d 1235 (Fla. 1985); Trotter v. State, 576 So.2d 691 (Fla. 1990). It is axiomatic that any evidence relevant to prove a fact in issue is admissible unless its admissibility is precluded by some specific rule of evidence. Section 90.401, Florida Statutes (1993), defines relevant evidence as "evidence tending to prove or disprove a material fact." Evidence should not be submitted to a jury

unless it is logically and legally relevant to the issues in the case. Blanco v. State, 452 So.2d 520 (Fla. 1984). In Watkins v. State, 120 Fla. 58, 163 So. 292 (1935), this Court held:

> The rule "res inter alios acta" forbids the introduction against an accused of evidence of collateral facts which by their nature are incapable of affording any reasonable presumption or inference as to the principal matter in dispute, the reason being that such evidence would be to oppress the party affected, by compelling him to be prepared to rebut facts of which he would have no notice under the logical relevancy rule of evidence, as well as prejudicing the accused by drawing away the minds of the jurors from the point in issue.

Accord Skipper v. State, 319 So.2d 634 (Fla. 1st DCA 1975). The blood splatter evidence is just the type of evidence to which the court in Watkins, supra, was referring. According to the state's own witness the blood that was present on the jacket and shorts of Appellant was back splatter from when the wound was inflicted. (T2168) The blood on Alfonsa Smalls clothing was splashed or dropped blood, probably accumulated while the bodies were being dragged. (T2166-67) Mr. Parker could not determine where Smalls was in relation to the victims at the time of the shooting. (T2196) He could only say that Appellant was within four feet of the victim at the time that the blood was splattered. (T2198) Mr. Parker also admitted that splashed or dropped blood could obliterate any back splatter that may have accumulated on Smalls' clothing. (T2191) Mr. Parker could not say with any degree of certainty that the defendant shot the victims. (T2199) As such, the evidence that Mr. Parker supplied had no bearing whatsoever

on any aggravating circumstance. Thus, it was completely irrelevant both logically and legally to the issues at the penalty phase. Additionally, the testimony from Dorothy Lewis was also inadmissible since it was not relevant to prove any aggravating circumstance. While the trial court said in its ruling that it would be relevant to show the terrorizing of the victims, this finding is simply not supported by the facts. Ms. Lewis could not testify with any certainty that the children actually heard this statement. On the other hand, the jury heard what a "terrible" person Appellant was, equating himself with Satan. Where irrelevant testimony is presented to a jury during the penalty phase, this Court has not hesitated to reverse the death sentence and remand for a new penalty proceeding. Castro v. State, 547 So.2d 111 (Fla. 1989). The same result must be reached in this case.

POINT IX

IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED JURY INSTRUCTION ON HEINOUS, ATROCIOUS OR CRUEL, AND INSTEAD GIVING THE JURY AN UNCONSTITUTIONALLY VAGUE AND OVERBROAD INSTRUCTION THEREON.

Prior to trial, defense counsel moved to declare Florida's especially heinous, atrocious or cruel aggravating factor unconstitutional for vagueness and overbreadth. (R512-27) A hearing was conducted on this motion and it was denied. (T2712-16) Subsequently, defense counsel filed a written request for a special jury instruction on the definition of heinous, atrocious and cruel. (R1114; T2110-15) The trial court overruled the objections and denied the requested instruction and instead gave the standard instruction as follows:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show the crime was conscienceless, pitiless or was unnecessarily tortuous [sic] to the victim.

(T2544) The requested jury instruction by the defense provided as follows:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. To be heinous, atrocious or cruel, the defendant must have deliberately inflicted or consciously chosen a method of death with the intent to cause extraordinary mental or physical pain to the victim, and the victim must have actually, consciously suffered such pain for a substantial period of time before death. Events occurring after the victim dies or loses consciousness should not be considered by you to establish this crime was especially heinous, atrocious, or cruel.

(R1114)

Appellant submits that the current standard jury instruction remains unacceptably vague and overbroad for essentially the same reasons as the previous standard instruction which was held unconstitutional in Espinoza v. Florida, 505 U.S. 112 (1992). The current instruction on HAC is unconstitutional under Proffitt v. Florida, 428 U.S. 242 (1976) and Espinoza, supra. Although the Supreme Court order approving the instruction states that the instruction was proposed by the Standard Jury Instructions Committee,[6] this is not entirely accurate. On rehearing, the Committee proposed this instruction:[7]

> The crime for which the defendant is to be sentenced was especially heinous,

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[6] The Standard Jury Instructions, Criminal Cases -- No. 90-1, 579 So.2d 75 (Fla. 1991).

[7] See Cumfer, Instructing a Capital Sentencing Jury on Florida's Especially Heinous, Atrocious, or Cruel Aggravating Circumstance, 14 Criminal Law Section Newsletter, No. 1, 18 (October 1991).

