IN THE

SUPREME COURT OF FLORIDA

BILLY LEON KEARSE, Appellant, v. STATE OF FLORIDA, Appellee.	)	CASE NO. 79,037

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 2

SUMMARY OF THE ARGUMENT 22

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED LIMITING INSTRUCTION ON THE CONSIDERATION OF DUPLICATE AGGRAVATING CIRCUMSTANCES. 25

POINT II

THE TRIAL COURT ERRED IN SEPARATELY AND INDEPENDENTLY FINDING AND WEIGHING AGGRAVATING FACTORS WHICH WERE DUPLICATIVE. 30

POINT III

THE TRIAL COURT ERRED IN USING THE WRONG STANDARD IN FAILING TO FIND THE STATUTORY MITIGATING CIRCUMSTANCE OF APPELLANT'S AGE AT THE TIME OF THE OFFENSE. 32

POINT IV

THE TRIAL COURT ERRED IN CONSIDERING THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS COMMITTED WHILE APPELLANT WAS ENGAGED IN THE COMMISSION OF THE CRIME OF ROBBERY. 34

POINT V

THE TRIAL COURT ERRED IN FINDING THE OFFENSE TO BE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL. 36

POINT VI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED JURY INSTRUCTION ON THE AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED AND PREMEDITATED AND IN GIVING THE STANDARD INSTRUCTION WHICH DOES NOT ADEQUATELY DEFINE THIS CIRCUMSTANCE. 39

POINT VII

APPELLANT WAS DENIED DUE PROCESS AND A FAIR, RELIABLE SENTENCING DUE TO PROSECUTORIAL MISCONDUCT DURING THE SENTENCING PHASE. 42

POINT VIII

THE TRIAL COURT ERRED IN CONSIDERING THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS COMMITTED WHILE APPELLANT WAS ENGAGED IN THE COMMISSION OF THE CRIME OF ROBBERY WHERE IT WAS BASED ON THE SAME ASPECT OF THE OFFENSE AS OTHER AGGRAVATING CIRCUMSTANCES. 44

POINT IX

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE. 46

POINT X

THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT AND MISLEADING EVIDENCE DURING THE SENTENCING PROCEEDING. . 51

POINT XI

THE TRIAL COURT ERRED IN GIVING THE PROSECUTOR'S SPECIAL INSTRUCTION ON PREMEDITATION OVER APPELLANT'S OBJECTION. 52

POINT XII

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON ESCAPE AS THE UNDERLYING FELONY OF FELONY MURDER. 58

POINT XIII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S CHALLENGES FOR CAUSE. 62

POINT XIV

THE TRIAL COURT ERRED IN ADMITTING OFFICER MANN'S TESTIMONY THAT THE PURPOSE OF A TWO-HANDED GRIP ON A GUN IS FOR BETTER CONTROL AND ACCURACY. 70

POINT XV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE FRUITS OF AN ILLEGAL ARREST. 71

POINT XVI

THE INSTRUCTION ON REASONABLE DOUBT DEPRIVED APPELLANT OF DUE PROCESS AND A FAIR TRIAL. 74

POINT XVII

IT WAS REVERSIBLE ERROR TO ADMIT HEARSAY EVIDENCE OVER APPELLANT'S OBJECTIONS. 75

POINT XVIII

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE PROSECUTOR INFORMING THE JURY THAT APPELLANT HAD BEEN PREVIOUSLY CONVICTED OF ROBBERY. 76

POINT XIX

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE EVIDENCE OF AN ALLEGED DISCIPLINARY RECORD INTO EVIDENCE OVER APPELLANT'S OBJECTION. 79

POINT XX

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE FELONY MURDER AGGRAVATING CIRCUMSTANCE. 81

POINT XXI

IT WAS REVERSIBLE ERROR TO DENY APPELLANT'S REQUESTED INSTRUCTION AND TO MINIMIZE THE JURY'S SENSE OF RESPONSIBILITY FOR THE SENTENCE APPELLANT WOULD RECEIVE IN THIS CASE. 82

POINT XXII

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT THEY WERE NOT LIMITED TO THE MITIGATING CIRCUMSTANCES WHICH THEY WERE INSTRUCTED ON. 83

POINT XXIII

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE CORRECT BURDEN OF PROOF IN THE PENALTY PHASE. . . . 84

POINT XXIV

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL. . 85

1. The jury

a. Standard jury instructions 85

i. Heinous, atrocious, or cruel 85
ii. Cold, calculated, and premeditated . . . 86
iii. Felony murder 87

b. Majority verdicts 87

c. Florida allows an element of the crime to be found by a majority of the jury. 88

d. Advisory role 88

2. Counsel 88

3. The trial judge 89

4. Appellate review 90

a. Proffitt 90

b. Aggravating circumstances 90

c. Appellate reweighing 92

d. Procedural technicalities 92

e. Tedder 93

5. Other problems with the statute

a. Lack of special verdicts 93

b. No power to mitigate 94

c. Florida creates a presumption of death 95

6. Florida unconstitutionally instructs juries not to consider sympathy. 96

7. Electrocution is cruel and unusual. 96

POINT XXV

THE AGGRAVATING CIRCUMSTANCES USED AT BAR ARE UNCONSTITUTIONAL. 97

CONCLUSION 100

CERTIFICATE OF SERVICE 100

AUTHORITIES CITED

CASES PAGE

Adams v. Wainwright, 804 F.2d 1526
(11th Cir. 1986) 83

Adamson v. Rickets, 865 F.2d 1011
(9th Cir. 1988) 88, 94, 95

Arango v. State, 411 So. 2d 172
(Fla. 1982) 84

Atkins v. State, 497 So. 2d 1200
(Fla. 1986) 92

Auriemme v. State, 501 So. 2d 41
(Fla. 5th DCA 1986) 63

Baldwin v. State, 35 So. 220,
46 Fla. 115
(Fla. 1902) 52

Bankers Multiple Line Ins. Co. v. Farish,
464 So. 2d 530
(Fla. 1985) 53

Bello v. State, 547 So. 2d 914
(Fla. 1989) 25, 31, 44

Bertolotti v. Dugger, 883 F.2d 1503
(11th Cir. 1989) 98

Bifulco v. United States, 447 U.S. 381,
100 S.Ct. 2247, 65 L.Ed.2d 205
(1980) 91

Blanco v. State, 452 So. 2d 520
(Fla. 1984) 36, 72

Blye v. State, 566 So. 2d 877
(Fla. 3d DCA 1990) 64

Brown v. State, 526 So. 2d 903
(Fla. 1988) 47

Buenoano v. State, 565 So. 2d 309
(Fla. 1990) 97

Burch v. Louisiana, 441 U.S. 130,
99 S.Ct. 1623, 60 L.Ed.2d 96
(1979) 87

Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) 83, 88

California v. Brown, 479 U.S. 538 (1987) 96

Campbell v. State, 571 So. 2d 415 (Fla. 1990) 33

Castro v. State, 597 So. 2d 259 (Fla. 1992) 26

Cherry v. State, 544 So. 2d 184 (Fla. 1989) 45

Cheshire v. State, 568 So. 2d 908 (Fla. 1990) 37

Clark v. State, 609 So. 2d 513 (Fla. 1992) 50

Cochran v. State, 547 So. 2d 928 (Fla. 1989) 93

Coker v. Georgia, 433 U.S. 584 (1977) 97

Commonwealth v. Jones, 355 Pa. 594, 50 A.2d 342 (1947) 79

Craddock v. State, 494 A.2d 971, 64 Md. App. 269 (Md. App. 1985) 79

Cunningham v. State, 591 So. 2d 1058 (Fla. 1991) 73

Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989) 90, 94

Dragovich v. State, 492 So. 2d 350 (Fla. 1986) 79, 80

Drysdale v. State, 325 So. 2d 80 (Fla. 4th DCA 1976) 61

Dukes v. State, 356 So. 2d 873 (Fla. 4th DCA 1978) 44

Dunn v. United States, 442 U.S. 100, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979) 91

Elledge v. State, 346 So. 2d 998 (Fla. 1977) 88, 92

Espinosa v. Florida, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992) 41, 85, 98, 99

Fenelon v. State, 594 So. 2d 292 (Fla. 1992) 55

Ferguson v. State, 105 So. 840 (Fla. 1925), appeal dismissed 273 U.S. 663 (1927) 97

Ferguson v. State, 417 So. 2d 639 (Fla. 1982) 33

Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) 46-48

Garcia v. State, 492 So. 2d 360 (Fla. 1985) 83

Garron v. State, 528 So. 2d 353 (Fla. 1988) 51

Givens v. Housewright, 786 F.2d 1378 (9th Cir. 1986) 62

Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980) 40

Government of Virgin Islands v. Pemberton, 813 F.2d 626 (3d Cir. 1987) 62

Grossman v. State, 525 So. 2d 833 (Fla. 1988) 93

Hall v. State, 83 So. 513, 78 Fla. 420 (Fla. 1919) 53

Hamilton v. State, 547 So. 2d 630 (Fla. 1989) 63, 65

Harris v. State, 544 So. 2d 322 (Fla. 4th DCA 1989) 75

Herring v. State, 446 So. 2d 1049 (Fla. 1984) 91, 95

Hildwin v. Florida, 109 S.Ct. 2055
(1989) 88, 94

Hines v. State, 358 So. 2d 183
(Fla. 1978) 79

Hodges v. Florida, ___ U.S. ___,
113 S.Ct. 33, 121 L.Ed.2d 6
(1992) 41, 86

Hodges v. State, 595 So. 2d 929
(Fla. 1992) 41

In re Kemmler, 136 U.S. 436
(1890) 97

Jackson v. Dugger, 837 F.2d 1469
(11th Cir. 1988) 95

Jackson v. State, 498 So. 2d 406
(Fla. 1986) 25

Johnson v. Louisiana, 406 U.S. 356,
92 S.Ct. 1620, 32 L.Ed.2d 152
(1972) 87

Johnson v. Reynolds, 97 Fla. 591,
121 So. 793
(1929) 70

Jones v. State, 580 So. 2d 143
(Fla. 1991) 35

Kent v. United States, 383 U.S. 541,
86 S.Ct. 1045, 16 L.Ed.2d 84
(1966) 78

Kritzman v. State, 520 So. 2d 568
(Fla. 1988) 68

Kyser v. State, 533 So. 2d 285
(Fla. 1988) 61

Livingston v. State, 565 So. 2d 1288
(Fla. 1988) 49

Lockett v. Ohio, 438 U.S. 586
(1978) 84

Longshore v. Fronrath Chevrolet, Inc.,
527 So. 2d 922
(Fla. 4th DCA 1988) 63

Louisiana ex rel. Frances v. Resweber, 329 U.S. 459 (1947) 97

Lowenfield v. Phelps, 108 S.Ct. 546 (1988) 90, 91

Maggard v. State, 399 So. 2d 973 (Fla. 1981) 77

Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) 83

Mann v. State, 571 So. 2d 551 (Fla. 3d DCA 1990) 65

Maynard v. Cartwright, 108 S.Ct. 1853, 486 U.S. 356, 100 L.Ed.2d 372 (1988) 40, 85, 87, 90

McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971) 78

McKinney v. State, 579 So. 2d 80 (Fla. 1991) 36, 47, 50, 86

McQueen v. State, 304 So. 2d 501 (Fla. 4th DCA 1974), cert. den., 315 So. 2d 193 (Fla. 1975) 61

Messer v. State, 330 So. 2d 137 (Fla. 1976) 43

Mills v. State, 476 So. 2d 172 (Fla. 1985) 45

Mills v. State, 625 S.W.2d 47 (Tex. App. 1981) 53

Mines v. State, 390 So. 2d 332 (Fla. 1980) 33

Morissette v. United States, 342 U.S. 246, 73 S.Ct. 240, 96 L.Ed.2d 288 (1952) 54

Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) 42

Nibert v. State, 574 So. 2d 1059 (Fla. 1990) 50

O'Connell v. State, 480 So. 2d 1284
(Fla. 1985) 67, 68

O'Conner v. State, 9 Fla. 215
(1860) 63

Oats v. State, 446 So. 2d 90
(Fla. 1984) 31, 33

Ortiz v. State, 543 So. 2d 377
(Fla. 3d DCA 1989) 64, 65

Osario v. State, 526 So. 2d 157
(Fla. 4th DCA 1988) 71

Parks v. Brown, 860 F.2d 1545
(10th Cir. 1988) 96

Patten v. State, 598 So. 2d 60
(Fla. 1991) 26, 31

Payne v. State, 426 So. 2d 1296
(Fla. 1983) 79

People v. Thomas, 67 Ill. Dec. 249,
444 N.E.2d 288, Ill. App. 451
(Ill. App. 1983) 79

Phillips v. State, 572 So. 2d 16
(Fla. 4th DCA 1990) 63

Polynice v. State, 568 So. 2d 1346
(Fla. 4th DCA 1990) 69

Porter v. State, 564 So. 2d 1060
(Fla. 1990) 37, 81

Powell v. Levit, 640 F.2d 239
(9th Cir. 1981) 78

Proffitt v. Florida, 428 U.S. 242,
96 S.Ct. 2960, 49 L.Ed.2d 913
(Fla. 1976) 90, 92

Raulerson v. State, 358 So. 2d 826
(Fla. 1978) 91

Raulerson v. State, 420 So. 2d 567
(Fla. 1982) 91

Reed v. State, 496 So. 2d 213
(Fla. 1st DCA 1986) 42

Rembert v.State, 445 So. 2d 337
(Fla. 1984) 50

Rhodes v. State, 547 So. 2d 1201
(Fla. 1989) 80

Richardson v. State, 604 So. 2d 1107
(Fla. 1992) 37

Rivera v. State, 545 So. 2d 864
(Fla. 1989) 37, 39

Robertson v. State, 18 Fla. L. Weekly S51
(Fla. Jan. 7, 1993) 36, 47

Rogers v. State, 511 So. 2d 526
(Fla. 1987), cert. denied
484 U.S. 1020, 108 S.Ct. 733,
98 L.Ed.2d 681 (1988) 39, 86, 91

Rowe v. State, 84 So. 2d 709
(Fla. 1956) 61

Ruiz v. State, 388 So. 2d 610
(Fla. 3d DCA 1980) 61

Russell v. United States, 369 U.S. 749,
82 S.Ct. 1038, 8 L.Ed.2d 240
(1962) 62

Rutherford v. State, 545 So. 2d 853
(Fla. 1989) 39, 93

Saffle v. Parks, 110 S.Ct. 1257
(1990) 96

Schafer v. State, 537 So. 2d 988
(Fla. 1989) 39, 91

Sciortino v. State, 115 So. 2d 93
(Fla. 2d DCA 1959) 61

Shell v. Mississippi, 111 S.Ct. 313
(1990) 85, 98

Sheppard v. Rees, 909 F.2d 1234
(9th Cir. 1989) 59

Shere v. State, 579 So. 2d 86
(Fla. 1991) 36, 37, 47

Sikes v. Seaboard Coast Line R. Co.,
487 So. 2d 1118
(Fla. 1st DCA 1986) 69

Singer v. State, 109 So. 2d 7 (Fla. 1959) 63

Sloan v. State, 70 So. 23, 70 Fla. 216 (1915) 57

Smalley v. State, 546 So. 2d 720 (Fla. 1989) 37, 50, 93

Smith v. State, 407 So. 2d 894 (Fla. 1981) 92

Smith v. State, 492 So. 2d 1063 (Fla. 1986) 33

Songer v. State, 544 So. 2d 1010 (Fla. 1989) 46, 50

Stano v. State, 473 So. 2d 1282 (Fla.) cert. den. 474 U.S. 1093 (1985) 70

State v. Allen, 335 So. 2d 823 (Fla. 1976) 60

State v. Baird, 572 So. 2d 904 (Fla. 1990) 75

State v. Cook, 475 So. 2d 285 (Fla. 5th DCA 1985) 73

State v. Dixon, 283 So. 2d 1 (Fla. 1973) 37, 46, 88

State v. Rogers, 427 So. 2d 286 (Fla. 1st DCA 1983) 73

Swafford v. State, 533 So. 2d 270 (Fla. 1988) 91, 92

Taylor v. State, 583 So. 2d 323 (Fla. 1991) 44

Tedder v. State, 322 So. 2d 908 (Fla. 1975) 41, 89, 93

Tenon v. State, 545 So. 2d 382 (Fla. 1st DCA 1989) 65

Thomas v. State, 456 So. 2d 454 (Fla. 1984) 33

Thompson v. State, 551 So. 2d 1248
(Fla. 1st DCA 1989) 72

United States v. Barham, 595 F.2d 231
(5th Cir. 1979) 53

United States v. Burke, 781 F.2d 1234
(7th Cir. 1985) 54

United States v. Cruz, 603 F.2d 673
(7th Cir. 1979) 74

United States v. Dellinger, 472 F.2d 340
(7th Cir. 1972) 65

United States v. Dove, 916 F.2d 41
(2d Cir. 1990) 54

United States v. Hernandez-Cuartas,
717 F.2d 552-555 (11th Cir),
rehearing denied, 721 F.2d 822
(11th Cir. 1983) 71

United States v. Martinez, 514 F.2d 334
(9th Cir. 1975) 57

United States v. Peña, 930 F.2d 1486
(10th Cir. 1991) 53

United States v. Robertson, 833 F.2d 777
(9th Cir. 1987) 72

United States v. Rubio-Villareal,
927 F.2d 1495
(9th Cir. 1991) 57

United States v. Shaffner, 524 F.2d 1021
(7th Cir. 1975) 74

Walton v. Arizona, 497 U.S. 639,
110 S.Ct. 3047, 111 L.Ed.2d 511
(1990) 40

Washington v. State, 432 So. 2d 44
(Fla. 1983) 47

White v. State, 415 So. 2d 719
(Fla. 1982) 92

Wilhelm v. State, 568 So. 2d 1
(Fla. 1990) 54, 58

Wilkerson v. Utah, 99 U.S. 130
(1878) 97

Wright v. State, 586 So. 2d 1024
(Fla. 1991) 76

Zant v. Stephens, 462 U.S. 862
(1983) 81

UNITED STATES CONSTITUTION

Fourth Amendment 73

Fifth Amendment 30, 32, 34, 35, 39, 42, 46, 52, 57-59, 68, 71, 74, 76, 80, 82-84, 94

Sixth Amendment 59, 60, 62, 76, 80, 83, 94

Eighth Amendment . . 30, 32, 34, 35, 39-42, 46, 52, 57, 80, 82-84, 94, 96

Fourteenth Amendment 30, 32, 34, 35, 39-42, 46, 52, 57-60, 62, 68, 71, 73, 74, 76, 80, 82-84, 94, 96

FLORIDA CONSTITUTION

Article I, Section 2 83

Article I, Section 9 . . . . 30, 32, 34, 35, 39, 41, 42, 46, 51, 52, 57-59, 68, 71, 74, 76, 80, 82-84, 94, 95

Article I, Section 12 74

Article I, Section 16 . . . . 52, 57, 59, 60, 62, 68, 71, 80, 83, 94

Article I, Section 17 . . . . 30, 32, 34, 35, 39, 41, 42, 46, 51, 52, 57, 58, 76, 80, 82-84, 94-96

Article I, Section 21 83

Article I, Section 22 . . . . 83, 94

FLORIDA STATUTES

Section 90.401 (1989) 70
Section 90.402 (1989) 70
Section 90.610(1)(b) 78

Section 921.141(1)(1989) 80
Section 921.141(2)(b) 95
Section 921.141(3)(b) 95
Section 921.141(5)(b) 79
Section 921.141(5)(d)(1989) 34, 44
Section 921.141(5)(e)(1989) 25, 31, 44
Section 921.141(5)(g)(1989) 25, 31, 44
Section 921.141(5)(j)(1989) 25, 30

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A. Streissguth, et al., Fetal Alcohol Syndrome in Adolescents and Adults, 265 J. A.M.A. 1961 (1992) 30

Barnard, Death Penalty (1988 Survey of Florida Law), 13 Nova L. Rev. 907 (1989) 92, 99

Gardner, Executions and Indignities -- An Eight Amendment Assessment of Methods of Inflicting Capital Punishment, 39 OHIO STATE L.J. 96 (1978) 97

Kennedy, Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L. Rev. 47 (1987) 91

Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases WIthout Making it Smaller, 13 Stetson L. Rev. 523 (1984) 92

PRELIMINARY STATEMENT

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

The following symbols will be used:

"R"	Record on Appeal,
"SR"	Supplemental Record (received September, 1992),
"2SR"	Second Supplemental Record (received December, 1992).

