IN THE

SUPREME COURT OF FLORIDA

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

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

The following symbols will be used:

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

Appellant will rely on his Initial Brief for argument on Points X, XIII, XV, XVII, XXI, and XXIII.

STATEMENT OF THE FACTS

Appellant would note that the statement of facts in Appellant's Initial Brief contains the facts relevant to this case. Appellee has not disputed Appellant's version of the facts. However, Appellee has provided its own version which isolates certain facts. These facts were already covered, in context with the other facts, in the statement of the facts in the Initial Brief. The reiteration of these facts violates Fla.R.App.Pro. 9.210(c) which states that the facts shall be omitted from the answer brief "unless there are areas of disagreement, which should be clearly specified." In addition, Appellee's version of facts taken out of context is misleading. For example, Appellee indicates that Appellant said in a tape statement that he did not receive any scratches from Officer Parrish (AB at 3). However, the record clearly shows that Appellant indicated one of the scratches was from the officer during the struggle[1] (R30-31).

Since Appellee has repeated the relevant facts in the argument portion of its brief, the discussion, or dispute, of such facts in their appropriate context as they apply to this case will be covered in the argument portions of Appellant's briefs.

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[1] This is from the same portion of the record to which Appellee has referred:

> MR. WALTERS: How, you're indicating the left side of your neck, the left side of your neck?
>
> THE DEFENDANT: This is the one -- this is the one that the officer did.

(R30-31). Appellant did state that the other scratches were not from the struggle with the officer.

ARGUMENT

POINT I

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

In its answer brief Appellee acknowledges the error of denying the requested instruction under Castro v. State, 597 So. 2d 259 (Fla. 1992), but claims that Castro is a change in law which should not apply to the instant case. Specifically, Appellee argues the law in effect at the time of trial was Suarez v. State, 481 So. 2d 1201 (Fla. 1985). In Castro this Court made it clear that Suarez did not involve the issue whether a limiting instruction on duplicative factors should be given:

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

597 So. 2d at 26. Thus, Castro did not announce a change in law from Suarez precluding application of the proper legal analysis.

In addition, Castro, supra, is clearly the law at the time of this appeal. As this Court held in Smith v. State, 598 So. 2d 1063 (Fla. 1992), any decision announcing a new rule of law, or applying an established rule of law to a different situation, must be applied to every case pending direct review or which is not yet final:

> Thus, we hold that any decision of this Court announcing a new rule of law, or merely applying an established rule

> of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final. Art. I, §§ 9, 16, Fla. Const.

598 So. 2d at 1066.[2] Thus, assuming, arguendo, that Castro, supra, is a change in law, it should be applied to the present case pending on direct appellate review.[3]

Appellee also claims that the error is harmless. However, without the instruction the jury is permitted to weigh the three aggravating circumstances separately. Without the limiting instruction, the prosecutor specifically urged the jury to consider the duplicating aggravating circumstances separately even though they were based on the same aspect of the offense (R2265-66).[4] The jury's only guidance as to what aggravating factors it is to weigh is the jury instruction listing the aggravating factors. The lack of a limiting instruction permits the jury to give weight to each of the duplicating circumstances separately even thought they are based on a single aspect of the offense and this aspect deserves only to be weighed one time. This is especially harmful in this

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[2] This Court has consistently held before Smith that the case law at the time of the appeal should be applied at the time of the appellate decision. See e.g. Lowe v. Price, 437 So. 2d 142 (Fla. 1983); Dougan v. State, 470 So. 2d 697 (Fla. 1985); Gonzalez v. State, 367 So. 2d 1008 (Fla. 1979); Jones v. State, 569 So. 2d 1234 (Fla. 1990).

[3] Smith, supra, at ftnt. 5. As opposed to a situation unlike the direct appellate review here where it may or may not apply.

[4] The prosecutor later explained to the trial court that two of the aggravating circumstances should not be treated separately. See footnote 6 of Appellant's Initial Brief.

case where three aggravating circumstances[5] would be improperly weighed separately. Error which affects the weighing process in such a way cannot be deemed harmless. Especially, contrary to Appellee's unsupported claim, in light of the substantial mitigating circumstances presented in this case. See pages 27-30 of Appellant's Initial Brief.[6]

Finally, the fact that the trial court merged two of the three duplicative aspects does not make the error harmless.[7] The trial court gives great weight to the jury's recommendation and the jury was not given the requested instruction on the consideration of duplicative aggravating factors. Moreover, two of the factors were merged because the prosecutor argued to the court that they should be merged (R2376-80) -- whereas the prosecutor informed the jury that the duplicative circumstances should be considered separately (R2265-66). The fact that the trial court made its own evaluation of the circumstances does not make the error harmless. See James v. State, 18 Fla. Law Weekly S139 (Fla. March 4, 1993) (error not harmless and case remanded for resentencing where it couldn't be said beyond a reasonable doubt that jury instruction error did not

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[5] Avoid arrest; hinder law enforcement; and law enforcement officer engaged in the performance of his lawful duties.

[6] These included the two important statutory mental mitigating circumstances found by the trial judge, and an IQ just above the retarded level, a chronological age of 18 years, 3 months and an emotional and functioning age which was much less, an impoverished and deprived childhood which included malnourishment and beatings and the fact Appellant was a severely emotionally handicapped child.

[7] Even the trial court failed to properly merge all three duplicative circumstances.

affect jury recommendation). After all, the trial court gives great weight to the jury's recommendation.

Appellant relies on his Initial brief for further argument on this point.

