IN THE SUPREME COURT OF FLORIDA

DEAN KILGORE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 83,684

APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

This is the appellant's second capital appeal in this case. The first appeal, Dean Kilgore v. State, Case No. 76,521, was dismissed after appellant was permitted to withdraw his nolo contendere plea.

References to the record on appeal are designated by "OR" for the original record in Case No. 76,521, by "R" for the current record, and by "T" for the trial transcript. References to the appendix to this brief are designated by "A".

STATEMENT OF THE CASE

On March 2, 1989, the Polk County Grand Jury indicted the appellant, Dean Kilgore, for the first-degree, premeditated murder of Emerson Robert Jackson on February 13, 1989, and for possession of contraband, a knife, by a state prison inmate. (OR 631-32) Kilgore pled nolo contendere to both charges, and on July 13, 1990, the circuit court sentenced him to death for the murder and fifteen years imprisonment for possession of contraband. (OR 1010-19)

Kilgore moved to withdraw the plea on the ground that it was entered on advice of counsel who mistakenly believed the circuit judge would not impose a death sentence. (OR 1028-29) Kilgore's notice of appeal was filed before the motion could be heard. (OR 1038-39, 1043-44, 1062) This Court relinquished jurisdiction with directions to hear the motion on its merits. (A 1-3) After further proceedings, the circuit court granted Kilgore's motion to withdraw his plea on June 22, 1993. (R 36-37) Consequently, this Court dismissed the original appeal in Case No. 76,521. (R 38)

Kilgore was tried by jury before the Honorable Dennis P. Maloney, Circuit Judge, on March 28 through April 7, 1994. (T 1) The jury found Kilgore guilty as charged and recommended the death penalty by a vote of 9 to 3. (R 84-85, 89) On April 27, 1994, the court sentenced Kilgore to death for the murder and fifteen years for possession of contraband. (R 119-35; A 4-8) Kilgore filed a notice of appeal on May 6, 1994. (R 136)

STATEMENT OF THE FACTS

A. Trial Testimony and Proceedings

Dean Kilgore and Emerson ("Pearl") Jackson were inmates at Polk Correctional Institution. (T 712, 714, 733-34, 742, 782, 790-91) They had a homosexual relationship. (T 757, 849, 868, 897, 902, 1165) Kilgore was diabetic. (T 1168, 1193) Jackson was involved with other men, including Tony Capers. (T 849, 868, 881-82, 897-98, 901-02, 908-09, 1059-60, 1073-74, 1165, 1168-69)

Inmate Timothy Squires said Kilgore frequented the hobby shop, made small boats, and usually minded his own business. (T 897) He described Jackson as "a trouble-making dude" who played people against each other and caused a lot of problems. (T 897-98) Jackson caused a group of other inmates to confront Kilgore at the hobby shop. Kilgore defended Jackson from the others, but he argued with Jackson for causing problems. (T 898-99) Inmate Jonathan Montgomery testified that Jackson came to the hobby shop on Saturday or Sunday and started an argument with Kilgore, who told Jackson to leave him alone, that he was tired of Jackson messing with him and playing games. (T 920-21) Inmate Raymond Trenary testified that on Sunday Kilgore told him not to empty the hobby shop trash can because he had put something in it. It was a common practice for the inmates to store things in the trash can. (T 926-33)

On the morning of Monday, February 13, 1989, Kilgore entered Jackson's dormitory, borrowed a cigarette from inmate James Montgomery, then confronted Jackson outside his cell. (T 850, 853,

883-84, 999-1004, 1007-08, 1063-65, 1080-83) Kilgore was armed with a homemade knife, a "shank," he borrowed from Squires the day before.[1] (T 789, 813, 884-86, 892-93, 1031) The two men struggled and fell to the floor.[2] (T 850, 853-60, 863-67, 913, 917-19, 924, 1066-67, 1254-55) Inmate Richard Meyer said Kilgore "body-slammed" Jackson to the floor. (T 1031, 1037, 1039) Inmate Jonathan Montgomery testified that Kilgore got up and said, "Next time I'll kill you." (T 914-15, 919, 925)

Jackson suffered three knife wounds. Two of the wounds were not serious, but the third was a deep stab wound to the chest which penetrated the left lung, the heart cavity, and the aorta, causing Jackson to die from internal bleeding. (T 645-47, 655, 669-80, 686, 690-95) There were no defensive wounds. (T 687-88) Jackson may have lost consciousness immediately; he could not have lived more than five to ten minutes. (T 679, 684)

While Jackson was lying on the floor, Kilgore poured paint thinner, or a similar caustic liquid[3] which also contained wood

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[1] An FDLE fingerprint expert examined the knife, but he did not find any latent prints on it. (T 960-70) An FDLE serologist found a trace of human blood on the knife blade, but the sample was too small to determine the blood type. (T 987, 991-92)

[2] Each witness described the struggle differently.

[3] The police seized three different containers as the possible sources of the liquid. Exhibit 7 was a can found in a paper bag obtained from the shower across the hall from Jackson's cell. (T 573-74, 583-88) Exhibit 8 was found in Kilgore's unlocked locker at the prison hobby shop two days after the offense. (T 1124, 1127-30) Exhibit 9 was a can found in Squire's locker. (T 1130-31) An FDLE chemist examined the contents of the containers, which he described as a can with a dried rusty colored substance inside, a bottle of liquid, and a mineral spirits can with liquid. Exhibits 7 and 9, the cans, contained medium

chips, from a can onto Jackson's face and into his mouth. (T 622-24, 632, 638-39, 655, 664-65, 717, 832, 1005-06, 1015, 1020-22, 1031-32, 1042-43, 1045, 1068-70) The state presented conflicting evidence regarding whether Kilgore attempted to strike a match to ignite the paint thinner. (T 925, 952-53, 958, 1007-08, 1015-17, 1020, 1022-23, 1047, 1083-84, 1087-89)

One witness, Marino Vargas testified that Kilgore also removed a shoelace from his boot and used it to strangle Jackson. A similar shoelace was found attached to the knife. (T 1015, 1022, 1024) But other witnesses testified that they did not see Kilgore try to strangle Jackson. (T 870, 925, 1049) Other inmates sought help for Jackson from the prison guards. (T 830, 840, 857, 872, 1044-45, 1086) During the ensuing commotion, Kilgore walked past the guards and out of the dorm. (T 723, 1033)

The court overruled defense counsel's objections and allowed the prosecutor to impeach some of the inmate witnesses by having Detective Ore first play tape recordings of their prior statements about what they had seen during the confrontation and then read the corresponding transcripts of the same statements. (T 1135-44, 1195-99, 1208-11, 1236-44, 1252-54)

Kilgore went directly to the administration building after

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petroleum distillate, a volatile ingredient of paint thinner or mineral spirits. Exhibit 7 appeared to be dried up paint, while 9 appeared to be mineral spirits. In liquid form, this substance is not readily ignited by a match, but the vapor is flammable. Exhibit 8 contained hydrocarbon components, including toluene and xylene, which are found in gasoline or glue. This substance was much more volatile than the others. (T 971-87) Squires testified that the police found a couple of ounces of gasoline which he kept in a mineral spirits can in his locker. (T 896)

leaving the dorm. (T 724, 771-74, 890, 1174) He told Sgt. Lindsay he had just stabbed a guy. (T 762-64, 1174-75) Lindsay said Kilgore was upset, out of breath, anxious, and nervous. She took him to the officer in charge, Sgt. Smallwood. (T 765-66, 774-75, 782, 1175) Officer Downes joined them. (T 732-34, 750, 782, 1175) Kilgore stated that he stabbed Jackson and hoped he killed him. (T 734-36, 759, 783, 785, 795) Kilgore also stated that Jackson was going to stab him. (T 785, 795)

Smallwood described Kilgore as being in a "hyper state." (T 786, 792) In his deposition, he said Kilgore was extremely upset. (T 793-94) Downes testified that Kilgore was angry, but in his taped statement to Officer Ore and in his deposition, Downes described Kilgore as being upset, incoherent, and irrational, but not angry. (T 741-42, 749-52)

The officers took Kilgore to the prison medical clinic for a preliminary examination before placing him in an isolation cell. (T 634, 637, 736-37) When Jackson's body was brought into the clinic, Kilgore became hysterical and began crying, screaming, and flailing his arms with handcuffs on one hand and holding a padlock in the other. (T 738, 746-47, 752-53, 755-56) The officers restrained him so the physical could be completed, then took him to confinement. (T 738)

When the officers began to search Kilgore at the confinement area, he told them he had a knife in his pocket. (T 738-39) Officer Downes removed the knife. (T 739) No matches were recovered. (T 1204-05) After the search, Kilgore repeatedly asked

whether Pearl was dead. (T 753-54, 759, 761) At trial, Downes said Kilgore was concerned about what would happen to him because of the stabbing.[4] (T 742, 761) The Court overruled defense counsel's objection that Downes was speculating as to Kilgore's state of mind. (T 761) In his deposition, Downes said Kilgore was babbling and appeared to be remorseful. (T 756) On redirect, Downes claimed that because Kilgore was present and unrestrained during the deposition, "I was trying to tell the truth the best I could without antagonizing him, without antagonizing anyone and creating a situation." (T 757-58)

An officer was assigned to watch Kilgore in confinement to prevent any suicide attempt. (T 748-49) Kilgore wrote a letter to his mother expressing remorse for killing his friend. (T 1119-21)

Later in the afternoon, investigators questioned Kilgore after advising him of his rights.[5] (T 1097-1102, 1116-18, 1144-54) Kilgore told them that he did not intend to kill Jackson. (T 1156-57, 1162, 1173, 1181) Jackson was involved with Tony Capers and other men. (T 1165, 1168-69) When Jackson was threatened by other inmates, he turned to Kilgore for protection. (T 1166-67, 1187-88) Kilgore took the knife and paint thinner -- Kilgore said it was

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[4] At the original penalty phase trial, Downes responded affirmatively when asked whether it appeared Kilgore was "certainly remorseful." (OR 473)

[5] Kilgore's original counsel moved to suppress his ensuing statements on the ground that the officers violated his right to counsel. (OR 705-06, 1165-66) The court denied the motion. (OR 738-39) Kilgore's new trial counsel adopted the motion to suppress in a pretrial conference, (R 61-62) but did not renew the motion at trial.

"sealer" someone had given to him two years before (T 1157-58) -- to Jackson's cell intending to "nick" him, to humiliate him by cutting him and pouring the sealer on him. (T 1179, 1184-85) Kilgore said he was sure that Jackson had a knife and would try to cut him. (T 1181) Kilgore also said that he originally intended to pour the sealer on Capers and then light it. (T 1189) He said the stab wound to Jackson's chest was accidental. (T 1176-77) Jackson was holding Kilgore's arm. When they fell to the floor, Jackson relaxed his grip, and Kilgore's hand accidentally thrust forward with the knife. (T 1156, 1159-60, 1172, 1190) Kilgore thought Jackson was faking since they had been playing "jam games" for over a year, so he poured the sealer on Jackson. (T 1161, 1191) Kilgore did not have any matches. (T 1178) He did not try to light the sealer. (T 1182, 1192) Kilgore wanted out of his relationship with Jackson because Jackson was "messing with" Capers and a number of other inmates, but he was not trying to kill him. (T 1193)

The court denied defense counsel's request[6] to instruct the jury on heat of passion as a defense to premeditation. The court agreed with the prosecutor's argument that heat of passion was only applicable as one form of excusable homicide. (T 1227-28) During closing argument, the prosecutor argued that defense counsel was wrong to argue that a crime of passion could not be first-degree murder, and that the court would instruct them that heat of passion

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[6] Defense counsel said he was having his office type the instruction. He read the instruction to the court. (T 1127)

applied only to excusable homicide when the killing occurred by accident and misfortune and upon sudden provocation. (T 1326-34)

B. Appellant's Courtroom Conduct

During a recess in the first round of voir dire, defense counsel informed the court that Kilgore wanted to waive his right to be present during the jury selection process. The court reserved ruling to research the applicable law. (T 128-32) Kilgore remarked that there were only five black people in the jury panel. (T 132)

During the next recess, the court determined that Kilgore understood that he had the right to be present and to assist his counsel in the jury selection process. (T 204-06) Kilgore asserted that he wanted a new attorney. He complained about the number of blacks on the panel and about defense counsel's failure to mention this to the court despite his request. Kilgore said he was not comfortable with defense counsel, but remained silent when the court asked why. The court denied his request to relieve counsel. (T 206-09)

Kilgore then reasserted his desire to leave the courtroom, stating that this was his way of getting rid of defense counsel. (T 209-10) The court allowed Kilgore to leave, finding that he had waived his right to be present. The court noted that Kilgore had spoken out loud to counsel numerous times. His conduct was not disruptive, but it was distracting. (T 210-11) Defense counsel used four peremptory challenges in Kilgore's absence. (T 236-40)

Kilgore returned to court the next morning, March 29, 1994.