STATEMENT OF THE CASE

Appellant, Billy Leon Kearse, was charged by indictment with premeditated murder (R2432). Appellant was also charged with one count of robbery (R2432). Jury selection began on October 14, 1991. At the close of the state's case, Appellant moved for judgment of acquittal (R1648-50). Appellant's motion was denied (R1656). Appellant was found guilty of first-degree murder as charged (R2596). Appellant was found guilty of robbery as charged (R2597). The jury recommended the death penalty (R2361). The trial court sentenced Appellant to death for the murder (R2710, 2715-32). The trial court departed from the recommended guideline sentence and sentenced Appellant to life in prison for the robbery (R2711). A timely notice of appeal was filed (R2733-34).

STATEMENT OF THE FACTS

The relevant facts are as follows.

THE GUILT PHASE

On January 18, 1991, Officer Danny Parrish called into the communications officer for St. Lucie County (R1101). Their conversation lasted from 7:47 p.m. to 8:10 p.m. (R1084). A tape of the conversation showed that Parrish was effecting a traffic stop at 5th Street and Avenue A in Ft. Pierce (R1113).

Bruce Heinsson, a taxi driver, was driving on Orange Avenue to pick up a fare, when he heard two shots (R1219,1221). There was then a slight pause, of no more than 2 seconds, followed by a rapid succession of shots along with flashes of gunfire (R1221,1237, 1238). Heinsson saw a police car parked with its lights flashing (R1221). Heinsson decided to help and turned on Avenue B and slowed down (R1224). Heinsson saw a car drive through a stop sign and make a left onto Avenue D (R1224). A black male was driving (R1226). A black female was on the passenger's seat (R1226). She looked like she was in shock (R1226). Heinsson made a right in to 5th Street and saw an officer in the road (R1228). Heinsson called his dispatcher and said that an officer was shot (R1228). The officer did not move (R1230). It looked like he was dead (R1230). Heinsson noticed that the officer's weapon was not around (R1229). Heinsson used the radio in the patrol car to summon help (R1231). Heinsson went to the police station the next night to identify from a photo lineup the man he had seen in the car (R1240). Heinsson picked someone other than Appellant (R1240).

John Boler lives at 601 Avenue B, Apartment 704 (R1248). Boler testified that the intersection of Avenue A and 5th Street is visible from his apartment (R1250). Boler was in his hallway when he heard a "boom" 9R1252). Fifteen to twenty seconds went by when Boler heard two shots almost simultaneously and a brief pause followed by continuous shots (R1253). Boler opened his curtain (R1253). Boler looked out for less than a second (R1265). Boler observed an individual standing over a figure in the street (R1253). The individual had a gun that was pointed downwards at a thirty or forty-five degree angle (R1255). Boler saw a police car with its lights flashing and figured someone was in trouble (R1253). Boler grabbed his .357 and ran out the emergency exit (R1256). Only the police car and a taxi were in the area (R1257). Bruce Heinsson got out of his taxi and approached the officer (R1257). Boler looked for the shooter (R1257). Boler then went back inside the building because he had forgotten his firearm permit (R1259). Boler changed clothes and returned outside (R1260).

Deputy M.F. Mann of the St. Lucie County Sheriff's Office testified that he was advised of the shooting at 8:20 p.m. on January 18, 1991 (R1280). Mann went to 1718 Avenue K (R1283). He was given the names of "Dwight Dixon Fuller" or "Dwight Dixon Phillips" as someone to look for (R1288). Mann was advised there was movement inside and that a '79 Monte Carlo was parked at the rear of the house (R1285,1294). The lights were on inside the house and the front door was open (R1295). Two black males walked out of the house (R1295). Mann walked toward them (R1296). One

male, Appellant, walked back in the house (R1296, 1297). Mann identified himself to the other and said, "Where is Dwight?" (R1296). The male responded, "I'm Derrick, the guy you want is in the house," and that he would get him (R1296). Derrick walked inside into a bedroom (R1296). Mann looked through the door and could hear voices inside (R1297). Within a few moments Appellant walked into the livingroom and Mann placed him under arrest (R1297). Two nine millimeter cartridges were taken from Appellant's pocket (R1300). Appellant was advised of his rights and waived his rights (R1298). Mann asked him where the officer's gun was (R1298). Appellant responded that he threw it off Taylor Creek Bridge (R1298). On the way to Taylor Creek Bridge Mann asked Appellant what had happened (R1310). Appellant explained that the officer stopped him for a traffic violation (R1310). He was going to give him some tickets (R1310). They got into a struggle (R1310). The officer started to pull his pistol (R1310). Appellant snatched it away and shot him and the gun was jumping in his hand (R1310). Appellant showed where he said he threw the gun (R1311). Appellant had discoloration under his eye (R1390). Mann testified that they next went to the police station to get a taped statement from Appellant (R1315).

The taped statement was played to the jury and showed the following (R1362,SR). Appellant was eighteen years old, five feet nine inches tall, and weighed 165 pounds (SR3). Appellant and Rhonda Pendleton were driving after picking up a pizza (SR6,17). Appellant was having car problems and to avoid traffic he turned in the direction of a sign that said "no right turn" (SR21).

Appellant had driven the wrong way on a one-way street (SR23). An officer stopped Appellant and asked him his name (SR4,18). Appellant initially told him "Davis Dixon" and then said, "I meant David Dixon Fuller" (SR18). Appellant did not tell the officer his real name because he was driving without a license which he knew was wrong (SR10). The officer told Appellant that he couldn't find any file under that name (SR18). The officer told Appellant that if he would give his real name he would write three tickets and let Appellant go (SR18). Appellant stated that his real name was Billy Leon Kearse, his date of birth was 10-26-72 and that he was eighteen years old (SR18-19). The officer told Appellant to step out of the car (SR18). Appellant stepped out of the car and put his hand on top of the car (SR5,19). While maneuvering with the handcuffs, the officer hit Appellant under his left eye with the handcuffs (SR5,19). Appellant said, "Go on, man, go on," and pushed the officer (SR19). The officer then pushed Appellant (SR19). Appellant believed that the officer was grabbing for his gun (SR5,11,19). Instead, Appellant grabbed the gun (SR11,19). The officer grabbed Appellant around the neck (SR11,19). Appellant was scratched on the neck (SR19-20). Appellant thought the officer was trying to take him (SR16). Appellant pointed the gun at the officer (SR15). The gun went off (SR19). The gun went off seven or eight times (SR16). Appellant heard the officer say, "Come on, man, don't do it, don't do it" (SR20). The officer was lying on the ground (SR12). Appellant was going to drop the gun (SR12). Instead, he kept the gun and got into the car and left (SR12). Rhonda Pendleton told Appellant that he "shouldn't have did that"

(SR13). Appellant dropped Pendleton at her house (SR14). Appellant then disposed of the gun at Taylor Creek (SR6,14). He then parked the car behind Pendleton's house and flattened the tire to keep police off him (SR9). Appellant had borrowed the car from Derrick Pendleton (SR9). Appellant stated that the incident was his fault and that he "didn't mean no harm" but it happened and he was willing to face the consequences (SR24).

In a second taped interview that night Appellant stated that he didn't think the officer intentionally hit him with the handcuffs under the eye (SR38). Appellant had turned and the officer must have thought he was trying to struggle and he grabbed Appellant's arm and the handcuffs struck him under the eye (SR38). Appellant grabbed the gun and pushed the officer (SR39). Appellant tried to put the gun in the right position to shoot (SR39). The officer grabbed Appellant around the neck and the gun went off (SR39). When asked if he had intentionally pulled the trigger for the first and second shots, Appellant responded, "Yes" (SR32-33). Then when told that one has to pull the trigger for the gun to fire, Appellant stated that he didn't think so because "I knew I was holding it tight like this — ... — and it just jumped" (SR33). The officer was still standing when Appellant was shooting (SR32). The officer was about to fall when the shooting continued (SR34). In response to the question as to whether Appellant shot him when he was then down, Appellant responded, "Yes" (SR34). Appellant admitted that he had hid the gun behind the house and did not throw it away as he initially indicated (SR34). Appellant stated that he told Rhonda Pendleton that he did it because he didn't want her

to get in trouble (SR40). Appellant told her that he didn't know if they would violate his probation for failure to pay money he owed (SR41). Appellant stated they probably wouldn't violate him (SR41). When he was asked the leading question if one of the reasons he had shot the man was because he was on probation and didn't want to go to jail, Appellant responded, "Yes, sir" (SR41). Appellant also stated that earlier that day he had been in a fight with his stepfather (SR27-28). During the fight Appellant's stepfather had scratched Appellant on the arm and neck (SR30-31). Appellant also had a different scratch to his neck from what the officer did (SR31).

Rhonda Pendleton testified that in January of 1991 she came to live with her brother Derrick at 1718 Avenue K for approximately 3 months (R1453). On the evening of January 18, Appellant came over to the house (R1453-57). Appellant told Pendleton that he had been in a fight with his stepfather (R1457). Appellant had scratches on his arm and neck (R1457). Pendleton and Appellant went in her brother's car to Domino's Pizza (R1458). She ordered a pizza and Appellant drove on the way back (R1460). Oil leaked from the car and it was smoking (R1461). Appellant turned the wrong way on a one-way street (R1460). They were stopped by an officer (R1461). The officer came over to the car and asked for a license and insurance or registration (R1461). Appellant told the officer he didn't have it with him (R1462). The officer asked Appellant his name (R1462). Appellant said, "Duane D. Fuller" (R1462). The officer went to his car, returned and said that he couldn't find anything on a Duane D. Fuller (R1463). The officer

asked Appellant again and received the same answer (R1463). The officer still could not find anything (R1463). The officer told Appellant if he would tell him that his license was suspended he would let him go because he didn't feel like doing paperwork (R1463). A few minutes later the officer told Appellant, if he didn't tell him what he wanted, he was going to haul him in (R1463). The officer asked Appellant to step out of the car and to put his hands on top of the car (R1465). Appellant did so (R1465). Pendleton heard Appellant say, "Don't touch me man" (R1465). She then saw the two men wrestling (R1466,1477). She turned away and then heard a shot (R1467). She then turned back and saw Appellant shooting (R1466,1467). There had been a one or two second pause and then continuous shots (R1477,1484). Appellant had the gun in both hands (R1467). Appellant was pointing the gun downwards at an angle (R1468). Pendleton couldn't see where the officer was in relation to Appellant (R1480). The officer said, "Oh, God," a couple of times (R1468). Appellant got in the car and threw the gun in the seat (R1468). Pendleton told Appellant to get the gun away from her (R1468). Appellant put the gun on the floor (R1468). They drove off (R1469). Appellant drove through a stop sign as a taxi travelled in the opposite direction (R1469). Appellant was not smiling after the shooting and did not appear to be happy (R1477). He was upset and nervous (R1478). Pendleton asked Appellant why he had done it (R1470). Appellant said that his probation was suspended and the police were looking for him already (R1470). They arrived back at the house and Pendleton went inside (R1470). Pendleton told her brother that Appellant had

killed a police officer (R1471). Later, the police came and arrested Appellant (R1472).

Sergeant Lester Lasenby of the Fort Pierce Police Department testified that he arrived at the scene of the shooting to see Officer Danny Parrish lying on his back almost in the middle of 5th Street just north of Avenue A (R1128). Lasenby instructed his staff to secure the scene (R1133). A citation book was retrieved from Parrish's car (R1133). The top citation had a description of the vehicle for which Parrish was writing a ticket (R1135). Lasenby put out a BOLO for a blue, 1979 Chevy Monte Carlo with Florida tag #DJR-94C (R1137). The citation had the name Duane D. Phillips crossed out and replaced with Duane D. Fuller (R1137-38). The citation was for going the wrong way down a one-way street (R1138).

Douglas Heinmiller of the Fort Pierce Police Department testified that he was involved in the crime scene investigation including finding Officer Parrish's citation book and nightstick on the front seat of his car (R1148-55). Heinmiller later went to 1718 Avenue K in search of Parrish's firearm (R1426). Heinmiller was instructed where to look (R1426). The firearm, a sig saver P-226, and an empty gun magazine, were found under a clothesline post in a paper bag (R1430-31). The serial number was checked (R1431). The firearm belonged to Parrish (R1431).

Officer Leslie Raulerson testified that he investigated the scene of the shooting and found 14 shell casings laying in the road (R1183,1187). A service revolver would carry a total of 16 projectiles (R1189). Raulerson had been called at approximately

8:00 p.m. on January 18, 1991 (R1179). Officer Parrish was pronounced dead and taken to Lawnwood Hospital (R1198). Raulerson attended the autopsy (R1199). Eight projectiles were taken from Parrish's body (R1199). Two projectiles were taken from Parrish's clothing (R1196).

The medical examiner, Dr. Fred Hobin, testified that he performed the autopsy on Danny Parrish on January 19, 1991 (R1514). The cause of death was the result of gunshot injury (R1559). There were nine gunshot injuries that entered into the body (R1537). Four bullets impacted Parrish's vest (R1564). Two injuries were below the knee (R1542). Four injuries were to the hip and thigh area (R1542). Spinal nerves were severed (R1554). There was a bullet wound to the arm (R1557). There is a possibility that Parrish could have said something after receiving his injuries (R1560). There were no entrance wounds to the back (R1563). There were no wounds to the head (R1565). There is no basis to show defensive wounds (R1566).

Antonio Laurito, an expert in firearms identification, testified that the bullets taken from the autopsy had the same class and individual characteristics as bullets that had been test fired from Parrish's gun (R1593,1600).

Daniel Nippes was declared an expert in the area of physiological and trace evidence examination (R1615). Nippes testified that he examined the clothes of Appellant and found no bloodstains on them (R1616). Nippes examined Parrish's clothing and found twelve bullet holes including two exit holes (R1620). Residue on the clothing indicated that the entry holes were made by a weapon

fired within at least four feet of the clothing (R1627). There was no exit hole to the back of Parrish's clothing (R1627). There were two other tears corresponding to the holes to the back of the clothing which correlated with the holes in the vest (R1628). Nippes opined that one of the holes was the result of a contact shot and the other holes were the result of a shot at very close range (R1628). Nippes could give no interpretation as to the positions of the victim or the shooter (R1632). Nippes had no opinion as to the order in which the bullets struck the body (R1633).

Reed Knight, an expert in the field of firearms, testified that he examined Officer Parrish's sig saver P-226 9 millimeter semi-automatic pistol (R1488). The pistol had not been damaged or modified (R1495). When the trigger is pulled, the gun fires and another round is cycled out of the magazine and waits for the trigger to be pulled again (R1488). The firearm can't be constantly fired by pulling back the trigger and holding it (R1499). However, it takes less pressure to fire the gun a second time (R1498). It takes 13.5 pounds for the first trigger pull and only 4 pounds for the second (R1508). Knight testified that when you teach someone unfamiliar with weapons you do not start out with a semi-automatic because they have a tendency to discharge more bullets than the shooter intends (R1507).

THE PENALTY PHASE

Dr. Fred Petrilla, a licensed psychologist, testified that he was asked to evaluate Appellant (R2023-26). In doing so, Dr. Petrilla spoke with Appellant's mother and reviewed police reports,

school records, psychological and psychiatric evaluations, and spent approximately 20 hours testing Appellant (R2028,2050,2095). Dr. Petrilla concluded that Appellant was sane at the time of the offense and that he was competent to stand trial (R2026). Appellant's mother drank liquor and beer when she was pregnant with Appellant (R2030). She was a teenager (R2046). She said she drank every weekday and would get totally drunk on weekends (R2030). She drank 3 six-packs on the weekends (R2030). Appellant had two brothers (R2030). The brothers had different fathers than Appellant (R2030). Another died of crib death (R2031). Appellant's father left when he was 3½ to 4 years old (R2029). The other fathers were around, but they basically ignored Appellant (R2032). Appellant's mother picked fruit and would not get home until between 8:00 p.m. and midnight (R2046). She was sleeping when Appellant would go to school (R2047). Appellant's mother would discipline him by hitting him with an extension cord (R2048). Appellant's family was dysfunctional (R2048). His mother was not around much (R2049). Appellant basically raised himself on the streets without support from his family (R2049).