POINT II

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

The test for whether two aggravating factors are duplicative so that they cannot be considered separately is whether they are based on the same aspect of the offense. Bello v. State, 547 So. 2d 914, 917 (Fla. 1989). The evidence, rather than the elements of the aggravating circumstances, must be analyzed. See Oats v. State, 446 So. 2d 90, 95 (Fla. 1984) (emphasis added) ("these two circumstances must be considered cumulative and may not 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") (emphasis added); Jackson v. State, 498 So. 2d 406, 411 (Fla. 1986) (to determine whether "avoid arrest" and "hinder law enforcement" doubled, one must examine the evidence of the law enforcement activity which the defendant disrupted -- since it was arrest, the factors doubled).[8] Clearly, the killing of Officer Parrish "a law enforcement officer engaged

[8] If Appellee's Blockburger element type of analysis were utilized, "avoid arrest" and "hinder law enforcement" would never double since the former does not require law enforcement to be involved and the latter does not require an arrest. The same applies to "pecuniary gain" and "burglary" [Cherry v. State, 544 So. 2d 184 (Fla. 1989)]. However, since the moral culpability of the accused is the primary concern, this Court, as shown by Jackson, etc., has looked at the actual evidence of what occurred in determining whether aggravating factors are doubling.

in the performance of his lawful duties" and the killing of Parrish to "avoid arrest" or "hinder the enforcement of law" are based on the same aspect of the crime. Patten v. State, 598 So. 2d 60, 62 (Fla. 1991) (killing of officer attempting to enforce the laws was a necessary aspect of hindering law enforcement).

Appellee next claims the error is harmless because the trial court ruled that any of the aggravating circumstances would outweigh the mitigating circumstances. This statement cannot make the error harmless for several reasons. First, the trial court failed to properly consider some very important and substantial mitigating factors -- such as age (See Point III). Thus, the trial court cannot effectively evaluate the effect of eliminating an aggravating factor from one side of the weighing process when it has not properly considered the other side of the scale -- the mitigating factors. Second, the interpretation that any one aggravating factor can outweigh the totality of the mitigating factors is clearly erroneous under this Court's teaching in Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989), that the death penalty is inappropriate where there is one aggravating factor and significant mitigating factors.[9] The use of the clearly erroneous

[9] The present case demonstrates this. The felony-murder aggravator is a very common element of death penalty cases and therefore by itself has very little significance (in fact, the only cases which do not possess this aggravator are premeditated murders which generally involve greater moral culpability). No reasonable person could say that the felony-murder aggravator alone would outweigh the significant mitigating evidence the trial court found in this case including: extreme mental or emotional disturbance, capacity to appreciate criminality of conduct or to conform conduct was substantially impaired, Appellant coming from an impoverished and culturally deprived background, Appellant being a severely emotionally disturbed child, Appellant's intelligence being just above the retarded level, etc. (R2729-30).

statement that any one aggravating factor will outweigh the total mitigation cannot legitimately be used to claim harmless error. Finally, the utilization of the statement amounts to the trial court analyzing the impact of its error. Because of the possibility of being an advocate for a result and thus less sensitive to due process after reaching a decision, it would be improper to have the error maker decide if the error would be harmless. See Griffis v. State, 509 So. 2d 1104, 1105 (Fla. 1987) (In disapproving the trial court's language in departure case that any reason justifies departure, Court cannot in good conscience condone anticipatory language of the trial judge rather than reweighing of the appropriate factors. The trial judge should "review and weigh the appropriate factors after guidance from the appellate court's review of the reasons given"). Appellant relies on his Initial Brief for further argument on this point.

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.

In its answer brief Appellee relies on the trial court's finding that age does not apply as a mitigating circumstance because Appellant was 19 years old and therefore an adult. This finding was factually incorrect where, as fully explained in the Initial Brief, Appellant was 18 years old at the time of the offense. A new sentencing should be required where an important statutory mitigating circumstance is rejected due to a clearly flawed factual finding.

More important is the fact that the trial court utilized the wrong standard in totally rejecting age -- based merely on the fact that Appellant was legally an adult.[10] The cases Appellee relies on do not support the use of such a standard. For example, in Peek v. State, 395 So. 2d 492, 498 (Fla. 1980), this Court stated that "there is no per se rule which pinpoints a particular age as an automatic factor in mitigation." Conversely, it cannot be said that there is a per se rule excluding all adults from this mitigating circumstance -- particularly an 18 year old who is much younger emotionally and intellectually. Appellant recognizes that in Ellis v. State, 18 Fla. L. Weekly (Fla. July 1, 1993) this Court has recognized one group to which this factor must apply -- people under 18 years of age. However, Ellis is not meant to automatically exclude all person 18 years and older. In fact, it makes no sense to require the finding of this factor for a person of unusual maturity who is 3 months younger than Appellant, but to automatically exclude this factor for an intellectually and emotionally immature person as Appellant due to 3 months in age.[11] The trial

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[10] The trial court also made reference to the fact that Appellant was not insane. Such a fact does not eliminate age as mitigating. The trial court also mentions one prior conviction as a juvenile but does not attempt to explain how this discounts age as mitigating. For all we know, Appellant's prior trouble was due to his youth, low intelligence, and severe emotional handicaps.

[11] Appellee claims that Appellant is a mature individual but cites no evidence for this proposition. In fact, the uncontroverted evidence showed that throughout his life Appellant functioned at a retarded level (R1938,1965,1971,1976), and tested low intellectually. For example, 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

court erred in using the wrong standard an in failing to find age as a mitigating factor.