The court discussed Kilgore's concerns about his diet, insulin, use of the law library, and recreation, but there was no discussion of whether Kilgore accepted his counsel's actions while he was absent from the courtroom. (T 358-59) During the next round of challenges, (T 397-401) counsel conferred with Kilgore and used two additional peremptory challenges at his request. (T 401) Three times during the prosecutor's continuing voir dire, the court reporter noted that Kilgore was "[t]alking inaudibly." (T 475, 479) The final round of challenges was conducted, and the jury was sworn, but no one inquired to determine whether Kilgore accepted his counsel's actions in selecting the jury. (T 503-07)

On March 31, 1994, following an overnight recess, defense counsel informed the court that Kilgore was dissatisfied with the proceedings. When the judge asked Kilgore what the problem was, Kilgore declined to respond except to say, "You know what the problem is." (T 796-97)

During the presentation of impeachment evidence that Kilgore attempted to ignite the paint thinner he poured on Jackson, Kilgore became upset and screamed, "I'm serious, now, get me out of here. Get me out of here right now. All them damn matches. Wasn't matches there." He tipped up the counsel table, spilling defense counsel's materials to the floor, ran to the bailiff at the back of the courtroom, and demanded to be taken back to his cell. Kilgore was taken out of the courtroom by the bailiff, and the court excused the jury. (T 1244-45) Defense counsel spoke to Kilgore and reported to the court that he could not convince him to return

to the courtroom. He also expressed concern that Kilgore could not maintain decorum in the courtroom. (T 1246)

Upon the court's invitation, Kilgore returned to discuss the situation. The court reminded him of his right to be present or absent. The court recommended that he stay to listen and to assist his counsel. (T 1246-47) Kilgore responded that assisting his counsel had not done any good. The court asserted that counsel had done an excellent job. Kilgore complained that all the court's rulings were for the prosecutor. The court responded that the rulings would be reversed on appeal if they were wrong. (T 1247) Kilgore asked to return to the jail. (T 1248)

Defense counsel then expressed concern that Kilgore might not be competent to make a rational decision, nor able to control his conduct because he had not been given his insulin, he was retarded, and the stress of trial may have worsened his mental condition. (T 1248-49) The court responded, "I don't want to get into the question. The situation is second guessing psychologists and psychiatrists." (T 1249) The court found that the reference to Kilgore being mentally retarded was "incredible" because he wrote very articulate letters. (T 1249) A nurse at the jail had told the court that they had provided Kilgore with insulin, but he had refused to take it. (T 1249-50) Kilgore acknowledged that this was true. He had not taken his insulin that day, but he had taken it the evening before and did not feel he needed it at that time. (T 1250) Kilgore finally agreed to remain in the courtroom, stating, "I'm going to get railroaded anyway." (T 1250-51)

Defense counsel then moved for a mistrial on the ground that the jury's ability to deliberate fairly had been tainted by what they had seen. The court denied the motion. (T 1251-52) After the jury returned guilty verdicts for both first-degree murder and possession of contraband, (T 1387) the court granted defense counsel's request to delay the start of the penalty phase trial until ten o'clock the following morning so Dr. Kremper could see Kilgore at nine to update his findings. (T 1390-92)

C. Penalty Phase Testimony and Proceedings

The state introduced documentary evidence and testimony by officers and a kidnapping victim to establish Kilgore's prior convictions and sentences for prior violent felonies, including three counts of assault with intent to commit second-degree murder, two counts of aggravated assault, and one count each of resisting arrest with force, first-degree murder, kidnapping, and trespass with a firearm. (T 1399-1408, 1420-53)

The defense presented the testimony of a clinical psychcologist, Dr. Kremper, (T 1454-93) a neuropsychologist, Dr. Dee, (T 1494-1531), as well as the transcribed prior testimony of a deceased psychiatrist, Dr. Ainsworth. (T 1547-84) Kilgore had suffered brain damage,[7] "organic brain syndrome," from childhood injuries, the consumption of lead tainted moonshine during childhood, and the combined effects of diabetes, long term alcohol

[7] Dr. Ainsworth recommended that Kilgore be examined by a neurologist, who was not able to discern any brain dysfunction. (T 1550) Dr. Dee testified that the psychological testing he conducted could detect brain damage that would not be readily apparent from the tests conducted by a neurologist. (T 1501)

abuse, and a brief period of heroin abuse. (T 1476-77, 1485-88, 1507-15, 1517, 1523, 1552-61) The brain damage, diabetes, and alcohol abuse caused a continuing decline in Kilgore's cognitive abilities, including his memory and self-control. (T 1462, 1475, 1481, 1484, 1499-50, 1504-07, 1510-15, 1523-28) His intelligence had been in the average range, with an IQ of 91 when he was examined in the 1970s, (T 1475, 1483-84, 1508) but it fell to borderline, with an IQ of 76 by 1989, (T 1464, 1475-76, 1508, 1560) and it had fallen to mildly retarded, with an IQ of 66 or 67 by 1994. (T 1509, 1515) Dr. Dee testified that mental retardation and brain damage are the same thing; a low IQ score shows that the brain is not functioning properly. An IQ of 67 is "grossly defective," below 99.9% of the population. (T 1515)

Kilgore's diabetes, alcohol abuse, brain damage, and stress from his relationship with Jackson caused him to be extremely emotionally disturbed on the day of the offense. (T 1480, 1490-91, 1523, 1528, 1562-68) Dr. Dee said Jackson threatened to tell other inmates that Kilgore was impotent because of his diabetes, so Kilgore wanted to establish his status and dominance by "nicking" Jackson. (T 1519-21) Dr. Ainsworth found that Kilgore was distressed by Jackson's threat, by Jackson's involvement with other inmates, and "a lot of paranoid ideations about what Pearl was planning to do to him." (T 1564-68, 1571-73, 1576-77) Dr. Ainsworth also found that the offense may not have been premeditated. Kilgore's "impulsivity" meant that "a whim turns into an action without being considered." (T 1579) Kilgore's conduct and

statements were consistent with a desire to humiliate Jackson and establish his dominance by nicking him, cutting and/or burning him so he would have been "a marred Pearl." (T 1578-82)

Although Kilgore understood the difference between right and wrong, his ability to control his behavior was substantially impaired at the time of the offense. (T 1478, 1489, 1491-93, 1516, 1521-22, 1528-29, 1569) Kilgore's early record indicated aggressive acting out associated with alcohol, but with the passage of time, his brain dysfunction resulted in aggression without alcohol. (T 1478) Dr. Ainsworth also found that Kilgore was truly remorseful about the offense. (T 1570)

While the jury was excused, (T 1531) the court called Dr. Dee back, showed him a letter written by Kilgore during the trial, and remarked that Kilgore's letters were "literate, coherent, logical, and quite inconsistent with the mental status that both you and Dr. Kremper ascribe to Mr. Kilgore." (T 1532-33) Dr. Dee responded, "Well, he wouldn't necessarily lose linguistic competency to become mental believe it or not." (T 1533)

When Dr. Dee finished reading Dr. Ainsworth's prior testimony, the court excused the jury and again asked Dr. Dee about Kilgore's letters. (T 1584-85) The court noted that Dr. Kremper found Kilgore's IQ to be 76 in 1989, and Dr. Dee determined that his IQ was 67 in 1994, making Kilgore mentally deficient and deteriorating. (T 1585-86) Because Kilgore's letters appeared to be "literate and logical, coherent; they are discussing legal issues," the court suggested that Kilgore was malingering. Dr. Dee

responded that he structured an interview to determine whether Kilgore was malingering and determined that he was not. (R 1586)

Mary Ann Hall, the officer assigned to maintain a suicide watch while Kilgore was in confinement on the day of the offense, testified that Kilgore was upset and crying. He kept asking her whether Jackson was dead. She answered that she did not know. (T 1534-37) Kilgore said he was in love with Jackson and did not mean to kill him. His emotional state appeared to be genuine. (T 1538) He was remorseful. (T 1539)

Two of Kilgore's sisters, Dorothy Spates and Irlene Spearman, also testified that he expressed remorse for killing Jackson. (T 1587, 1595-96, 1602-04) Mrs. Spates also testified about his impoverished childhood, lack of formal education, alcohol abuse by his parents and other family members, his own alcohol abuse, an untreated head injury suffered during a prior arrest, and physical abuse by their mother. (T 1588-1601)

The court denied defense counsel's request to instruct the jury on specific nonstatutory mitigating circumstances. (T 1610-12; R 86-88)

C. Sentencing

In a written memorandum and oral argument defense counsel identified the following mitigating circumstances to be considered by the court: 1. extreme mental and emotional disturbance; 2. substantial impairment of capacity to conform conduct; and 3. the domestic nature of the relationship between Kilgore and Jackson. (R 103-07, 111-16) In the defense requested instruction on

nonstatutory mitigating circumstances, counsel identified the following mitigating circumstances: a. remorse; b. mental retardation; c. low level of intelligence and comprehension; d. lack of education; e. learning disability; f. situational stress; g. deprivation in childhood; h. emotional turmoil at the time of the offense; i. chronic ill health; and j. emotional and personal reasons for commission of homicide. (R 87)

The court found two aggravating circumstances: 1. The capital felony was committed by a person under sentence of imprisonment -- Kilgore was serving consecutive life sentences for first-degree murder and kidnapping and five years for trespass with a firearm. (R 123; A 4) 2. Kilgore was previously convicted of violent felonies -- three counts of assault to commit murder, two counts of aggravated assault, and one count each of resisting arrest with force, first-degree murder, kidnapping, and trespass with a firearm. (R 123-24; A 4-5)

The court found two statutory mitigating circumstances were proved: 1. The capital felony was committed while Kilgore was under the influence of extreme mental or emotional disturbance -- Kilgore's diabetes, alcohol abuse, and drug abuse caused a deterioration of his cognitive skills, his I.Q. declined from normal to borderline or less, and he was under the influence of mental or emotional distress. (R 124; A 5) 2. Kilgore's capacity to conform his conduct to the requirements of law was substantially impaired. (R 124-25; A 5-6) The court expressly considered evidence of the following nonstatutory mitigating circumstances:

Kilgore was raised in an environment of extreme poverty, as a child he was disciplined by being beaten, he quit school in the fifth grade, and he was in poor physical and mental health. (R 125; A 6)

In weighing the aggravating and mitigating circumstances, the court expressly contradicted its own finding that the mental disturbance and impaired capacity mitigating circumstances had been proved:

> Nevertheless, there is little or nothing about the facts of this case from which one could conclude that at the time of the murder, or during the twenty-four hours preceding the murder, Mr. Kilgore was under the influence of extreme mental or emotional disturbance. Indeed, the accomplishment of this murder necessitated considerable preparation, cunning and stealth which is inconsistent with extreme disturbance.

