

IN THE FLORIDA SUPREME COURT

CARL PUIATTI, :  
Appellant, :  
vs. : Case No. 65,321  
STATE OF FLORIDA, :  
Appellee. :  
\_\_\_\_\_ :

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

INITIAL BRIEF OF APPELLANT

**FILED**

SID J. WHITE

FEB 28 1985

CLERK SUPREME COURT

By *[Signature]*  
Chief Deputy Clerk

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## SUMMARY OF THE ARGUMENT

### ISSUE I.

The trial court's failure to grant a severance denied Carl Puiatti his right to confrontation, forced him to face two accusers, and gave the State unfair advantage.

### ISSUE II.

The trial court erred by denying Carl Puiatti's motion to suppress post-arrest statements because the statements were the fruit of an arrest made without probable cause.

### ISSUE III..

The trial court erred by overruling defense objections to the prosecutor's improper and prejudicial arguments to the jury. The prosecutor appealed to the fears of the women jurors and characterized Carl Puiatti as an animal.

### ISSUE IV.

The prosecutor repeatedly advised the jury that they could "presume" premeditation from Mr. Puiatti's involvement in a felony murder. The trial court erroneously overruled a defense objection to this improper commentary, and then aggravated that error by refusing to instruct the jury that the aggravating factor of "cold, calculated, and premeditated" requires a heightened degree of premeditation.

### ISSUE V.

At the penalty phase jury instruction conference, the defense tendered an instruction listing several non-statutory

mitigating circumstances which have been recognized by this Court. This instruction was erroneously refused by the trial court.

#### ISSUE VI.

The trial court's findings in support of the death penalty are erroneous because (A) the court improperly found that the murder was "cold, calculated, and premeditated" where the evidence failed to establish a heightened degree of premeditation; (B) the court ignored unrebutted evidence of brain damage in concluding that there was "no credible evidence whatsoever" that Mr. Puiatti was under the influence of mental or emotional distress; (C) the court misinterpreted the evidence in concluding that Mr. Puiatti had not acted under the substantial domination of another person; (D) the court relied upon improper criterion in rejecting expert testimony relating to Mr. Puiatti's inability to conform his conduct to the requirements of law; (E) the court overlooked relevant evidence relating to the effect Mr. Puiatti's brain dysfunction had on his emotional stability as opposed to his thought processes in rejecting age as a mitigating circumstance; and (F) the trial court erred by refusing to characterize Mr. Puiatti's cooperation with the police, capacity for rehabilitation, and strong family background as "non-statutory mitigating circumstances" despite finding that Mr. Puiatti had presented favorable evidence with respect to these factors.

#### ISSUE VII.

The trial court denied a pretrial motion by the defense to empanel two separate juries--one to determine guilt or inno-

cence and another for the penalty phase of the trial. This was error because it resulted in the exclusion of jurors opposed to the death penalty from Mr. Puiatti's trial thereby denying him his Sixth Amendment right to a jury drawn from a fair cross-section of the community.

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STATEMENT OF THE CASE

Carl Puiatti was charged by indictment with the offenses of first degree murder, kidnapping, and robbery. (R13) Following a jury trial, Mr. Puiatti was found guilty of the offenses charged. (R2184-2185)

The court subsequently accepted the advisory jury's recommendation and sentenced Mr. Puiatti to death. (R2694) The court also imposed consecutive life sentences on the robbery and kidnapping convictions. (R338,2697)

Mr. Puiatti appeals his convictions and sentences.

STATEMENT OF THE FACTS

A. Pretrial

Prior to trial, the defense moved to suppress statements which had been obtained from Carl Puiatti following his arrest.

(R159-163) The motion alleged, in pertinent part, that the statements had been obtained pursuant to an illegal arrest and in violation of Mr. Puiatti's right to counsel.

At the ensuing hearing, the evidence established that on August 20, 1983 at approximately 4 p.m. police officer William Moore stopped a Toyota automobile on the New Jersey turnpike.

(R477-479) Officer Moore had observed that the vehicle's license plate was improperly displayed in violation of the New Jersey motor vehicle code. (R481) The car was occupied by Mr. Puiatti and Robert Glock. (R478-479) Mr. Glock was driving. (R479)

When neither Mr. Puiatti nor Mr. Glock could produce a driver's license, Officer Moore requested the vehicle registration. (R481-482) Mr. Puiatti opened the glove box to obtain the registration and Officer Moore observed a handgun therein. (R482) Officer Moore was handed the registration which indicated that the vehicle was owned by an individual named Ritchie. (R483) Mr. Glock explained that Mr. Ritchie was his brother-in-law. (R485)

Officer Moore requested and was given permission to search the vehicle. (R483) The search resulted in the seizure of two handguns. (R485) Mr. Glock explained that the guns belonged to his brother-in-law. (R485) Officer Moore then placed Mr. Puiatti and Mr. Glock under arrest for possession of a handgun without a permit. (R486) Mr. Glock informed Officer Moore that

Mr. Puiatti "knew nothing about the guns." (R489) After being transported to the police station, Mr. Puiatti requested that he be allowed to telephone his uncle, a New York police officer. (R496-498) The request was denied. (R497)

At approximately 5 p.m., the police discovered, pursuant to a license check, that the Toyota automobile had been stolen and its owner was a homicide victim. (R529) The police then interrogated Mr. Glock who admitted abducting a woman in Florida and stealing her car. (R535-536) Mr. Puiatti denied any knowledge of the crimes. (R538)

On August 21, after being told that Mr. Glock had given a statement, Mr. Puiatti admitted his participation in the events leading to the death of Sharon Ritchie. (R549,598,704)

On August 22, Mr. Puiatti filled out an application for the appointment of the Public Defender. (R707,718) This application was given to an individual connected with the Public Defender's Office. (R707,718) The same day Mr. Puiatti appeared before a judge for the first time. (R550,710)

Mr. Puiatti waived an extradition hearing and was transported to Pasco County, Florida on August 24. (R601) After arriving in Pasco County, Mr. Puiatti and Mr. Glock gave a joint statement concerning their involvement in Mrs. Ritchie's death. (R607)

Following arguments, the motion was denied. (R783)

Mr. Puiatti also moved to sever his trial from that of his co-defendant. (R203-205) The motion alleged that severance was necessary to a fair and impartial trial. At the hearing on the motion, defense counsel advised the court that the co-defen-

dants had given conflicting statements and would in all likelihood assert inconsistent defenses. (R840-845) This motion was also denied. (R846) The motion was renewed and again denied several times during the trial. (R1913-1914,1918,1937-1940,1984,2358)

B. Trial

The evidence presented at trial tended to establish that on the morning of August 16, 1983, Sherilynn Ritchie left home in her Toyota automobile to go shopping. (R1835-1836,1862) Later that day, Mrs. Ritchie's body was discovered near the side of a road in rural Pasco County. (R1741) The ensuing autopsy revealed multiple gun shot wounds, including a bullet wound to the chest which was considered to be the cause of death. (R1800, 1804) The medical examiner opined that Mrs. Ritchie had expired between 12:25 p.m. and 2:25 p.m. that day. (R1794)

Four days later on November 20, a State Trooper effected a traffic stop of a Toyota automobile on the New Jersey Turnpike. (R1849) The automobile was occupied by Robert Glock and Carl Puiatti. (R1850-1855) Mr. Glock was driving. (R1850) When neither occupant could produce a drivers license, the Trooper requested the vehicle registration. (R1850-1851) The registration revealed that the vehicle was owned by William Ritchie. (R1853) After observing a handgun inside the car, the Trooper arrested Mr. Glock and Mr. Puiatti for possession of a weapon without a permit. (R1853-1854,1857)

Mr. Glock and Mr. Puiatti were transported to the local police station where a license check revealed that the Toyota automobile had been reported stolen. (R1864-1868) Mr. Glock and

Mr. Puiatti subsequently gave statements implicating themselves in the kidnapping, robbery, and murder of Sherilynn Ritchie. (R1882, State's Ex.Nos. 41 and 42)

According to their statements, Mr. Glock and Mr. Puiatti were at a mall in Bradenton on the morning of August 16, 1983. They were looking for a car to steal when Mrs. Ritchie attempted to exit her car. Mr. Glock and Mr. Ritchie forced her back inside and they got in with her and drove away. Mr. Glock was armed with a .32 caliber revolver and Mr. Puiatti had a .22 caliber derringer. They took \$50 from Mrs. Ritchie's purse and then forced her to cash a check for \$100 at her bank.

They drove north and subsequently reached a rural orange grove where they let Mrs. Ritchie out of the car. They then drove away.

According to Mr. Puiatti's statement, after they had driven a short distance, Mr. Glock told him, "hey man we have to kill her." Although Mr. Puiatti "didn't want to," he eventually turned the car around and drove back to where Mrs. Ritchie was standing. After they had obtained Mrs. Ritchie's wedding ring, Mr. Puiatti shot her in the chest and drove off. Mr. Glock noticed that Mrs. Ritchie was still standing and told Mr. Puiatti to go back. Mr. Puiatti drove by Mrs. Ritchie again, shooting her in the chest. When she did not fall, Mr. Glock took the gun from Mr. Puiatti and shot her three times.

According to Mr. Glock's statement, it had been Mr. Puiatti who had suggested shooting Mrs. Ritchie.

The evidence further indicated that Mr. Glock and Mr. Puiatti both waived extradition. (R1890) After returning to

Florida, they gave a joint statement in which they agreed that it was Mr. Glock who first suggested shooting Mrs. Ritchie. (R1984-2023)

Following closing arguments, the jury retired for their deliberations and subsequently from Mr. Puiatti and Mr. Glock guilty of the offenses charged. (R2184-2185)

C. Penalty Phase

At the penalty phase proceeding before the advisory jury, the State elected to rely upon the evidence which had been adduced at trial. (R2218)

Dr. Donald Delbeato, a clinical forensic psychologist, testified on behalf of the defense. (R2222) Dr. Delbeato had performed a series of psychological tests upon Mr. Puiatti. (R2227-2228) These tests revealed that Mr. Puiatti suffered from a brain dysfunction which caused him to function at the emotional level of a young adolescent. (R2238-2248) This dysfunction became particularly pronounced when Mr. Puiatti was under stress, causing him to be more violent, more aggressive, more easily influenced, and susceptible to manipulation by another person. (R2249) Dr. Delbeato opined that Mr. Puiatti was under stress at the time of the crime. (R2297)

Dr. Richard Meadows, a psychiatrist, testified that he had interviewed Mr. Puiatti, reviewed the evidence, and studied the psychological examinations which had been done by Dr. Delbeato. (R2405-2406) Dr. Meadows stated that he was "certain" that Mr. Puiatti suffered from brain damage. (R2659) As a consequence of this mental condition, Mr. Puiatti was easily influenced and had

difficulty resisting encouragement. (R2425,2664) Dr. Meadows opined that Mr. Puiatti was under the substantial domination of another person at the time of the crime. (R2425) Dr. Meadows further opined that Mr. Puiatti was under the influence of extreme mental or emotional disturbance at the time of the crime as a result of his mental illness combined with a series of personal and emotional crises which he had recently incurred. (R2415-2425) Dr. Meadows concluded his testimony by stating that Mr. Puiatti had a nonviolent personality and that he was capable of rehabilitation. (R2424,2427)

Mr. Puiatti's mother, father, and brother also testified on his behalf. (R2362-2398) These witnesses described Mr. Puiatti as a nonviolent person who had suffered a series of personal setbacks in recent years including a separation from his wife and the death of his child. (R2371-2387,2391,2399)

Following closing arguments, the jury retired for their deliberations and subsequently returned a death recommendation by a vote of 11 to 1. (R2531)

Thereafter, on May 16, 1984, the court entered its findings in support of the death sentence. (R312-319) The court found the presence of three aggravating factors: the murder was committed for the purpose of avoiding arrest; the capital felony was committed for pecuniary gain; and the murder was cold, calculated, and premeditated. (R313-314) The court did not specifically find any mitigating factors, either statutory or nonstatutory, but did indicate that "it did weigh the fact of the confessions favorable" to Mr. Puiatti; that it considered evidence that Mr.



Puiatti was capable of rehabilitation in Mr. Puiatti's "favor;" and that it was "convinced" that Mr. Puiatti "comes from a very fine family." (R319)

In addition to the sentence of death, the court imposed consecutive life sentences on the robbery and kidnapping convictions. (R338,2697)

## ARGUMENT

### ISSUE I.

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING CARL PUIATTI'S MOTION TO SEVER HIS TRIAL FROM THAT OF HIS CO-DEFENDANT.

Carl Puiatti and Robert Glock were charged with the robbery, kidnapping, and first degree murder of Sharilyn Ritchie. Prior to trial, Mr. Puiatti's defense attorney moved for severance noting that the codefendants had given antagonistic post-arrest statements which could create the potential for Bruton (Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)) problems in the event of a joint trial. Defense counsel also advised the court of the likelihood of inconsistent defenses, and emphasized that the potential for prejudice would be particularly acute in this capital proceeding wherein the jury would be called upon to make a decision not only as to Mr. Puiatti's guilt or innocence but whether he should live or die as well. Following arguments, the motion was denied. Mr. Puiatti renewed his motion several times during trial, and each time it was again denied.

Although the granting or denying of a motion for severance is normally discretionary (Crum v. State, 398 So.2d 810 (Fla.1981)), the trial court abused its discretion in this case. Florida Rule of Criminal Procedure 3.152(b)(1) directs the trial court to order severance whenever necessary "to promote a fair determination of the guilt or innocence of one or more defendants." This rule is consistent with the American Bar Association standards relating to joinder and severance which suggest that

severance should be granted whenever it appears that potential prejudice may arise at trial. Crum v. State, 398 So.2d at 811.

In this case, the potential for prejudice was readily apparent prior to trial and this prejudice became increasingly evident as the proceedings progressed through the trial and penalty phase. This prejudice accrued from three primary sources: (a) antagonistic post-arrest statements which had been given by the codefendants following their arrest; (b) inconsistent and conflicting penalty phase defenses; and (c) penalty phase jury instructions and prosecutorial comments relating thereto which were relevant to codefendant Glock's case but were prejudicial error as to Mr. Puiatti.

A.

The Trial Court's Failure To Grant A Severance Resulted In The Denial Of Carl Puiatti's Constitutional Right To Confrontation.

In McCray v. State, 416 So.2d 804 (Fla.1982), the Court held that severance is appropriate where the jury could be confused or improperly influenced by evidence which applies to only one of several defendants. This Court further stated that:

A type of evidence that can cause confusion is the confession of a defendant which, by implication, affects a codefendant, but which the jury is supposed to consider only as to the confessing defendant and not as to the others. A severance is always required in this circumstance. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

416 So.2d at 806, citation original.

In the present case, codefendants Glock and Puiatti each made statements following their arrest in which they admitted

participating in the offenses charged. However, Mr. Glock claimed that the idea for the murder had originated with Mr. Puiatti, while Mr. Puiatti claimed that it was Mr. Glock who had been the motivating force behind the crime. The defendants also gave a subsequent joint statement in which they agreed that the murder had been Mr. Glock's idea.

In denying the motion for severance, the trial court reasoned that the joint statement constituted interlocking confessions. The trial court was correct in holding that severance is not required where the codefendants have given interlocking confessions. Parker v. Randolph, 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979). Thus the joint statement was admissible at trial. However, the court erred by ruling that the initial statements, in which each codefendant implicated the other as the instigator and motivating force behind the murder, could be admitted too. This constituted prejudicial error and denied Mr. Puiatti his right to confrontation. Bruton v. United States, 391 U.S. at 127-128.

Neither codefendant took the stand at trial. The prosecution's case against the defendants rested primarily upon their post-arrest statements which were admitted over defense objection. The trial court instructed the jury that the initial statements could be used only against the defendant who gave it and could not be considered as evidence of a codefendant's guilt.

The trial court's finding that each defendant's initial statement was admissible only against the defendant who gave it brings this case squarely within the language of McCray v. State

which was quoted above. The jury's exposure to Mr. Glock's claim that Mr. Puiatti was the instigator of the crime created the likelihood that the jury would be confused or improperly influenced by this inadmissible evidence. As this Court stated in McCray, "[a] severance is always required in this circumstance." 416 So.2d at 806. However, instead of granting a severance, the trial court attempted to cure the resultant prejudice to Mr. Puiatti by giving a limiting instruction.<sup>1/</sup> This was insufficient. Bruton v. United States, 391 U.S. at 139. In Bruton situations, the "practical and human limitations of the jury system" override the premise that the jury will follow the trial court's instruction. Bruton v. United States, 391 U.S. at 135.

The procedure which the trial court should have followed is set forth in Florida Rule of Criminal Procedure 3.152(b)(2). Under this rule, if the court determines that the statement of one codefendant is inadmissible against the other, it shall require the State to elect one of the following courses: (1) a joint trial at which evidence of the statement would be excluded; (2) a joint trial at which the statement is admitted only after prejudicial references to the other defendant have been excised; or (3) severance.

The court's failure to follow the foregoing procedure violated Rule 3.152(b)(2), denied Mr. Puiatti his right of confrontation, and resulted in severe prejudice which became increasingly apparent as the trial proceeded to the penalty phase.

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<sup>1/</sup> The court instructed the jury that Mr. Glock's oral statement "was admissible against Mr. Glock, and only Mr. Glock" and should not be considered as evidence against Mr. Puiatti. (R1914)

At the penalty phase hearing, the defense presented substantial evidence on Mr. Puiatti's behalf concerning the applicability of the following statutory mitigating circumstances: the defendant acted under the influence of extreme mental or emotional disturbance (Fla.Stat. Ch.921.141(6)(b)); and the defendant acted under extreme duress or the substantial domination of another (Fla.Stat. Ch.921.141(6)(e)).

Dr. Donald Delbeato, a forensic psychologist, testified that Mr. Puiatti suffered from a brain dysfunction which caused him to be "[v]ery easily manipulated" by another person. (R2249) Dr. Delbeato concluded that due to Mr. Puiatti's brain dysfunction, combined with the stress he was under at the time of the incident, caused him to be easily influenced and more easily dominated by another individual. (R2249,2251)

Dr. Delbeato's conclusions were supported by the testimony of Dr. Richard Meadows. Dr. Meadows, a psychiatrist, opined that at the time of the incident Mr. Puiatti was under the substantial domination of another person. (R2425) Dr. Meadows explained that because of the brain dysfunction Mr. Puiatti was "easily influenced" and his capacity to conform his conduct to the requirements of law was "substantially impaired." (R2425-2426)

The expert testimony of Dr. Delbeato and Dr. Meadows constituted strong and convincing evidence in support of the statutory mitigating circumstances noted above. However, this expert testimony was severely discredited and sharply contradicted by Mr. Glock's claim that the idea for the murder had originated with Mr. Puiatti. Even though Mr. Glock had indicated in a later

statement that the murder had been his idea and not Mr. Puiatti's, the damage had been done and the initial prejudice remained. Mr. Glock's contradictory assertions could only confuse the jury and since he did not take the stand at trial,<sup>2/</sup> he was not subject to cross-examination as to which assertion was in fact the truth.

Thus, the jury's exposure to Mr. Glock's inadmissible claim that Mr. Puiatti had been the instigator and moving force behind the murder generated a cloud of doubt over Mr. Puiatti's penalty phase defense. This prejudicial evidence may well have caused the jury to reject the mitigating evidence, thereby tipping the scales in favor of a death recommendation. As the Bruton court recognized, the admission at a joint trial of the incriminating extrajudicial statements of a nontestifying codefendant can have "devastating" consequences, adding "substantial, perhaps even critical weight to the Government's case." 391 U.S. at 128.

B.

The Trial Court's Failure To Grant A Severance Forced Carl Puiatti To Stand Trial Before Two Accusers As A Result Of His Codefendant's Antagonistic Penalty Phase Defense.

The possibility of conflicting defenses is not in and of itself sufficient grounds for severance. McCray v. State, 416 So.2d 804,806 (Fla.1982). However, where one codefendant goes beyond accusing the other of the crime and offers evidence to prove that accusation, severance is required. Crum v. State,

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<sup>2/</sup> Mr. Glock took the stand during the penalty phase for the very limited purpose of testifying that he had no prior criminal convictions. Accordingly, Mr. Glock was not subject to cross-examination with respect to his post-arrest statements. See McCrae v. State, 395 So.2d 1145,1152 (Fla.1980).

398 So.2d 810,812 (Fla.1981). Under such circumstances, the defendant is denied due process of law because he is forced "to stand trial before two accusees: the State and his codefendant." 398 So.2d at 811-812.

At the penalty phase hearing in this case, psychiatric testimony was presented on Mr. Puiatti's behalf which tended to indicate that he was under the substantial domination of codefendant Glock at the time of the crime. Although not rebutted by the State, this evidence was contradicted by psychiatric testimony presented by codefendant Glock which indicated that Mr. Glock would not have participated in the crime but for his association with Mr. Puiatti. (R2342) Mr. Glock's evidence discredited the psychiatric testimony which had been presented on behalf of Mr. Puiatti and may well have influenced the advisory jury to reject the statutory mitigating circumstances of extreme duress and substantial domination of another person. In fact, the prejudice to Mr. Puiatti is readily apparent from the trial court's findings in support of the death sentence. In rejecting the mitigating circumstances of extreme duress and substantial domination of another, the court concluded:

The opinions by the two psychologists that each respective defendant was dominated by the other are simply devoid of credibility.  
(R346)

Thus, the court's conclusion that these mitigating circumstances had not been established was based, at least in part, on evidence which had been presented not by the State but by Mr. Puiatti's codefendant. The evidence presented by codefendant Glock added significant weight to the State's case against Mr.



Puiatti thereby denying Mr. Puiatti his right to due process of law.

C.

The Trial Court's Failure To Grant A Severance Resulted In The Jury Being Improperly Exposed To Improper Instructions And Prosecutorial Argument Relating To The Nonexistence Of The Mitigating Factor Of No Significant Prior Criminal Activity.

This Court has held that where the defendant waives the mitigating factor of no significant criminal activity (Fla.Stat, §921.141(6)(a)), the State is precluded from arguing the nonexistence of this mitigating circumstance. Maggard v. State, 399 So.2d 973 (Fla.1981). Moreover, in instructing the jury, the court should exclude the waived aggravating circumstance from the list of mitigating factors read to the jury. Maggard v. State, 399 So.2d at 978.

In this case, while Mr. Puiatti waived any reliance upon this mitigating circumstance (R206,2453), codefendant Glock did not. The trial court elected to instruct the jury on the mitigating circumstance over Mr. Puiatti's objection. Moreover, the prosecutor emphasized the nonexistence of this mitigating circumstance as to Mr. Puiatti on his closing argument:

Mitigating circumstances in this particular case--number one is that the defendant has no significant history of prior criminal activity. I believe you heard the evidence. You know who has a prior significant history and who doesn't....<sup>3/</sup> (R2474)

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<sup>3/</sup> One of Mr. Puiatti's penalty phase witnesses had alluded to the fact that Mr. Puiatti had a prior burglary conviction.

The jury instruction and prosecutorial comment on the nonexistence of the waived mitigating factor constituted reversible error. Maggard v. State, 399 So.2d at 978. Mitigating circumstances are solely for the defendant's benefit and once waived they become irrelevant to the jury's consideration.

Significantly, the jury's exposure to the irrelevant instruction and prosecutorial comment thereon was a direct result of the trial court's failure to grant severance. This Court has recognized that severance should be granted where the jury could be confused or improperly influenced by evidence which applies to only one of the codefendants. McCray v. State, 416 So.2d at 806. Such was the case here where the mitigating factor of no significant history of prior criminal activity was relevant only to codefendant Glock.

Once the jury became advised of the fact that no significant history of prior criminal activity is a statutory mitigating factor, the potential was created for the jury to be improperly influenced by Mr. Puiatti's inability to establish this mitigating factor in his defense. This potential for abuse became even greater when the prosecutor argued to the jury that:

You know who has a prior significant history  
and who doesn't....  
(R2474)

The prosecutor's thinly veiled insinuation that Mr. Puiatti had "a prior significant history" was grossly unfair and highly prejudicial. The only evidence before the jury on this issue was that Mr. Puiatti had a prior burglary conviction. Whether or not Mr. Puiatti has a "significant" history of criminal

activity as a result of the burglary conviction would have been a question for the jury if the existence or nonexistence of the mitigating circumstance had been properly at issue. See Salvatore v. State, 366 So.2d 745,748 (Fla.1979)<sup>4/</sup> However, because Mr. Puiatti had waived this mitigating factor, he was precluded from arguing that his prior record was insignificant. Maggard v. State, 399 So.2d at 978. Thus, the joint trial gave the State unfair advantage while denying Mr. Puiatti due process of law.

D.

Summary

The trial court's failure to grant a severance denied Carl Puiatti his right to confrontation, forced him to face two accusers, and gave the State unfair advantage. As a result, the jury was exposed to prejudicial evidence, prosecutorial comment, and instructions which would have been inadmissible if Mr. Puiatti's trial had been properly severed from that of his codefendant. Accordingly, Carl Puiatti's convictions and sentences should be reversed, and this cause remanded for a new trial.

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<sup>4/</sup> In Salvatore, the trial court found that a prior burglary conviction did not constitute a "significant" history of criminal activity.

ISSUE II.

CARL PUIATTI'S MOTION TO SUPPRESS POST-ARREST STATEMENTS WAS IMPROPERLY DENIED WHERE IT WAS ESTABLISHED THAT THE STATEMENTS WERE THE PRODUCT OF AN ILLEGAL DETENTION.

At the time of his initial detention, Carl Puiatti was a passenger in an automobile driven by Robert Glock on the New Jersey turnpike. The automobile was stopped by a State Trooper because its license plate was improperly displayed. Neither Mr. Puiatti nor Mr. Glock could produce a driver's license and the vehicle registration indicated that the car belonged to an individual named Ritchie. Mr. Glock explained that Mr. Ritchie was his brother-in-law.

When Mr. Puiatti had opened the glove compartment to obtain the vehicle registration, the trooper observed a handgun inside. After obtaining consent to search, the trooper seized two handguns from the glove compartment. Mr. Glock explained that the handguns belonged to his brother-in-law.

The trooper arrested Mr. Puiatti and Mr. Glock for possession of a handgun without a permit. Mr. Glock immediately informed the trooper that Mr. Puiatti "knew nothing about the guns." (R489) Nevertheless, Mr. Puiatti continued to be detained along with Mr. Glock. They were transported to a police station where the police subsequently ascertained that the automobile had been stolen and its owner was a suspected homicide victim. The next day Mr. Puiatti made a statement incriminating himself in the instant offenses. After being extradited to Florida, Mr. Puiatti made an additional statement in conjunction with Mr. Glock.

It is clear that statements which are the product of an illegal detention are inadmissible at trial. Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). In this case, the New Jersey State Trooper lacked probable cause to initially detain Mr. Puiatti for possession of a handgun without a permit. Because the initial detention was illegal, the trial court should have granted Mr. Puiatti's motion to suppress the statements.

In denying Mr. Puiatti's motion, the trial court took judicial notice of the New Jersey firearms statute (N.J.S. 2C:39-2) which provides that a firearm found within a vehicle is presumed to be in the possession of all the occupants of that vehicle. This provision is consistent with Florida case law which recognizes that possession of contraband may be joint as well as constructive. Smith v. State, 363 So.2d 21 (Fla.3d DCA 1978). However, in this case, even if the trooper had probable cause to arrest Mr. Puiatti pursuant to the foregoing presumption, that probable cause dissipated when Mr. Glock, the driver of the vehicle, claimed sole possession of the weapons.

In State v. Humphreys, 54 N.J. 406, 255 A.2d 273 (1969), the New Jersey Supreme Court discussed the validity of the firearms presumption and concluded that the statute would be unconstitutional as applied under certain circumstances. The court explained:

For example, if owner-driver of an automobile had a gun locked in the glove compartment or trunk of his car, to which he held the key, it would violate common sense to conclude that other occupants of the vehicle might be

presumed to be in possession of it, and especially where they were unaware of its presence and had no power of control over it. 255 A.2d at 277.