Finally, Appellee claims that the error was harmless. This claim is based on the trial court's conclusion that the aggravating circumstances outweigh the mitigating circumstances. However, where an important mitigating circumstance is excluded from the weighing process, the state has not proven beyond a reasonable doubt that the weighing process has not been affected -- that is, that the error is harmless.[12] Age is a mitigating circumstance of great significance in this case where it is combined with Appellant's emotional and mental immaturity. See Echols v. State, 484 So. 2d 568, 575 (Fla. 1985) ("if it [age] is to be accorded any significant weight it must be linked with some other characteristic of the defendant ... such as immaturity" (emphasis added)). The other mitigating evidence, along with the duplication or triplication of some of the aggravating evidence, makes this a legitimate weighing process. It cannot be said that exclusion of an important statutory mitigating factor from the weighing process was harmless. In addition, assuming arguendo that the error by itself could be harmless, this error combined with other possible sentencing errors

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functioning well below his chronological age of 18 (R2054-76). Clearly, Appellant was not intelligent or mature for the age of 18.

[12] Appellee's reference to the statement that any of the aggravators would outweigh the mitigators cannot make the error harmless. First, since the trial court failed to consider an important mitigating circumstance the weighing process is incomplete and it cannot be concluded that the aggravators outweigh the mitigators. Second, as explained on pages 7-8, it is not permissible for a trial court to rectify its error through a harmless error analysis.

requires a new sentencing proceeding. Appellant relies on his Initial Brief for further argument on this point.

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.

Appellee relies on Grossman v. State, 525 So. 2d 833 (Fla. 1988), claiming the facts are identical in finding the felony aggravator because an office's handgun was taken. However, Grossman is not applicable because other items were taken from the officer during the struggle in that case -- the defendant's property which included a driver's license. Unlike this case, the robbery of these other items in Grossman was the purpose of the confrontation. In other words, the robbery was not incident to the killing; it was the purpose of the killing. In addition, Grossman was decided prior to the principle of law involved here.

Appellee also states that the later case of Jones v. State, 580 So. 2d 143 (Fla. 1991), can be factually distinguished. However, the importance of Jones is not in its facts being on point. The importance of Jones is in its principle -- where the robbery is not the reason for the killing the aggravator does not apply. 580 So. 2d 146.[13] This principle is important as it eliminates the aggravator in the less culpable situation where robbery was not the planned motivating force but was incidental to the killing. The principle also eliminates the anomaly of consid-

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[13] See also Parker v. State, 458 So. 2d 750, 754 (Fla. 1984) (motive for killing was not for items stolen -- motive was to keep victim from implicating defendant in other murders).

eration of the aggravator where there is the snatching of a pistol during the heat of a struggle, but not finding the aggravator in a more culpable situation where one purposely arms oneself prior to the shooting. It was error to find the taking of the officer's gun to be an aggravating factor where it was not the reason for the killing. The error in weighing this factor cannot be deemed harmless where substantial mitigation was present and other aggravating factors were duplicating, or triplicating.[14] Appellant relies on his Initial Brief for further argument on this point.

POINT V

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

In its answer brief, Appellee relies on subjective feelings to claim that this offense should qualify as HAC. Appellee also relies on reasons not utilized by the trial court. None qualify this offense as especially HAC.

The trial court's foremost reason for finding HAC is due to the multiple shots and how they show deliberation. However, the fact is that there was one shot, a pause for a second or two, followed by a rapid continuous succession of shots that were fired within a matter of seconds (R1221,1237,1238).[15] As explained in Appellant's Initial Brief, the fact that the victim was shot

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[14] For the reasons stated in Point II, supra, the existence of other possible remaining aggravating circumstances cannot automatically make the error harmless.

[15] In fact, the shots were so rapid that not all of them could be distinguished separately (R1237). It should be noted Reed Knight, the state's firearm examiner, testified that the gun used in this case has a tendency to discharge more bullets than the shooter intends if the shooter is not familiar with the gun (R1507).

multiple times does not qualify the offense as especially HAC.[16] Appellant acknowledges that the raw number of shots involved tends to give one a "gut" feeling that this was HAC. However, aggravating circumstances are not supposed to be decided on gut reactions. Bonifay v. State, 18 Fla. L. Weekly S464, 465 (Fla. Sept. 2, 1993) (although murder was "vile and senseless," where the victim was shot multiple times and begged for his life, it did not rise to especially HAC). As explained in Bonifay, supra, HAC applies when there is the intent to inflict a high degree of pain or to torture the victim, but not merely because the victim begged for his life and died from multiple gunshots:

> The record fails to demonstrate any intent by Bonifay to inflict a high degree of pain or to otherwise torture the victim. The fact that the victim begged for his life or that there were multiple gunshots is an inadequate basis to find this aggravating factor absent evidence that Bonifay intended to cause the victim unnecessary and prolonged suffering. *Santos v. State*, 591 So. 2d 160 (Fla. 1991).

18 Fla. L. Weekly at S465.

Here, the rapid succession of shots, within a matter of seconds in a panicked situation, simply does not prove the torturous intent required for HAC.[17]

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[16] See Robertson v. State, 611 So. 2d 1228 (Fla. 1993) and page 36 of Appellant's Initial Brief.

[17] It is not the number of shots which informs one of the wrongdoer's culpability for this aggravator. Rather, it is what the wrongdoer is doing during, or between, the shots. For example, if there are 3 shoots spaced 10 minutes apart, and the wrongdoer taunts the victim between shots, showing an enojyment of the suffering of the victim, HAC would apply. Whereas, a greater number of shots in rapid succession would not prove such an intent. That is why multiple shots of 7, 9, 10 or 14 does not qualify as HAC by itself. See page 36 of Initial brief.

The trial court's other reason for finding HAC was the conclusion that the victim must have suffered intense pain. First, as explained in Teffeteller v. State, 439 So. 2d 840, 846 (Fla. 1983), the suffering of the victim is not HAC as it does not set the murder apart from the norm of capital felonies:[18]

> The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies.