(R 126; A 7) The court concluded that it was obligated to sentence Kilgore to death to prevent him from murdering again, (R 126-27; A 7-8) and stated, "To sentence Mr. Kilgore to anything but death would be tantamount to giving him a license to kill." (R 127; A 8)

SUMMARY OF THE ARGUMENT

I. Due process of law requires the court to instruct the jury on the law applicable to the theory of defense when there is any evidence to support that theory. Kilgore's theory of defense was that the murder was not premeditated because he acted in the heat of passion aroused by his homosexual lover's infidelity. Florida common law recognizes that an intentional killing committed in the heat of passion aroused by adequate provocation is not premeditated and may be punished only as manslaughter or second-degree murder. Defense counsel requested the court to give a legally correct jury instruction on the theory of defense. The court committed reversible error in denying this instruction.

The prosecutor misled both the court and the jury by arguing that heat of passion applies only as an element of excusable homicide when the killing is accidental. Had the jury known that an intentional killing in the heat of passion is not legally premeditated, the result of the trial may very well have been different, so the court's error could not have been harmless. The judgment and sentence must be reversed, and this case must be remanded for a new trial.

II. Due process of law also prohibits the state from proceeding against the accused when he is not mentally competent to stand trial. Whenever the court has reason to believe that the accused may not be competent to proceed, it must suspend the proceedings to have the accused evaluated by experts and to conduct a hearing to determine whether the accused is competent. The court's duty to order a competency evaluation may be triggered by the defendant's

behavior and demeanor in the courtroom during the trial. Kilgore's disruptive conduct during voir dire and the presentation of the state's case caused defense counsel to question his competence and to request an evaluation.

The trial judge's refusal to even consider ordering a competency evaluation because of his skepticism regarding the ability of mental health professionals to accurately determine the defendant's mental state was reversible error. In the absence of a contemporaneous evaluation and hearing, Kilgore's competency cannot be retroactively determined. The judgment and sentence must be reversed, and this case must be remanded for a determination of Kilgore's current competency, to be followed by a new trial if he is competent.

III. Due process of law requires the presence of the accused to confer with counsel about the use of peremptory challenges during jury selection. While this Court has ruled that the accused may waive his right to be present, the waiver must be knowing, intelligent, and voluntary. Kilgore's demand to be excused during a portion of the jury selection in this case was not a valid waiver of his right to be present. He left the courtroom to protest the racial composition of the jury panel, defense counsel's inaction upon his complaint, and the court's refusal to appoint substitute counsel. Additionally, his courtroom conduct placed his competency to waive his constitutional rights in doubt. Under these circumstances, the court erred by accepting Kilgore's desire to leave as a waiver of the right to be present.

While Kilgore was absent, defense counsel used four of his peremptory challenges. In the absence of a valid waiver, the court was required to determine whether Kilgore approved his counsel's use of peremptory challenges in his absence, but no such inquiry occurred. Kilgore demonstrated his desire to confer with counsel about the use of peremptory challenges when he returned to the courtroom the following day and requested counsel to use two additional challenges during the next round of strikes. The nature and importance of peremptory challenges makes it impossible to determine whether the court's errors were harmless. The judgment and sentence must be reversed for a new trial.

IV. The Eighth Amendment requires individualized sentencing in capital cases and prohibits mandatory death sentences. While Florida's death penalty statute provides for individualized sentencing, the trial court violated the Eighth Amendment when it concluded that it was obligated to sentence Kilgore to death because he was already serving life sentences for murder and kidnapping. The court found that the state's interests in deterrence and retribution required the imposition of the death penalty because any other sentence would amount to giving Kilgore a license to kill. The United States Supreme Court expressly rejected this rationale for a mandatory death penalty for murders committed by life term inmates in Sumner v. Shuman, 483 U.S. 66, 107 S. Ct. 2716, 97 L. Ed. 2d 56 (1987). The death sentence must be reversed, and the case must be remanded for resentencing.

V. The Eighth Amendment requires the sentencing judge in a

capital case to consider and weigh all relevant mitigating circumstances supported by the evidence. To implement this requirement, this Court requires the sentencing judge to expressly evaluate each mitigating circumstance proposed by the defense to determine whether it is supported by the evidence and whether nonstatutory factors are truly mitigating. The judge is then required to expressly weigh the mitigating circumstances against the proven aggravating circumstances.

The sentencing judge in this case violated these requirements by finding that the statutory mental mitigating factors had been proven, then refusing to give the mental or emotional disturbance factor any weight on the self-contradictory ground that it was not supported by the facts. The court compounded this error by failing to expressly evaluate and weigh the proposed nonstatutory mitigating factors, and by ignoring the evidence of Kilgore's troubled sexual relationship with Jackson and his remorse over killing his best friend. The death sentence must be reversed, and this case must be remanded for resentencing.

VI. The trial court violated the Eighth and Fourteenth Amendments by denying defense counsel's request to give written jury instructions concerning the nonstatutory mitigating circumstances which the jury could consider in making its sentencing recommendation. Due process requires the court to instruct the jury on the law applicable to the theory of defense when there is any evidence to support it. Mitigating circumstances provide the theory of defense in the penalty phase of a capital trial. Because

the jury acts as co-sentencer in capital cases, the Eighth Amendment requires the court to instruct the jury upon the factors they must consider in making their recommendation. Allowing defense counsel to argue nonstatutory mitigating factors is inadequate because the jury must rely upon the court's instructions on the law. The jury cannot be expected to know that certain factors have been recognized to be mitigating as a matter of law when supported by the evidence unless the court so instructs them. The court's failure to properly instruct the jurors on the factors they were to consider in mitigation in this case rendered their death recommendation constitutionally unreliable. The death sentence must be reversed, and the case must be remanded for a new penalty phase trial with a new jury.

ARGUMENT

ISSUE I

APPELLANT'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHEN THE COURT DENIED HIS REQUESTED INSTRUCTION ON HEAT OF PASSION AND THE STATE MISLED BOTH THE COURT AND THE JURY ABOUT THE LAW APPLICABLE TO APPELLANT'S THEORY OF DEFENSE.

Defense counsel requested the court to instruct the jury on heat of passion as a defense to premeditated murder as follows:

> An intentional unlawful killing is not premeditated murder if it was committed while the defendant was in the heat of passion brought on by sudden provocation sufficient to produce in the mind of an ordinary person the highest degree of rage, anger, or resentment that is so intense as to overcome the use of ordinary judgment thereby rendering a normal person incapable of reflection.

(T 1227)

The court agreed with the prosecutor's argument that heat of passion was only applicable to one form of excusable homicide and denied the request. (T 1227-28) During closing argument, the prosecutor asserted that defense counsel was wrong in arguing that a crime of passion could not be first-degree murder, and that the court would instruct the jury that heat of passion applied only to excusable homicide when the killing occurred by accident and misfortune and upon sudden provocation. (T 1326-34) But the prosecutor and the court were wrong, and their errors violated Kilgore's right to a fair trial under the due process clauses of the federal and state constitutions. U.S. Const. amend. XIV; Art.

I, § 9, Fla. Const.

While an accidental killing prompted by heat of passion is one form of excusable homicide, Rodriguez v. State, 443 So. 2d 286, 289 n. 5 (Fla. 3d DCA 1983); § 782.03, Fla. Stat. (1989), the common law of Florida has long recognized that an intentional killing committed in the heat of passion arising from adequate provocation is not premeditated and may be punished only as manslaughter or second-degree murder. Id., at 289; Febre v. State, 158 Fla. 853, 30 So. 2d 367, 369 (1947); Forehand v. State, 126 Fla. 464, 171 So. 241, 243 (1936); Tien Wang v. State, 426 So. 2d 1004, 1007 (Fla. 3d DCA), rev. denied, 434 So. 2d 889 (Fla. 1983); Clay v. State, 424 So. 2d 139, 141 (Fla. 3d DCA), rev. denied, 434 So. 2d 889 (Fla. 1983).

In Forehand, 171 So. at 243, this Court ruled,

> As the element of premeditation is an essential ingredient of the crime of murder in the first degree, it is necessary that the fact of premeditation uninfluenced or uncontrolled by a dominating passion sufficient to obscure the reason based upon an adequate provocation must be established beyond a reasonable doubt before it can be said that the accused was guilty of murder in the first degree as defined by our statute. [Emphasis added.]

Forehand and his brother Lonnie became involved in a struggle with a deputy and a night club employee when the deputy tried to arrest them for causing a disturbance outside the club. Forehand struck the deputy, who then struck Forehand with a blackjack. When the deputy and Lonnie grappled and fell to the ground, Forehand fired the deputy's gun four or five times and wounded the deputy in the

back. Both the deputy and Lonnie died from wounds suffered in the altercation. This Court concluded that the evidence was not legally sufficient to establish premeditation beyond a reasonable doubt, reversed Forehand's first-degree murder conviction, and remanded for a new trial to determine whether the homicide was premeditated, second-degree murder, or manslaughter. Id., at 244.

In Febre, the defendant and his wife were separated. Febre went to their house around midnight and discovered his scantily clad wife emerging from the bedroom with a nude man. Febre shot the man, they struggled, and the man suffered a fatal skull fracture. This Court determined that the evidence established Febre's guilt of manslaughter, but was insufficient to support his conviction for first-degree murder, and remanded for resentencing. Id., 30 So. 2d at 369. This Court relied upon and quoted Collins v. State, 88 Fla. 578, 102 So. 880, 882 (1925), as follows:

> There is no statutory ground of provocation or adequate cause which is applicable to the facts in this case. Therefore the common law obtains and prescribes the rule by which human conduct in such matters is controlled. The law reduces the killing of a person in the heat of passion from murder to manslaughter out of a recognition of the frailty of human nature, of the temporary suspension or overthrow of the reason or judgment of the defendant by the sudden access of passion and because in such case there is an absence of malice. Such killing is not supposed to proceed from a bad or corrupt heart, but rather from the infirmity of passion to which even good men are subject.
>
> . . .
>
> The act of the seducer or adulterer has always been treated as a general provocation. Sexual intercourse with a female relative of another is calculated to arouse ungovernable passion, especially in the case of a wife.

In this case, Kilgore and Jackson had a homosexual relationship. (T 757, 849, 868, 897, 902, 1165) But Jackson was also involved with other men, including Tony Capers. (T 849, 868, 881-82, 897-98, 901-02, 908-09, 1059-60, 1073-74, 1165, 1168-69) Kilgore told the investigators that he wanted out of his relationship with Jackson because Jackson was "messing with" Capers and a number of other inmates, but he did not try to kill Jackson. (T 1193) Kilgore said he did not intend to kill Jackson. (T 1156-57, 1162, 1173, 1181) He took the knife and paint thinner, or sealer, to Jackson's cell intending to "nick" him, to humiliate him by cutting him and pouring the sealer on him. (T 1179, 1184-85) Kilgore said the stab wound to Jackson's chest was accidental. (T 1176-77) Jackson was holding Kilgore's arm. When they fell to the floor, Jackson relaxed his grip, and Kilgore's hand accidentally thrust forward with the knife. (T 1156, 1159-60, 1172, 1190) Kilgore thought Jackson was faking since they had been playing "jam games" for over a year, so he poured the sealer on Jackson. (T 1161, 1191) Kilgore did not have any matches. (T 1178) He did not try to light the sealer. (T 1182, 1192)

Kilgore's statement to the police would support two theories of defense based upon heat of passion -- the killing was either excusable homicide if the jury accepted Kilgore's claim that the fatal stab wound was accidental, or if the killing was intentional, it was not premeditated and could be punished only as second degree murder or manslaughter. See Febre; Forehand; Rodriguez; Tien Wang; Clay.