> atrocious, or cruel. To be heinous, atrocious, or cruel, the defendant must have deliberately inflicted or consciously chosen a method of death with the intent to cause extraordinary mental or physical pain to the victim, and the victim must have actually, consciously suffered such pain for a substantial period of time before death.

Florida Bar News, February 1, 1991, p. 2. The Committee's proposed instruction was based on cases such as Porter v. State, 564 So.2d 1060 (Fla. 1990) wherein this Court struck the HAC circumstance where the state did not prove a torturous intent.

The instruction given in the instant case is deficient in two regards. First, it violates the Eighth Amendment in the same ways that the Court invalidated instructions in Espinoza, Proffitt, and Shell v. Mississippi, 498 U.S. ___, 111 S.Ct. ___, 112 L.Ed.2d 1 (1990). The Supreme Court in Shell held that instructions defining heinous, atrocious and cruel in terms identical to those used in the instruction below are unconstitutionally vague. While the instruction below says that the "conscienceless...pitiless...unnecessarily torturous" crime is "intended to be included" it does not expressly limit the circumstance only to such crimes as required by Proffitt.

The second prong of the attack on the constitutionality of the instant instruction is based on due process, in that the instruction below relieves the state of its burden of proving the elements of the circumstance as developed by this Court in its caselaw. For instance, the instruction does not state that there must be a torturous intent. This Court in Porter, supra, struck

the HAC finding where the evidence did not show that the murder "was meant to be deliberately and extraordinarily painful." 564 So.2d at 1063. Similarly, in McKinney v. State, 579 So.2d 80 (Fla. 1991), this Court struck a finding of HAC where "the evidence does not show that the defendant intended to torture the victim." The instant instruction also does not state that events occurring after the victim dies or loses consciousness are to be excluded from consideration, as this Court has held in Jackson v. State, 451 So.2d 458 (Fla. 1984). Additionally, the instant instruction does not state that a lingering death does not establish the circumstance, as this Court once again held in Teffeteller v. State, 439 So.2d 840 (Fla. 1983).

In denying Appellant's challenge to the constitutionality of this instruction, the trial court cited to this Court's previous decision in Hall v. State, 614 So.2d 473 (Fla. 1993). While it is true that this Court rejected a constitutional challenge to the current instruction on HAC, the instant case is distinguishable. In Hall, defense counsel did not submit a requested jury instruction on HAC. Rather, only an attack on the current instruction was made. In the instant case defense counsel submitted a proposed instruction to be given defining the aggravating factor of HAC. The trial court's rejection of the proposed instruction was based only on the fact that it did not contain the "definitions" of heinous, atrocious, or cruel as the current instruction does. However, the instruction, when taken as a whole, certainly does define the

aggravating factor with more specificity than the current instruction does. Indeed, to a layman, every murder will be unnecessarily torturous, conscienceless, and pitiless. See Tuilaepa v. California, 512 U.S. ___, 114 S.Ct. ___, 129 L.Ed.2d 750 (1994) (an aggravating circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder). See also Arave v. Creech, 507 U.S. ___, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993) ("If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm.")

Because the jury was given an unconstitutionally vague and overbroad instruction on a critical aggravator, and because there was significant mitigating evidence, the state cannot show beyond a reasonable doubt that the error did not effect the jury's weighing process, its penalty recommendation, or the ultimate sentencing decision. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Appellant's death sentence must be reversed.

POINT X

IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE WHERE TWO OF THE AGGRAVATING CIRCUMSTANCES RELIED UPON BY THE TRIAL COURT WERE NOT PROVEN BEYOND A REASONABLE DOUBT.

In imposing the death penalty, Judge Hill found that four aggravating factors had been proven: 1) Mr. Henyard had a prior conviction for a violent felony[8]; 2) the capital offense was committed in the course of a kidnapping; 3) the capital felony was committed for pecuniary gain; and 4) the capital felony was especially heinous, atrocious and cruel. Appellant contends that the aggravating factors of pecuniary gain and heinous, atrocious and cruel have not been proven beyond a reasonable doubt.

A. PECUNIARY GAIN

The trial court, in his findings of fact in support of the death penalty, initially listed the facts of the case. Following this recitation of facts, the trial court merely listed the aggravating circumstances that he found applicable. (R1491-1515) Presumably, the trial court made its decision that the murder was for pecuniary gain based on a fact that, prior to the evening of the murder, Appellant told someone that he was going

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[8] As noted in Point VIII, the jury and the trial judge relied on an improper juvenile commitment to satisfy this aggravating circumstance.

to steal a car and kill the owner. Appellant contends that the evidence is insufficient to prove this aggravating factor beyond a reasonable doubt.

For this aggravating factor to be present, there must be proof beyond a reasonable doubt that the murder was an integral step in obtaining some sought-after specific gain. Rogers v. State, 511 So.2d 526, 533 (Fla. 1987); Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988). In the instant case, even if you accept the premise that Appellant's intent was to steal a car, the killing of the children was not an integral part of this plan. The children were not the owners of the car and did not have the capacity to prevent the theft which already occurred. No specific financial gain was made from the killing of the children. This aggravating factor must be stricken.