In addition, there was not sufficient evidence of prolonged suffering. The officer's death, although not instantaneous, was quick as he was pronounced dead upon reaching the hospital (R1198). The degree of pain could not be determined. The trial court even recognized this in its sentencing order:

> Medically, Dr. Hobin could not determine the time the victim remained conscious or whether the officer could have moved after all the shots were fired.

(R2722). The trial court merely surmised suffering. This Court has specifically condemned the finding of HAC based on a trial judge's assumption as to pain, even where the assumption is based on a logical inference. Clark v. State, 443 So. 2d 973, 976 (Fla. 1983) (where degree of pain not proven by state, offense is not HAC -- "logical inferences" by trial court will not suffice where state has proved the aggravator); King v. State, 514 So. 2d 354 (Fla.

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[18] Of course, if the defendant deliberately tries to torture or inflict a high degree of pain, HAC would apply. See Cheshire v. State, 568 So. 2d 908 (Fla. 1990); Porter v. State, 564 So. 2d 1060 (Fla. 1990). But it is the intentional design of the perpetrator to torture of inflict pain rather than the pain itself which HAC is designed to cover. Mills v. State, 476 So. 2d 172, 178 (Fla. 1985) (whether victim lingers is pure fortuity, the intent of the wrongdoer is what needs to be examined). Appellant's quick panic actions were not designed to torture.

1987) (aggravator may not be based on what might have occurred). Moreover, this case cannot be legitimately reconciled with Rivera v. State, 545 So. 2d 864, 866 (Fla. 1989) wherein HAC was rejected when a police officer was shot, then while kneeling with his hands upraised he was shot twice more, and even though he lingered for a few moments.

Appellee also claims that the victim was aware of his upcoming death and cites cases upholding HAC on that ground. In the cases where HAC is upheld on this basis the victim was acutely aware of his upcoming death and was helpless. For example, in Cooper v. State, 492 So. 2d 1059, 1062 (Fla. 1986) the victims were bound and helpless when the gun was pointed at one of the victims' head and it initially misfired three times. In Rodriguez v. State, 609 So. 2d 493, 501 (Fla. 1992) the victim was shot twice, then ran pleading for his life, and the defendant followed him and shot him again, the victim ran 200 feet further and the defendant pursued and shot him again. HAC is more applicable in these types of stalking or kidnapping situations where the wrongdoer obviously is intentionally causing the victim to agonize over his impending death. In cases like the present one, where there is a struggle followed quickly by a shooting, HAC has been struck even though the victim might be aware for a short period that he would die. See Brown v. State, 526 So. 2d 903 (Fla. 1988) (defendant and officer struggle, defendant shoots officer, officer says "please don't shoot", defendant then shoots officer two more times --

evidence not support HAC);[19] Rivera, supra; Bonifay, supra; Fleming v. State, 374 So. 2d 954, 958 (Fla. 1979) (murder of officer shot during struggle for weapon no more shocking than majority of murder cases).

Finally, Appellee claims that two other reasons exist for HAC -- the victim was a police officer and the officer's plea for mercy (i.e. he asked Appellant not to shoot any more (SR20)). First, this Court has made it clear that the killing of a law enforcement officer does not make it HAC. Brown v. State, 526 So. 2d 903, 907 (Fla. 1988). Second, the especially HAC aggravator is intended to apply to "the utter indifference to, or enjoyment of, the suffering of another." See Cheshire v. State, 568 So. 2d 908 (Fla. 1990). The cases cited by Appellee involve the intent to inflict pain after ignoring pleas of mercy.[20] Such actions can show an utter indifference to the suffering of another. In the present case it cannot be disputed that Appellant did not ignore the officer's request or plea, which came after Appellant had fired all the shots in rapid succession (SR20). Appellant did not show utter indifference to the officer's request.[21] This was not a "conscienceless" or "pitiless" crime as required for HAC. Instead, it was a

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[19] It should be noted in this case the officer asked Appellant not to shoot after being shot. Unlike in Cooper, Appellant did not shoot after this statement by the officer.

[20] The fact the victim pled for mercy is not significant toward finding this aggravator unless coupled with an intentional infliction of pain. Bonifay, supra.

[21] As in the other arguments, Appellant is not claiming that this action would justify his conduct; it merely intended to show that this particular aggravator does not apply.

panicked shooting which happened quickly as the result of a rapid onset of excitement. It was error to find HAC.

The error of finding this aggravator cannot be deemed harmless where there was substantial mitigation found and possible other mitigation which should at least be considered (see Point III) and the weighing of other aggravators is in question (see Points II, IV, V, VIII). Since this factor was extensively argued to the jury and one cannot determine what effect it had on the sentencing panel, a new jury should be empaneled to make a recommendation as to the appropriate sentence. Bonifay, supra. Appellant relies on his Initial Brief for further argument on this point.

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.

Appellee claims that the issue regarding the CCP jury instruction has been rejected. Such is not true. In Hodges v. State, 619 So. 2d 272 (Fla. 1993) this Court noted in a footnote that the issue had not been rejected on the merits:

> We have uniformly rejected this claim [regarding the statute] on the merits. E.g. Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992); Klokoc v. State, 589 So. 2d 219 (Fla. 1991). We have never addressed the issue of whether the standard instruction itself was vague and do not in this opinion because of our disposition of this case.