The prosecutor's argument to the court and the jury, that heat of passion was only relevant to excusable homicide, was based upon the standard jury instructions for homicide cases, which only mention heat of passion as one element of excusable homicide. Fla. Std. Jury Instr. (Crim.), Homicide. (T 1227-28, 1326-34) Both the prosecutor and the court should have known that the standard jury instructions are not necessarily a complete statement of the law applicable to a particular case, and that an intentional killing in the heat of passion upon adequate provocation is neither excusable nor premeditated.

This Court has ruled that trial courts are not bound by the standard jury instructions. Cruse v. State, 588 So. 2d 983, 989 (Fla. 1991), cert. denied, __ U.S.__, 112 S. Ct. 2949 L. Ed. 2d 572 (1992). The standard instructions are intended to be "a guideline to be modified or amplified depending upon the facts of each case." Id., quoting, Yohn v. State, 476 So. 2d 123, 127 (Fla. 1985).

In Gardner v. State, 480 So. 2d 91, 92 (Fla. 1985), this Court ruled, "A defendant has the right to a jury instruction on the law applicable to his theory of defense where any trial evidence supports that theory." Allowing defense counsel to argue his theory of defense to the jury is insufficient "because the jury must apply the law as given by the court's instructions rather than counsel's arguments." Id., at 93. Thus, due process of law requires the court to define each element of the law applicable to the defense, just as the court is required to instruct on each element of the charged offense. Motley v. State, 155 Fla. 545, 20

So. 2d 798, 800 (1945). The failure to properly instruct the jury on the law applicable to the defense is "necessarily prejudicial to the accused and misleading." Id.

Not only was the court's error inherently prejudicial, the prosecutor compounded the error by his conduct, misleading both the court and the jury about the law applicable to Kilgore's theory of defense. In both Nowitzke v. State, 572 So. 2d 1346, 1355 (Fla. 1990), and Garron v. State, 528 So. 2d 353, 357 (Fla. 1988), this Court found reversible error based in part upon the prosecutors' improper criticism of the validity of the legal defense of insanity before the triers of fact. The prosecutor's conduct in this case was just as prejudicial because he incorrectly insisted that there was no law to support the theory of defense. (T 1227-28, 1326-34)

In Davis v. Zant, 36 F. 3d 1538 (11th Cir. 1994), the Eleventh Circuit held that Davis's murder trial was fundamentally unfair because the prosecutor intentionally misled the jury about the factual basis for the theory of defense. The prosecutor had known months before trial that Davis's co-defendant had confessed that she, and not Davis, had committed the murder. Her confession was excluded from the trial as inadmissible hearsay. When Davis attempted to testify about the confession, the prosecutor objected and asserted that what Davis was saying was untrue. The prosecutor argued in closing that the defense had made up the claim that the co-defendant had committed the murder during the course of the trial. Although the defense did not object to the prosecutor's misleading remarks, the Eleventh Circuit found plain error which

required reversal for a new trial.

In this case, we do not know whether the prosecutor intentionally misled the court and the jury about the law applicable to Kilgore's defense, or whether he was simply mistaken. The effect of the prosecutor's argument was the same, regardless of his intent. Both the court and the jury were misled to believe that there was no legal basis for Kilgore's heat of passion defense. Misleading the jury about the law is more egregious than misleading them about the facts. Both the United States Supreme Court and this Court have ruled that "although a jury is unlikely to disregard a theory flawed in law, it is indeed likely to disregard an option simply unsupported by the evidence." Sochor v. Florida, 504 U.S. __, 112 S. Ct. 2114, 119 L. Ed. 2d 326, 340 (1992); Johnson v. Singletary, 612 So. 2d 575, 576 (Fla.), cert. denied, __ U.S.__, 113 S. Ct. 2049, 123 L. Ed. 2d 667 (1993).

While defense counsel failed to object to the prosecutor's improper argument, misleading the court and jury about the theory of defense is fundamental error under Davis v. Zant. Also, the prosecutor's argument to the jury establishes the harm to Kilgore's defense caused by the court's erroneous denial of defense counsel's heat of passion jury instruction. The court's error was preserved for appeal when defense counsel read to the court the precise language of his requested instruction and the court denied it. (T 1227-28) In Toole v. State, 479 So. 2d 731, 733 (Fla. 1985), this Court ruled,

> The contemporaneous objection rule is satisfied when, as here, the record shows that

> there was a request for an instruction, that the trial court understood the request, and that the trial court denied the specific request.

The court's erroneous denial of the requested theory of defense instruction cannot be found harmless under Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1965), and State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). The error was used by the state to mislead the jury to believe that there was no legal basis for Kilgore's defense, and therefore must have affected the jury's verdict. The jury could not fairly determine Kilgore's guilt or innocence of first-degree murder after being misled about the applicable law. The judgment and sentence must be reversed, and this case must be remanded for a new trial.

ISSUE II

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW BY DENYING DEFENSE COUNSEL'S REQUEST TO RE-EVALUATE APPELLANT'S COMPETENCY AFTER APPELLANT DISRUPTED THE TRIAL.

Due process of law under the United States and Florida Constitutions prohibits the State from proceeding against a criminal defendant while he is mentally incompetent. Drope v. Missouri, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); Nowitzke v. State, 572 So. 2d 1346, 1349 (Fla. 1990); U.S. Const. amend. XIV; Art. I, § 9, Fla. Const.; Fla. R. Crim. P. 3.210(a). The test for determining competency is whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960); Pridgen v. State, 531 So. 2d 951, 954 (Fla. 1988); Fla. R. Crim. P. 3.211(a)(1).

While either defense counsel or the State may request a determination of the defendant's competency, Fla. R. Crim. P. 3.210(b), the court has the ultimate responsibility to ensure that the defendant is competent to proceed. Whenever the court has reasonable ground to believe that the defendant may be incompetent, the court must suspend the proceedings, have the defendant examined by mental health experts, and conduct a hearing to determine his competency. Nowitzke, 572 So. 2d at 1349; Pridgen, 531 So. 2d at 954-55; Hill v. State, 473 So. 2d 1253, 1257 (Fla. 1985); Fla. R.

Crim. P. 3.210(b).

> Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.

Drope, 420 U.S. at 181.

The court's duty to order a competency evaluation may be triggered by the defendant's irrational behavior. In Drope, 420 U.S. at 180, the Supreme Court explained that

> evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances be sufficient.

In the present case, Kilgore repeatedly manifested his inability to control his conduct and maintain decorum in the courtroom. During a recess in the first round of voir dire, defense counsel informed the court that Kilgore wanted to waive his right to be present during the jury selection process. The court reserved ruling to research the applicable law. (T 128-32) Kilgore remarked that there were only five black people on the jury panel. (T 132)

During the next recess, the court determined that Kilgore understood that he had the right to be present and to assist his counsel in the jury selection process. (T 204-06) Kilgore asserted that he wanted a new attorney. He complained about the number of blacks on the panel and about defense counsel's failure to mention this to the court despite his request. Kilgore said he

was not comfortable with defense counsel, but remained silent when the court asked why. The court denied his request to relieve counsel. (T 206-09)

Kilgore then reasserted his desire to leave the courtroom, indicating that this was his way of getting rid of defense counsel. (T 209-10) The court allowed Kilgore to leave, finding that he had waived his right to be present. The court noted that Kilgore had spoken out loud to counsel numerous times, and his conduct was distracting, but it was not disruptive. (T 210-11)

Kilgore returned to court the next morning, March 29, 1994. The court discussed Kilgore's concerns about his diet, insulin, use of the law library, and recreation. (T 358-59) Three times during the prosecutor's continuing voir dire, the court reporter noted that Kilgore was "[t]alking inaudibly." (T 475, 479)

On March 31, 1994, following an overnight recess, defense counsel informed the court that Kilgore was dissatisfied with the proceedings. When the judge asked Kilgore what the problem was, Kilgore declined to respond except to say, "You know what the problem is." (T 796-97)

On April 5, during the presentation of impeachment evidence that Kilgore attempted to ignite the paint thinner he poured on Jackson, (T 1236-44) Kilgore became upset and screamed, "I'm serious, now, get me out of here. Get me out of here right now. All them damn matches. Wasn't matches there." He tipped up the counsel table, spilling defense counsel's materials to the floor, ran to the bailiff at the back of the courtroom, and demanded to be

taken back to his cell. Kilgore was taken out of the courtroom by the bailiff, and the court excused the jury. (T 1244-45)

Defense counsel spoke to Kilgore during a recess and reported to the court that he could not convince him to return to the courtroom. He also expressed concern that Kilgore could not maintain decorum in the courtroom. (T 1246)

Upon the court's invitation, Kilgore returned to discuss the situation. The court reminded him of his right to be present or to absent himself. The court recommended that he stay to listen and to assist his counsel. (T 1246-47) Kilgore responded that assisting his counsel had not done any good. The court asserted that counsel had done an excellent job. Kilgore complained that all the court's rulings were for the prosecutor. The court responded that the rulings would be reversed on appeal if they were wrong. (T 1247) Kilgore asked to return to the jail. (T 1248)

Defense counsel then expressed concern that Kilgore might not have been competent to make a rational decision, nor able to control his conduct, because he had not been given his insulin, he was retarded, and the stress of trial may have worsened his mental condition. (T 1248-49) The court responded, "I don't want to get into the question. The situation is second guessing psychologists and psychiatrists." (T 1249) The court found that the reference to Kilgore being mentally retarded was "incredible" because he wrote articulate letters. (T 1249)

A nurse at the jail had told the court that they had provided Kilgore with insulin, but he had refused to take it. (T 1249-50)

Kilgore acknowledged that this was true. He had not taken his insulin that day, but he had taken it the evening before and did not feel he needed it at that time. (T 1250) Kilgore finally agreed to remain in the courtroom, stating, "I'm going to get railroaded anyway." (T 1250-51) Defense counsel then moved for a mistrial on the ground that the jury's ability to deliberate fairly had been tainted by what they had seen. (T 1251-52) The court denied the motion without further discussion. (T 1252)

The court's refusal to even consider the question of Kilgore's competence to stand trial, despite his irrational and self-defeating emotional outbursts during voir dire and the presentation of the state's evidence, violated the court's duty to ensure that Kilgore was competent to proceed with the trial. It is evident from the court's response to defense counsel's suggestion that a re-evaluation of Kilgore's competency was needed that the court denied the request not because there were insufficient grounds to question Kilgore's competency, but because the court was skeptical about the ability of mental health experts to make such determinations.

The court's skepticism about the opinions of mental health experts was also demonstrated by his questioning of Dr. Dee during the penalty phase of the trial. The court excused the jury twice to ask Dr. Dee about the contrast between Kilgore's letter writing ability and findings by Dr. Kremper and Dr. Dee that Kilgore's intellectual ability had declined from borderline, with an IQ of 76 in 1989, to deficient, with an IQ of 67 in 1994. The court felt

that Kilgore was malingering. (T 1532-33, 1584-86) Dr. Dee first responded that "he wouldn't necessarily lose linguistic competency to become mental." (T 1533) The second time, Dr. Dee explained that he had structured an interview to determine whether Kilgore was malingering and concluded that he was not. (T 1584-86) Both times the court seemed to be skeptical of Dr. Dee's answers. (T 1533, 1586)

The court's skepticism was further shown by the court's self-contradictory findings regarding the mental or emotional disturbance mitigating factor in the sentencing order. The court found that the statutory mental disturbance and impaired capacity mitigating circumstances were proven, then stated that there was no indication from the facts of the case that Kilgore was mentally disturbed at the time of the offense. (R 124-26) See Issue V, infra, for appellant's argument concerning the court's findings on mitigating circumstances.

The court's skepticism about mental health experts was not a legitimate basis for refusing to re-evaluate Kilgore's competency. In Nowitzke, this Court condemned the prosecutor's conduct in attacking the validity of the defense of insanity because that was a matter of legislative judgment. Id., 572 So. 2d at 1355. Even the legislature could not decide to eliminate the constitutional requirement of competency to stand trial.

The court's improper denial of defense counsel's request to re-evaluate Kilgore's competency violated his right to due process of law. Drope; Nowitzke; Pridgen. Competency cannot be determined

retroactively. Drope, 420 U.S. at 183; Pridgen, 531 So. 2d at 955. Therefore, the court's error was not cured by Dr. Kremper's re-interview of Kilgore the following day, April 6, just before the penalty phase trial began, particularly since the court did not inquire to determine the result of that interview before resuming the trial. (T 1390-91, 1399) Kilgore's erratic behavior as the trial progressed demonstrated that his ability to control his conduct and maintain decorum varied from day to day.

The error cannot be remedied by remanding for a hearing to redetermine Kilgore's competency at the time of the original trial. Drope, 420 U.S. at 183; Pridgen, 531 So. 2d at 955. Because of the impossibility of determining whether Kilgore was competent when he was tried in the absence of a contemporaneous examination and hearing, the error cannot be harmless. The judgments and sentences must be reversed, and the case must be remanded for a determination of Kilgore's present competence to stand trial, to be followed by a new trial if he is currently competent.

ISSUE III

THE TRIAL COURT ERRED BY ALLOWING APPELLANT TO LEAVE THE COURTROOM DURING PART OF THE JURY SELECTION PROCESS WITHOUT A VALID WAIVER OF HIS RIGHT TO BE PRESENT AND WITHOUT INQUIRING TO DETERMINE WHETHER HE APPROVED COUNSEL'S USE OF PEREMPTORY CHALLENGES IN HIS ABSENCE.

Due process of law under the United States and Florida Constitutions requires the presence of the accused during all stages of the trial where fundamental fairness might be thwarted by his absence. Snyder v. Massachusetts, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934); Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982); U.S. Const. amend. XIV; Art. I, § 9, Fla. Const. The selection of the jury is a critical stage in the trial during which the presence of the accused is required. Francis, at 1177. Thus, Florida Rule of Criminal Procedure 3.180(a)(4) provides:

> In all prosecutions for crime the defendant shall be present:
>
> * * *
>
> (4) At the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury[.]

This Court has ruled that a capital defendant may knowingly and voluntarily waive the right to be present during trial. Peede v. State, 474 So. 2d 808, 812-14 (Fla. 1985), cert. denied, 477 U.S. 909, 106 S. Ct. 3286, 91 L. Ed. 2d 575 (1986). However, the Eleventh Circuit Court of Appeals has ruled that a capital defendant may never waive the right to be present at any critical stage of trial. Hall v. Wainwright, 733 F.2d 766, 775 (11th Cir. 1984), cert. denied, 471 U.S. 1107, 1111, 105 S. Ct. 2344, 2346, 85

L. Ed. 2d 858, 862 (1985). The United States Supreme Court has never resolved this conflict. The Court has left open the question of whether a capital defendant may waive the right to be present at trial. Drope v. Missouri, 420 U.S. 162, 182, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975).

In Coney v. State, 20 Fla. Law Weekly S16, S17 (Fla. Jan. 5, 1995), this Court declared that Rule 3.180(a)(4)

> means just what it says: The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised. See Francis. Where this is impractical, such as where a bench conference is required, the defendant can waive this right and exercise constructive presence through counsel. In such a case, the court must certify through proper inquiry that the waiver is knowing, intelligent, and voluntary. Alternatively, the defendant can ratify strikes made outside his presence by acquiescing in the strikes after they are made. See State v. Melendez, 244 So. 2d 137 (Fla. 1971). Again, the court must certify the defendant's approval of the strikes through proper inquiry.

This Court further ruled that no contemporaneous objection is required to preserve a violation of this rule for appeal, and that the Coney ruling is prospective only. Id. Coney's right to be present was violated during a bench conference in which counsel for the state and defense struck jurors for cause because of their views on the death penalty and no peremptory challenges were used. Because the challenges involved a purely legal issue, this Court found that the error was harmless. Id.

Since the only portion of the Coney decision which announces a new rule for criminal cases is the express requirement of the

defendant's presence at the bench when jurors are challenged during a bench conference, the Court's determination that the Coney rule would be applied only prospectively has no effect upon Kilgore's case. Kilgore was absent from the courtroom while defense counsel used peremptory challenges, (T 210-11, 236-40) so his right to be present to assist counsel was established by Francis, 413 So. 2d at 1177, and the court's duty to determine whether he accepted his counsel's use of challenges in his absence was established by both Francis, at 1178, and State v. Melendez, 244 So. 2d 137 (Fla. 1971).

Kilgore's absence from the courtroom came about as follows: During a recess in the first round of voir dire, defense counsel informed the court that Kilgore wanted to waive his right to be present during the jury selection process. The court reserved ruling to research the applicable law. (T 128-32) Kilgore remarked that there were only five black people on the jury panel. (T 132) During the next recess, the court determined that Kilgore understood that he had the right to be present and to assist his counsel in the jury selection process. (T 204-06)

However, Kilgore's expressed reasons for leaving the courtroom did not demonstrate a knowing, intelligent, and voluntary waiver of his right to be present and assist counsel. First, in response to the court's question, he stated, "No, I ain't ill. I just don't want to be in here sitting through all anyway now." (T 206) Next, he said, "Might as well stay now 'cause I've been going through with it." (T 206) When the court asked if he wanted to stay,

Kilgore replied, "Still want to know why only four or five blacks on this jury though." (T 206) Kilgore then asserted that he wanted a new attorney. (T 207) He again complained about the number of blacks on the panel and about defense counsel's failure to mention this to the court despite his request. (T 208) Kilgore said he was not comfortable with defense counsel, (T 208) but remained silent when the court asked why. The court denied his request to relieve counsel. (T 209)

Kilgore then reasserted his desire to leave the courtroom, indicating that this was his way of getting rid of defense counsel. (T 209-10) The court allowed Kilgore to leave, finding that he had waived his right to be present. The court noted that Kilgore had spoken out loud to counsel numerous times. His conduct was not disruptive, but it was distracting. (T 210-11) Defense counsel exercised four peremptory challenges in Kilgore's absence. (T 236-40) When Kilgore returned to the courtroom the next morning, the court did not inquire to determine whether he approved of defense counsel's strikes. (T 358-59)

During the next round of challenges, (T 397-401) counsel conferred with Kilgore and exercised two additional peremptory challenges at his request. (T 401) Three times during the prosecutor's continuing voir dire, the court reporter noted that Kilgore was "[t]alking inaudibly." (T 475, 479) The final round of challenges was conducted, and the jury was sworn, but no one inquired to determine whether Kilgore accepted his counsel's actions in selecting the jury. (T 503-07)

This record does not establish that Kilgore's waiver of his right to be present during part of the jury selection process was truly knowing, intelligent, and voluntary as required by Francis and Coney. Instead, the record shows that Kilgore was angry with defense counsel for not objecting to the racial composition of the jury panel. He chose to leave the courtroom to protest the composition of the jury panel, counsel's inaction upon his complaint, and the court's refusal to provide him with a new attorney.

As argued in Issue II, supra, the record also calls into question whether Kilgore was mentally competent. The test for determining competence to waive a constitutional right is the same as the test for competence to stand trial, that is, whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him. Godinez v. Moran, 509 U.S. __, 113 S. Ct. __, 125 L. Ed. 2d 321 (1993). If Kilgore was not competent, his decision to leave the courtroom was not a valid waiver of his right to be present. See Pridgen v. State, 531 So. 2d 951, 955 (Fla. 1988) (if defendant was not competent, tactical decision to offer no defense during penalty phase of capital trial cannot stand).

Without a valid waiver of the right to be present, the court was required to inquire to determine whether Kilgore accepted defense counsel's use of cause and peremptory challenges during his absence. Coney, 20 Fla. L. Weekly at S17; Francis, 413 So. 2d at 1178; State v. Melendez, 244 So. 2d 137 (Fla. 1971). The court's

failure to make the required inquiry was error. Unlike Coney, the error was not harmless because defense counsel used four of Kilgore's peremptory strikes while Kilgore was absent. (T 236-40) Also, Kilgore demonstrated his desire to communicate with counsel regarding the use of peremptory strikes the following day during the next round of challenges, (T 397-401) when counsel conferred with Kilgore and exercised two additional peremptory challenges at his request. (T 401)

Kilgore had the constitutional right to the assistance of counsel in making his defense. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); Myles v. State, 602 So. 2d 1278, 1280 (Fla. 1992); U.S. Const. amends. VI and XIV; Art. I, § 16, Fla. Const. The right to assistance of counsel mandates the right to communicate with counsel during trial:

> Self-evidently, assistance of counsel cannot be rendered illusory or ineffective by a trial court's rulings. . . . While there are many facets to the right to assistance of counsel, there can be no doubt that a core element is ready access to and communication with counsel during trial. . . .
>
> Any delay in communication between defendant and defense counsel obviously will chill this constitutional right. Communication between defendant and defense counsel must be immediate during the often fast-paced setting of a criminal trial.

Myles, at 1280.

In Johnson v. Wainwright, 463 So. 2d 207, 211 (Fla. 1985), this Court explained that communication between the defendant and counsel is necessary during the exercise of peremptory challenges:

> Just as the accused has the right to the assistance of counsel, he also has the right

> to assist his counsel in conducting his defense. . . . Thus in Francis the defendant's presence during the exercise of peremptories was deemed important because of the aid the accused could have given to his counsel.

In Walker v. State, 438 So. 2d 969 (Fla. 2d DCA 1983), voir dire was conducted in open court in the defendant's presence, but the judge, prosecutor, and defense counsel retired to another room out of the jury's presence for the exercise of peremptory challenges. The court denied the defendant's request to accompany them after determining that counsel had consulted the defendant concerning the challenges. The district court found reversible error because the defendant was not present to consult with counsel at the time the challenges were exercised. The court explained that the exercise of peremptory challenges is not a mechanical function; it involves the formulation of on-the-spot strategy decisions which may be influenced by the actions of the prosecutor. Id., at 970.

This Court explained the importance of the use of peremptory challenges in Francis, at 1178-79:

> The exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant. . . . It is an arbitrary and capricious right which must be exercised freely to accomplish its purpose. It permits rejection for real or imagined partiality and is often exercised on the basis of sudden impressions and unaccountable prejudices based only on the bare looks and gestures of another or upon a juror's habits and associations.

The nature and purpose of peremptory challenges makes it impossible to assess the extent of prejudice to the defendant when

he is not present to consult with his counsel during the time that the challenges are exercised. Id., at 1179; Walker, at 970. The trial court's failure to determine whether Kilgore approved defense counsel's use of peremptory challenges while he was absent from the courtroom cannot be shown to be harmless beyond a reasonable doubt and was reversible error entitling him to a new trial. Francis, at 1179; Walker, at 970.

ISSUE IV

THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY FINDING THAT THE COMMISSION OF A MURDER BY AN INMATE SERVING LIFE SENTENCES FOR A PRIOR MURDER AND KIDNAPPING OBLIGED THE COURT TO SENTENCE APPELLANT TO DEATH.

The trial court correctly found that the State proved two statutory aggravating circumstances: 1. Kilgore was serving consecutive life sentences for first-degree murder and kidnapping at the time of the offense. (R 123; A 4) § 921.141(5)(a), Fla. Stat. (1989). 2. Kilgore was previously convicted of another capital felony and other violent felonies, three counts of assault with intent to commit murder in the second degree, two counts of aggravated assault, and one count each of resisting arrest with force, first-degree murder, kidnapping, and trespass with a firearm. (R 123-24; A 4-5) § 921.141(5)(b), Fla. Stat. (1989).

The court erred by concluding that these two aggravating circumstances alone obliged the court to sentence Kilgore to death:

> Under certain circumstances the state not only has the right, but the obligation, to take the life of convicted murderers in order to prevent them from murdering again. This is one of those cases. To sentence Mr. Kilgore to anything but death would be tantamount to giving him a license to kill. The fact that his prey would theoretically be limited to fellow inmates and prison guards is not comforting. An orderly society cannot permit human life to be violently taken with impunity.

(R 126-27; A 7-8) In essence, the court found that the state's interests in deterrence and retribution required the death sentence

for a murder committed by an inmate already serving a life sentence for a prior murder. This conclusion violated the prohibition of cruel and unusual punishment provided by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, section 17 of the Florida Constitution.

The United States Supreme Court's decisions in capital cases have addressed "two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision." Tuilaepa v. California, 512 U.S. __, 114 S. Ct. __, 129 L. Ed. 2d 750, 759 (1994). The Eighth Amendment first requires that the defendant must be convicted of an offense for which death is a proportionate punishment. The trier of fact must find that the defendant is guilty of murder and at least one aggravating factor which does not apply to every defendant convicted of murder and is not unconstitutionally vague. Id. The aggravating circumstances in the present case satisfy that requirement and make Kilgore constitutionally eligible for the death penalty.

The selection decision concerns whether a death-eligible defendant should in fact be sentenced to death. The Eighth Amendment requires "an individualized determination on the basis of the character of the individual and the circumstances of the crime." Id., at 759-60 (internal quotation marks omitted), quoting, Zant v. Stephens, 462 U.S. 862, 879, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983). The requisite individualized sentencing determination "must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defen-

dant's culpability." Tuilaepa, 129 L. Ed. 2d at 760.

In Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976), and Roberts v. Louisiana, 428 U.S. 325, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1976), the Supreme Court held that mandatory death penalty statutes violate the Eighth Amendment because they do not provide for an individualized sen-tencing determination. In Woodson, 428 U.S. at 292-93, the Court determined,

> The history of mandatory death penalty statutes in the United States thus reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid.

Mandatory death penalty statutes are unconstitutional because they do not "allow the particularized consideration of relevant aspects of the character and record of each convicted defendant[.]" Id., at 303. However, the Court left open the question of whether a mandatory death penalty would be justified for a defendant who was previously convicted of murder or serving a life sentence. Id., at 287 n. 7; Roberts, 428 U.S. at 334 n. 9.

In Sumner v. Shuman, 483 U.S. 66, 107 S. Ct. 2716, 97 L. Ed. 2d 56 (1987), the Court decided the open question. In 1958, Shuman was convicted of first-degree murder and sentenced to life imprisonment without possibility of parole. In 1975, he was convicted of capital murder for killing a fellow inmate. The Nevada statute in effect at that time provided for a mandatory death penalty for any defendant convicted of murder while serving a life sentence without possibility of parole. The Supreme Court found that the

two elements of capital murder did not provide an adequate basis to determine whether death was the appropriate penalty in any particular case:

> The fact that a life-term inmate is convicted of murder does not reflect whether any circumstance existed at the time of the murder that may have lessened his responsibility for his acts even though it could not stand as a legal defense to the murder charge.

Id., at 78-79. Also,

> The simple fact that a particular inmate is serving a sentence of life imprisonment without possibility of parole does not contribute significantly to the profile of that person for purposes of determining whether he should be sentenced to death.

Id., at 80. Moreover, the elements of capital murder

> say nothing of the "[c]ircumstances such as the youth of the offender, . . . the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct."

Id., at 82, quoting, Roberts v. Louisiana, 431 U.S. 633, 637, 97 S. Ct. 1993, 52 L. Ed. 2d 637 (1977).

The Supreme Court expressly rejected the state's contentions that a mandatory death penalty for life-term inmates convicted of murder is necessary as a deterrent and justified because of the state's retribution interests. Shuman, at 82-83. The Court found,

> [T]here are other sanctions less severe than execution that can be imposed even on a life-term inmate. An inmate's terms of confinement can be limited further, such as through a transfer to a more restrictive custody or correctional facility or deprivation of privileges of work or socialization.

Id., at 84. The Court concluded that the Nevada mandatory death penalty statute violated the Eighth and Fourteenth Amendments, and

> any legitimate state interests can be satisfied fully through the use of a guided-discretion statute that ensures adherence to the constitutional mandate of heightened reliability in death-penalty determinations through individualized-sentencing procedures.

Id., at 85.

Although Florida has a guided-discretion statute which is supposed to ensure heightened reliability through individualized-sentencing procedures, § 921.141, Fla. Stat. (1989), the trial court's sentencing order in Kilgore's case effectively negated that procedure. The court relied upon the same rationale found to be unconstitutional in Shuman when it found that it was obligated to sentence Kilgore to death to satisfy the state's interests in deterrence and retribution. The court's summary rejection of any penalty less than death because it "would be tantamount to giving him a license to kill," (R 127; A 8) converted the guided-discretion proceedings into a mandatory death penalty for any life-term inmate convicted of murder.

The court's refusal to seriously consider any penalty other than death violated Kilgore's right to individualized-sentencing procedures under the Eighth and Fourteenth Amendments. See Hildwin v. State, 20 Fla. Law Weekly S39, S41 (Fla. Jan. 19, 1995) (Anstead, J., concurring):

> Confidence in the outcome of [the capital sentencing] process is severely undermined if the sentencing judge is already biased in favor of imposing the death penalty if there is "any" basis for doing so. Such a mindset

> is the very antithesis of the proper posture of a judge in any sentencing proceeding.

Similarly, because the court relied upon the unconstitutional premise that death was the only suitable penalty that could be imposed because Kilgore was a life-term inmate convicted of murder, the death sentence must be reversed, and this case must be remanded for resentencing.

ISSUE V

THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY CONTRADICTING ITS OWN FINDINGS OF MENTAL MITIGATING FACTORS, BY FAILING TO EXPRESSLY EVALUATE EACH MITIGATING FACTOR PROPOSED BY APPELLANT, AND BY FAILING TO GIVE ANY WEIGHT TO THE MITIGATING FACTORS IT CONSIDERED.

The trial court correctly found that two statutory mitigating circumstances had been proved: 1. Kilgore committed the offense while he was under the influence of extreme mental or emotional disturbance. § 921.141(6)(b), Fla. Stat. (1989). His diabetes, coupled with alcohol and drug abuse, caused a deterioration of his cognitive skills, his IQ declined from normal to borderline or less, and he was under the influence of emotional distress. (R 124; A 5) 2. Kilgore's capacity to conform his conduct to the requirements of law was substantially impaired. § 921.141(6)(f), Fla. Stat. (1989). (R 124-25; A 5-6) However, in its conclusion, the court expressly rejected the mental or emotional disturbance factor as mitigating:

> Concerning the mitigating circumstances, I have found that both statutory mental health circumstances were proved during the penalty phase. Nevertheless, there is little or nothing about the facts of this case from which one could conclude that at the time of the murder, or during the twenty-four hours preceding the murder, Mr. Kilgore was under the influence of extreme mental or emotional disturbance.

(R 126; A 7)

Yet the evidence of Kilgore's mental condition presented at trial did support the court's finding that Kilgore was extremely

emotionally disturbed on the day of the offense. Sgt. Lindsay described Kilgore as being upset, out of breath, anxious, and nervous when he turned himself in at the administration office. (T 765-66, 774-75) Sgt. Smallwood testified that Kilgore was in a "hyper state." (T 786, 792) And in his deposition, he said Kilgore was extremely upset. (T 793-94) Officer Downes said Kilgore was angry, but in his taped statement to the investigating officer and in his deposition he described Kilgore as upset, incoherent, and irrational. (T 741-42, 749-52) Downes testified that when Kilgore saw Jackson's body in the clinic, he became hysterical and began crying, screaming, and flailing about. (T 738, 746-47, 752-53, 755-56) At trial Downes claimed that Kilgore seemed to be concerned about himself rather than remorseful, but in his deposition he said Kilgore was babbling and remorseful. (T 756) All three mental health experts concluded that Kilgore's diabetes, alcohol abuse, brain damage, and stress from his relationship with Jackson caused him to be extremely emotionally disturbed on the day of the offense. (T 1480, 1491, 1523, 1528, 1562-68)

The court also stated that it considered all evidence of nonstatutory mitigating circumstances presented by the defense, including that Kilgore was raised in extreme poverty, he was disciplined by being beaten, he quit school in the fifth grade, and he was in poor physical and mental health. (R 125; A 6) However, the court's order does not disclose whether the court found those circumstances had been proven, whether it viewed those circum-

stances as truly mitigating, nor how the court weighed these circumstances other than the blanket, conclusory statement that "the aggravating circumstances far outweigh the statutory and non-statutory mitigating circumstances." (R 126; A 7)

The court's self-contradictory and superficial treatment of the mitigating circumstances did not satisfy the requirements of the Eighth and Fourteenth Amendments and Article I, section 17 of the Florida Constitution. The United States Supreme Court has repeatedly held that "in capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence." Hitchcock v. Dugger, 481 U.S. 393, 394, 107 S. Ct. 821, 95 L. Ed. 2d 347 (1987); Skipper v. South Carolina, 476 U.S. 1, 2, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986); Eddings v. Oklahoma, 455 U.S. 104, 113-14, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982).

This requirement is not satisfied solely by allowing the presentation of mitigating evidence. The sentencer is required to "listen" to the evidence and to give it some weight in determining the appropriate sentence. Eddings, 455 U.S. at 113-14 & n. 10. Thus, in Dailey v. State, 594 So. 2d 254, 259 (Fla. 1991), this Court held that the sentencing judge erred when he "considered" mitigating circumstances but concluded that none of them "mitigate this crime." Id.

To ensure the proper consideration of mitigating factors, this Court has ruled that defense counsel is obliged to identify the specific nonstatutory mitigating circumstances he wants the senten-

cing court to consider, and that the trial court's written findings concerning the mitigating factors must be of "unmistakable clarity." Lucas v. State, 568 So. 2d 18, 24 (Fla. 1990). Thus, in Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990), this Court ruled:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. [Emphasis added, footnote omitted.]

Accord Crump v. State, 20 Fla. Law Weekly S195 (Fla. April 27, 1995); Bryant v. State, 20 Fla. Law Weekly S164, S165 (Fla. April 13, 1995); Ferrell v. State, 20 Fla. Law Weekly S74, S75 (Fla. Feb. 16, 1995).

The trial court's obligation under Campbell cannot be satisfied by a conclusory statement that the court has considered and weighed all the mitigating evidence and found that it is outweighed by the aggravating circumstances. In Crump, at S195, this Court held that the following finding in the sentencing order was inadequate:

> The only reasonably convincing Mitigating Circumstances established by the evidence are that the Defendant possessed a few positive character traits and suffered from mental impairment not reaching the statutory standards of mental mitigation.

In Bryant, at S165, the trial court's statement that it found "no Mitigating Circumstances, statutory or otherwise" was held to be inadequate even though Bryant presented scant mitigating evidence.