Dr. Petrilla testified that he administered the WAIS-R test which showed that Appellant had an IQ of 79 (R2054). Appellant scored extremely poor in social judgment (R2055). Appellant scored within the retarded range in verbal area (R2055). Appellant's information score, long-range memory score, and vocabulary score were all within the mentally deficient range (R2055). Appellant has an extreme amount of difficulty sequencing, integrating, and conceptualizing information (R2055). He hears information, but

what he hears is distorted (R2056). Appellant had an IQ of 70 for vocabulary skills (R2057). The WAIS-R test indicated possible brain dysfunction (R2056).

Dr. Petrilla also administered symbol digit modality tests and Appellant scored at a level which suggests the probability of cerebral dysfunctioning (R2059-60). Appellant scored 11 of 50, and 7 of 25, for the Weschler Memory Test (R2060-62). The score shows Appellant is very slow in following directions and thinking (R2066). The score is lower than 99.1% of the population and indicates that Appellant has a great deal of difficulty remembering what is said to him (R2064). There is a problem in integrating information into his brain probably caused by a breakdown of the temporal lobes of his brain (R2065). In a verbal paired associated test Appellant scored lower than 99.7% of people in his age group (R2066). This is a test of mental control and suggests that Appellant has problems thinking with regard to auditory commands (R2068). Appellant hears what is said, but he gets it confused in his brain (R2068).

Dr. Petrilla testified that the Wide Range Achievement Test showed that Appellant scored lower than 99.1% of the population in reading had spelling skills and he scored lower than 99.6% of the population in arithmetic (R2069-70). His scores placed him approximately at a third grade level (R2069-70). Dr. Petrilla administered the Halstead-Reitan test for 5 to 6 hours (R2070). The test is designed to show if there is cognitive dysfunctioning or thinking problems (R2071). Appellant's results suggested brain dysfunction (R2071). Within a reasonable degree of probability

there was dysfunction to both sides of the brain, but particularly to the left, or "reasoning," side of the brain (R2072). The dysfunctioning was not sever (R2073). Appellant is a visual type of learner (R2073). If he is verbally instructed, he gets things all "befuddled" (R2073). The Halstead-Reitan tests all indicated borderline intellectual functioning (R2076). Certain parts of the test are designed to uncover malingering or faking (R2078). The test did not indicate faking or malingering (R2078-79).

Dr. Petrilla testified that he gave Appellant a number of personality and emotional tests (R2080). These tests indicated that Appellant had a lot of inferiority feelings (R2082). Appellant had difficulty in interpreting social situations and responding in the appropriate fashion (R2080). Dr. Petrilla testified that without a doubt Appellant has severe emotional problems (R2084). The results suggest that when Appellant had interaction with Officer Parrish there was a "probability of rapid onset of excitement, confusion, disorientation and hyperactivity" (R2084). In such a situation, Appellant "would go off, so to speak, become emotional without thinking, which is limited anyway" (R2084). Within a reasonable degree of psychological probability the killing of Officer Parrish was committed while Appellant was under the influence of an extreme emotional disturbance (R2087). Within a reasonable degree of psychological probability Appellant's brain dysfunction and emotional handicap combined to produce a personality disorder which substantially impaired his capacity to appreciate the criminality of his conduct (R2088). Dr. Petrilla doesn't believe that Appellant would misunderstand the officer's

request for names, but he would have a problem sequencing and integrating information and things would get mumbled and jumbled in his brain (R2095). Dr. Petrilla testified that Appellant knew what he was doing, but his judgment was very distorted (R2116). Appellant has very poor social judgment and a very difficult time understanding the consequences (R2116). He just reacts (R2116). Appellant has severe problems interpreting and understanding the nature of situations (R2117). The problems suggest dysfunction in the frontal and temporal lobes (R2118). Appellant is not incompetent nor insane (R2116-17).

Sharon Craft has a master's degree in rehabilitation counseling and taught mentally retarded children for three years before moving into the area of emotionally handicapped children (R1889). Craft first came into contact with Appellant in 1982 when he was 8 or 9 years old (R1889). Appellant was not progressing or learning and was having behavioral problems (R1889). Based on recommendations from psychologists, Appellant was placed in a program for emotionally handicapped children (R1890). Appellant had problems in this program and needed to be placed in a more restrictive environment at Anglewood Center (R1890). Anglewood is a highly structure environment for severely emotionally disturbed children (R1890). Appellant had to repeat both the first and second grade (R1890). The school system has a policy that a student can only repeat a certain number of times (R1899). Only twice within the first four years of school (R1899). Students have to be administratively passed because of size and age (R1899-1900). Appellant's problems were getting more and more serious (R1890).

Craft testified that, even though requested, Mrs. Kearse never came in to the school (R1892). Mrs. Kearse never indicated any concern for how Appellant was doing (R1891). Appellant appeared to be very neglected (R1893). He appeared malnourished (R1915). His clothes were too big for him (R1893). He was very hungry and needed a lot of affection (R1893). Appellant responded well to affection (R1983). An HRS counselor recommended Appellant for placement in two residential programs, but no one followed up on this (R1915). Appellant felt safer on the streets than at home (R1917).

Craft testified that Appellant had failed grades in school (R1894). He was a follower (R1894). He couldn't screen out noises that others would screen out (R1895). He heard everything and this kept him from concentrating (R1895). In achievement tests he was not at the functioning level of his grade (R1896). When Appellant was 13 years old he scored on a third grade level (R1897). The gap between what Appellant was doing and what he should have been doing got progressively worse (R1897). In the seventh grade, when he was 15 years old, Appellant scored in the .8 percentile -- meaning more than 99% of that population was doing better than he (R1898). Appellant appeared to operate and function on a retarded level (R1899).

Pamela Baker worked for HRS in 1981 and later taught at Dan McCarty Middle School (R1925). Baker is certified in both the fields of mental retardation education and emotionally handicapped education (R1924). Baker taught Appellant in an emotionally handicapped child program for two years (R1925). Baker first came

in contact with Appellant in 1981 when she worked for HRS doing intake on abuse, neglect, and delinquency cases (R1926). Appellant was a referral for abuse by his mother (R1926). There were also allegations that Appellant was running away (R1926). Appellant's mother alleged that Appellant left home without permission and he would be found roaming the streets (R1927). There were problems getting Mrs. Kearse to show up at school and meetings (R1928). There were indications that Appellant's mother gave up on him at the age of 4 or 5 (R1951).

Baker later had contact with Appellant in her emotionally handicapped class (R1930). The class was a closed setting with 1 administrator, 4 teachers, and 1 aide for a class of 5 to 8 students (R1930-31). Appellant did pretty well under this system (R1931). Appellant was referred back to a mainstream program for emotionally handicapped children (R1932). Appellant failed all his courses with the exception of a "D" and "C" (R1933). Appellant was placed in a higher grade, although not promoted, where he again failed all but two courses where he scored "D"s (R1933). While in the 7th grade, Appellant scored at the 3rd grade level on the Wide Range Achievement Test (R1934-35). The test does not go below the 3rd grade level (R1935). At the age of 13, Appellant was testing at the age of 5 to 8 (R1936). Appellant functioned at a retarded level in the classroom (R1938).

Curt Craft is a teacher with a master's degree in rehabilitation (1961). Appellant was as student of Craft's in 1983-84 at Anglewood Center for severely emotionally disturbed students (R1962). Craft testified that Appellant small for his age and had

a great deal of academic difficulties (R1963). Appellant was emotionally disturbed and dysfunctional (R1964). Craft tried to teach Appellant skills that would help him function more successfully in society (R1965). Appellant did not master these skills (R1965). Appellant functioned at a retarded level (R1965).

Steven Baker taught Appellant in the 6th grade at a center for severely emotionally handicapped children (R1969). The program at the center was highly structure with 30 students and 16 staff (R1970). Appellant did well in the structured, supervised program (R1970). Appellant was not a leader, but was a follower (R1971). Problems that he got into were things that somebody else started (R1971). Appellant was emotionally handicapped (R1971). Appellant operates and functions at a retarded level (R1971).

Dan Dye was the dean of St. Lucie School in 1986 (R1973). It was a school for severely emotionally handicapped children (R1974). Appellant went to the 6th grade there (R1974). Appellant appeared to be a neglected child (R1974). He appeared malnourished and was poorly clothed (R1974). Appellant was not getting sufficient support from his home environment (R1974). Dye didn't feel that Appellant's mother was concerned about him at all (R1974).

Dye testified that Appellant tried very hard at school and seemed eager to please (R1975). He had a desire for affection (R1975). Appellant did better in the St. Lucie School than he had done previously elsewhere (R1975). The school had a lower student-teacher ratio and a very structured curriculum (R1975). Psychological records showed recommendations that Appellant be placed in

a group treatment home (R1975-76). None was provided (R1976). Appellant appeared to operate at a retarded level (R1976).

Appellant was referred to Dr. Linda Kushner, a licensed psychologist, in October of 1981 by the St. Lucie County School system for possible placement in an emotionally handicapped class (R2002). Kushner acquired background information on Appellant including the fact that Appellant's father left when he was 4 years old (R2002). When Appellant was 2 or 3 years old he fell out of a window onto his head (R2003). Because there appeared to be no injuries, Appellant's mother did not seek treatment (R2003). School records indicate that Appellant was distracted by almost everything and had difficulty comprehending visual auditory handwriting (R2003). Appellant was overactive and had difficulty communicating verbally (R2003).

Appellant was 8 years and 11 months old when Dr. Kushner examined him (R2003). Appellant exhibited a very slow rate of performing tasks (R2004). His work habits appeared to be random, trial-and-error (R2004). Kushner gave Appellant the Wechsler Intelligence Scale for Children-Revised test (WAIS-R) (R2004). On the verbal part of the test Appellant scored within the borderline intelligence classification which is below, below average (R2007). Appellant scored slightly above mentally handicapped -- the term used in place of retarded (R2007-08). The verbal score was 74 (R2008). Average is 100 (R2008). The full scale score was 78 which is in the borderline range (R2009). Appellant scored at the bottom one percent in ability to acquire factual information

(R2010). He scored in the 2nd percentile in verbal comprehension skills (R2011).

Dr. Kushner testified that Appellant had poor planning ability and foresight (R2012). Appellant had a poor ability to remember and his common sense was low average (R2012). Appellant did have social reasoning in that he had the ability to comprehend situations (R2012). As far as Appellant's personality he had feelings of rejection (R2013). He felt unloved and unwanted by his parents and perceived himself as being bad (R2013). He had feelings of inadequacy, especially mental inadequacy (R2014). The results of all these feelings of inadequacy, frustration, helplessness, etc., contributed to his difficulty adjusting emotionally and socially (R2014). Appellant coped with these feelings through aggressive behavior reflected through infantile tendencies (R2014-15). Kushner believed Appellant would benefit from instruction in a very structure emotionally handicapped child program (R2016).

Dr. Angeline Desai, an expert in the field of psychiatry, testified that she did psychiatric evaluations of Appellant on September 17 and 22 in 1982 (R2157-58). Appellant was referred by the school system for evaluation (R2163-64). Dr. Desai also interviewed Appellant's mother and reviewed the records of HRS and the St. Lucie County School system (R2158). Appellant had run away from home 20 to 30 times (R2159). When he was 2 or 3 years old, Appellant fell from a window and hit his head (R2162). Because there were no bruises, Appellant was not taken to a doctor (R2162). Appellant's father moved away when he was approximately 3 years old (R2161). Appellant's mother lived with various men and has had

children by four different men (R2173). She had lived with a man at an age when she was in the need of parenting and supervision (R2173). There was very little structure, supervision or discipline provided for Appellant (R2173). Appellant would argue with his mother's boyfriend (R2160). At such times he became disobedient she would whip him with an extension cord (R2160). Appellant felt and sensed rejection not only from his immediate family, but also from the extended family in the neighborhood (R2172). Appellant indicated that he did not like living at home and wanted to run away or to be sent away (R2168). All of Appellant's relatives had "washed their hands of him" (R2168).

Dr. Desai testified that Appellant was small for his age, shabbily dressed, but willing to cooperate (R2168). His verbal IQ was 74 and his full scale IQ was 78 (R2164-65). Appellant was in a borderline classification -- one range above retarded (R2165). Appellant had learning disabilities and emotional problems (R2165). He was unable to talk in complete sentences which was inappropriate for his age (R2170). He exhibited extremely poor insight and practical judgment (R2172). He appeared overwhelmed by the problems around him (R2172). Appellant indicated that sometimes he hears his mind talking to him (R2172). Appellant was not psychotic, homicidal, or suicidal (R2175). However, his insight and judgment were extremely poor and he was in need of treatment (R2175). Without treatment he might continue to participate in more delinquent activities and get progressively worse (R2175). Dr. Desai recommended a very structured treatment in a closely supervised family group home for children his age (R2175). In

addition, placement in an emotionally handicapped school was recommended (R2175). As an alterative plan to the group home, Dr. Desai recommended that Appellant be placed in a structure residential treatment center for children his age who exhibit severe problems (R2176). Dr. Desai did not feel that it was appropriate to leave Appellant with Mrs. Kearse (R2197). Dr. Desai's recommendations were never followed (R2176).

SUMMARY OF THE ARGUMENT

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

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

3. The trial court rejected age as a mitigating circumstance because Appellant was 19 years old and thus an adult under the law. The trial court erred in utilizing an incorrect standard in rejecting this circumstance. The error was not harmless where Appellant was 18 years and 3 months old at the time of the offense and evidence showed that his emotional and functional age was much less.

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

5. The trial court erred in finding the aggravator that the offense was especially heinous, atrocious, or cruel (HAC).

6. It was error to deny Appellant's requested instruction on the "cold, calculated, and premeditated" aggravator and to give an instruction which is too vague to properly guide the jury.

7. Appellant was denied due process and a fair sentencing due to prosecutorial misconduct which occurred during the sentencing phase.

8. The aggravator that the capital offense was committed while Appellant committed a felony was based on the same aspect as other aggravators. It was error to consider this aggravator.

9. Due to the nature of the offense and the substantial mitigation present, the death penalty is not proportionally warranted in this case.

10. It was error to admit an irrelevant opinion that Appellant was not under the influence of an extreme mental or emotional disturbance at the time of trial.

11. The prosecutor's special instruction on premeditation improperly highlighted its evidence and was unbalanced, improperly constituted a comment on the evidence, and permitted the finding of premeditation based on insufficient evidence. It was error to give this instruction over Appellant's objection.

12. Where the state misled the defense as to the underlying felony it was utilizing for the charge of felony murder, and where there was insufficient evidence to prove the corpus delicti for escape, it was error to instruct the jury on escape as the underlying felony of felony murder.

13. The trial court erred in denying Appellant's five challenges for cause. The error was not harmless.

14. A police officer's reason for using a two-handed grip on a gun was not relevant in this case.

15. The trial court erred in denying Appellant's motion to suppress the fruits of an illegal search.

16. The instruction on reasonable doubt deprived Appellant due process and a fair trial.

17. A number of hearsay statements were introduced into evidence. It was error to allow these statements to be introduced into evidence.

18. It was error to overrule Appellant's objection to evidence of an uncounseled robbery conviction. Appellant had waived the mitigator of no significant criminal history.

19. It was error to allow the state to introduce an alleged disciplinary report into evidence. The report constitutes a non-statutory aggravating factor.

20. The felony murder aggravator fails to adequately channel the discretion of the sentencer and is thus unconstitutional.

21. It was error to deny Appellant's instruction that the jury recommendation should be given great weight and it was error to minimize the jury's sense of responsibility in sentencing.

22. It was error to deny Appellant's requested instruction that the jury was not limited to the mitigating circumstances which they were instructed on.

23. It was error to deny Appellant's requested instruction that the burden of proof in the penalty phase requires that the aggravators must outweigh the mitigators to impose death.

24. Florida's death penalty is unconstitutional

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

ARGUMENT

POINT I

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

The jury in this case was instructed to consider the aggravating circumstances that the offense was: (1) committed for the purpose of avoiding lawful arrest;[1] (2) committed to disrupt or hinder law enforcement;[2] (3) the victim was law enforcement officer engaged in the performance of his lawful duties.[3] This Court has held that finding both aggravators -- (1) for the purpose of avoiding arrest and (2) to hinder law enforcement -- would constitute an improper "doubling" -- i.e. finding two aggravating circumstances based on the same aspect of the offense. Eg. Bello v. State, 547 So. 2d 914 (Fla. 1989); Jackson v. State, 498 So. 2d 406 (Fla. 1986). The remaining factor -- the victim was a law

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[1] § 921.141(5)(e), Fla. Stat. (1989).

[2] § 921.141(5)(g), Fla. Stat. (1989).

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

enforcement officer engaged in the performance of his lawful duties -- is also based on the same aspect of the offense and constitutes an additional "doubling." See Point II; Patten v. State, 598 So. 2d 60, 62 (Fla. 1991) (killing officer in the line of duty is a hindrance to the enforcement of laws).

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

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

(R2616,2243-44).[4] The trial court denied the requested limiting instruction (R2247).

In Castro v. State, 597 So. 2d 259 (Fla. 1992), this Court held that while it was not error to instruct the jury on all the aggravating factors, it was error not to give a special instruction limiting consideration of circumstances that could double. 597 So. 2d at 261. Thus, it was error to deny Appellant's requested jury instruction.[5]

The error is not harmless in this case. The jury could have found all three aggravating factors mentioned above and considered them independently and separately even though they are based on

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[4] Appellant also requested other alternative limiting instructions as to the doubling of aggravators which were denied by the trial court (R2620,2635,2242).

[5] The requested instruction in this case was identical to the instruction which was erroneously denied in Castro v. State, 597 So. 2d 259, 261 (Fla. 1992).

the same aspect of the offense -- that Appellant avoided arrest, and hindered law enforcement, by killing a law enforcement officer. In fact, the prosecutor specifically urged the jury to consider these aggravating circumstances separately even though they were based on the same aspect of the offense (R2265-66).[6] Obviously, failure to give the instruction limiting consideration of the aggravating circumstances which double could have influenced the jury's recommendation and thus would not be harmless. This is especially true where three of the five aggravating circumstances offered by the state -- avoid arrest, hinder law enforcement, and the victim was a law enforcement officer -- deal with the same aspect of the offense in this case.