619 So. 2d at 273 (emphasis added). Appellee claims the issue was resolved in Brown v. State, 565 So. 2d 304 (Fla. 1990). However, the true merits of the issue were never really dealt with in Brown. Instead, Brown found no error based on the premise that the

requirement of Maynard v. Cartwright, 108 S.Ct. 1853, 486 U.S. 356, 100 L.Ed.2d 372 (1988) requiring clear and non-vague definition of the aggravators was not applicable to Florida because the trial judge also weighs the circumstances. However, Espinosa v. Florida, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992) has since held that clear definitions are required in Florida:

> Our cases further establish that an aggravating circumstance is invalid in this sense if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor....
>
> Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation....
>
> Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.
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> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see *Mills v. Maryland*, 486 U.S. 367, 376-377, 108 S.Ct. 1860, 1866-1867, 100 L.Ed.2d 384 (1988), just as we must further presume that the trial court followed Florida law, cf. *Walton v. Arizona*, 497 U.S. 639, 653, 110 S.Ct. 3047, ___, 111 L.Ed.2d 511 (1990), and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, cf. *Baldwin v. Alabama*, 472 U.S. 372, 382, 105 S.Ct. 2727, 2733, 86 L.Ed.2d 300 (1985), and the result, therefore, was error.

112 S.Ct. at 2928 (emphasis added). Thus, Brown is inapplicable.

Appellee next relies on Vaught v. State, 410 So. 2d 147 (Fla. 1982) to argue that the standard CCP instruction is adequate even

though it does not reflect CCP as defined in decisional caselaw. First, Vaught does not contain the rationale of its holding. Presumably, it is base don the same premise as Brown, supra, which, as explained above, is no longer applicable. Second, Appellee's argument is the same as the prosecutor argued below -- that the jury need not be adequately guided in discerning aggravating circumstances.[22] Appellee's claim is that the jury need not be told that for an offense to be CCP it must be the result of "a careful plan or prearranged design."[23] However, this is the very essence and nature of CCP. E.g. Rivera v. State, 545 So. 2d 864, 865 (Fla. 1989); Rogers v. State, 511 So. 2d 526, 553 (Fla. 1987); Schafer v. State, 537 So. 2d 988, 991 (Fla. 1989); Rutherford v. State, 545 So. 2d 853, 856 (Fla. 1989). This nature of CCP is not adequately defined to a lay juror by merely defining the factor as cold, calculated and premeditated. It was error to deny the requested instruction and to give the vague instruction in its place.

Finally, Appellee argues the error is harmless because the trial court conducted an independent evaluation of CCP and didn't find it. This argument misses the point. The instruction directly affects the jury's decision and, as explained in the above quote from Espinosa, it is to be presumed that the jury relied on CCP. In this light, in James v. State, 615 So. 2d 668 (Fla. 1993) this Court recognized that a vague instruction on an aggravator would

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[22] Of course, such is not true. Espinosa, supra.

[23] The very definitional law that was left out of the instructions to the jury.

not be harmless as to the jury recommendation even where the trial court found 4 aggravators and no mitigators:

> Striking that aggravator left four vague ones to be weighed against no mitigators, and we believe that the trial court's consideration of the invalid aggravator was harmless error. We cannot say beyond a reasonable doubt, however, that the invalid instruction did not affect the jury's consideration or that its recommendation would have been the same if the requested expanded instruction had been given. Therefore, we reverse the trial court's order as to the last issue regarding the constitutionality of the instruction on the heinous, atrocious, or cruel aggravator. The trial court is directed to empanel a new jury, to hold a new sentencing proceeding, and to resentence James.

615 So. 2d at 669 (emphasis added). The possible reliance on CCP by the jury, but not directly by the trial court, is explained by the fact that the prosecutor aggressively argued to the jury that CCP applied (R2274-75) and after the recommendation told the trial court that under the law it did not apply (R2388-89). The error which affects the jury's decisional process, particularly in light of the substantial mitigation, cannot be deemed harmless. Appellant relies on his Initial Brief for further argument on this point.

POINT VII

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

As to the prosecutor's opposition to a limiting instruction regarding the doubling of aggravating factors and then over Appellant's objection (R2267), arguing to the jury to consider duplicate factors separately, while later informing the trial court not to consider them separately -- Appellee claims the prosecutor's argument to the jury was not improper. Such claim is frivolous.

The prosecutor even admitted, to the judge, that the duplicate factors should not be considered separately (R2376-78). The error of allowing the prosecutor to distort the jury determination at sentencing is by itself sufficient to require reversal for a new sentencing.

The other two improprieties were, admittedly, unobjected to. However, as stated in the Initial Brief, such misconduct constitutes fundamental error because it destroyed the essential fairness of the sentencing. See Dukes v. State, 356 So. 2d 873, 874 (Fla. 4th DCA 1978). For example, by arguing CCP to the jury when he knew it didn't apply (by his acknowledgement to the trial court) the prosecutor essentially was presenting something to the jury he knew to be false. Various forms of knowingly presenting false evidence have been classified as fundamental type error. See DeMarco v. United States, 928 F.2d 1074 (11th Cir. 1991); Porterfield v. State, 442 So. 2d 1062 (Fla. 1st DCA 1983); State v. Nessim, 587 So. 2d 1344 (Fla. 4th DCA 1991).

Appellee does not challenge that the prosecutor's comment regarding the victim was improper.

As to the prosecutor's arguing to the jury to find CCP, while telling the trial court that that law did not support CCP, Appellee does not defend the prosecutor's false argument to the jury, but argues "we can presume that the jury disregarded the factors not supported by the evidence." Appellee's brief at 30. There can be no such presumption where the prosecutor has urged the jury to find the aggravator. See James v. State, 615 So. 2d 668, 669 (Fla. 1993).

Finally, Appellee claims the error is harmless because of the trial court's evaluation. However, the error of misleading the jury goes to the jury's recommendation which may have been influenced. See James v. State, supra. Appellee also claims the error might be harmless because Appellant's closing argument might have been persuasive. The focus should be on the impact of the error. The distorting of the jury's evaluation during sentencing cannot be deemed harmless, especially in light of the significant mitigation present in this case. Appellant relies on his Initial Brief for further argument on this point.

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.

Appellee claims this issue is not preserved. However, Appellant did challenge the applicability of this circumstance (R2216-19). Furthermore, this is a type of sentencing error which can be reviewed for the first time on appeal. See State v. Whitfield, 487 So. 2d 1045 (Fla. 1986) (validity of findings may be raised first time on appeal).

Appellee argues that the robbery was not based on the same aspect as the aggravtor to avoid arrest and hinder law enforcement. However, as the trial court's order shows, Appellant committed the robbery of the gun to specifically avoid arrest and hinder law enforcement:

> 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). The robbery was not separate and distinct from the other two aggravators.[24] Even Appellee admits the purpose and effect of taking the gun was to avoid arrest.[25] Thus, these aggravators are based on the same aspect of the offense. For the reasons noted in the other points, this error cannot be deemed harmless. Finally, Appellant takes issue with Appellee's misrepresentation that the officer was downed by the first shot and the remaining shots were fired while he was on the ground.[26] The record shows that, after the first shot, the officer was still standing when shots were fired (SR32). Some other shots hit the officer while he was in the process of falling (SR34). Apparently, during the rapid continuous succession of shots, the officer may have been on the ground at the last shot or shots (SR34). Appellant relies on his Initial Brief for further argument on this point.

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[24] It would be totally different situation if Appellant was initially perpetrating a robbery, and then was confronted by the officer, and then tried to avoid arrest. Such facts would support separate and distinct aggravators of robbery and avoid arrest.

[25] Appellee has taken issue with Appellant's reference to the trial court's order that indicates the taking of the gun was to aviod arrest. The fact is the trial court did not find any other reason for taking the gun other than to avoid arrest and hinder law enforcement. After the gun was taken it was further used in an effort to avoid arrest. Appellant certainly did not take the gun for profit. He did not go looking to steal a gun that night.

[26] Appellee offers no citations for such a representation.

POINT IX

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

In its answer brief, Appellee claims that Appellant's sentence is proportional to sentences in other similar cases.[27] However, Appellee fails to compare the present case to any other similar cases.

As pointed out in Appellant's Initial Brief there are other cases involving the killing of other police officers with facts more egregious than the present case which resulted in a sentence of life. For example, in Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988) the defendant took hostages and stated that he would shoot the police and when the police arrived he killed two officers. In Brown v. State, 526 So. 2d 903 (Fla. 1988), the facts are very similar -- where Brown was ordered out of the car, as the officer tried to cuff him the two men got into a struggle, Brown then shot the officer. At this point the facts in Brown become more egregious where the officer said, "please don't shoot," but Brown ignored the request and killed the officer with two shots. Life was imposed. As more fully explained in the Initial Brief, while the instant crime is not excusable, it is clear the manner of the crime is not the most aggravated type for which the unique punishment of death is reserved.

The main thrust of Appellee's claim, as shown by the extensive quotes of the trial court's order, is in essence that, if the trial court orders death, the death penalty is proportionally warranted.

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[27] In fact, this is the heading Appellee uses.

This is nonsense. Under Appellee's analysis no death sentence would, or could, ever be deemed disproportional. Individual trial judges are not in a position to preform proportionality review of their cases. Such review is done by this Court to ensure that the death sentence is not disproportional where death has not been imposed in similar situations.

Appellant also takes issue with Appellee's claim that only the facts of offense, and not mitigating factors and the defendant's character, play a role in proportionality analysis. Clearly, mitigating circumstances play a role in proportionality analysis. As fully explained in pages 47-50 of the Initial Brief there were significant mitigating circumstances in number and quality in this case.

Appellee tries to minimize the finding of the trial court of the mental mitigator that Appellant was under a severe mental or emotional disturbance by stating that Appellant's emotions were disturbed only due to a fight with his stepfather a few hours earlier. First, a physical fight with a family member can be emotionally significant. Second, another part of Appellant's emotional and mental state was explained by Dr. Petrilla's testimony that Appellant is subject to a 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). This cannot be ignored.

Similarly, the trial court's finding of the mental mitigator regarding the second statutory mental mitigator (impairment of

capacity to appreciate criminality of conduct) was supported by substantial evidence including Dr. Petrilla's testimony that Appellant's brain dysfunction and emotional handicaps combined to substantially impair the capacity to appreciate the consequences of conduct (R2088). Contrary to what has been alleged, the record is replete with details of Appellant's brain dysfunction and emotional handicaps from a very young age up to the time of the offense. See pages 11-22 of Appellant's Initial Brief.[28] These include raw data, tests, and evaluations by Dr. Petrilla when Appellant was 18 years old. See pages 12-15 of Appellant's Initial Brief.

Appellee did cite to two cases to claim proportionality -- Jones v. State, 580 So. 2d 143 (Fla. 1991) and Rivera v. State, 545 So. 2d 864 (Fla. 1989). These cases were merely cited and not analyzed or compared to the instant case. These cases are significantly different. In Jones and Rivera there were absolutely no mitigating circumstances. In the present case there were substantial and significant mitigating circumstances. See Appellant's Initial Brief at page 47-50. A comparison of the dissimilar cases does not help in proportionality review. This simply is not one of the most aggravated and least mitigated cases for which the unique punishment of death is reserved.

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[28] As these facts show the dysfunction and emotional handicaps were not something that suddenly appeared on the day of the offense; rather they were present at a young age and, because Appellant had not been placed in the type of treatment program which doctors had recommended (R2175), his problems became progressively worse (R2175).