B. HEINOUS, ATROCIOUS AND CRUEL

A murder may qualify for the aggravating circumstance of heinous, atrocious or cruel if it exhibits a desire on the part of the defendant to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. Santos v. State, 591 So.2d 160 (Fla. 1991). This Court has on numerous occasions emphasized that the factor of heinous, atrocious and cruel is proper only in torturous murders -- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. Cheshire v. State, 568 So.2d 908 (Fla. 1990); accord, State v. Dixon, 283 So.2d 1 (Fla.

1973). This Court has stated that in most cases where death results from a single gunshot, and there are no additional acts of torture or harm, heinous, atrocious and cruel does not apply. Cochran v. State, 547 So.2d 928 (Fla. 1989); Jackson v. State, 502 So.2d 409 (Fla. 1986); Fleming v. State, 374 So.2d 954 (Fla. 1979). In Porter v. State, 564 So.2d 1060 (Fla. 1990), this Court reversed a finding of heinous, atrocious and cruel where the evidence did not reveal that the murder was "meant" to be deliberately and extraordinarily painful.

Applying the foregoing cases to the instant case, the conclusion must be reached that the heinous, atrocious and cruel factor does not apply. Appellant is not unmindful of the fact that the victims in the instant case were small children. The fact remains, however, that each child was killed with a single gunshot. There is no evidence that at any time did Appellant or the codefendant do anything that was meant to be torturous to these children. Undoubtedly the murder of a small child is a tragic consequence. However, this Court must not be blinded by that fact. Undoubtedly, if the victims had been adults, heinous, atrocious and cruel would not be present on this record. As this Court noted recently in Anderson v. State, 20 Fla. L. Weekly S239 (Fla. May 26, 1995), this case has the potential of illustrating the old adage that "hard cases make bad law." Emotionally, one can see that the murders were indeed tragic. However, they simply do not meet the stringent test that this Court has set for the establishment beyond a reasonable doubt of the aggravating

factor of heinous, atrocious and cruel as set forth in the cases cited above. This Court must strike this aggravating factor.

POINT XI

IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION, THE DEATH PENALTY IS DISPROPORTIONATE AND MUST BE VACATED.

Although the trial court found four aggravating factors with regard to each of the murders, as argued above, two of the aggravating factors are not proven, pecuniary gain and heinous, atrocious and cruel. A third aggravating factor, prior conviction for a violent felony, is based solely on the contemporaneous crimes since, as argued previously, the juvenile commitment cannot be considered. The remaining aggravating factor, in the course of a kidnapping, is present. The record is replete with mitigating factors. Although Appellant was eighteen years of age at the time these offenses were committed, he had a mental age of thirteen. (T2340) Alfonsa Smalls, who was fourteen years of age at the time of the murders, may have in fact been the triggerman in the instant case. He, as a matter of law, was not subject to the death penalty. It seems incongruous for someone who functions at an age less than Alfonsa Smalls, can be subjected to a penalty greater than Smalls for conduct less egregious. Appellant's IQ of 85 places him in the below average range of intellectual functioning. (T2310) Appellant's upbringing was less than ideal, to say the least. He was born to a mother who cared little for him preferring to abuse drugs and alcohol instead of nurturing him. Although his father saw him

when he could, he was never in a situation where he was a strong presence in Appellant's life. Appellant did get some nurturing from his godmother, Jacqueline Turner, but this was again on an infrequent basis. The trial judge put much emphasis on the fact that Appellant had back splatter blood on his clothing, while Alfonsa Smalls did not. However, the forensic expert testified that Alfonsa Smalls' clothing were covered with splashed blood which could have obliterated any back splatter. (T2191) The most that the expert could testify to was that Appellant was within four feet of the victim. (T2198) There is no physical evidence to prove that Appellant shot the children. Certainly throughout his statements to the police one thing remained constant and strident -- his denial of killing the children. Simply put, the death penalty for Richard Henyard is not proportionate to the crime, or to the sentence received by the arguably more culpable actor. This Court should reverse the death penalty and remand for imposition of a life sentence.

CONCLUSION

Based upon the foregoing cases, arguments, and policies, this Court is respectfully requested to grant the following relief:

As to Points I, II, III, IV, V, VI and VII, reverse Appellant's convictions and sentences and remand for a new trial;

As to Points VIII and IX, reverse Appellant's death sentences and remand for a new penalty phase before a newly-empaneled jury;

As to Points X and XI, reverse Appellant's death sentences and remand for imposition of life sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118 in his basket at the Fifth District Court of Appeal and mailed to Mr. Richard Henyard, Jr., #225727 (42-2082-A1), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 12th day of June, 1995.

Michael S Becker

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER