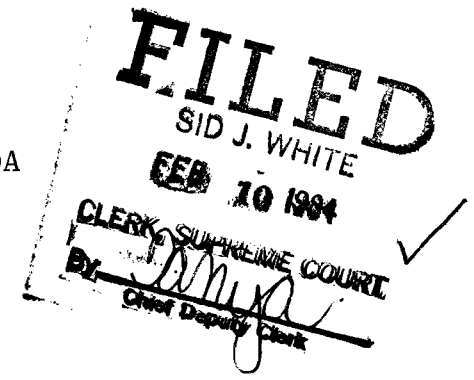


IN THE SUPREME COURT OF FLORIDA

CARL ALLEN CARUTHERS,

Appellant,

v. CASE NO. 64,114

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, FLORIDA

# INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS
(cont.)

TABLE OF CITATIONS

TABLE OF CITATIONS
(cont.)

## TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

| | | |
|---|---|---|
| CARL ALLEN CARUTHERS, | : | |
| Appellant, | : | |
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| Appellee. | : | |
| | : | |

# INITIAL BRIEF OF APPELLANT

## I PRELIMINARY STATEMENT

Appellant, CARL ALLEN CARUTHERS, was the defendant in the trial court and will be referred to in this brief as appellant or by his proper name. Appellee, the State of Florida, was the prosecution and will be referred to as the state. The record on appeal will be referred to by use of the symbol "R". All emphasis is supplied unless the contrary is indicated.

## II STATEMENT OF THE CASE

Carl Allen Caruthers was charged by indictment filed January 19, 1983 with first degree murder of Martha Zereski, armed robbery, and two counts of grand theft (R.1390). On March 7, 1983, a number of defense motions were filed, including several motions challenging the constitutionality of Florida's death penalty statute and certain of the aggravating circumstances enumerated therein (R.1391-1429). The defense filed a motion in limine seeking to prohibit the state from questioning prospective jurors about their views concerning the death penalty (R.1427-29), and a motion to preclude the state from challenging for cause those prospective jurors who would not or might not be able to recommend imposition of the death penalty (R.1423-24). These motions were denied on May 24, 1983 (R.1259,1278,1435-36).

The case proceeded to trial before Circuit Judge George E. Lowrey and a jury on May 31-June 3, 1983. Appellant was found guilty as charged of first degree murder (premeditated and felony murder), robbery with a firearm, and both counts of theft (R.1439). Following the penalty phase of the trial, the jury recommended, by a vote of 9, that the death penalty be imposed (R.1440). On July 18, 1983 the trial court sentenced appellant to death (R. 1383,1468-70). [Appellant was also sentenced to life imprisonment on the robbery conviction and five years imprisonment on each of the theft convictions (R.1384-85,1471-72)]. Notice of appeal was filed August 9, 1983 (R.1474).

## III STATEMENT OF THE FACTS

Immediately prior to jury selection, defense counsel stated to the court:

> I'd like to put on the record that the Defendant at all times, including this time, has offered and asked to plead straight up to the indictment in exchange for a life sentence on the capital, and any other sentence on the other three counts. I just want to make sure that that's on the record before the trial begins. And that still remains his posture here now.
>
> (R.50)

At the outset of the trial, in his opening statement to the jury, defense counsel made it clear that he was not contesting the fact that appellant was guilty of robbery, felony murder, and theft; the only real issue in the guilt phase was whether or not the murder was premeditated (R.648-50).

According to the evidence presented at trial, appellant was living on the premises of Grady Adams, a missionary worker, from February to June, 1982 and again in November, 1982 (R.652-53). During his second stay, appellant stole a .38 pistol from a filing cabinet in Grady Adams' bedroom (R.659-63, 893). Appellant subsequently went to live in Betty Boyd's camper, behind the house occupied by Ms. Boyd, her daughter Brenda Jenkins, and James Coleman (R.777-78, 795). On January 9, 1983, appellant went fishing with Coleman, Boyd, and Boyd's three children (R.778,796,891, 894). Approximately a case and two six packs of beer were consumed by the three adults (almost all of it by appellant and Coleman) (R.779,789-90,796,801-02,902-03). In the early evening,

appellant stole Grady Adams' car from the church parking lot (R.654-58, 892). The car was a 1967 Pontiac Bonneville, white with a black top; it was in very bad condition and had to be started with a screwdriver (R.654-55,892).

Shortly before 8:00 p.m., Paul Chase was traveling east on the Chumuckla Highway when he observed a car accelerating rapidly out of the parking lot of a Han D Pak convenience store (R.667). The car was a Bonneville or Catalina, '67 - '72, white with a dark top (R.669). A few minutes later, customers Ronald Wadkins, Jr. and Jeffrey White entered the store and found the clerk lying motionless behind the counter, with the cash register open (R.673,678). Deputy Sheriff Larry Bryant was dispatched to the scene; upon his arrival he found the body of a white female known to him as the store's clerk (R.682-83). He checked her condition and found no pulse (R.685,689). Dorothy Clenney, the manager of the Han D Pak store identified the clerk as Martha Zereski (R.717-18). Ms. Clenney determined that $54.96 was missing from the register (R.718).

[An autopsy was performed the following day by Dr. Garland Hilbert, who determined that Ms. Zereski was shot three times; the entrance wounds were in the left arm, the upper left side of the back, and the lower left side of the back (R.840-47). The cause of death was internal hemorrhage, mainly in the chest cavities (R.846). Dr. Hilbert concluded that unconsciousness would have resulted within a minute or so of the infliction of the wounds, and death would have ensued within a couple of minutes (R.848-49)].

On the night of January 9, in the course of their investigation, police officers found Grady Adams' car abandoned on a dirt road known as Union Valley Campground Road (R.750-53,809-10). The motor was still running (R.753). There were some footprints leading from the lefthand door of the car down the road and into the woods (R.734,755,809-10). On the ground, by the rear of the car, the police found a twenty dollar bill and a ten dollar bill (R.810-12,828-29). John Townson, a dog trainer, was called to that location, and he and two of his dogs began tracking by sight and scent in the direction of the footprints (R.759-63). The trail led to the back doorstep of Betty Boyd's house (R.763,767-69). Police officers went to the house, where they spoke with appellant (R.768-70). Since he was a suspect, Sergeant Dees leaned him up against the police car and patted him down, and advised him of his rights (R.770-72). Appellant's shoes appeared to match the footprint impressions (R.772). Appellant was placed in the back of a police car and transported to the Santa Rosa County Jail (R.772,806). Appellant's personal effects were received by the police; he had $25.06 in his possession[1] (R.806). Grady Adams'

---

[1] In his closing argument, the prosecutor left no doubt that it was the state's theory that the ten and twenty dollar bills found on the dirt road had been dropped by appellant:

> The defendant's later taken to the jail. His money is taken from him. How much money is taken from him? Twenty-five dollars and six cents. That was the money they took from him at the jail. Three fives, the rest ones, six cents.
>
> What did Ms. Clenney tell us? Ms. Clenney told us that there was $54.96 taken in that robbery. $54.96. We've got $24.06 here. We've got $30.00 found on the ground; remember, one ten and one twenty. So we come up with $55.06. Ten cents difference.
>
> Here's the money he dropped on the ground. He was broke; he needed some money. Now, he'd go kill a clerk. He killed Martha -- He executed Martha for $54.96.
>
> (R.991)

.38 pistol was recovered from the glove compartment of a Buick LaSabre parked adjacent to the Boyd-Coleman residence (R.815-16, 828,893).

In the early morning hours of January 10, 1983, appellant was interviewed by police officers and an assistant state attorney at the Santa Rosa County Sheriff's Department (R.873-77). After being advised of his Miranda rights (R.873-79), appellant told them that he had been fishing out at the bay with Betty Boyd, her three children, and James Coleman (R.894-95). Appellant said he had drunk "about a good case" of beer that day (R.895,902-03). He had his last beer about twenty-five minutes before the shooting occurred (R.903). When they got back from fishing, appellant asked Boyd and Coleman to drop him off at the home of a girl he knew named Virginia (R.891-92). There was nobody there so appellant began walking home (R.892). When he got down by Faith Baptist Church, appellant decided he didn't feel like walking any further, and he remembered that Grady Adams' car would be easy to start with a screwdriver (R.892). He took the car and began riding around for a while (R.892,895). Then he parked the car, walked over to the house, and got the gun he had taken from Grady Adams' place several months earlier (R.892-93). James Coleman had been wanting him to shoot this big dog for quite a while, so appellant went looking for the dog but couldn't find it (R.892). He rode around some more and then went to the Han D Pak store (R.892). There was another customer in there; appellant walked around and waited until he left (R.892,896,900). When he saw the man pull away, appellant pulled his gun out of his pants (R.896). He told the

clerk he wanted the money and if she did what he said he wouldn't hurt her (R.897). Appellant was "shaking like crazy," and he thought the clerk was crying (R.910). Appellant kept telling her he didn't want to hurt her (R.892,897). Then she jumped and he just started shooting (R.892,897,910). Appellant stated that he didn't mean to pull the trigger; as soon as it went off he fired two more rounds (R.897,910). Appellant was standing behind the counter when he fired the shots; the clerk was turned sideways from him (R.897). Appellant took the money out of the register and threw it in his coat pocket (R.901). Later, when he got back to the camper, he put it in his billfold (R.901). Appellant parked Grady Adams' car "out on that old road", leaving the motor running because he couldn't find the screwdriver to shut it off (R.893,903-04). He walked home and put the gun in the glove compartment of James Coleman's Buick (R.893,904). Then he waited at home for the police to come, because he knew they would be coming there (R.893). Some time before the police arrived, appellant rode with Betty Boyd and James Coleman back to the Han D Pak (R.905-06). There were "a bunch of cars" there, and the area was roped off (R.906).

Betty Boyd testified that she, James Coleman, and appellant drank a case of beer while they were fishing, and bought two more six packs on the way back (R.779,789-90). Ms. Boyd drank only two or three beers out of the case, and she did not drink any of the two six packs (R.789-90). Around 6:00 p.m. they got back into Milton and dropped appellant off at a house on Hinote Street (R.779-790). She described appellant's physical condition at that

time as "just kind of happy-go-lucky", but in her opinion he wasn't drunk (R.780). At around 7:30 p.m., appellant came back to her house and spoke with James Coleman on the porch (R.781). Appellant stayed about fifteen minutes, then left the house, and returned through the back door at around 8:05 (R.782). He said he had a tremendous headache and wanted a couple of aspirins (R.782). He seemed "a little hyper" and his face was flushed, but Ms. Boyd didn't think he was drunk (R.783-85). Later in the evening, they went out to get cigarettes but they were having problems with their car (R.785-86). They stopped on the street by the Han D Pak store, and a man came out to the car and asked what they needed (R.786). James Coleman asked the man what had happened (R.786). Ms. Boyd recalled appellant saying "Who would shoot an innocent lady?" (R.787). They returned home, and there was a policeman waiting at the entrance (R.787).

Ms. Boyd testified that she knew Martha Zereski "vaguely", by going into the store and talking to her (R.788). Ms. Boyd would go to that store just about every day to buy cigarettes, drinks, and such (R.788). She had been in the store several times with appellant when Martha Zereski was working there (R.788-89).

James Coleman testified that while they were fishing, he and appellant "pretty much split" a case and two six packs of beer (R.796,801-02). There are twenty-four cans of beer in a case (R.802); the two six packs would bring the total to thirty-six. They drank consistently, off and on, until they dropped appellant off (R.802). When they let him off, appellant had a

can of beer in his hand and another one in his pocket (R.796, 802). Coleman testified that appellant was drinking pretty well, but he didn't think he was drunk (R.798-99,801).

Coleman testified that about a week earlier he had given appellant four bullets, because he wanted appellant to shoot a dog which had been running the kids (R.797-99). When appellant came by the house at about 7:30 p.m. on January 9, he said he had seen the dog up on the road (R.798).

Brenda Jenkins, the daughter of Betty Boyd, testified that appellant came into the house a little bit after 8:00 p.m., said he had a headache, and asked for about five aspirin (R.919-20). Later that evening, Ms. Jenkins' grandmother called up and said the Han D Pak store had been robbed and the clerk had been shot and killed (R.920). Ms. Jenkins went out to the camper, woke up appellant, and told him (R.920). Appellant got a gun out from underneath the pillow and came in the house (R.920-21). He kept asking over and over again "Is she dead?" (R.921-22). Appellant's face was flushed, his eyes were red, and "you could smell that he had been drinking" (R.921). When he got up to go to bed he nearly tripped, but he grabbed hold of the door (R.921,924). However, she believed he was in control of his faculties (R.923).

Ms. Jenkins testified that she had been in the store with appellant ten or fifteen times when this clerk was working there (R.927). They would go up there three or four times a day (R.928). The clerk would talk to Ms. Jenkins and appellant (R.927). She and appellant knew each other's faces, but Ms. Jenkins never heard either of them call the other by name (R.928). They would say

"general stuff" like "How do you do", "Have a nice day", and "How's the weather", and appellant would ask about prices (R. 928).

The following is a summary of the evidence presented in the penalty phase of the trial:

Claudia Shanks, appellant's mother, testified that Carl would turn twenty-three years old in two weeks (R.1048-49). Carl grew up in Keokuk, Iowa, and left home at age seventeen (R.1048-49). When Carl was born he was totally deaf in his right ear, which they did not realize until he was five (R.1050). He was in the hospital many times as a child and as a baby with high temperatures caused by ear infections (R.1050). When Carl started school, he was taken to a specialist and his hearing deficiency was discovered (R.1050). He also had a nerve disorder which was affecting his eyes and his other ear (R.1050). Carl was sick quite often as a child and had three operations before he was sixteen (R.1050). It was determined that a hearing aid would do no good, so it was necessary for Carl to have an amplifier on his desk at school so he could hear (R.1050). Despite missing school often due to illness, Carl did well in elementary school and made good grades (R.1051). The family was active in their church, and Carl sang in the choir (R.1051). Things changed when Carl was in the seventh grade (R.1051). Instead of one teacher in one room, there were numerous teachers, and Carl's amplifier could not go with him to other rooms (R.1051). For the first semester he was on the Honor Roll, but then his school work

started going down (R.1051). He would work very hard to get good grades during football season so he would be eligible to participate, but he would lose interest during the rest of the year (R.1052). Around this time, Ms. Shanks and Carl's father were having problems in their marriage, and they ultimately were divorced (R.1052). Ms. Shanks got custody of Carl and his younger brother Gary (R.1053). Carl was very close to his father, and it deeply bothered him that he was not allowed to go see his father at times (R.1053).

At age sixteen, Carl was becoming deaf in his good ear, the left one, and major surgery was necessary (R.1053). It was a difficult decision whether to have the surgery, and it was a very trying time for Carl (R.1053-54). The surgery was done, and they were able to restore about sixty percent of his hearing in that ear (R.1053-54).

Ms. Shanks testified that Carl is seven and one half years older than his brother Gary, and has always been very close to him (R.1053-54). Gary was ten when Carl left home, and Carl has continually kept up with him by writing letters and by telephone (R.1054). Carl was supportive of Gary and was interested in everything that Gary was doing (R.1054). He tried in his own way to be a good influence on Gary; he would say "Gary, always do right, do as you're doing, never do the things that - - anything that I would do, don't do it." (R.1054). Ms. Shanks testified that on the night before the penalty phase, in the jail, Carl begged his brother to never do what he had done (R.1068). "He told his brother that his life was gone, but his brother was very special

to him and that he prayed that he'd never, ever in any way do anything that he had done. That he was sorry for what had happened" (R.1068).

Ms. Shanks recalled many occasions when Carl would baby-sit with children (R.1055). She remembered one time when a man who had been in prison came to their church and didn't have anyone or anything, and Carl took his allowance and bought the man a bible (R.1056). Carl did a lot of church work with children; when you were thirteen years old you could be a counselor for the younger children (R.1056).

Ms. Shanks testified that Carl and his father were better able to communicate than Carl and she were (R.1056-57). She was never able to talk to him about his problems in school and the like (R.1056-47). Carl never had any trouble with the law or juvenile authorities until he left home (R.1057).

Raymond Caruthers, appellant's father, testified that while Carl was growing up in Keokuk he did well in school up to a point, sang in the church choir, was active in sports, and never had any trouble with the law or juvenile authorities (R.1069-70). After the divorce, Carl's mother was given custody, but Carl subsequently lived with his father for about three months (R.1070). Carl was working at the steelcasting in Keokuk at the time (R.1070). After Carl left home, he stayed in contact with his father, and he always wanted to know how his younger brother Gary was doing (R.1071). Mr. Caruther's testified that the divorce seemed to affect Carl, that "[i]t just seemed like things started bothering him" (R.1071-72).

Mr. Caruthers testified that he has been living with Ms. Betty Ragar for five years (R.1072). Ms. Ragar has two children and Carl was really good with them (R.1072). Carl would take care of the children when he and Ms. Ragar would go up town (R.1072). Carl had a way of making Betty feel better when she would get down in the dumps (R.1072). Carl was very kind and respectful to Ms. Ragar, and her children loved him very much (R.1072).

Betty Ragar testified that she is blind, and has been all her life (R.1077). She has known appellant for five years (R.1077). Carl has visited and stayed in her home with her and Mr. Caruthers (R.1078). When her children Mark and Tracy were younger, she trusted Carl to take care of them (R.1078). He has been kind and considerate to them, and they love him as a brother (R.1078). Ms. Ragar testified that Carl has been kind to her and showed her respect (R.1078-79).

Appellant, Carl Caruthers, testified that other than the matters presently before the Court, the only time he was convicted for violating the law was a misdemeanor conviction for stealing a bicycle about a year earlier (R.1082-83).

Appellant testified that he enjoyed grade school (R.1083). He had to have an amplifier to hear with, but he got rid of it when he got to junior high school (R.1083). Then he started going out for sports (R.1083). He testified that he loves all kinds of sports, and that he also enjoyed his activities in the church and the choir (R.1083-84).

After his parents' divorce, appellant lived with his mother

at first (R.1083-84). When he was about sixteen he went to live with his father, and when he was seventeen he moved with his grandmother to Texas, where they stayed with his uncle (R.1084). He moved back to Keokuk after about a year; then went to Illinois and got a job working with the Pepsi-Cola Company (R.1084). Appellant then went to California with his older brother Eddie and got a job with a construction company (R.1085). After he was laid off, he went back to Keokuk (R. 1085). A carnival came through Keokuk every June; appellant joined up and traveled with the show for quite a long time (R.1085). A friend talked him into quitting the show and going to Apalachicola, Florida, when there was good money in shrimping and oystering (R.1085). They hitchhiked almost all the way (R.1085). Somewhere around Milton they stole two bicycles, and were pulled over with them (R.1085). A police officer took the bikes and let them go, and appellant thought they had heard the last of it (R.1085). They continued on to Apalachicola, and did some fishing and shrimping (R.1086). But then a warrant was served for the bicycles, and they got hauled back to Milton (R.1086). Appellant believed he spent about six months in jail waiting to go before the judge, who then let him out on time served (R.1086).

While he was in jail, appellant met Grady Adams (R.1086). Adams used to visit him quite often, and was telling him about this home that he had out at his place to help people get restarted with their life and meet the Lord (R.1086). Appellant was quite interested, so when he got out of jail he went to Grady Adams' place (R.1086). He stayed for a while and got

active in Adams' church (R.1087). He met a girl, Brenda Jenkins, who came to the church one day, and they started dating (R.1087). Grady Adams didn't like Brenda, and kept telling appellant he didn't want him to see her (R.1087). Appellant moved in with Brenda and stayed about three months; then he went back to Keokuk and joined the carnival again (R.1087). When he was laid off for the winter in Jackson, Mississippi, appellant decided to return to Milton until the season opened back up (R.1087). He lived with Grady Adams again for a few weeks, and then moved back with Brenda Jenkins at Betty Boyd's place (R.1088). Before he left, appellant stole Grady Adams' gun (R.1088).

On January 9, 1983, appellant went fishing with Betty Boyd and James Coleman (R.1089). Appellant was playing with one of the children and "drinking pretty good" (R.1089). He wasn't drunk while they were fishing, but he was getting to that point (R.1089). When they were ready to leave, they had about three cans of beer left, which they finished off, and then bought a couple more six packs (R.1089). By then, appellant believed that he was drunk; he usually does not drink a whole lot, but he drank quite a bit that day (R.1089). When they dropped him off at Virginia's house, James Coleman said he could have the last three beers (R.1090). Appellant stuck one in each coat pocket and he already had one in his hand (R.1090).

In recounting the circumstances of the robbery and killing, appellant testified:

> Well, when I was walking home, I was pretty well drunk, and I didn't feel like walking all the way home 'cause it's--I don't know--pretty close to

five or six miles from where Virginia lives. I did know that it was a Sunday night. I did know that Grady Adams would be in church. And I -- I know how to start his car without having to use a key. So I walked to the church and got in his car and -- there was a -- there usually is a screwdriver in it. So I started it up and I took it off and drove it home. And I parked it on a dirt road--I don't know just how far it is from where I was living at the time, but it ain't very far.

So on the way to the -- walking from the car to the house, there's a dog out there where we live that scares the kids when they're going to school and they've got to wait at a bus stop. And James Coleman's always been wanting to get rid of the dog. And before the ninth, he got me four shells for the .38. So I went back to the house....

[Defense Counsel]: (Interposing) To shoot the dog with?

A. Yes,sir.

Q. Go ahead.

A. I went back to the house, and I asked James Coleman to unlock the car that I kept the gun in because I'd seen that dog. So he gave me the key and I went out and got the gun, and then I walked back up the road. And the dog wasn't out there where I was looking for it.

And I decided that I was going to go down to the Han D Pak and get me some cigarettes. (Pause.)

(Weeping) So, I drove down to the Han D Pak, and I still had the gun on me. I went into the store, and there was some guy in there, so I walked over to where some of the items are to wait for him to get done up at the counter.

(Pause.)

Q. What happened after that, Carl?

A. Then he left. So I walked up to about

> the edge of the counter. Then I just decided that I'd rob the woman. So I pulled my gun out, pulled the hammer back. And I told her I didn't want to hurt her (weeping). I don't know how many times I told her. So I told her to give me the money. She opened up the cash register, (pause) and then she -- I don't know what it was, but she started screaming and jumping. And then I just pulled the trigger (weeping). I pulled it three times.
>
> Q. Had you intended on killing Martha Zereski?
>
> A. No, sir.
>
> (R.1091-92)

Appellant testified that he had offered to plead guilty to all four counts of the indictment in exchange for a sentence of life imprisonment (R.1102-03). Asked how he felt about the death of Martha Zereski, appellant replied, "I'd give anything if she was still alive today" (R.1102).

Gary Caruthers, appellant's fifteen year old brother, testified that he was ten when Carl left home (R.1105). Gary stated that he and Carl have a close relationship (R.1105). Carl had encouraged Gary in his school work and his other activities including track, basketball, and music (R.1105-06). Carl has also urged Gary not to do bad things and to stay away from the wrong people (R.1106). Gary testified that he loves his brother, and that Carl loves him (R.1106-07).

The trial court, in imposing the death penalty, found as

aggravating circumstances 1) that the murder was committed in the course of a robbery (R.1458), and, alternatively[2], 2a) that the murder was committed for the purpose of avoiding lawful arrest (R.1458-49), or 2b) that the murder was committed in a cold, calculated, and premeditated manner (R.1460). The court found as a mitigating circumstance that appellant does not have a significant history of prior criminal activity (R.1461). The court also found that the defense had proved the existence of non-statutory mitigating factors, on the basis of the evidence regarding appellant's relationship with his family, his voluntary confession to the police and his offer to plead guilty in exchange for a life sentence, and the fact that he has expressed remorse for his crime (R.1464-65). However, the court declined to accord significant weight to these non-statutory mitigating circumstances (R.1465).

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2 The trial court noted that his findings of "avoiding lawful arrest" and "cold, calculated, and premeditated" were grounded upon essentially the same circumstances, i.e. his determination that the victim was killed in order to prevent her from identifying appellant as the perpetrator of the robbery (R.1460). In weighing the aggravating circumstances against the mitigating circumstances, the trial court stated that he was considering these two aggravating circumstances in the alternative, and not in conjunction with one another (R.1461).

## IV ARGUMENT

### ISSUE I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO PRECLUDE CHALLENGES FOR CAUSE AND MOTION IN LIMINE; AND THE "DEATH-QUALIFICATION" OF PROSPECTIVE JURORS VIOLATED APPELLANT'S RIGHT TO AN IMPARTIAL JURY AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Prior to trial, the defense filed a motion to preclude the state from challenging for cause those prospective jurors who would not or might not be able to recommend the death penalty (R.1423-24). In this motion, the defense asserted:

> 2. These challenges for cause violate the Accused's right to trial by a jury selected from a representative cross-section of the community, as guaranteed by the Sixth and Fourteenth Amendments of the Constitution of the United States and Article I, Sections 9 and 22 of the Constitution of the State of Florida.
>
> 3. These challenges for cause violate the Accused's Fourteenth Amendment right to due process and equal protection of the laws by denying him trial by a jury selected from a cross-section of the community, without furthering any permissible State interest since
>
> (a) The jury does not finally impose sentence;
>
> (b) Its advisory sentencing verdict occurs at the second stage of the bifurcated trial;
>
> (c) This verdict is rendered by a majority vote.
>
> 4. This practice subjects the Accused to trial by a jury which is not impartial, but, in fact, is biased in favor of the

> prosecution on the issues of the Accused's guilt and of the degree of the crime of which he is charged, in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 9 of the Constitution of the State of Florida.
>
> 5. This practice subjects the Accused to cruel and unusual punishment as prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States because the jurors that will be selected for the trial will be incapable of performing the function demanded by Woodson v. North Carolina, 428 U.S. 280 (1976) of "maintaining a link between contemporary community values and the penal system." Also, see Gregg v. Georgia, 428 U.S. 153 (1976).
>
> (R.1423-24)

The defense also filed a corollary motion in limine, seeking to prohibit the state from questioning prospective jurors about their attitudes toward the death penalty (R.1427-29). Both motions were denied by the trial court (R.1269,1278,1435). As a result of the denial of these motions, appellant was tried by a "death-qualified" jury. He submits that his right to be tried by an impartial jury, guaranteed by the Sixth and Fourteenth Amendments was thereby violated. Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983); see also Avery v. Hamilton, __ F.Supp. __ (W.D. N.C. 1984)[3]; Hovey v. Superior Court of Alameda County, 616 P.2d 1301 (Cal. 1980).

In Grigsby v. Mabry, supra, the U.S. District Court for the Eastern District of Arkansas held that the exclusion, in a

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[3] In Avery v. Hamilton, supra, the U.S. District Court for the Western District of North Carolina reached a conclusion similar to the holding of Grigsby v. Mabry, supra. See Woodard v. Hutchins, __ U.S. __ (1984)(Brennan, J. dissenting from vacation of stay)(34 Cr.L. at 4157).

capital case, of jurors who are opposed to the death penalty but who could be fair and impartial on the question of guilt or innocence is constitutionally impermissible. The court discussed the "guilt-proneness" of death-qualified juries, and stated, inter alia:

> All of petitioners' experts testified as to the relationship between death penalty attitudes and other criminal justice related attitudes. All agreed that the empirical evidence and data made it clear, in their professional opinions, that persons excluded by the process of death qualification share sets of attitudes toward the criminal justice system that set them apart and distinguish them collectively from those not excluded by that process. All were also of the opinion that death-qualified jurors are more prone to favor the prosecution, to be hostile to the defendant, to regard significant constitutional rights lightly, and to make adverse judgments concerning minority groups than persons who adamantly oppose the death penalty (i.e., are not "death qualified"). Petitioners' experts were convinced that death-qualified jurors differ systematically from those excluded under Witherspoon standards. ***
>
> The Court credits and accepts the said opinions of petitioners' experts and finds that those opinions are based overall on solid scientific data, reason, and common sense.
>
> * * *
>
> To summarize, death qualification skews the predispositional balance of the jury pool by excluding prospective jurors who unequivocally express opposition to the death penalty. The evidence, and particularly the attitudinal surveys discussed by Drs. Bronson and Hastie, clearly establishes that a juror's attitude toward the death penalty is the most powerful known predictor of his overall predisposition

> in a capital criminal case. That evidence shows that persons who favor the death penalty are predisposed against the defendant. The evidence shows that death penalty attitudes are highly correlated with other criminal justice attitudes. Generally, those who favor the death penalty are more likely to trust prosecutors, distrust defense counsel, to believe the state's witnesses, and to disapprove of certain of the accepted rights of defendants in criminal cases. A jury so selected will not, therefore, be composed of a cross-section of the community. Rather, it will be composed of a group of persons who are uncommonly predisposed to favor the prosecution, a jury "organized to convict."
>
> [T]he Haney study provides strong empirical support for what trial lawyers and judges already know, and that is, that regardless of the preconceptions which a juror might have before entering the courtroom, the questions and the answers have a clear tendency to suggest that the defendant is guilty. Death qualification, then, is comparable to saturating the jury pool with prejudicial, pretrial publicity, which, as we know, is unconstitutional. *** But the death qualification process is worse because the biasing information is transmitted to the prospective jurors inside the courtroom and is imparted, albeit unconsciously, not only by the attorneys, but also by the judge.
>
> Grigsby v. Mabry, supra (33 Cr.L. at 2478)

The District Court in Grigsby concluded that the exclusion of persons who adamantly oppose the death penalty but could be impartial at the guilt-innocence phase is unconstitutional, and further concluded that "most of the state's legitimate interest can be accomodated by requiring completely bifurcated trials in capital cases - with one jury to determine the guilt [or] innocence of the defendant and another jury to determine the penalty if the defendant is convicted." The court observed:

> [T]he State's principal interest in preserving death qualification or the death qualification process boils down to a question of efficiency and money. The State simply does not want to pay the expense of having two separate juries, one to determine guilt and the other, if necessary, to determine penalty.
>
> If such a bifurcated system were established, would it mean that in every case in which the State sought the death penalty two separate juries would have to be impaneled? The answer is, obviously, no.
>
> Grigsby v. Mabry, supra (33 Cr.L. at 2478)

The District Court pointed out that a second jury would need to be impaneled only if the guilt phase resulted in a conviction of capital murder, and only if the state continued to seek the death penalty and to insist upon its consideration by a fully death-qualified jury, and concluded that:

> . . . the state's interests in using the present death-qualification system in capital cases cannot justify its effects on guilt determinations in capital cases. Nor can such interests justify the destruction of the representativeness of the juries which result from death qualification. In sum, the respondent has failed to carry its burden of justifying the use of nonrepresentative and partial juries in the trial of the guilt or innocence of those accused of capital crimes.
>
> Grigsby v. Mabry, supra (33 Cr.L. at 2479)

As emphasized in appellant's motion to preclude challenges for cause, the State of Florida's interest in using its present death-qualification system in capital cases is even less compelling than Arkansas'. Under Arkansas' death penalty statute, the

jury must be unanimous in order to impose a death sentence; if the jury does not unanimously agree to the death sentence and to all the written findings required by the statute, the judge must impose a sentence of life imprisonment. Arkansas Criminal Code (1977) §41-1302. Consequently, imposition of the death penalty would be impossible in any case where even one juror absolutely refused to consider voting for a death sentence regardless of the evidence and the law. Yet, notwithstanding this possibility, the District Court in Grigsby held that the state must protect its interest by providing for separate juries in the two phases of a capital trial, rather than requiring the guilt or innocence of the accused to be determined by a jury which is predisposed by the death-qualification process to find him guilty. Under Florida's death penalty statute, a death recommendation need not be unanimous, but may be returned by a majority, i.e., seven jurors. See Rose v. State, 425 So.2d 521, 525 (Fla. 1982). Thus, it would take no fewer than six jurors unalterably opposed to the death penalty under any circumstances to render it impossible for the state to secure a death recommendation. Under these circumstances, if there are one or two "death-scrupled" jurors on a jury which has just convicted a defendant of first degree murder, rather than impaneling a new jury the state might well prefer to have the same jury hear the penalty phase notwithstanding the fact that there are one or two "life" votes to start out with. The prosecutor would simply be in the position of having to convince seven out of the eleven other jurors or seven out of the ten other jurors that the circumstances of the case

warrant a death sentence; and that is a far less onerous burden than most states (which require that a death verdict be unanimous) impose on him at the outset. Bear in mind also that the prosecutor will have a minimum of ten peremptory challenges available to him. Fla.R.Cr.P. 3.350(a). Appellant submits that in the highly improbable event that there is any county in this state in which, even after the prosecutor has exercised his peremptory challenges, there could remain six or more people on the jury who are unalterably opposed to the death penalty under all circumstances, then unquestionably the death penalty does not comport with the conscience of that particular community and should not be imposed there in any event. See Witherspoon v. Illinois, 391 U.S. 510, 519-20 (1968).

There is yet another peculiarity in Florida's death penalty statute, in addition to the fact that a death recommendation may be returned by a simple majority, which negates the asserted rationale for death-qualifying the jury. This is the "life-override" provision which allows the trial court to impose a death sentence even if the jury recommends life. Thus even twelve "death-scrupled" jurors cannot block a death sentence if the judge is determined to impose it. Florida, Indiana, and Alabama are the only states in which the jury's recommendation as to penalty in a capital case is advisory only, with the ultimate determination to be made the trial court. Even assuming arguendo, contrary to Grigsby, that "death-qualification" of prospective jurors is constitutionally tolerable in states in which the jury's penalty verdict is binding, its rationale does not hold up where the jury's recommendation is advisory. This distinction was recognized by Justice Prentice of

the Supreme Court of Indiana, concurring in Hoskins v. State, 441 N.E.2d 419,429-30 (1982):

> I do not necessarily agree that the trial judge acted properly in excusing certain prospective jurors by reason of indicated bias against death sentences. The quotation from Adams v. Texas, (1980) 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581, i.e., "We repeat that the State may bar from jury service those whose beliefs about capital punishment would lend them to ignore the law or violate their oaths.", although applicable in that case, may be misplaced in the case at bar.
>
> Under our statutory provisions, the recommendation of the jury upon the punishment issue is not binding upon the court. The jury's determination, therefore, does not have the critical effect that it has in Texas, although in Witherspoon, the Court stated, " * * * but nothing in our decision turns upon whether the judge is bound to follow (the jury's) recommendation." 391 U.S. at 518 n.12, 88 S.Ct. at 1775 n.12, 20 L.Ed2d at 783 n.12. Additionally, the wording of the Indiana Statute, Ind.Code 35-50-2-9(e) (Burns 1979) does not appear to bind the conscience of the jurors but provides only that the jury may recommend the death penalty under certain prescribed circumstances. It is not altogether illogical to conclude, therefore, that although a juror finds facts warranting the death penalty and no mitigating circumstances whatsoever, he may, nevertheless, recommend against imposing it without violating his oath. Under such an interpretation of the statute, Juror Flowers certainly did not unequivocally indicate that his feelings about the death penalty could, or would, interfere with the duties imposed upon him by his oath and the death penalty statute.
>
> Unquestionably the State is entitled to a jury composed only of such persons who can abide by their oaths to follow the law and thus would not let their personal convictions in opposition to the death penalty control their votes upon the guilt or inno-

> cence of the defendant or upon any other issue of fact. However, whether, under our statute, which only permits the imposition of a death sentence under some circumstances and does not require it under any, and which renders the verdict advisory only, the State is entitled to a jury all members of which could, under some circumstances, recommend a death sentence, is a question which, to my knowledge, has not been answered. It is not necessary to answer it to resolve the case before us, and I leave it for another day.

For the foregoing reasons, appellant submits that the denial of his motion to preclude challenges for cause and his motion in limine, and the ensuing "death-qualification" of the jury panel, violated his constitutional right to an impartial jury, and his conviction and death sentence should be reversed.

ISSUE II

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO ASK PROSPECTIVE JURORS ON VOIR DIRE IF THEY COULD SET ASIDE ANY SYMPATHY FOR APPELLANT OR HIS FAMILY.

During voir dire, which was conducted individually, the prosecutor asked the first prospective juror:

> MR. JOHNSON [prosecutor]: Do you understand that the defendant's family may get up here and plead for his life, and show some emotion.
>
> MR. COLLINS: Yes.
>
> MR. JOHNSON: Can you assure this Court that you wouldn't be influenced just by emotion and base your verdict solely upon the evidence....
>
> MR. MITCHELL: Your Honor, I object to that as being an improper statement of law. Always, the juror can consider any mitigating factors. And if any mitigating factor in that juror's mind outweighs the aggravating factors they find exist, then they would return a life sentence. That's an improper statement.
>
> MR. JOHNSON: Any mitigating factor of the character or the background of the defendant, but no sympathy for the defendant, or for his family. And what I'm asking Mr. Collins is, can he place aside any appeal for sympathy on behalf of the defendant or his family?
>
> THE COURT: I think that's a fair question. You can respond to it as restated.
>
> MR. COLLINS: I think that I could disregard that as well as anyone. To say that I would not be moved by such emotion, totally, would be incorrect.
>
> MR. JOHNSON: Okay. Not be moved by it. But, I mean, you're going to make all effort to not consider it in your recom-

mendation?

MR. COLLINS: I certainly think so.

MR. JOHNSON: Okay, I think that's all I have at this time, Your Honor.

(R.238-39)

The defense objection having been overruled, the prosecutor continued to inform prospective jurors that members of appellant's family might testify, and to ask the jurors if they could disregard any consideration of sympathy for appellant or his family (R.247,291,331-32,359,442,521).

In the penalty phase of the trial, as the prosecutor had anticipated, appellant's mother, father, and younger brother were all called as witnesses for the defense. Their testimony concerned appellant's childhood; his hearing problems which contributed to his difficulties with school work; his activities in church, sports, and working with young people; the emotional effect of his parents' divorce; his closeness to and concern for his brother Gary; his kindness and respect toward his father's friend Betty Ragar and her children; and his remorse for his crime and his fervent advice that Gary not lead the same kind of life appellant had. All of this testimony in mitigation was admissible under the principles set forth in Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982). Those decisions "make it clear that in a capital case the defendant is constitutionally entitled to have the sentencing body consider any 'sympathy factor' raised by the evidence before it." People v. Robertson, 33 Cal. 3d 21, 57-58 (1982); People v. Easley, __ P.2d __ (Cal. 1983) (34 Cr.L. 2177); see also Romine

v. State, 305 S.E.2d 93,100-01 (Ga. 1983); Cofield v. State, 274 S.E.2d 530,542 (Ga. 1981). However, in obtaining a commitment from many of the prospective jurors (at least five of whom served on the jury which heard both the guilt and penalty phases of the trial[4]) to set aside any consideration of sympathy for appellant or his family, the prosecutor was effectively able to predispose the jury to ignore virtually all of the mitigating evidence presented by appellant. See People v. Easley, supra.

In Dicks v. State, 83 Fla. 717, 93 So. 137 (1922), this Court observed:

> Prospective jurors are examined on their voir dire for the purpose of ascertaining if they are qualified to serve, and it is not proper to propound hypothetical questions purporting to embody testimony that is intended to be submitted, covering all or any aspects of the case, for the purpose of ascertaining from the juror how he will vote on such a state of the testimony. Such questions are improper, regardless of whether or not they correctly epitomize the testimony intended to be introduced.

See also Smith v. State, 253 So.2d 465,470-71 (Fla. 1st DCA 1971); Harmon v. State, 394 So.2d 121 (Fla. 1st DCA 1980); Saulsberry v. State, 398 So.2d 1017 (Fla. 5th DCA 1981). In the present case, the prosecutor was permitted to express to

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[4] Prospective jurors Frenz (R.247); Gillman (R.291); Townsend (R.331-32); Schuster (R.359); and Acree (R.521-22), all of whom served on the jury (R.585), each responded to the prosecutor's inquiry that they could disregard any consideration of sympathy in their penalty deliberations.

the prospective jurors an incorrect statement of law[5] (i.e., that "considerations of sympathy" cannot properly be weighed in mitigation, and should be disregarded) and to obtain their commitment to set aside any sympathy for appellant or his family. As a result, the jurors may well have erroneously believed that they were required, as a matter of law, to disregard the mitigating evidence offered by appellant's family.[6] See People v. Easley, supra. This was constitutionally impermissible. Lockett v. Ohio, supra; Eddings v. Oklahoma, supra. Appellant's death sentence should be reversed and the case remanded for a new penalty trial.

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5 It has been held that "hypothetical questions having correct reference to the law of the case that aid in determining whether challenges for cause or peremptory are proper" may be allowed in the discretion of the trial court. Pope v. State, 84 Fla. 428, 438, 94 So. 865, 869 (1922); Pait v. State, 112 So.2d 380, 383 (Fla. 1959); Harmon v. State, supra, at 123-24. In the present case, however, the prosecutor's question embodied an incorrect statement of law; it misinformed the jurors that they should disregard any "sympathy factor," when in fact they could have considered it.

6 The prejudicial effect was compounded during the prosecutor's closing argument in the penalty phase, in which he twice told the jury that it should not be influenced by any consideration of sympathy for appellant's family "because that's not a mitigating circumstance" (R.1192, 1206).

## ISSUE III

THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF APPELLANT'S MOTHER THAT SHE DOES NOT BELIEVE APPELLANT SHOULD BE PUT TO DEATH.

During the penalty phase, defense counsel asked appellant's mother:

> Based on your knowledge of him, his background, his character, his record, even realizing he's committed this terrible crime, do you feel that based on your knowledge of all those facts, that he should be put to death?
>
> (R.1058)

The prosecutor objected, arguing that "there are no cases that allow a witness, particularly a mother, testify as to what she thinks would be the proper penalty in a penalty phase of this type of trial" (R.1058-59). The prosecutor contended that this was opinion testimony on the ultimate issue to be decided by the jury (R.1058-59,1061), and argued:

> It's still opinion. If the Defense lawyer can present the testimony of the mother's opinion as to the proper penalty, then can the State call in, say, Judge Melvin, and give him a hypothetical set of facts and give his opinion of what the proper penalty should be in this case?
>
> (R.1061)

The trial court observed that under the Evidence Code, Fla. Stat. §90.703, testimony in the form of an opinion, otherwise admissible, is not objectionable simply because it includes

an ultimate issue to be decided by the trier of fact (R.1059). Defense counsel argued that since appellant's mother was uniquely familiar with appellant's character and his background, her testimony regarding her opinion of whether or not he should be put to death would be relevant to mitigating circumstances which the jury could consider (R.1060-61). Defense counsel also pointed out that under Fla. Stat. §921.141(1), any evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence (R.1060).

The trial court sustained the state's objection and refused to permit appellant's mother to answer the question (R. 1063). The court explained his ruling:

> ...I think the evidentiary rule in question really was intended to permit a witness to express opinions having to do with technical expertise or skill, or with knowledge of that is based on experience that go to an ultimate issue, but which had probative value of other issues to be resolved, as well.
>
> I don't understand that the statute contemplates, even though it's very liberal in the relaxation of evidentiary matters, I don't understand it contemplates that witnesses will be called to express opinions as to whether a death or life sentence should be imposed.
>
> I really see no reason why, if it's appropriate for a mother of the defendant or some other family member or friend, to express such an opinion, that it wouldn't make just as much sense to open it up to a variety of experts, and we're really not trying

> to resolve this matter on the opinions of others, but upon evidence of factual circumstances from which these ultimate issues can be decided, in the immediate instance, by the jury, and in the ultimate instance, by the Court.
>
> (R.1062)

The exclusion of appellant's mother's testimony that she did not believe her son should be put to death was error as a matter of federal constitutional law [Lockett v. Ohio, supra; Eddings v. Oklahoma, supra] and as a matter of state law under §921.141(1). In Romine v. State, 305 S.E.2d 93, 101 (Ga. 1983) the Supreme Court of Georgia reversed a death sentence on the ground that the trial court erroneously refused to grant a continuance to permit the defense to present the testimony of the defendant's grandfather, who would have testified that he did not want to see his grandson executed:

> It is clear that the largest factor in the court's denial of continuance was the court's belief that Ralph's [the grandfather] testimony would not have been admissible in mitigation. This court, however, has consistently refused to place unnecessary restrictions on the evidence that can be offered in mitigation at the sentencing phase of a death penalty case. See, e.g., Brooks v. State, 244 Ga. 574,584, 261 S.E.2d 379 (1979); Cobb v. State, 244 Ga. 344 (28), 260 S.E.2d 60 (1979); Spivey v. State, 241 Ga. 477, 479, 246 S.E.2d 288 (1979); Brown v. State, 235 Ga. 644(3), 200 S.E.2d 922 (1975). See also Lockett v. Ohio, 438 U.S. 586,604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978), which held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the cir-

> cumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis in original, footnotes omitted.) In Cofield v. State, 247 Ga. 98(7), 274 S.E.2d 530 (1981), we held that, whether or not Lockett v. Ohio required it, in Georgia, a mother's testimony that she loved her son and did not wish to see him executed was admissible in mitigation in a death penalty case.
>
> Ralph's testimony that he did not wish to see his grandson die would have been admissible in mitigation and the trial court's opinion to the contrary was wrong. Moreover, Ralph's testimony would have been particularly significant because he was closely related not only to the appellant but also to the victims; unlike the mother in Cofield, Ralph wasn't viewing the case solely from appellant's perspective, and his opinion might well have been given considerable importance by the jury.

See also Cofield v. State, supra; People v. Easley, supra.

The reason why appellant's mother could properly express her opinion on whether she believes her son should be executed, while Judge Melvin, on a hypothetical set of facts propounded by the state, could not, is simple and twofold. First of all, the defendant is constitutionally entitled to submit any evidence relevant to his character or background in mitigation [Lockett v. Ohio, supra; Eddings v. Oklahoma, supra]; this includes the right to ask the jury to consider "sympathy factors." People v. Easley, supra. The state has no corresponding right. Secondly, appellant's mother was not asked to express her opinion on a hypothetical state of facts. Defense counsel made it clear that he was asking for her opinion based on her close relationship with appellant, and her knowledge of his background, character, and record. Her opinion was admissible in mitigation, and the jury should have been permitted to consider it. Lockett v. Ohio, supra; Romine v. State, supra.

ISSUE IV

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT ITS FINDING OF PREMEDITATED MURDER IN THE GUILT PHASE DOES NOT NECESSARILY ESTABLISH THE AGGRAVATING CIRCUMSTANCE THAT THE CRIME WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

The trial court, at the request of the state and over defense objection (R.1150-53), instructed the jury that among the aggravating circumstances it could consider was that "the crime for which the defendant is to be sentenced was a homicide, and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification" (R.1237). Fla. Stat. §921.141(5)(i). Defense counsel argued that such an instruction would violate due process, as it would amount to an automatic aggravating circumstance (R.1151-52). Defense counsel further argued that if the court was going to instruct the jury on the "cold, calculated, and premeditated" aggravating circumstance, he could perhaps avoid the due process problem by further instructing the jury that this circumstance was not necessarily established by its prior finding, in the guilt phase, that the murder was premeditated (R.1151-55,1180-81). On the authority of Jent v. State, 408 So.2d 1024,1032 (Fla. 1981), the defense requested the following special instruction:

> The finding of a verdict of premeditated murder on the trial of this matter does not necessarily establish the aggravating factor that is stated as follows: The crime for which the Defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

> You, the Jury, must further find that the premeditated murder was committed in a cold and calculated manner without any pretension of moral or legal justification.
>
> (R.1181)

Defense counsel argued that the requested instruction would eliminate the danger of the jury applying an automatic aggravating circumstance:

> That is what Jent stood for; that it was a clarification of an issue that was not clarified to that point. And I think the jury needs to receive it to be able to understand it. If they see premeditation in the instruction and they return a premeditated verdict, I think it'd point out to them that that is not sufficient, just the finding at the guilt phase, that it must be more; and that's exactly what the case stood for, and there's no adequate jury instruction to cover it.
>
> (R.1154-55)

The requested jury instruction was denied by the trial court (R.1181).

In Jent v. State, supra, at 1032, this Court rejected a constitutional challenge against the subsection of the death penalty statute which establishes the "cold, calculated, and premeditated" aggravating circumstance:

> Regarding Jent's second sentencing claim, he alleges that every person convicted of premeditated murder will start the sentencing proceeding with one aggravating circumstance already established. This, Jent argues, will violate due process by forcing the defendant to prove lack of premeditation in the sentencing phase of the trial. We do not agree that this will occur. As we stated in State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied,

> 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), the aggravating circumstances set out in section 921.141 must be proved beyond a reasonable doubt. The level of premeditation needed to convict in the [guilt] phase of a first-degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor - "cold, calculated ...and without any pretense of moral or legal justification."

Since Jent, this Court has repeatedly made it clear that premeditation alone is not sufficient to support a finding of the (5)(i) aggravating circumstance. See e.g. Herzog v. State, 439 So.2d 1372,1380 (Fla. 1983); Maxwell v. State, __ So.2d __ (Fla. 1983)(case no. 60,754, opinion filed December 15, 1983)(1983 FLW 506,508); Preston v. State, __ So.2d __ (Fla. 1984)(case no. 61,475, opinion filed January 19, 1984)(1984 FLW 26,29). The "cold, calculated, and premeditated" aggravating circumstance was not intended by the legislature to apply to all premeditated murder cases. Harris v. State, 438 So.2d 787,798 (Fla. 1983). Rather, the evidence must show beyond a reasonable doubt that there was a "heightened degree of premeditation, calculation, or planning." Richardson v. State, 437 So.2d 1091,1094 (Fla. 1983); see White v. State, __ So.2d __ (Fla. 1984)(case no. 62,144, opinion filed January 19, 1984)(1984 FLW 29,31). See also Maxwell v. State, supra, 1983 FLW at 508 (proof of the aggravating circumstance "requires a showing of a state of mind beyond that of the ordinary premeditation required for a first-degree murder conviction"); Preston v. State, supra, 1983 FLW at 29 (aggravating circumstance

has been found "when the facts show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator").

It is clear, then, that the instruction requested by the defense was a correct statement of law. It is the very fact that the aggravating circumstance is not automatic, and is not synonymous with the level of premeditation needed to convict in the guilt phase, that arguably saves §921.141(5)(i) from being unconstitutional. See Jent v. State, supra; Johnson v. State, 438 So.2d 774,779 (Fla. 1983); Herring v. State, __ So.2d __ (Fla. 1984)(case no. 61,994, opinion filed February 2, 1984) (Ehrlich, J. concurring in part and dissenting in part). Unfortunately, the subsection as it is worded, and the standard instruction as given in this case (R.1237), do not in any way convey to the jury that the aggravating circumstance is not established automatically by the guilt phase finding of premeditation. As a result of the trial court's refusal to give the requested instruction, the jury may well have begun its deliberations under the assumption that, having found the defendant guilty of premeditated murder, an aggravating circumstance was established by the guilty verdict, and thus started with the presumption that death was the appropriate sentence. See State v. Dixon, 283 So.2d 1,9 (Fla. 1973). As Justice Ehrlich observed in his separate opinion (concurring in part and dissenting in part) in Herring v. State, supra, loss of the "very significant distinction between simple premeditation and the heightened premeditation contemplated in section 921.141(5)(i)...would bring into question the constitutionality of that aggravating factor and, perhaps, the constitutionality,

as applied, of Florida's death penalty statute." See also Godfrey v. Georgia, 446 U.S. 420 (1980). The jury's recommendation of death was constitutionally tainted, and appellant's death sentence must be reversed.

ISSUE V

THE TRIAL COURT ERRED IN FINDING, AS ALTERNATIVE AGGRAVATING CIRCUMSTANCES, THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST AND THAT THE CAPITAL FELONY WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The trial court found, as an aggravating circumstance, that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest (R.1458). The court based this finding on the evidence that appellant had been in the store on numerous prior occasions when the victim was working there as a clerk or cashier, and that the victim had engaged in conversation with appellant on previous occasions and could recognize him (R.1458). The court stated in his sentencing order:

> The evidence clearly supports the inference and conclusion that the victim's acquaintance with the Defendant was such that the victim knew and/or would be able to identify the Defendant; that the Defendant knew and understood that the victim would be able to identify him, and that the Defendant knew it would be necessary to kill the victim in order to avoid identification and arrest.
>
> (R.1458)

This Court has construed Fla. Stat. §921.141(5)(e), which establishes an aggravating circumstance where a capital felony is committed for the purpose of avoiding or preventing a lawful arrest, to require (at least where the victim is not a law enforcement officer) a clear showing that the dominant or only motive for the murder was the elimination of witnesses. Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979). See also Riley v. State, 366 So.2d 19 (Fla. 1978); Armstrong v. State, 399 So. 2d 953 (Fla. 1981)(proof of requisite intent to avoid arrest and detection must be very strong). In Clark v. State, __ So.2d __ (Fla. 1983)(case no. 62,126, opinion filed December 22, 1983) (1984 FLW 1) this Court emphasized:

> The burden is upon the state in the sentencing portion of a capital felony trial to prove every aggravating circumstance beyond a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla. 1980). Not even "logical inferences" drawn by the trial court will suffice to support a finding of a particular aggravating circumstance when the state's burden has not been met.

In the present case, as in Cannady v. State, 427 So.2d 723, 730 (Fla. 1983), the only direct evidence of the manner in which the murder was committed was appellant's own statements to the police. Appellant admitted robbing and killing the victim, but denied that he had intended to hurt her. He stated that he was scared and "shaking like crazy"; that he kept telling the clerk he didn't want to hurt her; that she jumped or moved suddenly and he fired three times. Appellant told the police that he and James Coleman had split a case and two six-packs of beer

that day; minus the two or three cans Betty Boyd drank, this would mean that appellant had consumed sixteen or seventeen beers that day. Appellant's statement was corroborated in that regard by the testimony of state witnesses Boyd and Coleman. Appellant got about fifty-five dollars from the cash register and threw it in his coat pocket; then, upon leaving Grady Adams' car in the dirt road with the motor running (because he couldn't find the screwdriver to shut it off), he accidentally dropped a twenty dollar bill and a ten dollar bill on the ground. When he got back to his camper, appellant put the money in his billfold, apparently without realizing that more than half of the money he had just stolen was lying in the dirt road by the car. The evidence also established that appellant was not an experienced criminal; his only prior offenses were a bicycle theft and the theft of Grady Adams' gun. Given all these factors, the evidence is at least as consistent, if not more so, with appellant's admissions as to how the crime occurred than with the trial court's theory, drawn by "logical inference" merely from the fact that the victim could recognize appellant, that the murder was coldly planned for the purpose of eliminating the victim as a potential witness.

In order to support a finding, beyond a reasonable doubt, that a murder was committed for the purpose of avoiding arrest or detection, there must be at least some concrete evidence that this was in fact the dominant or only motive for the killing. See e.g. Herring v. State, __ So.2d __ (Fla. 1984)(case no. 61,994, opinion filed February 2, 1984)(defendant told detective that he

shot clerk a second time to prevent him from being a witness); Clark v. State, supra (defendant made statement to cellmate that "one of [the victims] could identify [him]"); Hitchcock v. State, 413 So.2d 741 (Fla. 1982)(defendant admitted to having choked and beaten victim in order to keep her from carrying out her threat to tell her mother of sexual battery); Vaught v. State, 410 So.2d 147 (Fla. 1982)(victim shot after pulling off assailant's mask and telling him he knew who he was and where he lived); Elledge v. State, 408 So.2d 1021 (Fla. 1981)(rape victim threatened to call police); Blair v. State, 406 So.2d 1103 (Fla. 1981) (defendant killed his wife, who threatened to report to police that he committed a sexual battery upon her daughter); White v. State, 403 So.2d 331 (Fla. 1981)(three co-perpetrators discussed the need for killing victims after mask of one of the perpetrators fell off; "wheelman" was later told not to worry because none of victims should live); Riley v. State, supra, (victim executed after one of perpetrators expressed concern for subsequent identification).

In the present case, there was no evidence that the killing was motivated -- solely, dominantly, or at all -- by desire to avoid arrest. There was only the inference drawn by the trial court based on the bare fact that the victim could recognize appellant. That is not sufficient to support the trial court's finding of this aggravating circumstance. See Menendez v. State, supra; Cannady v. State, supra; Clark v. State, supra; Rembert v. State, __ So.2d __ (Fla. 1984)(case no. 62,715, opinion filed February 2, 1984).

The trial court's alternative finding of the aggravating circumstance that the murder was committed in a "cold, calculated, and premeditated" manner also cannot stand, since this finding was based on the court's conclusion that "the Defendant executed the victim so that she could not later identify him" (R.1460). For the reasons previously expressed, the state failed to meet its burden of proving beyond a reasonable doubt that this was a "witness elimination" murder. Moreover, the fact that the victim was shot three times is not sufficient in itself to prove that the crime was committed in a cold, calculated, and premeditated manner. Cannady v. State, supra, at 730.

Simple premeditation is not sufficient to support a finding of this aggravating circumstance; the evidence must show beyond a reasonable doubt that there was a "heightened degree of premeditation, calculation, or planning." Richardson v. State, 437 So.2d 1091, 1094 (Fla. 1983); see also White v. State, __ So.2d __(Fla. 1984)(case no. 62,144, opinion filed January 19, 1984)(1984 FLW 29,31). "Proof of this aggravating circumstance requires a showing of a state of mind beyond that of the ordinary premeditation required for a first-degree murder conviction." Maxwell v. State, __ So.2d __ (Fla. 1983)(case no. 60,754, opinion filed December 15, 1983)(1983 FLW 506,508); see also Jent v. State, 408 So.2d 1024,1032 (Fla. 1981); Washington v. State, 432 So.2d 44,48 (Fla. 1983). In Preston v. State, __ So.2d __ (Fla. 1984)(case no. 61,475, opinion filed January 19, 1984)(1984 FLW 26,29), this Court said:

> This aggravating circumstance has been found when the facts show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator. See, e.g., Jent v. State (eyewitness related a particularly lengthy series of events which included beating, transporting, raping, and setting victim on fire); Middleton v. State, 426 So.2d 548 (Fla. 1982)(defendant confessed he sat with a shotgun in his hands for an hour, looking at the victim as she slept and thinking about killing her); Bolender v. State 422 So.2d 833 (Fla. 1982), cert. denied, 103 S.Ct. 2111 (1983)(defendant held the victims at gunpoint for hours and ordered them to strip and then beat and tortured them before they died).

The killing in the present case, like those in Cannady v. State, supra (defendant stole money from motel, kidnapped night auditor, drove him to wooded area and shot him; defendant said he had not meant to shoot victim -- factor not found) and Peavy v. State, __ So.2d __ (Fla. 1983)(case no. 62,115, opinion filed December 8, 1983)(1983 FLW 494)(defendant burglarized and ransacked victim's apartment, stole television set and watch, and sprayed shaving cream on door locks; victim found stabbed to death; defendant said he had helped victim carry groceries home from store, victim gave him two dollars, and he left -- factor not found), occurred during the commission of a robbery "and is susceptible to other conclusions than finding it committed in a cold, calculated, and premeditated manner." Peavy v. State, supra, 1983 FLW at 495. The trial court improperly found the existence of this aggravating circumstance because the evidence does not establish it beyond a reasonable doubt. See Cannady v. State, supra; Washington v. State, supra; Richardson v. State, supra; Peavy v. State, supra; Maxwell v. State, supra; Preston

v. State, supra; White v. State, supra.

In view of the invalidity of the "avoid lawful arrest" and "cold, calculated, and premeditated" aggravating circumstances found in the alternative by the trial court, the only valid aggravating circumstance in this case is that the murder was committed while appellant was engaged in the commission of an armed robbery (R.1458). The trial court found as a mitigating circumstance that appellant does not have a significant history of prior criminal activity (R.1461). He also found that the defense proved the existence of non-statutory mitigating factors in that appellant "enjoys the love and affection of his family and friends, . . . has been kind and considerate in his dealings with them, . . . has expressed remorse and encouraged his younger brother to conform his conduct to socially acceptable and desirable norms . . ." (R.1465). Appellant therefore submits that it would be appropriate for this Court to remand this case to the trial court with instructions to reduce the penalty to life imprisonment without eligibility for parole for twenty-five years. See Kampff v. State, 371 So.2d 1007 (Fla. 1979); Blair v. State, 406 So.2d 1103 (Fla. 1981); Rembert v. State, supra. In the alternative and at the least, this Court should remand this case to the trial court for the purpose of resentencing appellant without taking into consideration the aggravating circumstances set forth in subsections (e) and (i) of Fla. Stat. §921.141(5). See Gafford v. State, 387 So.2d 333 (Fla. 1980); Moody v. State, 418 So.2d 989 (Fla. 1982); Peavy v. State, supra.

ISSUE VI

THE TRIAL COURT ERRED IN FAILING TO FIND AS A STATUTORY OR NON-STATUTORY MITIGATING CIRCUMSTANCE THAT APPELLANT'S FACULTIES WERE IMPAIRED BY EXCESSIVE CONSUMPTION OF BEER, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Fla. Stat. §921.141(6)(f) establishes a statutory mitigating circumstance where "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." Under the principles expressed in Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982), the mitigating circumstances which are available to a capital defendant, if established by the evidence, cannot constitutionally be limited to those in the statute. See Songer v. State, 365 So.2d 696, 700 (Fla. 1978). Thus, if the evidence showed any impairment of appellant's faculties, whether rising to the level of "substantial" impairment or not, that evidence should have been considered in mitigation. The weight to be accorded this circumstance is largely within the discretion of the trial court, but he is not free to ignore it altogether.

In the present case, appellant stated in his confession to the police that he and James Coleman had split a case and two six packs of beer. When appellant was dropped off at Virginia's house, Coleman gave him the last couple of beers. Allowing for the two or three beers Betty Boyd drank, appellant must have consumed about seventeen or eighteen cans of beer on the day of the robbery-murder; the last one less than half an hour before the

shooting. The testimony of Betty Boyd and James Coleman, both of them state witnesses, confirmed that appellant had indeed had that much beer. While Boyd and Coleman both were of the opinion that appellant was not drunk, appellant's bungling actions during the robbery, and especially immediately thereafter, were fully consistent with the behavior of one whose faculties are impaired by eighteen cans of beer. Leaving Grady Adams' car near his own residence, with the motor running because he couldn't find the screwdriver to turn if off, and dropping more than half of the stolen money on the ground without even realizing it, are actions strongly indicative that appellant was functioning at less than full capacity. Since the evidence that appellant committed this crime after consuming something on the order of eighteen cans of beer was undisputed, and largely established by the state's own witnesses, the trial court should have accorded this evidence at least some weight as a mitigating circumstance. Lockett v. Ohio, supra; Eddings v. Oklahoma, supra. His failure to do so requires reversal of appellant's death sentence. See Kampff v. State, 371 So.2d 1007 (Fla. 1979).

ISSUE VII

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. The issues are presented in a summary form in recognition that this Court has specifically or impliedly rejected each of these challenges to the constitutionality of the Florida statute and thus detailed briefing should be futile. However, Appellant does urge reconsideration of each of the identified constitutional infirmities.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors. Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." The statute, further, does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980).

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, supra; Witt v. State, 387 So.2d 922, 931-932 (Fla. 1980)(England, J. concurring).

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and factors. See Lockett v. Ohio, 438 U.S. 586 (1978).

Compare Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

The failure to provide the Defendant with notice of the aggravating circumstances which make the offense a capital crime and on which the State will seek the death penalty deprives the Defendant of due process of law. See Gardner v. Florida, 430 U.S. 349, 358 (1977); Argersinger v. Hamlin, 407 U.S. 25,27-28 (1972); Amend. VI and XIV, U.S. Const.; Art. I, §§9 and 15(a), Fla. Const.

Execution by electrocution imposes physical and psychological torture without commensurate justification and is therefore a cruel and unusual punishment. Amend. VIII, U.S. Const.

The Florida capital sentencing statute does not require a sentencing recommendationby a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law.

The Elledge Rule (Elledge v. State, 346 So.2d 998 (Fla. 1977)), if interpreted to automatically hold as harmless error any improperly found aggravating factor in the absence of a finding by the trial court of a mitigating factor, violates the Eighth and Fourteenth Amendments to the United States Constitution.

The Amendment of Section 921.141, Florida Statutes (1979) by adding aggravating factor 921.141(5)(i)(cold and calculated) renders the statute in violation of the Eighth and Fourteenth Amendments to the United States Constitution because is results in death being automatic unless the jury or trial court in their discretion find some mitigating circumstance out of an infinite

array of possibilities as to what may be mitigating.

Additionally, a disturbing trend has become apparent in this Court's recent decisions and its review of capital cases. This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction. Quince v. Florida, __ U.S. __ 32 C.L. 4016 (U.S. Sup.Ct. Case No. 82-5096, Oct. 4, 1982)(Brennan and Marshall, J.J., dissenting from denial of cert.); Brown v. Wainwright, 392 So.2d 1327 (1981). Appellant submits that such an application renders Florida's death penalty unconstitutional.

In rejecting a constitutional challenge to the statute, the United States Supreme Court assumed in Proffitt v. Florida, 428 U.S. 242 (1976), that this Court's obligation to review death sentences encompasses two functions. First, death sentences must be reviewed "to insure that similar results are reached in similar cases." Proffitt, supra, at 258. Secondly, this Court must review and reweigh the evidence of aggravating and mitigating circumstances to determine independently whether the death penalty is warranted. Id. at 253. The United States Supreme Court's understanding of the standard of review was subsequently confirmed by this Court when it stated that its "responsibility [is] to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." Harvard v. State, 375 So.2d 833, 834 (1978) cert. denied, 414 U.S. 956 (1979)(emphasis added).

In view of this Court's abandonment of its duty to make an independent determination of whether or not a death sentence is

warranted, the constitutionality of the Florida death penalty statute is in doubt. For this and the previously stated arguments, appellant contends that the Florida death penalty statute as is exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

## V CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court grant the following relief:

As to Issue I: reverse the conviction and death sentence and remand for a new trial.

As to Issues II, III, and IV: reverse the death sentence and remand for a new trial, with an advisory jury, on the issue of penalty.

As to Issues V and VI: reverse the death sentence and remand for imposition of a life sentence without possibility of parole for twenty-five years, or in the alternative, reverse the death sentence and remand for resentencing by the trial judge.

As to Issue VII: reverse the death sentence and remand for imposition of a life sentence without possibility of parole for twenty-five years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to John Tiedemann, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 and a copy mailed to appellant Carl Caruthers, #090486, Florida State Prison, Post Office Box 747, Starke, Florida 32091 on this 10th day of February, 1984.

Steven L Bolotin

STEVEN L. BOLOTIN