And in Ferrell, at S75, this Court held that the following finding was inadequate:

> This Court has further considered all statutory and nonstatutory mitigating factors presented by the Defendant, JACK DEMPSEY FERRELL. The Court has carefully weighed the aggravating circumstance as well as the circumstances presented in mitigation and the Court does find that the aggravating circum-stances outweighs [sic] the mitigating circumstances in this case.

Moreover, "when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). Accord Morgan v. State, 639 So. 2d 6, 13 (Fla. 1994); Knowles v. State, 632 So. 2d 62, 67 (Fla. 1993).

The court may reject mitigating circumstances as unproven only when "the record contains competent substantial evidence to support the trial court's rejection of these mitigating circumstances." Nibert, at 1062 (internal quotation marks omitted). "Once established, a mitigating circumstance may not be given no weight at all." Dailey, at 259.

In this case, defense counsel satisfied his obligation to identify mitigating circumstances for the court. In a written memorandum and oral argument defense counsel identified the following mitigating circumstances: 1. extreme mental and emotional disturbance; 2. substantial impairment of capacity to conform conduct to the requirements of law; and 3. the domestic nature of the relationship between Kilgore and Jackson. (R 103-07,

111-16) In the defense requested instruction on nonstatutory mitigating circumstances, counsel identified the following factors: a. remorse; b. mental retardation; c. low level of intelligence and comprehension; d. lack of education; e. learning disability; f. situational stress; g. deprivation in childhood; h. emotional turmoil at the time of the offense; i. chronic ill health; and j. emotional and personal reasons for commission of homicide. (R 87)

The court, however, did not fulfill its obligation to explain its findings regarding the mitigating circumstances with unmistakable clarity. With regard to the statutory mental health mitigating circumstances, the court's findings were inconsistent and self-contradictory. Having found that these mitigating circumstances were proved, the court could not refuse to give them any weight on the ground that they were not supported by the facts, especially when the evidence at trial established that Kilgore was extremely disturbed on the day of the offense.

In Morgan v. State, 639 So. 2d 6, 13 (Fla. 1994), the trial judge made conflicting findings regarding whether the mental or emotional disturbance factor had been proved, which this Court found to be "confusing at best." This Court determined that the judge should have found eight specific statutory and nonstatutory mitigating circumstances supported by the evidence, and concluded that the death sentence was disproportionate. Id., at 14.

Regarding the nonstatutory mitigating circumstances proposed by Kilgore, the court's findings were inadequate to satisfy the requirements of Campbell:

> In addition to the two statutory mitigating circumstances, the defense offered evidence of non-statutory mitigating circumstances. I considered all of the evidence presented. Specifically, I considered the evidence that Mr. Kilgore was raised in an environment of extreme poverty. I considered the evidence that as a child he was disciplined by being beaten. I considered the evidence that he quit school in the fifth grade. Finally, I considered the evidence that he is in poor physical and mental health.

(R 125)

The court failed to expressly evaluate these circumstances. It did not explain whether it found these factors were proven, whether they were truly mitigating, nor whether it gave them any weight. Also, the court failed to address some of the proposed mitigating factors. It ignored the evidence of the nature of the relationship between Kilgore and Jackson and the situational stress caused by their troubled sexual relationship. (T 757, 849, 868, 881-82, 897-99, 901-02, 908-09, 920-21, 1059-60, 1073-74, 1165-69, 1193, 1490-91, 1519-21, 1564-68, 1571-73, 1576-82) It ignored the evidence of Kilgore's remorse for killing his best friend. (T 756, 1119-21, 1534-39, 1570, 1587, 1595-96, 1602-04)

The court addressed some of the nonstatutory mitigating factors in finding that the statutory factor of extreme mental or emotional disturbance had been proved:

> Kilgore suffers from diabetes and this disease, coupled with alcohol and drug abuse, has caused a deterioration of his cognitive skills. His I.Q., which was once determined to be normal, is now considered to be "borderline range" or less.

(R 124; A 2) In Morgan, 639 So. 2d at 14, this Court held that the

trial court should have found and weighed as distinct mitigating factors both the statutory mental mitigating factors and the nonstatutory mitigating factors of marginal intelligence, a history of substance abuse (sniffing gasoline), consumption of the abused substance on the day of the offense, and brain damage. Similarly, the court should have considered Kilgore's diabetes, alcohol and drug abuse, and the deterioration of his cognitive skills from normal to retarded as separate nonstatutory factors in addition to the statutory mental mitigators.

In summary, the trial judge's self-contradictory findings regarding the mental mitigating factors, combined with his failure to consider all the factors proposed by the defense, and the failure to explain his weighing of the other mitigating circumstances with unmistakable clarity, violated the requirements of the Eighth and Fourteenth Amendments as construed by both the United States Supreme Court and this Court. The death sentence must be reversed, and the case must be remanded for resentencing.

ISSUE VI

THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BY DENYING APPELLANT'S REQUESTED JURY INSTRUCTION ON NONSTATUTORY MITIGATING CIRCUMSTANCES.

In the penalty phase of Kilgore's trial, defense counsel requested the court to give special written jury instructions on nonstatutory mitigating circumstances. (T 1610-11; R 86-88) The first instructionn provided, "Other aspects which you may consider as a mitigating factor and give it such weight as you may determine include," then listed ten proposed circumstances: a. remorse; b. mental retardation; c. low level of intelligence and comprehension; d. lack of education; e. learning disability; f. situational stress; g. deprivation in childhood; h. emotional turmoil at the time of the offense; i. chronic ill health; and j. emotional and personal reasons for commission of homicide. (R 87)

The second special instruction provided:

> A critical factor in the individualized determination of punishment required in capital cases is the mental state of a defendant who commits the crime. Defendants who commit criminal acts with a reduced comprehension of the consequences of those acts due to mental defects may warrant less severe punishment than those who have no such excuse.
>
> You may consider the evidence concerning any mental defects which you find that the defendant may have had at the time of the capital crime. The weight to be given such evidence must be decided by you.

(R 88) The court denied the special instructions on the ground that they were adequately covered by the standard instructions. (T 1611-12) The court agreed that defense counsel could argue the

proposed mitigating circumstances to the jury. (T 1612)

Appellant is aware that this Court has ruled that the standard jury instructions on mitigating circumstances are sufficient and that there is no need to instruct the jury on specific nonstatutory mitigating circumstances. Ferrell v. State, 20 Fla. Law Weekly S74, S75 (Fla. Feb. 16, 1995); Walls v. State, 641 So. 2d 381, 389 (Fla. 1994); Robinson v. State, 574 So. 2d 108, 111 (Fla.), cert. denied, __ U.S.__, 112 S. Ct. 131, 116 L. Ed. 2d 99 (1991). Nonetheless, appellant respectfully requests this Court to reconsider this issue because those decisions conflict with the principles applied by this Court in deciding other jury instruction issues and with the requirements of the Eighth and Fourteenth Amendments as construed by the United States Supreme Court.

As argued in Issue I, supra, this Court has ruled that trial courts are not bound by the standard jury instructions. Cruse v. State, 588 So. 2d 983, 989 (Fla. 1991), cert. denied, __ U.S.__, 112 S. Ct. 2949 L. Ed. 2d 572 (1992). The standard instructions are intended to be "a guideline to be modified or amplified depending upon the facts of each case." Id., quoting, Yohn v. State, 476 So. 2d 123, 127 (Fla. 1985).

In Gardner v. State, 480 So. 2d 91, 92 (Fla. 1985), this Court ruled, "A defendant has the right to a jury instruction on the law applicable to his theory of defense where any trial evidence supports that theory." In the penalty phase of a capital trial the defendant's proposed mitigating circumstances are his theory of defense against the death penalty, so the defendant should be

entitled to instructions on the mitigating factors supported by any evidence in the trial. In fact, this Court has ruled that when "evidence of a mitigating or aggravating factor has been presented to the jury, an instruction on the factor is required." Bowden v. State, 588 So. 2d 225, 231 (Fla. 1991), cert. denied, __ U.S.__, 112 S. Ct. 1596, 118 L. Ed. 2d 311 (1992). While the issue in Bowden was whether the trial court erred in giving a state requested instruction on an aggravating factor, the plain language of the rule applies equally to defense requests for instructions on mitigating circumstances.

Since the jury acts as the co-sentencer with the trial judge in a Florida capital case, jurors must be given sufficient guidance to determine the presence or absence of the factors to be considered in determining the appropriate sentence. Espinosa v. Florida, 505 U.S.__, 112 S. Ct. 2926, 120 L. Ed. 2d 854, 858-59 (1992). This principle should apply to mitigating circumstances as well as aggravating circumstances because the Eighth Amendment requires individualized consideration of the character and record of the defendant and of any circumstances of the offense which may provide a basis for a sentence less than death. Sumner v. Shuman, 483 U.S. 66, 72-76, 107 S. Ct. 2716, 97 L. Ed 56 (1987); Woodson v. North Carolina, 428, U.S. 280, 304, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).

Jury instructions on mitigating circumstances which restrict the jury to the consideration of only the statutory mitigating circumstances violate the Eighth Amendment. Hitchcock v. Dugger,

481 U.S. 393, 398-99, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987). Similarly, instructions which may mislead jurors into believing that they must unanimously agree that a particular mitigating circumstance has been proven before it can be considered also violate the Eighth Amendment. Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988). Each juror must be allowed to weigh every mitigating circumstance he finds to have been proven. Id. As explained by the Supreme Court,

> The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case. The possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing.

Id., 486 U.S. at 383-84. Thus, jury instructions on mitigating circumstances should be designed to implement the Eighth Amendment's requirement of heightened reliability in capital sentencing.

This Court has said that defense counsel has an obligation to identify the specific nonstatutory mitigating circumstances he wants the sentencing court to consider. Lucas v. State, 568 So. 2d 18, 24 (Fla. 1990). This Court has ruled that the trial court's failure to expressly consider specific nonstatutory mitigating circumstances was not error when the defense failed to identify those circumstances for the court. Thompson v. State, 648 So. 2d 632, 634 (Fla. 1994). If the court, with its superior knowledge of the law and greater experience in deciding factual disputes, cannot

be expected to discern the mitigating factors from the evidence presented unless defense counsel expressly identifies them, the jurors cannot be expected to find the factors to be considered without express identification.

Just as the court needs guidance from defense counsel, the jurors need guidance from the court. Allowing defense counsel to argue the existence of specific nonstatutory mitigating circumstances before the jury is insufficient "because the jury must apply the law as given by the court's instructions rather than counsel's arguments." Gardner v. State, 480 So. 2d at 93.

It is more likely that the jury will conduct its task properly if the court instructs the jurors to consider each of the specific nonstatutory mitigating circumstances which have been identified by the defense and supported by the evidence. The jurors are less likely to consider and weigh specific nonstatutory mitigating circumstances if they are given only the standard instruction, which simply states that the jury may consider "[a]ny other aspect of the defendant's character or record, and any other circumstance of the offense." Fla. Std. Jury Instr. (Crim.), Penalty Proceedings--Capital Cases.

While the standard instruction is certainly a correct statement of the law, see Sumner v. Shuman, 483 U.S. at 76-77, it is not a complete statement of the law. This Court has recognized a number of nonstatutory factors which must be found in mitigation when they are supported by the evidence, including, but not limited to: childhood abuse or deprivation, contribution to community or

society, remorse, potential for rehabilitation, charitable or humanitarian deeds, a history of alcohol or drug abuse, the consumption of intoxicants on the day of the offense, marginal intelligence, and brain damage. See Morgan v. State, 639 So. 2d 6, 14 (Fla. 1994); Knowles v. State, 632 So. 2d 62, 67 (Fla. 1993); Nibert v. State, 574 So. 2d 1059, 1062-63 (Fla. 1990); Campbell v. State, 571 So. 2d 415, 419 n. 4 (Fla. 1990).