Finally, as explained at page 50 of the Initial Brief, the death penalty would also be disproportionate due to the elimination of some aggravators which are either duplications or invalid. Appellant relies on his Initial Brief for further argument on this point.

POINT XI

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

Appellee argues this issue is not preserved. Clearly, Appellant put forth objections (R1665,1673), which the trial court understood and overruled (R1667,1673).[29] Appellee even recognizes that the first ground -- the improper highlighting of the prosecution's evidence -- could be properly viewed as the ground raised below in slightly different semantics.[30] The trial court understood[31] and ruled on the objection, thus this ground is ripe for appellate review. See Williams v. State, 414 So. 2d 509 (Fla. 1982) (magic words not required for preservation as long as objection understood and ruled on); Jaggers v. State, 536 So. 2d 321 (Fla. 2d DCA 1988). The two other separate grounds -- instruction permitted decision based on insufficient evidence and the improper comment on the evidence -- may not have been specifically raised by defense counsel below. Nevertheless, the nature of the errors, flaws in the premeditation instruction which was the key

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[29] At the end of the discussion the trial court specifically noted the objection was in the record and subject to review (R1673).

[30] Appellee states this in terms of the language in the brief being an extension of the argument in the trial court.

[31] As did the prosecutor below.

element of the case, is fundamental error going to the heart of this case. Gill v. State, 586 So. 2d 471 (Fla. 4th DCA 1991) (instruction which misleads jury as to required element which is in dispute is fundamental error); Carter v. State, 469 So. 2d 194 (Fla. 2d DCA 1985); State v. Jones, 377 So. 2d 1163 (Fla. 1979); Doyle v. State, 483 So. 2d 89 (Fla. 4th DCA 1986).

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

Citing cases that standard jury instructions are only a guide and do not relieve the judge of the responsibility to correctly instruct the jury on the law, Appellee apparently is claiming that the standard instruction is not sufficient to define premeditation. Clearly this is wrong. The only additions provided by the requested instruction are those parts singling out the prosecutor's theory of premeditation.[32] As fully explained in Appellant's Initial Brief at pages 52-55, this type of highlighting is improper.

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

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[32] Additionally, the following holding from Perkins v. State, 463 So. 2d 481 (Fla. 2d DCA 1985) is also appropriate to this issue:

> In so ruling, we note that the trial court refused to give appellant's requested instruction, which is specialized and requires comment on the evidence. Instead, the trial court gave the standard jury instruction used in criminal cases. *See* Fla.Std. Jury Instr. (Crim.) (pp. 12-15, 23-24, 29, 168) (1981 ed.). This is the correct practice as the standard jury instructions were designed to cover all aspects and elements of the statutory offense, and to avoid unnecessary comment on the evidence.

463 So. 2d at 482-483.

Appellee does not challenge the merits of this part of the instruction being improper. Appellant relies on his Initial Brief for further argument on this ground.

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

Appellee does not challenge the merits of this impropriety. Appellant relies on his Initial Brief for further argument on this ground.

Finally, Appellee claims that all three errors were harmless. In support of such a claim Appellee airs its belief that "there was no doubt that Appellant committed this murder during the commission of a felony." Appellee's brief at 47. However, the jury never found Appellant guilty of felony murder. The indictment charged Appellant only with premeditated murder (R2429) and Appellant was found guilty only of murder as charged in the indictment (R2596). Thus, the jury did not find Appellant guilty under the theory of felony murder and it cannot be said beyond a reasonable doubt that the flawed premeditation instruction was harmless. In making this argument Appellant realizes that this Court has held in the past that the state need not provide notice of felony murder in the charging document. However, this does not mean that the state can rely on a verdict finding Appellant guilty as charged in the indictment as a finding on felony murder where felony murder is not charged or specified in the indictment. For such reliance the state must either specifically charge felony murder or move for a verdict form which in some manner informs appellate courts that there was a finding of guilt on the basis of felony murder. The state as beneficiary of the error, cannot rely on this theory to prove beyond a reasonable doubt that the error was harmless.

Appellee's other claim is that the error was harmless because there were multiple shots and thus there can be no jury question as to premeditation.[33] However, clearly there was at least a question as to whether Appellant was acting in a panic or depraved mind in killing the officer or whether he acted from a premeditated design.[34] Merely because an affirmative defense was not presented does not mean that there was no jury question as to premeditation. The error of allowing the state to improperly tailor the premeditation instruction to fit its theory of premeditation, along with the other flaws in the instruction, cannot be deemed harmless.[35] Appellant relies on his Initial Brief for further argument on this point.

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[33] Appellee asserts that there was a few seconds pause after the first shot. To clarify matters, the record shows that there was a struggle, Appellant fired a shot, then after a pause of one to two seconds the other shots were fired in a continuous, rapid succession (R1221,1237,1238).

[34] In some cases, similar, but not identical, facts regarding a defendant's intent has been found insufficient to prove premeditation. For example, in Weaver v. State, 220 So. 2d 53 (Fla. 2d DCA 1969) evidence was insufficient for premeditation where the defendant struggled with the officer, the officer was heard to exclaim, "No! No!" followed by a sporadic series of shots and the officer being shot to death, plus the defendant's confession to killing the officer. See also Forehand v. State, 126 Fla. 464, 171 So. 241 (1936) (defendant took officer's gun then shot him 4 or 5 times -- no premeditation); Tien Wang v. State, 426 So. 2d 1004 (Fla. 3d DCA 1983) (evidence of repeated blows not sufficient to prove premeditation where consistent with other emotional state). At the very least, there is a legitimate jury question as to premeditation.