In addition, any error that could influence the jury in its consideration of aggravating circumstances, would not be harmless due to the significant mitigating factors present in this case. The jury obviously could have found the two important statutory mitigating circumstances that the trial court found -- (1) the

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[6] The prosecutor urged the jury to consider each of the aggravating circumstances separately as follows:

> MR. COLTON: ... Now, these are separate aggravating circumstances. Each and every one of these is to be looked at and considered separately. Now, that doesn't mean that some of the evidence that you consider for one can't be the same evidence that you consider for others. But as you read them, as you listen to the judge's instructions and as you read these, when you go back into the jury room and consider them in conjunction with the evidence, you'll see that they are separate and in and of themselves.

(R2265-66). Ironically, after the jury reached its recommendation (without knowing that doubling aggravating circumstances were to be considered as a single aggravating circumstance), the prosecutor informed the judge that the aggravating circumstances were doubled and should be treated as one circumstance (R2376-2380).

offense was committed while Appellant was under the influence of extreme mental or emotional disturbance and (2) the capacity of Appellant to appreciate the criminality of his conduct or to conform to the requirements of the law was substantially impaired (R2725-28).[7] Also, the jury could have found the important statutory mitigating circumstance of age. Appellant chronologically was less than 18 years, 3 months at the time of the offense.[8] Moreover, his emotional and functioning age was much less.[9] The jury also could have weighed non-statutory mitigating circumstances that: Appellant comes from an impoverished and culturally deprived background; Appellant was a severely emotionally disturbed child;

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[7] Even though the trial judge found these two important statutory mitigating circumstances, he did not give them substantial weight. Clearly, jurors could give these two circumstances considerably more weight. Especially in light of Dr. Petrilla's review of the facts, findings, and testimony that without doubt Appellant has severe emotional problems, is subject to rapid onset of excitement and confusion, so that he "would go off ... without thinking" and thus there is a probability that the killing occurred while Appellant was under the influence of an extreme emotional disturbance (R2084,2087), and his findings that Appellant's brain dysfunction and emotional handicap combined to produce a personality disorder which substantially impaired his capacity to appreciate the criminality of his conduct (R2088). The jury could also give more weight to the background information supporting these circumstances. See pages 11-22 of this brief.

[8] The trial court improperly rejected this circumstance because Appellant was an adult under the law and was not incompetent.

[9] Throughout his life Appellant functioned at a retarded level (R1938,1965,1971,1976), and tested low intellectually. At the age of 8, Appellant had a verbal IQ of 74 and a full scale score of 78 (R2008-09). At the age of 13, Appellant tested at a level equivalent to a 5 year old (R1936). At the age of 18, Appellant scored lower than 99.7% of his age group in tests measuring his ability to integrate information (R2065-68). Other tests and findings were also consistent with Appellant functioning well below his chronological age of 18 (R2054-76).

Appellant's IQ is just above the retarded level. The trial court had found the above circumstances along with the following:

a) The Defendant's father abandoned the Defendant at the age of three (3);

b) The Defendant's mother neglected him, and at times rejected him, and washed her hands of him at an early age because the Defendant was uncontrollable and unable to be disciplined, leaving home often, even after beatings with an electric cord;

c) The Defendant as a child was malnourished and poorly clothed; he roamed the streets foraging for himself;

d) The Defendant was placed in special educational programs as a child and did poorly, and was tested frequently and referred to various special education programs throughout grade school;

e) The Defendant dropped out of school at an early age, and today has a third grade reading level;

f) The Defendant's mother never appeared in school when the Defendant was in grade school undergoing testing and counseling; the mother was never present at school to show any interest in the Defendant, or to offer assistance in any way with her son's severe learning disabilities.

(R2729-30). In addition, despite the evidence of Appellant's severe emotional and mental handicaps and his domestic life that included malnourishment, beatings, and roaming the streets foraging for himself at a young age, there was evidence that Appellant was able to overcome these factors when placed in a very structured program for severely emotionally handicapped children (R1930-31,1969-70).[10] Unfortunately, the placement was merely temporary. Despite Dr. Desai's recommendation that Appellant be placed in a structured residence at this time, there was no attempt to do so

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[10] The program basically had a 1 to 1 student-teacher ratio (R1930-31). The other programs for emotionally handicapped children that Appellant was placed in were not structured.

(R2176). Also, it should be noted that Appellant's mother consistantly consumed large amounts of alcohol during her pregnancy with Appellant (R2030) and Appellant fell out of a window onto his head when he was two or three years old (R2003,2162).[11]

With all the significant mitigating circumstances for the jury to consider and the existence of aggravating factors which are duplicative, combined with the prosecutor's urging the jury to consider these duplicative factors as three separate and independent aggravators, it cannot be said beyond a reasonable doubt that the error of denying the requested limiting instruction was harmless. The error denied Appellant due process and a fair, reliable sentencing contrary to Article I, Sections 9 and 17, of the Florida Constitution, and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

POINT II

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

The trial court found the circumstance that the "victim was a law enforcement officer engaged in the performance of his official duties"[12] separately and independently from the two circumstances that the offense was "committed for the purpose of preventing a lawful arrest" and "committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of

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[11] These events could explain why Appellant was functioning just above the retarded level. The heavy alcohol consumption may have resulted in Appellant's suffering from Fetal Alcohol Syndrome. See A. Streissguth, et al., Fetal Alcohol Syndrome in Adolescents and Adults, 265 J. A.M.A. 1961 (1992).

[12] § 921.141(5)(j), Fla. Stat. (1989).

laws"[13] (R2717,2720). The finding and weighing of this circumstance separately and independently of the others was error.

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

In this case the state's theory was that Appellant avoided arrest and hindered law enforcement by shooting Deputy Parrish -- a law enforcement officer engaged in the performance of his lawful duty. Obviously, the killing of "a law enforcement officer engaged in the performance of his lawful duties" aggravator and the killing of Parrish to "avoid arrest" or "hinder the enforcement of law" aggravator are based on the same aspect of the crime. In Patten v. State, 598 So. 2d 60, 62 (Fla. 1991), this Court explained that the killing of a law enforcement officer attempting to enforce the laws was a necessary aspect of hindering law enforcement:

> The fact that the victim was a law enforcement officer attempting to enforce the laws during the incident was not only a necessary aspect of this factual situation but also critical for the State to establish the existing aggravating circumstance of "hindering the enforcement of laws," contained in section 921.141(5)(g), Florida Statutes (1981). Clearly, the slaying of a police officer acting in the line of duty is a hindrance to the enforcement of laws.

[13] § 921.141(5)(e) & (g), Fla. Stat. (1989). The trial court weighed these two circumstances as one circumstance (R2718).

598 So. 2d at 62. The consideration of the aggravators based on the same aspect of the offense was error.

The error cannot be deemed harmless where it had the potential of interfering with the weighing process directed by statute. Improper consideration of an aggravating circumstance clearly affects the weight to be given the aggravating circumstances. There was substantial mitigation found by the trial court. It cannot be said beyond a reasonable doubt that the improper consideration of an aggravating circumstance may not have played a role in tipping the scale against the substantial mitigating circumstances. The error denied Appellant due process and a fair, reliable sentencing contrary to Article I, Sections 9 and 17, of the Florida Constitution, and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

POINT III

THE TRIAL COURT ERRED IN USING THE WRONG STANDARD IN FAILING TO FIND THE STATUTORY MITIGATING CIRCUMSTANCE OF APPELLANT'S AGE AT THE TIME OF THE OFFENSE.

As shown by its order, the trial court rejected age as a mitigating factor because Appellant was allegedly 19, thus an adult under the law, and therefore the circumstances could not be found:

> 3) The age of the defendant at the time of the crime. Chapter 921.141(6)(g), F.S.
>
> The Court finds no evidence in the record to support this statutory mitigating circumstance.
>
> Our facts indicate clearly the Defendant was nineteen (19) years old when the homicide took place. He was an adult under the law. The Defendant had previously been convicted of a crime and placed on probation with the Department of Corrections. Even though competency was never an issue in this case, we do have testimony from Dr. Fred Petrilla that the Defendant did know the nature of his acts and the consequences of them. The Defendant

> is a competent adult and his conduct should be held to the same standard as any other adult.

(R2728-29) (emphasis added).[14] Essentially, the trial court ruled that age mitigating circumstance, as a matter of law, was not applicable to anyone over the age of 18. This clearly is not true. This Court has recognized that there is no magic number for the age mitigator and that it can apply to someone over the age of 20. See Thomas v. State, 456 So. 2d 454 (Fla. 1984) (20 years old); Oats v. State, 446 So. 2d 90 (Fla. 1984) (22 years old). In Smith v. State, 492 So. 2d 1063 (Fla. 1986), this Court held it to be error to refuse a jury instruction on age as mitigation in a case involving a 20-year-old. Thus, being over 18 does not as a matter of law eliminate age as a mitigating circumstance. There is no litmus test for chronological age for this circumstance. It was reversible error for the trial court to utilize the wrong standard to avoid finding age as a mitigating factor. See Mines v. State, 390 So. 2d 332, 337 (Fla. 1980) (trial court improperly used "sanity" standard in rejecting mental mitigator of being under extreme mental or emotional disturbance); Campbell v. State, 571 So. 2d 415, 418-19 (Fla. 1990) (trial court improperly used "sanity" standard in rejecting "impaired capacity" as a mitigator); Ferguson v. State, 417 So. 2d 639, 644-45 (Fla. 1982).

The error cannot be deemed harmless in this case. Evidence showed that Appellant was 18 years, 3 months old at the time of

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[14] It should be noted that in stating the "facts indicate clearly the Defendant was nineteen (19) years old when the homicide took place," the trial court was making an incorrect assumption. As counsel informed the court, Appellant was 18 years old (R2684). Appellant was born on October 26, 1972 (R2028,2708) which made him 18 years, 3 months on the date of the offense.

the offense. Uncontroverted evidence showed that his emotional and functional age was much less. Throughout his life Appellant functioned at a retarded level (R1938,1965,1971,1976), and tested low intellectually. At the age of 8, Appellant had a verbal IQ of 74 and a full scale score of 78 (R2008-09). At the age of 13, Appellant tested at the age of 5 to 8 (R1936). At the age of 18, Appellant scored lower than 99.7% of his age group in tests measuring his ability to integrate information (R2065-68). Other tests and findings were also consistent with Appellant's functioning well below his chronological age of 18 (R2054-76). Clearly, Appellant's age should count as a mitigating circumstance in this case. The error denied Appellant due process and a fair, reliable sentencing contrary to Article I, Sections 9 and 17, of the Florida Constitution and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

POINT IV

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

The trial court found the aggravator under § 921.141(5)(d), Florida Statutes (1989), that the capital felony occurred during the commission of a robbery (R2715). The trial court found that the taking of the officer's pistol was to avoid arrest:

> ... the Court finds the Defendant feared his probation would be violated, resisted the officer's arrest, by force and violence, forcibly stole the officer's service pistol, then turned the gun on the officer ...

(R2717). Clearly, robbery was not the reason or motive for the killing.

In Jones v. State, 580 So. 2d 143, 146 (Fla. 1991), this Court held that although the taking of a police officer's gun may constitute robbery, since the robbery was not the reason for the killing the aggravating circumstance that the capital offense was committed during the course of a robbery would not apply:

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

580 So. 2d at 146. Likewise, the taking of the officer's gun in this case was not the reason for the killing. Rather, the "robbery" was merely an incident during an attempt to avoid arrest. Thus, the robbery aggravator does not apply at bar.[15] The error cannot be deemed harmless where substantial mitigation was found by the trial court and the improper consideration of this aggravating factor may have played a role in tipping the scale against weighing the circumstances in favor of a life sentence. The error denied Appellant due process and a fair, reliable sentencing contrary to Article I, Sections 9 and 17, of the Florida Constitution and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

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

POINT V

THE TRIAL COURT ERRED IN FINDING THE OFFENSE TO BE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

The trial court found the offense to be especially heinous, atrocious, or cruel (HAC) because it went beyond the normal "one shot capital theory" (R2724). The trial court relied on the fact that Appellant fired 14 shots, 9 which wounded the officer, to find HAC. This was error.

The fact that the victim was shot multiple times does not qualify the offense as especially heinous, atrocious, or cruel. Robertson v. State, 18 Fla. L. Weekly S51, S53 (Fla. Jan. 7, 1993); Shere v. State, 579 So. 2d 86, 89 (Fla. 1991) (one shot fired, then 5 or 6 shots, then 2 shots to head and one to chest); McKinney v. State, 579 So. 2d 80 (Fla. 1991) (7 gunshot wounds plus 2 lacerations); Blanco v. State, 452 So. 2d 520 (Fla. 1984) (victim shot 7 times, once and then 6 subsequent shots in rapid succession).

In this case the trial court found that some reflection was necessary to shoot multiple shots and thus HAC would apply. However, in all the cases cited above there was reflection, but this does not qualify the offense for HAC. For example, in Shere v. State, 579 So. 2d 86, 89 (Fla. 1991), despite the fact that the defendant shot the victim 10 times (firing one shot, then 5 or 6 shots, then 2 shots to the head and then one to the chest), the evidence was insufficient for HAC because the evidence did not prove beyond a reasonable doubt that the shooting was designed to torture and inflict pain. Multiple shots do not automatically qualify as HAC. Id.

This aggravator is intended to apply to crimes designed to inflict a high degree of pain with the utter indifference to, or enjoyment of, the suffering of another. See Cheshire v. State, 568 So. 2d 908 (Fla. 1990); Shere v. State, 579 So. 2d 86 (Fla. 1991); State v. Dixon, 283 So. 2d 1 (Fla. 1973); Smalley v. State, 546 So. 2d 720, 722 (Fla. 1989); Porter v. State, 564 So. 2d 1060 (Fla. 1990). To be HAC the crime must be both "conscienceless" or "pitiless" and "unnecessarily torturous" to the victim:

> The United States Supreme Court recently has stated that this factor would be appropriate in a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." *Sochor v. Florida*, ___ U.S. ___, ___, 112 S.Ct. 2114, 2121, 119 L.Ed.2d 326, 339 (1992). Thus, the crime must be *both* conscienceless and pitiless *and* unnecessarily torturous to the victim. *Id.*

Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992).

In the present case, Appellant did not design to inflict a high degree of pain or to torture the officer. The crime was one of mere happenstance. Appellant never looked to commit any crime on the night of the incident. Instead, he was stopped for a traffic violation. Appellant panicked and struggled with the officer. As the officer had his arm around his neck, Appellant grabbed the officer's gun and shot him. After a pause of one or two seconds, there was a continuous succession of shots. When Appellant's panic stopped so did the shooting. The shots lasted a matter of seconds. Two bullets remained in the gun (R1196). The officer asked Appellant not to shoot any further. Appellant did not shoot any further and left the scene.

These type of actions do not show an intentionally torturous killing. In Rivera v. State, 545 So. 2d 864 (Fla. 1989), the

defendant initially shot the officer with his gun while they were struggling, and then twice shot the officer while he was "kneeling on the floor with his hands upraised." 545 So. 2d at 865. Despite the defendant's actions, and the fact that the victim lingered for a few moments after the fatal shot, this Court held that the killing was not especially heinous:

> Here, Miyares was shot a total of three times with one wound to his arm and two wounds to his chest. Witnesses testified that all three shots were fired within approximately sixteen seconds of each other. While Miyares did linger for a few moments after the fatal shots were fired, this murder was not accompanied by additional acts setting it apart from the norm of capital felonies and the evidence did not prove that it was committed so as to cause the victim unnecessary and prolonged suffering. Consequently, we reject the trial court's finding that this murder was especially heinous, atrocious, or cruel.

545 So. 2d at 866. The evidence of Appellant's continued shooting while in a panicked state is far from proof beyond a reasonable doubt that he was trying to inflict unnecessary torture. The only intent Appellant possessed came through his panic to avoid arrest.

In addition, the shooting in this case was not "conscienceless" or "pitiless." As Appellant's panic subsided, the shooting stopped. When the officer then asked Appellant not to shoot, Appellant didn't shoot, despite having two rounds remaining. Thus, Appellant did not act in a "pitiless" or "conscienceless" manner. Compare Rodriguez v. State, 609 So. 2d 493, 501 (Fla. 1992) (HAC found where defendant shot victim in knee and stomach, victim ran pleading for his life, defendant followed and shot him again, victim ran 200 feet further and defendant pursued and shot him again). Rather, he acted consistent with Dr. Petrilla's testimony that without doubt Appellant's severe emotional problems are

subject to a rapid onset of excitement and confusion so that he "would go off ... without thinking" (R2084,2087).[16] It was error to find the HAC aggravator. Article I, Sections 9 and 17, Fla. Const.; Fifth, Eighth, Fourteenth Amendments, U.S. Const.

POINT VI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED JURY INSTRUCTION ON THE AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED AND PREMEDITATED AND IN GIVING THE STANDARD INSTRUCTION WHICH DOES NOT ADEQUATELY DEFINE THIS CIRCUMSTANCE.

Appellant submitted a special instruction informing the jury that CCP must involve "a careful plan, or prearranged design" (R2239,2289,2633). The trial court denied the requested instruction (R2240,2263), and merely instructed the jury the offense must be cold, calculated, and premeditated for the aggravator to apply (R2351). This was error.

This Court has clearly and concisely held that for an offense to be CCP it must be the result of "a careful plan or prearranged design." Rivera v. State, 545 So. 2d 864, 865 (Fla. 1989); Rogers v. State, 511 So. 2d 526, 553 (Fla. 1987), cert. denied 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988); Schafer v. State, 537 So. 2d 988, 991 (Fla. 1989); Rutherford v. State, 545 So. 2d 853, 856 (Fla. 1989). This is precisely the definition Appellant requested.

It is well-established that the Eighth and Fourteenth Amendments prohibit the imposition of the death penalty "under sen-

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[16] Obviously, Appellant was capable of the minimal type of mental process required to squeeze the trigger. However, this would not mean that he was fully appreciating the consequence of what would result from his actions.

tencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980); U.S. Const. amends VIII and XIV. The state "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Id., 446 U.S. at 428, 64 L.Ed.2d at 406 (footnotes omitted). "[T]he channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 108 S.Ct. 1853, 486 U.S. 356, 100 L.Ed.2d 372 (1988). As a consequence, when the jury is the sentencer, "It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face." Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511, 528 (1990).

The instruction given was vague. The jury is given absolutely no guidance in seeking to apply the CCP factor. As a result, the jury is left to its own devices concerning the application of this aggravating factor and may very well find it applicable to any premeditated murder, despite this Court's efforts to properly limit application of the factor to more specifically defined groups of cases.

In the lower court the state urged that it was only the judge, and not the jury, who required proper guidance in determining what did, or did not, qualify as CCP (R2239). Essentially, the state

argued that the jury's decision did not matter. In arguing to the jury to recommend death the prosecutor aggressively argued that the CCP aggravator applied (R2274-75).

Courts have strongly rejected the state's argument that the jury recommendation is not important,[17] and that the jury need not be adequately guided in discerning aggravating circumstances.[18] Because the standard instruction on CCP is too vague to guide the jury in determining its sentencing recommendation, it must be presumed that the jury relied upon an invalid aggravating circumstance. Espinosa v. Florida, 112 S.Ct. 2926, 2928, 120 L.Ed.2d 854 (1992). As noted earlier, the prosecutor aggressively argued to the jury that CCP applied. It must also be presumed that the trial court gave great weight to the jury's recommendation of death. Id. Thus, the trial court indirectly weighed the invalid circumstance and violated the Eighth and Fourteenth Amendments. Id.

The United States Supreme Court has applied Espinosa to Florida's CCP aggravating circumstance when it remanded Hodges v. State, 595 So. 2d 929 (Fla. 1992). Hodges v. Florida, ___ U.S. ___, 113 S.Ct. 33, 121 L.Ed.2d 6 (1992). By Hodges, the United States Supreme Court acknowledged the flaws in the CCP instruction.

The error at bar violated the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution. Appellant's sentence must be vacated.

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[17] Tedder v. State, 322 So. 2d 908 (Fla. 1975).

[18] Espinosa v. Florida, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992).

POINT VII

APPELLANT WAS DENIED DUE PROCESS AND A FAIR, RELIABLE SENTENCING DUE TO PROSECUTORIAL MISCONDUCT DURING THE SENTENCING PHASE.

During the penalty phase the prosecution was guilty of gross misconduct which deprived Appellant of due process and a fair, reliable sentencing in violation of the Fifth, Eighth, and Fourteenth Amendments to the Untied States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

The prosecution's actions subverted and distorted the validity of the jury recommendation. The prosecution made arguments to the jury it knew were not true. The prosecutor asked for the cold, calculated, and premeditated (CCP) circumstance and strenuously argued to the jury that it should apply this aggravator and sentence Appellant to death (R2274-75). Once the prosecutor received the jury recommendation of death, he did not ask the trial court for the CCP aggravator; instead, he admitted that under the law it did not apply (R2388-89). Clearly, such an action was improper.

In a variety of contexts, it has been held improper for the prosecution to try to persuade the jury with claims it knows to be improper. See Reed v. State, 496 So. 2d 213 (Fla. 1st DCA 1986) (improper for state to death qualify the jury where there was no basis upon which death penalty could be imposed); Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959) (principle that state may not knowingly use false evidence is "implicit in any concept of ordered liberty"). Use of the CCP aggravator, which the prosecution admits to the trial court does

not apply, is even more egregious because it affects the jury's recommendation of life or death.

As this Court noted in Messer v. State, 330 So. 2d 137, 142 (Fla. 1976), the validity of the jury recommendation is directly related to the information the jury receives:

> It is clear that the Legislature in the enactment of Section 921.141, Florida Statutes, sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part. The validity of the jury's recommendation is directly related to the information it receives to form a foundation for such recommendation.

330 So. 2d at 142. Clearly, the prosecution's use of the CCP aggravator, which it knew did not apply to this case, as the information utilized by the jury distorts the validity of the jury's recommendation.

To enhance the error, the prosecutor also opposed Appellant's instruction regarding the doubling of aggravating factors, but then, over Appellant's objection (R2267), argued to the jury that they should consider the aggravators to avoid arrest and hinder law enforcement as separate aggravating circumstances (R2265-66,2268). Once the prosecutor received the jury's recommendation, the prosecutor informed the trial court that it could not consider these circumstances separately (R2376-78). As in the case with the CCP aggravator, the prosecutor distorted the jury recommendation by imploring the jury to consider aggravators in a manner in which the prosecutor knew to be improper.

Finally, the prosecutor utilized a patently improper argument to the jury that the deputy did "not have a jury to consider aggravating and mitigating circumstances before he was sentenced"

(R2300-01). Such an argument is clearly improper. See Taylor v. State, 583 So. 2d 323 (Fla. 1991).

The prosecutorial misconduct, individually and cumulatively, was of such a nature so as to destroy the essential fairness of the sentencing. See Dukes v. State, 356 So. 2d 873, 874 (Fla. 4th DCA 1978) ("if the errors complained of destroy the essential fairness of a criminal trial, they cannot be countenanced regardless of the lack of objection"). The sentence must be reversed and this cause remanded for a new sentencing proceeding.

POINT VIII

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

The trial court found the aggravator that "the capital felony was committed while the defendant was engaged in the commission of, or an attempt, or flight after committing or attempting to commit the crime of robbery"[19] along with the aggravators of "avoid arrest,"[20] "hinder the enforcement of laws."[21]

It is improper to consider an aggravating factor which is based on the same aspect of the offense as another aggravating factor. E.g. Bello v. State, 547 So. 2d 914, 917 (Fla. 1989). As shown by the trial court's order, in the present case the aggravator that the capital felony was committed during the commission of a robbery was based on the evidence of Appellant's resisting the

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[19] § 921.141(5)(d), Fla. Stat. (1989).

[20] § 921.141(5)(e), Fla. Stat. (1989).

[21] § 921.141(5)(g), Fla. Stat. (1989).

officer by taking his pistol as the officer was attempting to arrest him:

> This aggravating circumstance was proven beyond a reasonable doubt. The evidence presented establishes that the defendant snatched Officer Parrish's service pistol from him as the officer was attempting to arrest and handcuff the defendant.

(R2715-16). In other words, the snatching of the pistol to resist arrest (i.e. the robbery) was based on the same aspect of the offense as "avoiding arrest" and "hindering the enforcement of laws." The trial court further found that the sole reason for the robbery aggravator (the forcible taking of the pistol) was to hinder and avoid arrest:

> From the evidence, and particularly the Defendant's own statement, the Court finds the Defendant feared his probation would be violated, resisted the officer's arrest, by force and violence, forcibly stole the officer's service pistol, then turned the weapon on the officer killing the officer to facilitate his escape from the scene.

(R2717). Obviously, robbery was not the motive for Appellant's action. Rather, it was merely an aspect of his attempt to avoid arrest and hinder law enforcement. Where the commission of one aggravating circumstance is for the sole purpose of committing another aggravating circumstance, it is reversible error to consider both aggravating circumstances separately. See Cherry v. State, 544 So. 2d 184, 187 (Fla. 1989) (aggravating factor burglary doubled with pecuniary gain where "sole purpose for Cherry's burglary was pecuniary gain"); Mills v. State, 476 So. 2d 172 (Fla. 1985).

Here, the taking of the gun was committed solely for the purpose of committing the other aggravating factors of avoiding

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

POINT IX

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

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

The nature of the instant killing does not make it one of the most aggravated and indefensible of crimes to warrant the death penalty. Appellant went out, not looking for trouble or to commit a crime, to get a pizza on the night of the incident. Appellant was stopped on a routine traffic matter. He panicked. Appellant and the officer struggled for the officer's gun. Appellant, still in a panicked state, shot the officer. The victim's status as a police officer does not justify the death penalty. Songer v. State, 544 So. 2d 1010 (Fla. 1989). The killing in this case was,

if anything, less aggravated than the killing of police officers in other cases where the death sentence was vacated and life was imposed. See Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988) (defendant took hostages and stated that he would shoot the police, when the police arrived the defendant killed two officers); Brown v. State, 526 So. 2d 903 (Fla. 1988) (defendant ordered out of car by officer, as officer tried to cuff the defendant, the defendant jumped him and the two men struggled, the defendant shot the officer who then said "please don't shoot", defendant then killed the officer with two shots -- life imposed); Washington v. State, 432 So. 2d 44 (Fla. 1983) (defendant pointed gun at officer and told him to freeze, defendant then fired four bullets into officer). Nor does the fact that the victim was shot multiple times set the instant offense apart from other capital cases so as to call for the death penalty. See Robertson v. State, 18 Fla. L. Weekly 551, 553 (Fla. Jan. 7, 1993); Shere v. State, 579 So. 2d 86, 89 (Fla. 1991) (one shot fired, then 5 or 6 shots, then 2 shots to head and one to the heart); McKinney v. State, 579 So. 2d 80 (Fla. 1991) (7 gunshot wounds plus 2 lacerations). While the nature of the killing certainly does not excuse the crime, it is clear that the manner of the crime is not the most aggravated type for which the unique punishment of death is reserved.

In addition, the quality of the mitigators and aggravators shows that, in comparison to the other cases, the death sentence is not proportionally warranted. The mitigation in this case was substantial, it cannot be said that this is an unmitigated crime for which the death penalty is reserved. The trial court found

that two of the most important statutory mitigating circumstances were proven in this case. First, the offense was committed while Appellant was under the influence of extreme mental or emotional disturbance. Dr. Petrilla testified that Appellant has severe emotional problems, is subject to rapid onset of excitement and confusion, so that he "would go off ... without thinking" and thus, the killing occurred while Appellant was under the influence of an extreme emotional disturbance (R2084,2087). Second, Dr. Petrilla testified that Appellant's brain dysfunction and emotional handicap combined to produce a personality disorder which substantially impaired his capacity to appreciate the criminality of his conduct (R2088). The record is replete with details of Appellant's brain dysfunction and emotional handicaps. See pages 11-22 of this brief. In addition, Appellant's age was a significant factor. See Points I and III. Appellant's chronological age was 18 years, 3 months, but his emotional and functioning age was much less.[22]

In Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988), this court held that the presence of the two statutory mental mitigating plus the defendant's low emotional age lifted the case from the "unmitigated" cases that the death penalty is reserved for and reduced the sentence to life imprisonment:

> Thus, the trial judge's findings of the mitigating circumstances of extreme emotional or mental disturbance, substantially impaired capacity to conform conduct, and low emotional age were supported by sufficient evidence. In contrast, the aggravating circumstances of heinous, atrocious and cruel, and cold, calculated and premeditated are conspicuously absent. Fitzpatrick's actions were those of a seriously emotionally disturbed man-child, not those of a cold-blooded, heartless killer.

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[22] See footnote 9.

> We do not believe that this is the sort of "unmitigated" case contemplated by this Court in *Dixon*. Indeed, the mitigation in this case is substantial.

512 So. 2d at 512. Likewise, Appellants actions were the result of a panicked, severely emotionally handicapped 18-year-old, and not those of a cold-blooded, heartless killer.[23] As additional reasons for holding death to be disproportionate this Court has found the defendant's dysfunctional family life, which included beatings and neglect, combined with youth and immaturity effectively make the death penalty proportionally unwarranted. Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988). Like in Livingston, Appellant had a very dysfunctional family life. Appellant was abandoned at the age of three, his mother rejected him causing him to be malnourished and roaming the streets foraging for himself (R1927,2729-30). When his mother did attend to Appellant, it was through beatings with an extension cord (R2160). Like in Livingston, Appellant was young and his intellectual functioning was marginal. Appellant's chronological age was 18 years, 3 months, but his functioning age was much less. Throughout his life Appellant functioned at a retarded level (R1938,1965,1971,1976), and tested low intellectually.[24] At the age of 8, Appellant had a verbal IQ of 74 and a full scale score of 78 (R2008-09). At the age of 13, Appellant tested at the age of 5 to 8 (R1936). At the age of 18, Appellant scored lower than 99.7% of his age group in tests

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[23] The aggravating circumstances of CCP and HAC were also absent in this case. See Points V and VI.

[24] Appellant was examined at a young age by Dr. Desai who recommended that Appellant needed to be placed in a structured residential treatment program (R2176). The recommendation was never acted on (R2176).

measuring his ability to integrate information (R2065-68). The record is replete with other tests and findings as to Appellant's functioning well below his chronological age (R2054-76). As mentioned above, Appellant's brain dysfunction and emotional handicaps combined to create an extreme mental or emotional disturbance and substantially impaired his ability to appreciate his conduct (R2084,2087,2088). This is not one of the most unmitigated cases for which the death penalty is reserved.

Finally, it should be noted that although the trial court found five aggravating circumstances -- only one is truly justified. As explained in Point V, the HAC finding was error. As explained in Point IV, the finding that the aggravator that the killing was during the commission of a felony was error. As explained in Points I and II, the three aggravators dealing with Appellant hindering a law enforcement officer to avoid arrest should count as only one aggravator. This Court has consistently held that one aggravating circumstance will not support a death sentence where mitigating circumstances are present. E.g. Clark v. State, 609 So. 2d 513 (Fla. 1992); McKinney v. State, 579 So. 2d 80, 85 (Fla. 1991); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); Songer v. State, 544 So. 2d at 1011; Smalley v. State, 546 So. 2d 720, 723 (Fla. 1989); Rembert v.State, 445 So. 2d 337 (Fla. 1984). Even if this Court finds more than one aggravating circumstance exists, the substantial mitigating circum-stances present would still take this case from the group of the most unmitigated crimes for which the death penalty is reserved. Fitzpatrick, supra (5 aggravators found); Livingston, supra (2 aggravators found).

POINT X

THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT AND MISLEADING EVIDENCE DURING THE SENTENCING PROCEEDING.

One of the statutory mitigating circumstances offered by the defense was that Appellant was under the influence of an extreme mental or emotional disturbance at the time of the offense. During the cross-examination of Dr. Petrilla, the prosecutor, over Appellant's objection, was permitted to elicit that Appellant was not under the influence of an extreme mental or emotional disturbance at the time of the trial (R2111-12). It was error to overrule Appellant's objection and to admit such evidence.

Obviously, Appellant's mental condition at the time of the offense is extremely relevant. However, the mental condition of the defendant at the time of trial is not relevant to the jury's determination. Cf. Garron v. State, 528 So. 2d 353, 356 (Fla. 1988) (witness's testimony that defendant was not psychotic or insane at first appearance was irrelevant to determining whether he was insane at the time of the offense). It was error to admit this irrelevant evidence.

The error cannot be deemed harmless. The irrelevant evidence that Appellant was not under an extreme emotional or mental disturbance at trial is highly prejudicial because it could mislead the jury. See Garron, supra at 356. This is especially true here where Appellant was asking the jury to consider the mental mitigating circumstances that he had been under an extreme mental or emotional disturbance at the time of the offense. The error denied Appellant due process and a fair, reliable sentencing contrary to Article I, Sections 9 and 17, of the Florida Constitu-

tion and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. Appellant's sentence must be vacated and this cause remanded for a new sentencing.

POINT XI

THE TRIAL COURT ERRED IN GIVING THE PROSECUTOR'S SPECIAL INSTRUCTION ON PREMEDITATION OVER APPELLANT'S OBJECTION.

The prosecutor submitted a special instruction on premeditation (R1664). The trial court, over Appellant's objections (R1665, 1673), read the prosecutor's special instruction on premeditation to the jury as follows:

> Among the ways that premeditation may be inferred is from evidence as to the nature of the weapon used, the manner in which the murder was committed and the nature and manner of the wounds inflicted.

(R1842). This instruction for any one of several reasons denied Appellant due process and a fair trail under the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution, and Article I, Sections 9, 16, and 17 of the Florida Constitution.

1. **The instruction improperly highlighted the prosecution's evidence through the trial court's voice.**

The primary issue in this case was whether the killing of Officer Parrish was premeditated. The prosecutor emphasized to the jury that the killing was premeditated as shown by the manner in which Appellant fired the weapon and due to the nature of the wounds (R1719). The prosecution's special instruction was tailored to its case. The instruction highlighted its theory.

It is error to single out one party's theory through a jury instruction. Baldwin v. State, 35 So. 220, 222, 46 Fla. 115 (Fla. 1902) (instructions that "single out and emphasize specific parts of testimony without reference to other parts of testimony are

arguments to the jury by counsel, rather than the law of the case to be given by the court"); Hall v. State, 83 So. 513, 522, 78 Fla. 420 (Fla. 1919) ("It is improper to segregate [through instruction] ... any fact from all the material facts sought to be established, and by calling attention "to ... the fact it is given" undue importance ..."); Mills v. State, 625 S.W.2d 47 (Tex. App. 1981) (charge which singles out limited parts of evidence is error). Each party may argue the effect of the evidence to the jury, but it should not be given to the jury through instruction by the trial court:

> The instruction was essentially recounting of facts as seen through "rose colored glasses" of the defense which hoped jurors would wear when they retired to the jury room.
>
> Refusing to give such a proposed instruction was, far from being erroneous, actually quite correct. As the trial judge commented, the requested instruction was more in the nature of a jury argument than a charge. It was for defense counsel to make, not the judge.

United States v. Barham, 595 F.2d 231, 244-45 (5th Cir. 1979); United States v. Peña, 930 F.2d 1486, 1490 (10th Cir. 1991) ("As we have recognized, a prosecutor's summation may appropriately suggest to the jury what inferences it ought to draw from the evidence in the case").

The prosecutor tried to justify the instruction by arguing that the proposition in the instruction had been lifted from caselaw. However, it is a mistake to haphazardly lift statements from judicial opinions and to feed them to the jury in an instruction. See Bankers Multiple Line Ins. Co. v. Farish, 464 So. 2d 530, 533 n.3 (Fla. 1985) ("The fact that a statement of reasoning may be set forth in a judicial opinion does not mean that it is a

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

In Morissette v. United States, 342 U.S. 246, 73 S.Ct. 240, 96 L.Ed.2d 288 (1952), the United States Supreme Court has condemned an instruction which would permit the jury to assume intent from an isolated fact because it would allow prejudgment of a conclusion the jury should reach on its own:

> However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury.... A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach on its own volition.

72 S.Ct. at 255-56. As stated above, there is no reason why the prosecution should be allowed a special instruction to highlight its case. The instruction in this case was one-sided. The jury was told of specific evidence from which premeditation could be inferred. However, the jury was never told that certain evidence could infer a lack of premeditation. It is reversible error to give an unbalanced instruction which tells how certain evidence might bear on guilt without indicating how it might bear on innocence. United States v. Dove, 916 F.2d 41, 45 (2d Cir. 1990).

In requesting the instruction, the prosecutor informed the trial court that its purpose was to counter the defense argument

of lack of premeditation and to bolster its theory of premeditation:

> MR. MORGAN: Your Honor, the State's requested jury instruction is the state of the law. It specifically addresses arguments that defense counsel has been basically making in his opening statement and throughout the questioning of the witnesses, the cross examination that he did do, regarding order of shots, so forth.

(R1664). The prosecutor also noted that the instruction would also counter the defense argument that the weapons and wounds were not as important as what was occurring in Appellant's mind in determining intent:

> MR. MORGAN: ... The point is Mr. Udell, I believe, will try and argue that it's not premeditation and argue things that are inconsistent with the law. And basically argue that even though, or <u>maybe even try and argue that the type of weapon doesn't make any difference or the way the wounds are inflicted doesn't make any difference</u>. And there may be <u>something else in his mind that does make a difference</u>, I don't know. But certainly that's the state of the law and it seems to me the jury ought to entitled to hear the law, particularly when the jury instructions don't specifically cover the exact points that Mr. Udell has argued already basically in his opening statement and when he's cross examined witnesses.

(R1668) (emphasis added). The prosecutor was correct in believing the jury would give more credence in this theory of premeditation after hearing it emphasized by the trial court. However, the counter to the defense argument should have come by way of prosecutorial argument, and not by an instruction from the judge. It is simply error to permit one side to emphasize its case through a jury instruction by a perceived neutral voice of the trial judge.

Analogous to the instant situation is where this Court condemned an instruction which specified that flight is a circumstance to be considered with the other testimony. <u>Fenelon v. State</u>, 594 So. 2d 292 (Fla. 1992). In <u>Fenelon</u>, this Court noted

that previously the flight instruction was an exception to the rule prohibiting comments "on the evidence or indicating what inference may be drawn from it." Id. at 294 (emphasis added). This Court then noted that there was no valid policy reason why a trial judge should single out flight as opposed to any other evidence adduced at trial. Id. Likewise, there is no valid reason here to single out certain evidence to one party's advantage. It was error to overrule Appellant's objections and to give the prosecution's special instruction on premeditation.

The error cannot be deemed harmless. The reason the prosecution wanted the instruction was to emphasize facts believed favorable to proving a premeditated intent. In its closing argument, the prosecution emphasized the instruction on inferring premeditation from the nature of the weapons,[25] and then talked about the specific nature of the weapon and concluded that it showed premeditation based on the instruction (R1720-21). The prosecutor's closing argument then emphasized how these details showed premeditation. Whether the killing was premeditated was the key issue for the jury. It cannot be said beyond a reasonable doubt that the instruction was not utilized in helping the jury to conclude that the killing was premeditated rather than the product of a panicked shooting that Appellant never truly reflected upon.

[25] In closing argument the prosecutor read the special instruction to the jury (R1719) after emphasizing that he had asked them on voir dire whether they could follow the law on premeditation (R1719).

2. **The trial court improperly commented on the evidence by calling the killing a "murder."**

Within the instruction that was given there was a comment that the jury may infer premeditation form "the manner in which the murder was committed" (R1842). This constitutes a direct comment on the evidence by the trial court. It is error for the trial judge to comment on the evidence in such a manner. See Sloan v. State, 70 So. 23, 70 Fla. 216 (1915) (where question was the lawfulness of the homicide, it was error for the trial court to use the adjective "unlawful" in its instruction -- the use of "unlawful" was an "oversight, but oversights should not occur").

Appellant's right to due process and a fair trial was violated. Fifth, Eighth, and Fourteenth Amendments, United States Constitution; Article I, Sections 9, 16, and 17, Florida Constitution.

3. **The instruction was improper in that it permitted a decision on premeditation based on insufficient evidence.**

The prosecution's special instruction was also improper in that it permitted the jury to infer premeditation based on insufficient evidence. The instruction failed to inform the jury that the nature of the weapon and wounds may not be sufficient to prove premeditation. There was no determination, or restriction, as to what type of weapons or wounds are sufficient to infer premeditation. Thus, the instruction was erroneous. United States v. Rubio-Villareal, 927 F.2d 1495 (9th Cir. 1991); United States v. Martinez, 514 F.2d 334 (9th Cir. 1975). For example, in Rubio-Villareal, supra, the jury was instructed that they may infer the defendant knew cocaine was in an automobile from the fact he drove

the automobile and cocaine was concealed inside the automobile. The jury was instructed that they were not required to make this inference. However, the instruction was still found to be erroneous because it failed to inform the jury that knowledge could only be inferred if they found other facts in addition to driving a car containing cocaine. In otherwords, the instruction allowed for proof of an element based on insufficient evidence. In Wilhelm v. State, 568 So. 2d 1, 3 (Fla. 1990), this Court made clear that instructions based on statutory presumptions or inference must have clearly defined terms so that the jury isn't required "to guess as to their meaning." Likewise, in the present case, the instruction that the nature of the weapon and wounds, without any further explanation, was sufficient to find premeditation was error. The error deprived Appellant due process and a fair trial under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

POINT XII

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON ESCAPE AS THE UNDERLYING FELONY OF FELONY MURDER.

Over Appellant's objections (R1649,1653,1677), the trial court instructed the jury on escape as the underlying felony of felony murder (R1843). For the reasons below, it was reversible error to instruct the jury on the underlying felony of escape.

1. The state misled the defense thus denying the defense the opportunity to adequately prepare a defense.

Appellant objected that the state had misled the defense as to the charge it was using as the underlying felony for felony murder by not noticing the charge until the state had rested its

case (R1649,1653,1677). Appellant complained that the state had only been relying on robbery as the underlying felony to that point in time (R1649,1653,1677). The state claimed it did not have to notice Appellant of the charge (R1652). Misleading Appellant violated his right to be informed of the nature and cause of the charges under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution.

A similar situation occurred in Sheppard v. Rees, 909 F.2d 1234 (9th Cir. 1989), where the defendant was not noticed of the underlying felony for felony murder. The defense made the following objection about being misled and not being noticed:

> I object strenuously to the giving of any instructions based on any theory of first degree murder on the felony-murder theory. I would indicate that we went over instructions yesterday morning and no mention was ever made of any theory of felony-murder justification for a first degree murder verdict by the jury. It wasn't until this morning that Mrs. Nedde gave us or made the request of the Court to give the instructions that the Court has just indicated.
>
> ... It never occurred to me that the People would ever go forward on the theory of felony-murder, ...
>
> I would note that at no time has a robbery ever been charged in this case. It was never charged in the Municipal Court; there was no holding on that issue by the magistrate at the end of the preliminary hearing. There was no robbery charge ever filed in Superior Court in an Information. Mrs. Nedde has filed several amended Informations that never included a robbery charge.

909 F.2d 1235-36. The Court in Sheppard quoted the issue as follows:

> Hence, the difficulty in this case arises not because California's murder pleading practice furnishes inadequate notice, but because a *pattern of government conduct affirmatively misled the defendant,* denying him an

> effective opportunity to prepare a defense. 'The defendant was ambushed.'

909 F.2d at 1236. The Court then concluded that the prosecution had violated the defendant's Sixth Amendment rights.

Likewise, in the instant case the prosecution misled Appellant into believing that the felony-murder charge would involve robbery with no notice that an escape charge would be utilized.

Appellant's right to be informed of the nature and cause of the charges was violated. Sixth and Fourteenth Amendments, United States Constitution; Article I, Section 16, Florida Constitution.

It was error to permit instruction on the underlying felony of escape over Appellant's objection. Appellant's conviction and sentence must be reversed and this cause remanded for a new trial.

2. Lack of Corpus Delicti

The jury should not have been instructed on the felony murder charge of escape where the corpus delicti of escape was not proven.

Although the corpus delicti does not have to be proven beyond a reasonable doubt, as noted in <u>State v. Allen</u>, 335 So. 2d 823, 825 (Fla. 1976), the state has the burden to produce <u>substantial evidence</u> of the existence of every element of the crime charged:

> This rule obviously does not require the state to prove a defendant's guilt beyond a reasonable doubt before his or her confession may be admitted. Indeed, as this Court has stated before, it is preferable that the occurrence of a crime be established before any evidence is admitted to show the identity of the guilty party even though it is often difficult to segregate the two. The state has a burden to bring forth '<u>substantial evidence</u>' tending to show the commission of the charged crime. This standard does not require proof to be uncontradicted or overwhelming, but it must at least show the existence of <u>each element</u> of the crime.

(emphasis added). Proof of the corpus delicti must be established independent of the defendant's confession. Ruiz v. State, 388 So. 2d 610 (Fla. 3d DCA 1980); Drysdale v. State, 325 So. 2d 80 (Fla. 4th DCA 1976).

In addition, corpus delicti is not proven merely because there is evidence of a crime. There must be substantial evidence of the elements of the allegation. Rowe v. State, 84 So. 2d 709, 711 (Fla. 1956) (it would be unreasonable to attempt to show some form of crime was committed and then attempt to infer that the corpus delicti for the crime charged existed); Sciortino v. State, 115 So. 2d 93, 99 (Fla. 2d DCA 1959); Ruiz v. State, 388 So. 2d 610, 613 (Fla. 3d DCA 1980); McQueen v. State, 304 So. 2d 501 (Fla. 4th DCA 1974), cert. den., 315 So. 2d 193 (Fla. 1975).

At bar, there was no proof of the corpus delicti apart from Appellant's confession. One of the essential elements of escape is that the escapee be under arrest. Kyser v. State, 533 So. 2d 285, 287 (Fla. 1988). There was no evidence that Appellant was ever arrested. The only evidence presented apart from the confession was that a traffic ticket was being issued to Appellant. A traffic ticket does not constitute an arrest. In addition, for there to be an arrest, there must be a communication by the officer to the accused that he is under arrest. Id. In the present case, absent Appellant's confession, no evidence was presented that the officer communicated that he was under arrest.

Because the corpus delicti was not proven apart from the confession, it was error to allow instruction on escape as the underlying felony for the felony-murder charge. Appellant's

conviction and sentence must be vacated and this cause remanded for a new trial.

3. Lack of Notice of Felony-Murder Charge.

The indictment in the instant case charged only premeditated murder and made no mention of felony-murder. Because of this lack of notice of felony-murder, the trial court unlawfully allowed this charge to be submitted to the jury.

An indictment or information is required to state the elements of the offense charged with sufficient clarity to apprise the defendant what he must be prepared to defend against. Russell v. United States, 369 U.S. 749, 763-69, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962); Government of Virgin Islands v. Pemberton, 813 F.2d 626 (3d Cir. 1987); Givens v. Housewright, 786 F.2d 1378, 1380-81 (9th Cir. 1986).

In Givens, the Ninth circuit held that it was a sixth amendment violation to allow a jury instruction and prosecutorial argument on murder by torture (under Nevada law analogous to Florida's felony-murder) where the information charged willful murder (analogous to Florida's premeditated murder). Failure to properly charge the offense was a violation of Appellant's rights under the Article I, Section 16, of the Florida Constitution and the Sixth and Fourteenth Amendments of the United States Constitution.

POINT XIII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S CHALLENGES FOR CAUSE.

Appellant moved to challenge five members of the jury panel -- Mrs. Shawl, Mr. Goodwin, Mr. Bridwell, Mr. Gwathney, and Mrs.

Smith -- for cause (R877-78,882,888-89,899). The trial court denied Appellant's motions (R879,883,888-89,900). This was error.

Jurors should not only be impartial, but beyond even the "suspicion of partiality." Auriemme v. State, 501 So. 2d 41 (Fla. 5th DCA 1986); O'Conner v. State, 9 Fla. 215, 222 (1860).

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

When originally questioned, Mrs. Shawl testified that she knew a lot about the case in the news and might have problems being impartial:

> THE COURT: All right. Mrs. Shawl. All right, Mrs. Shawl, if you'll come forward. You had indicated at the start of the selection process that you might have heard or read or seen something about the case in the media.
>
> MRS. SHAWL: Uh-huh.
>
> THE COURT: Can you tell us what you recall about that?
>
> MRS. SHAWL: I read a saw a lot about it and I remember the whole thing pretty clearly.
>
> * * *
>
> THE COURT: Is that going to impact on your ability to listen to the evidence in this case?

> MRS. SHAWL: I've really been, you know, I'm really torn about it because I want to be impartial and yet I might have a problem with it. I was thinking about it, you know, last night, just how much I know and that it might be difficult for me to be impartial.

(R420-22) (emphasis added). Later questioning revealed that Mrs. Shawl had formed an opinion that Appellant was guilty (R426-27,432).

Mrs. Shawl's testimony about having problems being impartial and forming an opinion that Appellant was guilty after reading and seeing news media reports, clearly creates strong doubts as to whether she could be impartial. See Blye v. State, 566 So. 2d 877 (Fla. 3d DCA 1990) (A jurors' statement, "I would have difficulty being objective," should result in excusal for cause). In Ortiz v. State, 543 So. 2d 377 (Fla. 3d DCA 1989), a juror admitted reading a newspaper account of the crime and had formed an opinion that the defendant had "done it." The appellate court held that she would not be an impartial juror even after stating she would listen to the evidence:

> Ms. Arnold's candid admission that, upon reading the newspaper account of the fire, she had "felt at that time that he had done it [and] he was guilty," disqualified her from service on the jury even after she stated that she would try to render a fair and impartial verdict after listening to the evidence.

543 So. 2d at 379. Likewise, in this case, the challenge for cause should have been granted.

It should be noted after leading questions by the prosecutor Mrs. Shawl indicated that she would try to base her verdict on the evidence heard in court (R422-26,428-31). A couple of comments are in order. First, even though a juror states that he or she could

hear the case with an open mind, the challenges for cause should be granted where other responses raise doubt as to whether the juror can be impartial and will presume the defendant to be innocent before hearing before hearing evidence. Hamilton v. State, 547 So. 2d 630 (Fla. 1989) (juror's statement that would hear case with "open mind" not sufficient where other response raised doubts as to impartiality); Tenon v. State, 545 So. 2d 382 (Fla. 1st DCA 1989) (jurors's promise "to follow the law" not sufficient to rehabilitate juror); Mann v. State, 571 So. 2d 551 (Fla. 3d DCA 1990) (statement that "could be fair" not sufficient); United States v. Dellinger, 472 F.2d 340, 375 (7th Cir. 1972) ("Natural human pride would suggest a negative answer to whether there was a reason the juror could not be fair and impartial").

For example, in Ortiz v. State, 543 So. 2d 377, 379 (Fla. 3d DCA 1989), the juror's statement, that she would listen to the evidence and render a fair and impartial verdict, was not sufficient to erase doubts about her ability to be impartial where she had read about the crime and had formed an opinion as to the defendant's guilt. Under those circumstances, like here, it was error to deny the challenge for cause.

Finally, even after the leading questions, Mrs. Shawl was of the opinion that Appellant was guilty but would be willing to have her mind changed:

> MR. MORGAN: Okay. But you still have an impression and have formed the opinion at this time that the Defendant is probably guilty of the crime charged, correct?
>
> MRS. SHAWL: If you say probably. But let's say I'm open to --
>
> MR. UDELL: But is probably, the answer would be yes?

MRS. SHAWL: Well, you know, nothing's absolute black and white. But let's say 51 percent.

MR. UDELL: 51 percent probably guilty.

MRS. SHAWL: Uh-huh, uh-huh.

MR. UDELL: That's a yes. She can't take down uh-huh, uh-huh. That's a yes?

MRS. SHAWL: Yes.

MR. UDELL: But you're willing to have someone change your mind on that.

MRS. SHAWL: Absolutely, absolutely.

(R432). A juror who believes that the defendant is 51% guilty simply does not qualify as an impartial juror who would presume the defendant to be innocent. It was error to deny Appellant's challenge for cause.

It was also error to deny the defense challenges for cause of jurors Goodwin and Bridwell (R877,888). Mr. Goodwin testified that if Appellant was guilty of murder in the first degree the only appropriate sentence was death:

MR. GOODWIN: If he's convicted of first degree murder, in my mind, that is the death penalty.

* * *

MR. GOODWIN: I believe that if you are convicted of first degree murder, the death penalty should occur, with the exceptions of self-defense or there could be some aggravating circumstances that cause this. And that's the way I believe. That's the only way I believe.

(R769,868). Mr. Bridwell believed that all first-degree murders received the death penalty regardless of whether it was a killing in the heat of passion or whether it was an execution killing that was carefully planned (R702-04). It is error to deny a defendant's challenge for cause of a juror who automatically would recommend

a death sentence for first-degree murder. O'Connell v. State, 480 So. 2d 1284 (Fla. 1985). It should be noted that in response to leading questions from the prosecutor, Goodwin and Bridwell responded they would follow the law.[26] As pointed out above, leading questions drawing responses that the juror could follow the law simply do not erase the doubts, created by other responses, as to the juror's impartiality. It was error to deny Appellant's challenges for cause on Goodwin and Bridwell.

The error was not harmless. Appellant was denied due process under the Florida and Federal Constitutions due to the improper denial of the cause challenges. Appellant had used all his peremptories, requested additional peremptories, and pointed at Mrs. Shawl as one of the objectionable jurors (R901-903). Appellant noted that even if Shawl was removed other additional peremptories would be required (903,983). The trial court denied all of Appellant's motions (R904-05). However, the state later asked the trial court that both sides be given one additional challenge on the condition that the defense challenge be used on Mrs. Shawl (R982,985). The trial court acquiesced to the state's wishes (R988). The state utilized its extra peremptory challenge (R986-88). Appellant did not receive any additional peremptories for the other objectionable jurors (R903,983). Thus, this cause must be reversed for a new trial.

The error was harmful in another regard. As a result of the procedure used, the state received an extra peremptory challenge

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[26] When first asked if he could set aside his opinion and follow the law Bridwell responded, "Possible" (R861).

for absolutely no reason. This Court has recognized that it is a violation of due process for one party to have an advantage in selecting the jury. Kritzman v. State, 520 So. 2d 568 (Fla. 1988); O'Connell v. State, 480 So. 2d 1284, 1287 (Fla. 1985) (denial of due process to permit state advantage of examining certain jurors which defendant did not have). In Kritzman, this Court held that due process was violated where a situation essentially gave the state an inappropriate advantage over the defense in the number of peremptory challenges used on the jury.[27]

In the present case, the state received an unwarranted advantage of a peremptory challenge even though none of its challenges for cause had been improperly denied. The state maneuvered for the extra challenge and benefitted by the error disadvantaging Appellant due to the improper denial of his challenges for cause. Allowing the state the unwarranted advantage of having an extra peremptory challenge denied Appellant due process and a fair trial. Fifth and Fourteenth Amendments, United States Constitution; Article I Sections 9 and 16, Florida Constitution. This cause must be reversed and remanded for a new trial.

It was also error to deny the challenge for cause of Mr. Gwathney. Mr. Gwathney personally knew Reed Knight who the state would later use as its firearms expert (R599). Due to his personal

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[27] In Kritzman, the state received its share of challenges plus, in essence, others it would not normally be entitled to. The co-defendant was excluding jurors prone to believe Kritzman's defense. After jury selection, the co-defendant pleaded guilty and became the state's chief witness against Kritzman. Thus, although technically both sides had an equal number of peremptories, in reality the state and its chief witness were choosing the jury against Kritzman. This inappropriate advantage denied Kritzman due process.

knowledge of Knight, Mr. Gwathney was of the opinion that Knight was an expert in weaponry (R599). Mr. Gwathney would tend to believe Knight based on his knowledge of Knight's character (R599). Gwathney considers Knight to be a credible witness (R599). It cannot be said that Gwathney was impartial where he had strong personal beliefs in the credibility of one of the state's most important witnesses. It was error to deny Appellant's challenge for cause. See Polynice v. State, 568 So. 2d 1346 (Fla. 4th DCA 1990) (reasonable doubt of partiality of juror existed where stepson of juror was on the state's witness list).

Finally, it was error to deny Appellant's challenge of Mrs. Smith for cause (R882). Mrs. Smith was challenged due to possible impact of her acquaintance with the prosecutor -- Mr. Morgan. Mrs. Smith explained that she knew the prosecutor to be "honest" and a "man of integrity" and her acquaintance with the prosecutor would "bound to color" how she felt about the case, but she would "try" not to let it influence her even though there would be a "tendency" to do so (R748). Toward the end of voir dire Mrs. Smith was questioned, in a leading manner, about not giving the prosecutor's statements greater weight and her response was that "you have a tendency to lean toward your friends" (R867). Obviously, there is a reasonable doubt whether a juror who tends to "lean towards" the prosecutor can be deemed impartial.

A challenge for cause should be granted where the juror has potential to lean toward one side due to her relationship with one of the attorneys involved in the case. Sikes v. Seaboard Coast Line R. Co., 487 So. 2d 1118 (Fla. 1st DCA 1986); Johnson v.

Reynolds, 97 Fla. 591, 121 So. 793 (1929). For example, in Sikes, supra, a juror was acquainted with an attorney for one of the parties. She could not say if the acquaintance "might not cause her to have reservations." 487 So. 2d at 1119. When asked a couple of questions whether she might give more weight to what one side said she answered, "Probably," and, "Yes, I suppose it would." Id. The appellate court held despite the fact that the juror gave assurances she could be fair, that it was error to deny the challenge for cause because of the doubts as to her impartiality.[28] Likewise, it was error to deny the challenge for cause of Mrs. Smith.

POINT XIV

THE TRIAL COURT ERRED IN ADMITTING OFFICER MANN'S TESTIMONY THAT THE PURPOSE OF A TWO-HANDED GRIP ON A GUN IS FOR BETTER CONTROL AND ACCURACY.

The state was permitted to introduce Officer Mann's testimony that the purpose of a two-handed grip is for better control and accuracy (R1397-98). Appellant objected on the ground that Officer Mann does not know Appellant's reason for allegedly using such a grip (R1397). The trial court overruled Appellant's objection (R1397). It was error to admit such evidence.

All relevant evidence is admissible unless excluded by law. § 90.402, Fla. Stat. (1989). To be relevant, evidence must prove or tend to prove a fact in issue. Stano v. State, 473 So. 2d 1282 (Fla.) cert. den. 474 U.S. 1093 (1985); § 90.401, Fla. Stat.

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[28] The court partially relied on this Court's decision in Johnson v. Reynolds, 97 Fla. 591, 121 So. 793 (1929), wherein a juror's friendship to one side's attorney put her impartiality in doubt and this Court held, "If there is a doubt as to the juror's sense of fairness or his mental integrity, he should be excused."

(1989). Common practice of what occurs in other cases or situations has no relevancy to the instant case for it does not tend to prove or disprove the guilt of the defendant. Cf. Osario v. State, 526 So. 2d 157 (Fla. 4th DCA 1988). Evidence of a law enforcement officer's techniques simply is not relevant, and the defendant should be tried on the evidence against him or her:

> Generally, the admission of this evidence is nothing more than the introduction of the investigative techniques of law enforcement officers. Every defendant has a right to be tried based on the evidence against him or her, not on the techniques utilized by law enforcement officers....

United States v. Hernandez-Cuartas, 717 F.2d 552-555 (11th Cir), rehearing denied, 721 F.2d 822 (11th Cir. 1983).

At bar, obviously the testimony as to Officer Mann's reasons for holding a gun with two hands was not probative of Appellant's mindset during the incident. There was certainly no evidence that Appellant was a law enforcement officer trained in the use of firearms. This evidence could only be used to mislead the jury as to Appellant's mindset. Introduction of such evidence denied Appellant due process and a fair trial. Fifth and Fourteenth Amendments, United States Constitution; Article I, Sections 9 and 16, Florida Constitution.

POINT XV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE FRUITS OF AN ILLEGAL ARREST.

Appellant moved to suppress evidence, including his confession to the shooting of Officer Parrish, on the ground that the evidence was the fruit of an illegal arrest (R164). Appellant renewed his

motions during trial (R1305). The trial court denied Appellant's motions (R176,1306). This was error.

Appellant claimed that his warrantless arrest was illegal because it was not based on probable cause (R164). The police knew that Officer Parrish had stopped a black male in a dark blue Monte Carlo (R149). The police also knew that this Monte Carlo was registered to someone at 1718 Avenue K and that the car was found at that address (R149). The police saw two black males exiting the residence at 1718 Avenue K and knew that there were other individuals at this address.

The above-mentioned information simply does not give the police probable cause to arrest Appellant for the murder of Parrish. "Probable cause exists where the totality of the facts and circumstances within an officer's knowledge would cause <u>a man of reasonable caution</u> to believe that a criminal offense has been committed by the person who is to be arrested. <u>Blanco v. State</u>, 452 So. 2d 520 (Fla. 1984). The probable cause must be particularized with respect to the person. <u>United States v. Robertson</u>, 833 F.2d 777 (9th Cir. 1987). Mere proximity at the residence where the Monte Carlo was located is not sufficient probable cause to identify Appellant as the killer. <u>See</u> <u>Thompson v. State</u>, 551 So. 2d 1248 (Fla. 1st DCA 1989).

The arresting officer used additional evidence to particularize to Appellant. Two black males exited the residence and then one turned and returned inside. The officer asked the other male, "Where's Dwight" (R106,145). The male answered that he was Derrick and Dwight just returned inside the house (R106,145). At

first glance this appears to give the police probable cause to believe that Appellant was the killer. However, the police knew nothing about the source of the information. At the time they received the information the police did not know the name of the male. More importantly, the honesty or reliability of the male was unknown to police. Also, the information received was not corroborated by the police prior to the arrest. In summary, the uncorroborated information from someone of unknown reliability is not sufficient for probable cause. See Cunningham v. State, 591 So. 2d 1058 (Fla. 1991); Compare State v. Cook, 475 So. 2d 285, 287 (Fla. 5th DCA 1985) ("Officer testified that he knew both employees [the source of the information] and knew them to be reliable).

An illegal arrest presumptively taints any subsequent confession or admission obtained by the victim of the arrest. State v. Rogers, 427 So. 2d 286 (Fla. 1st DCA 1983). To remove the taint there must be a clear and unequivocal break in the chain of illegality. Id. At bar, there was no clear and unequivocal break from the illegal arrest. The confession was made 55 minutes after Appellant's arrest (R150). Appellant was constantly kept in custody and was without any contact with an attorney or someone else independent from the state to break the chain. See Rogers, supra, at 288. The fact that Appellant waived his rights does not break the chain of illegality. Id. at 287 (after the arrest the defendant was taken to jail where he waived his rights and then made an incriminating statement). Appellant's confessions and statements subsequent to the arrest should have been suppressed. Fourth and Fourteenth Amendments, United States Constitution;

Article I, Section 12, Florida Constitution. This cause must be remanded for a new trial.

POINT XVI

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

The trial court instructed the jury that, "A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt" (R1850) (emphasis added). Also, the prosecutor constantly emphasized that a reasonable doubt was not a possible doubt (R265,324, 346,1739-40).

The instruction was infirm. The instruction improperly tells the jury that reasonable doubt cannot be a "possible doubt." Such an instruction is improper. United States v. Shaffner, 524 F.2d 1021 (7th Cir. 1975).[29]

Finally, the language stating that a reasonable doubt is not speculative, imaginary, or forced, is also improper. 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).

The improper instructions regarding reasonable doubt denied Appellant due process and a fair trial. Fifth and Fourteenth Amendments, United States Constitution; Article I, Section 9,

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[29] In Shaffner the jury was instructed:

> It is not necessary for the government to prove the guilt of the defendant beyond all possible doubt.

524 F.2d at 1023. The reviewing court held that, "It is quite clear that this part of the instruction favors the government on the issue of reasonable doubt." Id.

Florida Constitution. Appellant's convictions and sentence must be reversed and this cause remanded for a new trial.

POINT XVII

IT WAS REVERSIBLE ERROR TO ADMIT HEARSAY EVIDENCE OVER APPELLANT'S OBJECTIONS.

During trial the state introduced a number of hearsay statements into evidence over Appellant's objections. Since the state's justifications for introducing the hearsay evidence are related, Appellant has raised the errors in this single point.

Over Appellant's objection, the state introduced testimony from James Tedder that Officer Parrish had obtained several names from the individual he had stopped (R1032). The state claimed that such evidence was admissible to show what the police officer did (R1033). This explanation has no merit:

> While the error in Freeman may have been harmless, as suggested by the special concurrence, we emphasize that it is not a sufficient justification for the introduction of incriminating hearsay that the statement explains or justifies an officer's presence at a particular location or some action taken as a result of the hearsay statement. There is a fine line that must be drawn between a statement merely justifying or explaining such presence or activity and one that includes incriminating (and usually unessential) details.

Harris v. State, 544 So. 2d 322, 324 (Fla. 4th DCA 1989) (emphasis added); State v. Baird, 572 So. 2d 904, 907-08 (Fla. 1990) (officer should state that he acted on "information received" rather than stating what that information was). It was error to admit this hearsay.

Over Appellant's objection, the state introduced the tape of the dispatcher's conversation with Officer Parrish (R1104-05). This tape contained the allegation that Parrish had obtained

several names from the individual he stopped (2SR2-4). The state claimed this evidence was solely admissible to show that the "statements were made" (R1106). This Court has rejected such a claim. Wright v. State, 586 So. 2d 1024, 1030 (Fla. 1991) (hearsay not admissible to show "something was said"). It was error to admit the hearsay tape.

Over Appellant's objection, the state was allowed to introduce James Tedder's testimony as to where he was told Parrish's body was found laying (R1042-43). Clearly such an out-of-court statement is hearsay and inadmissible.

The introduction of the hearsay evidence in this case, individually and cumulatively, constitutes reversible error which denied Appellant's rights to confrontation, due process, and a fair trial. Fifth, Sixth, and Fourteenth Amendments, United States Constitution; Article I, Sections 9 and 17, Florida Constitution. This cause must be reversed and remanded for a new trial.

POINT XVIII

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE PROSECUTOR INFORMING THE JURY THAT APPELLANT HAD BEEN PREVIOUSLY CONVICTED OF ROBBERY.

Prior to the penalty phase, Appellant had challenged the use of evidence that Appellant had a prior robbery conviction on the ground that the conviction was uncounseled (R68-69). The prosecutor stipulated that the robbery conviction would not be utilized. Appellant waived the statutory mitigating circumstance that Appellant had no significant criminal history (R1879).

In the penalty phase, during the cross-examination of Dr. Petrilla, the prosecutor specifically elicited that Appellant had previously been convicted of robbery to which Appellant objected:

> Q [Mr. Morgan]: Robbery?
>
> A [Dr. Petrilla]: I think that one was -- I don't know what you call it when you take seven cents off someone.
>
> Q What to you call when you take it by force? That's what we're talking about.
>
> A What happened was, if I remember right, one boy held the boy's arms to the side and Mr. Kearse reached in the pocket and took seven cents.
>
> Q The point is he was charged and convicted of robbery, right?
>
> A Yes.
>
> MR. UDELL: Objection, Judge. Can we approach the bench?
>
> (Thereupon, a discussion was held between Court and counsel out of the hearing of the jury).
>
> MR. UDELL: Judge, I object, move for a curative instruction, move for a mistrial. He specifically asked he was arrested and convicted of robbery. They have stipulated that that robbery conviction was improperly obtained.
>
> MR. MORGAN: I'm not using it for aggravating circumstance.
>
> MR. UDELL: He asked him if he was convicted of robbery. This jury has no heard that this man was convicted of robbery.
>
> MR. MORGAN: Definitely.
>
> MR. UDELL: And they stipulated because they knew the conviction was improperly obtained.

(R2123-24). It was error to permit such evidence.

It is error to introduce evidence of a prior criminal conviction where the defendant waives the mitigating circumstance of no significant history. Maggard v. State, 399 So. 2d 973 (Fla. 1981).

The prosecutor argued in the trial below, and the trial court agreed, that Appellant had "opened the door" to the introduction of Appellant's robbery conviction. During cross-examination of Petrilla, the prosecutor elicited that the juvenile detention record reflected Appellant had been arrested (R2104). On redirect, Appellant questioned whether the referrals were for thefts (R2122). Petrilla responded that Appellant had taken seven cents off a boy (R2122). On recross, the prosecutor brought out the evidence that the taking of seven cents was by reaching into the boy's pocket while another boy held him (R2123). The prosecutor then elicited the objectionable testimony that Appellant was convicted of robbery (R2123).

Petrilla's response to Appellant's question that seven cents had been taken off a boy, at best, opens the door to further explanation of the incident that the taking was by force.[30] However, the door was not opened to go beyond the incident and to describe how the criminal justice system treated the incident -- that a criminal conviction for robbery had resulted.[31] Payne v.

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[30] That is, by reaching into the pocket.

[31] Technically, it is not true that a conviction resulted. An adjudication of delinquency results for a juvenile. However, the jury was only informed of a conviction. A conviction does not include juvenile adjudications. See e.g. § 90.610(1)(b), Fla. Stat. (witness may not be impeached with juvenile adjudication of guilt) and Powell v. Levit, 640 F.2d 239 (9th Cir. 1981) (construing similar federal statute). In upholding the constitutionality of juvenile proceedings, a juvenile adjudication cannot be considered a conviction and serves the purpose of guidance and rehabilitation rather than punishment so that due process and sixth amendment procedural requirements necessary before a criminal conviction can be obtained do not apply with such force in juvenile proceedings. See e.g. Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966) and McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971).

State, 426 So. 2d 1296, 1300 (Fla. 1983) (Fact that defendant slightly opened door does not give state right to go beyond the opening). This is especially true where it was agreed that, after Appellant charged that that conviction had been improperly obtained, that the robbery conviction would not be elicited. There was no need or justification for bringing out the fact that Appellant had been previously convicted of robbery.

The error cannot be deemed harmless. Although the jury knew Appellant had prior arrests as a juvenile, arrests simply do not carry the weight of a conviction.[32] A conviction has special significance as shown by the statutory aggravating factor that the defendant was previously convicted of a felony involving the threat of force. § 921.141(5)(b), Florida Statutes. Thus, the error cannot be deemed harmless.

POINT XIX

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE EVIDENCE OF AN ALLEGED DISCIPLINARY RECORD INTO EVIDENCE OVER APPELLANT'S OBJECTION.

Over Appellant's objections, the prosecutor introduced Appellant's alleged disciplinary record at Dan McCarty school (R1980-81). It was error to permit this alleged disciplinary record to be introduced into evidence.

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[32] Arrests have widely been recognized as improper sentencing considerations. See Dragovich v. State, 492 So. 2d 350, 355 (Fla. 1986) (arrests can't be considered in aggravation); Hines v. State, 358 So. 2d 183, 185 (Fla. 1978) (constitution would not permit revocation of probation based upon arrest); People v. Thomas, 67 Ill. Dec. 249, 444 N.E.2d 288, 290, Ill. App. 451 (Ill. App. 1983); Craddock v. State, 494 A.2d 971, 64 Md. App. 269 (Md. App. 1985); Commonwealth v. Jones, 355 Pa. 594, 50 A.2d 342, 344 (1947).

Daniel Dye testified to his familiarity with Appellant when Appellant was a student at St. Lucie school (R1973). On cross-examination, the prosecutor, over Appellant's objections, introduced an alleged disciplinary record at Dan McCarty school into evidence (R1980-81).

The record at Dan McCarty school was irrelevant to any issue to which Dye was testifying. Thus, it should not have been admitted into evidence. Moreover, the record was pure hearsay. While hearsay is generally admissible at the penalty phase, it is only admissible if there is a fair opportunity to rebut the hearsay. Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989); § 921.141(1), Fla. Stat. (1989). In Rhodes, the jury heard a taped statement of the victim, but since the victim was not available to cross-examine, the defendant had no opportunity to rebut the hearsay and it was error to admit the statement. See also Dragovich v. State, 492 So. 2d 350, 355 (Fla. 1986).