The jurors cannot be expected to know that such factors are mitigating as a matter of law unless the court so instructs them, just as they cannot be expected to know the necessary elements to establish aggravating factors without proper instructions. See Espinosa v. Florida, 120 L. Ed. 2d at 858-59 (HAC instruction unconstitutionally vague); Jackson v. State, 648 So. 2d 85 (Fla. 1994) (CCP instruction unconstitutionally vague). Thus, the court's denial of Kilgore's requested instructions on nonstatutory mitigating circumstances created a substantial risk that the jury conducted its deliberations on mitigating circumstances improperly. This, in turn, rendered the jury's recommendation of the death sentence constitutionally unreliable. Mills v. Maryland, 486 U.S. at 383-84. Because of the great weight accorded to the jury's unreliable sentencing recommendation, the death sentence imposed on Kilgore violated the Eighth and Fourteenth Amendments. Espinosa. That sentence must be reversed, and this case must be remanded for a new penalty phase trial with a new jury. Mills.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse the judgment and sentence and remand this case to the trial court for the following relief: Issues I and III, a new trial; Issue II, a determination of appellant's competency, and if he is competent, a new trial; Issues IV and V, resentencing by the court; and Issue VI, a new penalty phase trial with a new jury.

APPENDIX

Supreme Court of Florida

THURSDAY, OCTOBER 22, 1992

No. 76,521

DEAN KILGORE, Appellant,

vs.

STATE OF FLORIDA, Appellee.

Circuit Court No. CF89-0686A1-XX
(Polk)

CORRECTED ORDER

Dean Kilgore appeals his conviction of first-degree murder of a prison inmate and his sentence of death, which was imposed on July 13, 1990. On that date, Kilgore filed a motion to vacate his plea on grounds that a factual basis had not been established and a motion to reduce sentence. These motions were denied by the trial court on July 16, 1990. Following these denials, counsel for Kilgore filed (1) a supplemental motion to withdraw a

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plea, (2) a motion for a new trial, and (3) a motion to vacate. Each of these motions contained new allegations, specifically, that defense counsel had strongly advised Kilgore to enter this plea because the trial judge, in conversations not of record, had indicated that if Kilgore did so he would impose a life sentence. These motions also alleged that the defendant was reluctant to enter the plea and did so only because of his attorney's advice. Counsel for the defendant specifically set forth in an affidavit the statements made by the judge, when they were made, and how he conveyed this information to his client. These allegations were also conveyed in a letter sent by counsel to the sentencing judge, dated July 16, 1990.

Counsel for the defendant also filed a motion to set a hearing date on these motions. It is apparent that a hearing was set because a supplemental motion to set a hearing date notes that the hearing set for August 3, 1990, was cancelled due to the unavailability of the assistant state attorney. It also notes that the next available date would be after the time for filing an appeal would have run and that counsel for the defendant expressly asked that the matter be heard before August 13, 1990, so that the trial court would not lose jurisdiction. No hearing was set and the pending motions were not considered on their merits.

We find that significant issues have been raised by the motion concerning the validity of the nolo contendere plea; that they were timely raised and set for hearing by counsel for the

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defendant; and that the failure to hear those motions on the merits was brought about by state action. These circumstances could result in a due process violation if these matters are not considered on their merits. It is thereupon

ORDERED that this Court hereby relinquishes jurisdiction to the Circuit Court of the Tenth Judicial Circuit with directions that it consider on their merits all pending motions filed in this cause after July 13, 1990, and that those motions be set for hearing within sixty days from the date of this order.

It is so ordered.

A True Copy
Test:
Sid J. White
Clerk, Supreme Court

TC
cc: Hon. E. D. Dixon, Clerk
Hon. J. Tim Strickland, Judge

Robert F. Moeller, Esquire
Candance M. Sunderland, Esquire

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IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR POLK COUNTY

STATE OF FLORIDA.
Plaintiff.

vs. CASE NO. CF89-0686A1-XX

DEAN KILGORE,
Defendant.

FILED AND RECORDED
BOOK 188 PAGE 1990
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D. "JUD" DIXON, Clerk
BY _____

JUDGMENT AND SENTENCE

The defendant was indicted for one count of first degree murder and one count of possession of contraband by an inmate. The jury found him guilty of both counts and recommended, by a vote of nine to three, that he be sentenced to death for the murder.

Aggravating Circumstances

In making the following findings of fact and conclusions of law I have taken into consideration only the evidence produced at the guilt and penalty phases of the trial. The state concedes, and I agree, that there is no evidence to support the aggravating circumstances listed in sections 921.141(5)(c), (d), (e), (f), (g), (h), (i), (j), and (k), Florida Statutes. With reference to the remaining two statutory aggravating circumstances, I find that both were proven beyond a reasonable doubt. Specifically:

(a) The capital felony was committed by a person under sentence of imprisonment or placed on community control. This murder was committed by one inmate upon another at Polk Correctional Institution, a facility operated by the Department of Corrections to house state prisoners. On December 18, 1978, Kilgore was sentenced to life imprisonment for first degree murder, a consecutive life sentence for kidnapping and a consecutive five year sentence for trespass with a firearm, (see state's exhibit number 34). Kilgore was serving that sentence at the time he committed this murder.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. Kilgore has previously been convicted of three

counts of assault with intent to commit murder in the second degree, two counts of aggravated assault, one count of resisting arrest with force, and the above-mentioned first degree murder, kidnapping and trespass with a firearm. (see state's exhibit numbers 29, 30, 31, 32, 33, 34, and 35)

Statutory Mitigating Circumstances

(a) The defendant has no significant history of prior criminal activity. For the reasons discussed under the heading "Aggravating Circumstances", this circumstance is not found.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. Two psychologists and one psychiatrist testified for the defense during the penalty phase. No experts were called by the state. Kilgore suffers from diabetes and this disease, coupled with alcohol and drug abuse, has caused a deterioration of his cognitive skills. His I.Q., which was once determined to be normal, is now considered to be "borderline range" or less. All the experts agreed that he was under the influence of mental or emotional distress. They differed on the question of whether he was under the influence of extreme mental or emotional disturbance. "When a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990). I find that this mitigating circumstance has been proved.

(c) The victim was a participant in the defendant's conduct or consented to the act. There is no evidence to support this circumstance and I find that it does not apply.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor. There is no evidence to support this circumstance and I find that it does not apply.

(e) The defendant acted under extreme duress or under the substantial domination of another person. There is no evidence to support this circumstance and I find that it does not apply.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The three mental health experts called by

the defense during the penalty phase all agreed that Mr. Kilgore understood that what he did to the victim was wrong and criminal. They also agreed that Mr. Kilgore s capacity to conform his conduct to the requirements of law was substantially impaired. Their opinion was succinctly stated by Dr. William G. Kremper, Ph.D.:

> I don't have any doubt that he understands the difference between right and wrong. I think there are times when it would be extremely difficult for him to conform his behavior to what he might understand as appropriate corrrect behavior.
>
> * * * * *
>
> We have an individual here who, if you look at his early record, what was happening is most of the antisocial kind of aggressive acting out behaviors are typically associated with alcohol. This is when he was primarily becoming aggressive. And what you have appears to be going on with time.
>
> Now we re getting aggression without alcohol. And this is the exact kind of thing that you would expect to happen when people are having brain dysfunction. They to do not have the controls; they are not able to inhibit impulses. Their ability---and this is extremely important to think-their ability to think of alternative solutions to solving problems becomes severely limited.

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I find that this mitigating circumstance was proved.

(g) The age of the defendant at the time of the crime. The defendant was thirty-eight years old at the time of the crime. I find that this circumstance does not apply.

Non-Statutory Mitigating Circumstances

In addition to the two statutory mitigating circumstances, the defense offered evidence of non-statutory mitigating circumstances. I considered all of the evidence presented. Specifically, I considered the evidence that Mr. Kilgore was raised in an environment of extreme poverty. I considered the evidence that as a child he was disciplined by being beaten. I considered the evidence that he quit school in the fifth grade. Finally, I considered the evidence that he is in poor physical and mental health.

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Conclusion

The jury, by a vote of nine to three, decided that the death penalty was appropriate. Great weight has been given to their recommendation, but my decision in this matter has been reached independently. I conclude that the aggravating circumstances far outweigh the statutory and non-statutory mitigating circumstances. The death penalty is appropriate.

Concerning the mitigating circumstances, I have found that both statutory mental health circumstances were proved during the penalty phase. Nevertheless, there is little or nothing about the facts of this case from which one could conclude that at the time of the murder, or during the twenty-four hours preceding the murder, Mr. Kilgore was under the influence of extreme mental or emotional disturbance. Indeed, the accomplishment of this murder necessitated considerable preparation, cunning and stealth which is inconsistent with extreme disturbance. The day before the killing he borrowed the murder weapon from another inmate and prevailed upon a third inmate to refrain from emptying a garbage can which contained the solvent he intended to pour over the victim's body. Immediately before the stabbing it was necessary for Mr. Kilgore to sneak into the victim's dorm without being seen by the guards. In order to accomplish this he asked a resident of the dorm where the guards were located. After he secured entry into the dorm, he went to the wing where the victim resided and, seeing that the victim had not come out of his room, smoked a cigarette with another inmate until the victim came into the hall. He then accosted the victim and stabbed him three times with a knife. After the murder, Mr. Kilgore calmly walked to the administration building where he told the guards, "I stabbed the bitch."

As has been mentioned, Mr. Kilgore was in prison as a result of another jury verdict finding him guilty of first degree murder. In the earlier case, the jury found that Mr. Kilgore illegally entered the residence of a man and a woman and their children late at night while armed with a firearm. Mr. Kilgore shot the man to death in the presence of one his children. Mr. Kilgore then kidnapped the woman and took her to an orange grove where he kept her the rest of the night. For this, Mr. Kilgore was sentenced to life. He had served approximately eleven years of this sentence when he decided to kill Emerson Robert Jackson. He now suggests that the appropriate sentence would be another life sentence.

Under certain circumstances the state not only has the right, but the obligation, to take the life of convicted murderers in order to prevent them

from murdering again. This is one of those cases. To sentence Mr. Kilgore to anything but death would be tantamount to giving him a license to kill. The fact that his prey would theoretically be limited to fellow inmates and prison guards is not comforting. An orderly society cannot permit human life to be violently taken with impunity.

Sentence

COUNT I. The defendant is adjudged guilty of first degree murder. It is the sentence of the court that the defendant be delivered by the Sheriff of Polk County to the Department of Corrections to be safely confined until such time as the Governor of the State of Florida, by his warrant, shall direct that the defendant, DEAN KILGORE, be electrocuted until he is dead.

COUNT 2. The defendant is adjudged guilty of possession of contraband by inmate. He is sentenced to fifteen years in the state prison. This sentence is to run consecutively to the sentence imposed in Court I.

The defendant is advised that this Judgment and Sentence shall be subject to automatic review by the Supreme Court of Florida within sixty days after certification by the court of the entire record of these proceedings as is provided by Chapter 921, Florida Statutes.

The Office of the Public Defender for the Tenth Judicial Circuit of Florida is appointed to represent the defendant in the filing and processing of the appeal.

DONE AND ORDERED in open court at Bartow, Polk County, Florida this 27th day of April, 1994.

Dennis P. Maloney
Circuit Judge

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CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 23d day of May, 1995.

Respectfully submitted,

Paul C. Helm

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(813) 534-4200

PAUL C. HELM
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