[35] This is far from an open and shut case of a premeditated design. The state did not theorize that Appellant went out looking to kill an officer. Instead, it was pure happenstance that Appellant was stopped. He panicked and engaged in a struggle. His emotions increased during the struggle. Without a premeditated design, although maybe with a depraved mind or in a panic, Appellant, while in excitement, shot the officer. Based on its view of the evidence, the jury is free to accept or reject this evaluation of the evidence. The point is, it cannot be said there was no jury question as to premeditation so as to make the error harmless.

POINT XII

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

Appellee has not challenged the fact that it was error for the state to mislead the defense as to the charge it was using as the underlying felony, thus Appellant relies on page 58-60 of his Initial Brief.

Appellee claims there was proof of corpus delicti (Part 2) because of the "possibility" that Appellant "could have" been arrested for failure to produce a driver's license. Speculation can not substitute for evidence. There is no evidence, apart from the confession, that the officer communicated to Appellant that he was under arrest for anything. Besides, the requirement of an actual or constructive detention does not occur while there is resistance. See California v. Hodari D., 499 U.S. ___, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). Thus, the corpus delicti was not shown. Appellant relies on his Initial Brief for further argument on Point II.

Appellee has challenged part 3 in this point regarding lack of notice in the indictment. Appellant relies on the Initial Brief for part 3.

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.

Appellee misapprehends the nature of this issue. Appellant does not complain that his actions, including the grip on the gun, or mindset are irrelevant. Rather, the complaint is that it is improper for Detective Mann to testify to police techniques and Detective Mann's reason for using a two-handed grip. As explained in the

Initial Brief, police techniques and their mindsets were not in issue and were not relevant.

Also, Appellant has mischaracterized what the evidence showed regarding the shooting. The officer was not downed by the first shot with the others following while he was on the ground. The record shows that after the first shot, the officer was still standing when shots were fired (SR32). Then some other shots hit the officer while he was in the process of falling (SR34). Again, these shots were fired in a continuous, rapid succession.

Finally, for the reasons stated in Point XI of this brief the error cannot be deemed harmless due to a felony murder conviction (which does not exist here) or on the strength of evidence of premeditation. Appellant relies on his Initial Brief for further argument on this point.

POINT XVI

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

This issue can be reviewed on the merits notwithstanding the lack of an objection at trial. Bennett v. State, 173 So. 817 (Fla. 1937). Appellant relies on his Initial Brief for further argument on this point.

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.

Although Appellee gives a detailed explanation of facts, most of which are not relevant to the true dispute in this issue, Appellee has failed to address Appellant's complaint regarding the evidence of the robbery conviction. Appellant agrees with Appellee that Dr. Petrilla may be questioned about the details of a prior incident which

he may have relied upon for his evaluation. However, as explained in the Initial Brief, the state did not have the freedom to elicit evidence as to how the criminal justice system treated the incident.[36] Furthermore, the prosecutor below argued that he was eliciting the robbery conviction because defense had opened the door, but did not make the claim Appellee now makes. The state cannot now make a new claim and jettison its claim made below.[37] State v. Adams, 378 So. 2d 72 (Fla. 3d DCA 1979). Appellant relies on his Initial Brief for further argument on this point.

POINT XIX

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

The main claim in this issue is that there was no opportunity to rebut hearsay (the report) which the witness (Mr. Dye) had no idea who wrote or under what conditions it was produced. This was preserved below (R1980-81). Because the witness had absolutely no idea as to who wrote the report (R1982-83), Appellant obviously could not rebut the report. Appellee argues that it could be rebutted by calling other witnesses. The problem is that no one know who created the report -- not even witness Dye who the state chose to question about the report. There is no evidence that any of the individuals named by Appellee had any knowledge regarding the report. There is only the

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[36] As explained in footnote 31 of the Initial Brief, in reality there was no criminal conviction. However, the jury was still led to believe there was such a conviction.

[37] This is particularly true where a foundation would need to be laid before introducing the evidence (i.e. -- that doctor specifically must have indicated that he was relying on the actions of the criminal justice system toward the conduct). Because the prosecutor below did not rely on Appellee's argument, he did not even attempt to lay the foundation which would be required.

state's speculation, which really is not worth much when the state below chose a witness who knew nothing about the report. Appellant relies on his Initial Brief for further argument on this point.

POINT XX

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

Appellant relies on his Initial Brief for argument on this point except to note that Appellee claims this issue has been resolved by the United States Supreme Court in Lowenfield v. Phelps, 484 U.S. 231 (1988). Such a claim is without merit. Lowenfield involves the question of how Louisiana narrows its class of death eligibles. Louisiana purposely narrows the class to a great degree by the specific guilt finding to enable death penalty eligibility. The Florida legislature did not have such an intention. Florida's intent is to define murder under one statute (§ 782.04) and then to narrow the class of death eligibles in a separate statute (§ 921.141) created especially for that purpose. Appellant relies on his Initial Brief for further argument on this point.

POINT XXIV

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Florida's capital sentencing scheme, facially and as applied to this case, is unconstitutional. Trushin v. State, 425 So. 2d 1126, 1129 (Fla. 1982) (factual validity may be raised for first time on appeal).

Contrary to Appellee's assertions, Appellant did challenge the constitutionality of Florida's death penalty on various grounds in the trial court (R2475-76,2497-98,2523-25,2611-36,2680-87,2573-81). Appellant relies on his Initial Brief for further argument on this point.

POINT XXV

THE AGGRAVATING CIRCUMSTANCES USED AT BAR ARE UNCONSTITUTIONAL.

As Appellee acknowledges, the constitutionality of the felony murder aggravator was challenged below. In addition, the challenge to the facial validity of other aggravators are reviewable on appeal. See Trushin v. State, 425 So. 2d 1126, 1129 (Fla. 1982).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to SARA D. BAGGETT, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 13th day of September, 1993.

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