In the present case, Appellant had no opportunity to rebut the alleged disciplinary report. When the witness was asked about the report he had no idea who wrote it or under what circumstances it was prepared (R1982-83). Thus, Appellant could not rebut such evidence. Clearly, it was error to allow such a report into evidence. The report constitutes a non-statutory aggravating factor which the jury may have considered. Introduction of the report into evidence denied Appellant due process and a fair sentencing. Fifth, Sixth, Eighth, and Fourteenth Amendments, United States Constitution; Article I, Sections 9, 16, and 17, Florida Constitution.

POINT XX

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE FELONY MURDER AGGRAVATING CIRCUMSTANCE.

Appellant objected to the trial court instructing the jury on the felony murder aggravating circumstance on the ground that such a circumstance fails to adequately channel the discretion of the sentencer in imposing the death penalty by narrowing the death eligibles (R2214). The trial court overruled Appellant's objection (R2216). This was error.

The standard jury instruction on felony murder does not serve the limiting function required by the Constitution and arbitrarily creates a presumption of death for the least aggravated form of first-degree murder.[33] In this regard, the following discussion of the premeditation aggravating circumstance in Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990) (footnote omitted) is especially pertinent:

> To avoid arbitrary and capricious punishment, this aggravating circumstance "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1989) (footnote omitted). Since premeditation already is an element of capital murder in Florida, section 921.141(5)(i) must have a different meaning; otherwise, it would apply to every premeditated murder.

The same logic applies to the felony murder aggravating circumstance. It violates the teachings of Zant v. Stephens by turning the offense of felony murder, without more, into an

[33] "An aggravating circumstance must genuinely limit the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983).

aggravating circumstance. It applies an aggravating circumstance to every first-degree felony murder. Further, the instruction turns the mitigating circumstance of lack of intent to kill into an aggravating circumstance. Hence, the instruction violates the Cruel and Unusual Punishment and Due Process Clauses under the Fifth, Eighth, and Fourteenth Amendments, United States Constitution, and Article I, Sections 9 and 17 of the Florida Constitution.

POINT XXI

IT WAS REVERSIBLE ERROR TO DENY APPELLANT'S REQUESTED INSTRUCTION AND TO MINIMIZE THE JURY'S SENSE OF RESPONSIBILITY FOR THE SENTENCE APPELLANT WOULD RECEIVE IN THIS CASE.

Appellant asked the trial court to give a jury instruction indicating that their recommendation would be given great weight (R2232,2623). The trial court denied the instruction (R2232,2623). Instead, the trial court instructed the jury that the responsibility of the final sentence was the judge's and their verdict was merely advisory:

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

(R2439) (emphasis added). The trial court consistently informed the jury that their recommendation was only advisory (R2352, 2353,2354). The prosecutor emphasized to the jury that the judge was the final sentencer (R310,322,931,1853,2349,2351,2353). It was reversible error to minimize the jury's sense of responsibility in the sentencing.

As this Court has clearly stated, a jury should be informed of the seriousness of its recommendation and to do otherwise would violate Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985):

> It is appropriate to stress to the jury the seriousness which it should attach to its recommendation and, when the recommendation is received, to give it weight. To do otherwise would be contrary to Caldwell v. Mississippi and Tedder v. State.

Garcia v. State, 492 So. 2d 360, 367 (Fla. 1985) (citations omitted).

In Caldwell v. Mississippi, supra, the United States Supreme Court held that the Eighth Amendment requirement of heightened reliability in capital sentencing is impermissibly compromised where the jury has been led to believe that the responsibility for determining the propriety of a death sentence rested elsewhere. See also Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988).

The denial of Appellant's requested instruction and instead instructing that the final decision as to punishment rests with the trial court, violates due process and subjected Appellant to cruel and unusual punishment contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, 17, 21 and 22 of the Florida Constitution.

POINT XXII

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT THEY WERE NOT LIMITED TO THE MITIGATING CIRCUMSTANCES WHICH THEY WERE INSTRUCTED ON.

Appellant requested that the jury be instructed that they were not limited to those mitigating circumstances they were instructed

on and that they could consider other circumstances as mitigating (R2229,2231,2622,2621). The trial court denied the requested instructions (R2229-31,2621-22). Failing to instruct that mitigating circumstances other than those instructed on violates due process and the Eighth Amendment requirement that the jury not be limited in the mitigating evidence they can consider. Lockett v. Ohio, 438 U.S. 586 (1978). The refusal to instruct that the jury was not limited to those mitigating circumstances it was instructed on rendered a reasonable probability of the jury ignoring relevant mitigating evidence contrary to the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

POINT XXIII

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

Appellant requested the jury be instructed on the burden of proof for the penalty phase requires that the aggravating circumstances must outweigh the mitigating circumstances (R2237,2631). The instruction was denied and the jury was instructed that the mitigating circumstances must outweigh the aggravating circumstances in order for a life sentence to be imposed (R2349). Of course, due process requires that the state has the burden of proof. Arango v. State, 411 So. 2d 172, 174 (Fla. 1982). The instruction given in this case incorrectly states the burden of proof and thus violates Article I, Sections 9 and 17 of the Florida Constitution and the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution.

POINT XXIV

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

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

1. The jury

a. Standard jury instructions

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

i. Heinous, atrocious, or cruel

The instruction does not limit and define the "heinous, atrocious, or cruel" circumstance. This assures its arbitrary application of in violation of the dictates of Maynard v. Cartwright, 108 S.Ct. 1853 (1988); Shell v. Mississippi, 111 S.Ct. 313 (1990); and Espinosa v. Florida, 112 S.Ct. 2926 (1992). The instruction in the present case violates the Eight Amendment and due process.[34] The HAC circumstance is constitutional where limited to only the "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Espinosa, supra. Instructions defining "heinous," "atrocious," or "cruel" in terms of the instruction given in this case are unconstitutionally vague. Shell, supra. While the instruction given in this case states that the "conscienceless or pitiless crime which is unnecessarily torturous" is "intended to be included," it does not limit the

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[34] The instruction given in this case is at pages 2350-51 of the record.

circumstance only to such crimes. Thus, there is the likelihood that juries, given little direction by the instruction, will apply this factor arbitrarily and freakishly.

The instruction also violates due process. The instruction relieves the state of its burden of proving the elements of the circumstances as developed in the case law.[35]

ii. Cold, calculated, and premeditated

The same applies to the "cold, calculated, and premeditated" circumstance. The standard instruction simply tracks the statute.[36] Since the statutory language is subject to a variety of constructions, the absence of any clear standard instruction ensures arbitrary application. See Rogers v. State, 511 So. 2d 526 (Fla. 1987) (condemning prior construction as too broad). Jurors are prone to like errors. See Hodges v. Florida, ___ U.S. ___, 113 S.Ct. 33, 121 L.Ed.2d 6 (1992) (Applying Espinosa to CCP and acknowledging flaws in CCP instruction). Since CCP is vague on its face, the instruction based on it also is too vague to provide the constitutionally required guidance. Any holding that jury instructions in Florida capital sentencing proceedings need not be definite would directly conflict with the Cruel and Unusual Punishment Clauses of the state and federal constitutions. These

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[35] For example, the instruction fails to inform the jury that torturous intent is required. See McKinney v. State, 579 So. 2d 80, 84 (Fla. 1991) ("The evidence in the record does not show that the defendant intended to torture the victim").

[36] The instruction is: "The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification."

clauses require accurate jury instructions during the sentencing phase of a capital case. See Cartwright, supra.

iii. Felony murder

As explained earlier, this circumstance fails to narrow the discretion of the sentencer and therefore violates the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions. Hence, the instruction violates the Cruel and Unusual Punishment and Due Process clauses of the state and federal constitutions.

b. Majority verdicts

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

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

In Burch, in deciding that a verdict by a jury of six must be unanimous, the Court looked to the practice in the various states in determining whether the statute was constitutional, indicating that an anomalous practice violates due process. Similarly, in deciding Cruel and Unusual Punishment claims, the Court will look

to the practice of the various states. Only Florida allows a death penalty verdict by a bare majority.

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

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

d. Advisory role

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

2. Counsel

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

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

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

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

3. The trial judge

The trial court has an ambiguous role in our capital punishment system. On the one hand, it is largely bound by the jury's penalty verdict under, e.g., Tedder v. State, 322 So. 2d 908 (Fla. 1975). On the other, it has at times been considered the ultimate sentence so that constitutional errors in reaching the penalty verdict can be ignored. This ambiguity and like problems prevent evenhanded application of the death penalty.

That our law forbids special verdicts as to theories of homicide and as to aggravating and mitigating circumstances makes problematic the judge's role in deciding whether to override the penalty verdict. The judge has no clue of which factors the jury considered or how it applied them, and has no way of knowing whether the jury acquitted the defendant of premeditated murder (so that a sentencing order finding of cold, calculated and premeditated murder would be improper), or whether it acquitted him of felony murder (so that a finding of killing during the course of

a felony would be inappropriate).[37] Similarly, if the jury found the defendant guilty of felony murder, and not of premeditated murder, application of the felony murder aggravating circumstance would fail to serve to narrow the class of death eligible persons as required by the eighth amendment under, e.g., Lowenfield v. Phelps, 108 S.Ct. 546 (1988).

4. Appellate review

a. Proffitt

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

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

b. Aggravating circumstances

Great care is needed in construing capital aggravating factors. See Maynard v. Cartwright, 108 S.Ct. 1853, 1857-58 (1988) (eighth amendment requires greater care in defining aggravating circumstances than does due process). The rule of lenity (criminal laws must be strictly construed in favor of accused), which applies

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

not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose, Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980), is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979). Cases construing our aggravating factors have not complied with this principle.

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

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

As to HAC, compare Raulerson v. State, 358 So. 2d 826 (Fla. 1978) (finding HAC), with Raulerson v. State, 420 So. 2d 567 (Fla. 1982) (rejecting HAC on same facts).[38]

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[38] For extensive discussion of the problems with these circumstances, see Kennedy, Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L. Rev. 47 (1987), and Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-

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

Although the original purpose of the "hinder government function or enforcement of law" factor was apparently to apply to political assassinations or terrorist acts,[39] it has been broadly interpreted to cover witness elimination. See White v. State, 415 So. 2d 719 (Fla. 1982).

c. Appellate reweighing

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

d. Procedural technicalities

Through use of the contemporaneous objection rule, Florida has institutionalized disparate application of the law in capital sentencing.[40] See, e.g., Rutherford v. State, 545 So. 2d 853 (Fla.

Eligible Cases WIthout Making it Smaller, 13 Stetson L. Rev. 523 (1984).

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

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

1989) (absence of objection barred review of use of improper evidence of aggravating circumstances); Grossman v. State, 525 So. 2d 833 (Fla. 1988) (absence of objection barred review of use of victim impact information in violation of eighth amendment); and Smalley v. State, 546 So. 2d 720 (Fla. 1989) (absence of objection barred review of penalty phase jury instruction which violated eighth amendment). Use of retroactivity principles works similar mischief.

e. Tedder

The failure of the Florida appellate review process is highlighted by the Tedder[41] cases. As this Court admitted in Cochran v. State, 547 So. 2d 928, 933 (Fla. 1989), it has proven impossible to apply Tedder consistently. This frank admission strongly suggests that other legal doctrines are also arbitrarily and inconsistently applied in capital cases.

5. Other problems with the statute

a. Lack of special verdicts

Our law provides for trial court review of the penalty verdict. Yet the trial court is in no position to know what aggravating and mitigating circumstances the jury found because the law does not provide for special verdicts. Worse yet, it does not know whether the jury acquitted the defendant of felony murder or murder by premeditated design so that a finding of the felony

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special scope of review violates the eighth amendment under Proffitt.

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

murder or premeditation factor would violate double jeopardy under Delap v. Dugger, 890 F.2d 285, 306-319 (11th Cir. 1989). This necessarily leads to double jeopardy and collateral estoppel problems where the jury has rejected an aggravating factor but the trial court nevertheless finds it. It also ensures uncertainty in the fact finding process in violation of the eighth amendment.

Our law in effect makes the aggravating circumstances into elements of the crime so as to make the defendant death eligible. Hence, the lack of a unanimous jury verdict as to any aggravating circumstance violates Article I, Sections 9, 16, and 17 of the state constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Federal constitution. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc). But see Hildwin v. Florida, 109 S.Ct. 2055 (1989) (rejecting a similar Sixth Amendment argument.

b. No power to mitigate

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

c. Florida creates a presumption of death

Florida law creates a presumption of death where but a single aggravating circumstance appears. This creates a presumption of death in every felony murder case (since felony murder is an aggravating circumstance) and every premeditated murder case (depending on which of several definitions of the premeditation aggravating circumstance is applied to the case)[42]. In addition, HAC applies to any murder. By finding an aggravating circumstance always occurs in first degree murders, Florida imposes a presumption of death which is to be overcome only by mitigating evidence so strong as to be reasonably convincing and so substantial as to constitute one or more mitigating circumstances sufficient to outweigh the presumption.[43] This systematic presumption of death restricts consideration of mitigating evidence, contrary to the guarantee of the Eighth Amendment to the Federal Constitution. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988); Adamson, 865 F.2d at 1043. It also creates an unreliable and arbitrary sentencing result contrary to due process and the heightened due process requirements in a death sentencing proceeding. The Federal Constitution and Article I, Sections 9 and 17 of the Florida Constitution require striking the statute.

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

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

6. Florida unconstitutionally instructs juries not to consider sympathy.

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

7. Electrocution is cruel and unusual.

Electrocution is cruel and unusual punishment in light of evolving standards of decency and the availability of less cruel but equally effective methods of execution. It violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 17 of the Florida Constitution. Many experts argue that electrocution amounts to excruciating torture. See Gardner, Executions and Indignities -- An Eight Amendment Assessment of

Methods of Inflicting Capital Punishment, 39 OHIO STATE L.J. 96, 125 n.217 (1978) (hereinafter cited, "Gardner"). Malfunctions in the electric chair cause unspeakable torture. See Louisiana ex rel. Frances v. Resweber, 329 U.S. 459, 480 n.2 (1947); Buenoano v. State, 565 So. 2d 309 (Fla. 1990). It offends human dignity because it mutilates the body. Knowledge that a malfunctioning chair could cause the inmate enormous pain increases the mental anguish.

This unnecessary pain and anguish shows that electrocution violates the Eight Amendment. See Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In re Kemmler, 136 U.S. 436, 447 (1890); Coker v. Georgia, 433 U.S. 584, 592-96 (1977). A punishment which was constitutionally permissible in the past becomes unconstitutionally cruel when less painful methods of execution are developed. Furman v. Georgia, 408 U.S. 239, 279 (Brennan, J., concurring), 342 (Marshall, J., concurring), 430 (Powell, J., dissenting). Electrocution violates the Eighth Amendment and the Florida Constitution, for it has no become nothing more than the purposeless and needless imposition of pain and suffering. Coker, 433 U.S. at 592. The improvement in methods of execution over time have made the court's last consideration of this issue in Ferguson v. State, 105 So. 840 (Fla. 1925), appeal dismissed 273 U.S. 663 (1927) obsolete.

POINT XXV

THE AGGRAVATING CIRCUMSTANCES USED AT BAR ARE UNCONSTITUTIONAL.

1. Felony murder

As already argued, this circumstances does not serve the limiting function required by the Constitution and arbitrarily

creates a presumption of death for the least aggravated form of first-degree murder. Further, it turns the mitigating circumstance of lack of intent to kill into an aggravating circumstance. Hence, it violates the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions.

2. Cold, calculated, and premeditated

This circumstance is vague and subject to numerous interpretations. It does not narrow the class of death eligible persons. Hence, it violates the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions.

3. Especially wicked, evil, atrocious, or cruel

This factor does not serve the channeling and limiting function required by the Constitution and has not been consistently strictly construed.

To be constitutional, this aggravating circumstance must, at a minimum, be limited to the conscienceless or pitiless crimes which are unnecessarily torturous to the victim. Espinosa v. Florida, 112 S.Ct. 2926 (1992); Bertolotti v. Dugger, 883 F.2d 1503, 1526-27 (11th Cir. 1989). History shows that it has been consistently applied to murders that are not "unnecessarily torturous."[44]

The United States Supreme Court has recently held in Shell v. Mississippi, 111 S.Ct. 313 (1990), instructions on the heinous, atrocious, or cruel aggravating factor, essentially identical to

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[44] Even this standard violates the Cruel and Unusual Punishment Clause and the constitutional and statutory rule of lenity. Almost any first-degree murder is conscienceless or pitiless. What a "necessarily torturous" murder is, or why it is not as bad as an "unnecessarily torturous" one, are mysteries.

Florida's is unconstitutional, See 111 S.Ct. at 3130 concurring opinion at 313-14. The instruction in this case does not limit application of this factor. The instruction states that the conscienceless or pitiless crime which is unnecessarily torturous is "intended to be included", but it does not limit the circumstances to such crimes. Thus, this factor is not constitutionally limited as it should be. See Espinosa, supra.

The heinous, atrocious, or cruel aggravating circumstance violates the Due Process and Cruel and Unusual Punishment Clauses of the state and federal constitutions. It does not rationally narrow the class of persons eligible for death, cannot be consistently applied, and is unconstitutionally vague.

4. Hinder governmental function or Enforcement of Law

Although the original purpose of this factor was to apply to political assignations or terrorist acts,[45] it has been broadly applied to other situations. As noted earlier, such application violates the due process rule of lenity which requires that statutes be strictly construed in the favor of the defendant.

In addition, the factor is susceptible to application in cases where (as here) it should be merged with other aggravating circumstances. Hence, it is unconstitutional

5. Avoid arrest

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

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

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

6. Victim was Law Enforcement Officer

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

CONCLUSION

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

Respectfully submitted,

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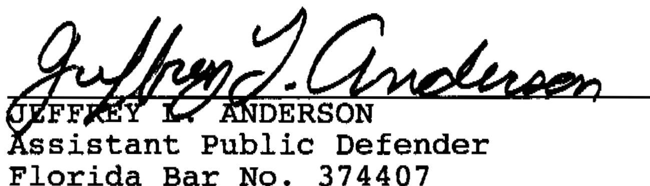

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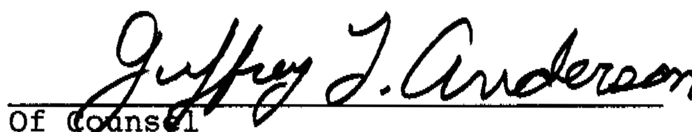
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 8th day of April, 1993.



Of Counsel