Similarly, in State v. Riley, 69 N.J. 217, 352 A.2d 257 (1976), the Court noted that if one occupant is found to be in sole possession of the firearm, the other occupants would not be in violation of the statute. 352 A.2d at 259, note 3.

The Appellant recognizes that probable cause to arrest is not to be equated with proof beyond a reasonable doubt. State v. Outten, 206 So.2d 392 (Fla.1962). However, the reasoning underlying the New Jersey decisions cited above simply reflects a common sense approach to the firearms presumption. This same common sense reasoning is applicable to a determination as to whether probable cause exists for an arrest.

Here Mr. Glock claimed sole and exclusive possession of the firearms which were found in the glove compartment of the automobile. Mr. Glock's claim was consistent with the fact that he was the driver of the car and asserted a possessory interest in the vehicle. Under these circumstances, where Mr. Glock claimed sole possession of the firearms, it would violate common sense to conclude that Mr. Puiatti would be presumed to be in possession of the guns. Therefore, the trooper lacked probable cause to arrest Mr. Puiatti for the offense of possession of a handgun without a permit.

At the hearing on the motion to suppress, the arresting officer testified that the only basis for Mr. Puiatti's arrest was the purported firearm permit violation. The arrest led to Mr. Puiatti being transported to the police station where he gave

incriminating statements relating to the instant offenses after being detained overnight. These statements, along with Mr. Puiatti's subsequent statement three days later, were the fruits of the illegal detention and their admission at trial violated Mr. Puiatti's constitutional rights under the Fourth and Fourteenth Amendments.

For these reasons, Carl Puiatti's convictions should be reversed and this cause remanded for a new trial.

ISSUE III.

CARL PUIATTI WAS DENIED HIS RIGHT  
TO A FAIR TRIAL BY THE PROSECUTOR'S  
INFLAMMATORY AND PREJUDICIAL STATE-  
MENTS TO THE JURY.

Carl Puiatti was charged with the kidnapping, robbery, and murder of Sharilyn Ritchie. In his opening statement to the jury, the prosecutor described these offenses as "what is probably most any woman's nightmare." (R1727) Appellant's objection to this statement was overruled and his motion for mistrial denied. (R1734) Thereafter, in his closing argument, the prosecutor characterized Mr. Puiatti as an animal by describing Appellant's participation in the offenses as follows:

It's like hungry wolves circling around a rabbit someplace who has no idea what's about to happen, and when the time is right they pounce upon their prey.  
(R2122)

Appellant's objection to the foregoing statement was also overruled. (R2122)

The prosecutor's inflammatory remarks were clearly improper and prejudicial. The prosecutor's description of the crime as "any woman's nightmare" was a calculated appeal to the fears of the women on the jury, the natural effect of which would be an adverse emotional feeling toward Mr. Puiatti. This technique of asking jurors to place themselves in the position of the victim, sometimes referred to as the "Golden Rule argument" (Lucas v. State, 335 So.2d 566,567 (Fla.1st DCA 1976)) is improper because it tends to deprive a defendant of a fair trial by an impartial jury. Adams v. State, 192 So.2d 762 (Fla.1966).



The prosecutor's characterization of Mr. Puiatti as an animal was also improper. See Blunt v. State, 397 So.2d 1047, 1048 (Fla.4th DCA 1981). "It is undoubtedly improper in the prosecution of persons charged with a crime for the representation of the state to apply offensive epithets to defendant's or their witnesses and engage in vituperative characterizations of them." Johnson v. State, 88 Fla. 461, 102 So. 549,550 (1924).

By overruling defense counsel's objections to the prosecutor's improper remarks, the trial court violated its duty to restrain counsel in the use of improper argument. As this Court emphasized in Blanco v. State, 150 Fla. 98, 7 So.2d 333,339 (1942):

When it is made to appear that a prosecuting officer has overstepped the bounds of that propriety and fairness which should characterize the conduct of a state's counsel in the prosecution of a criminal case, or where a prosecuting attorney's argument to the jury is undignified and intemperate, and contains aspersions, improper insinuations, and assertions of matters not in evidence, or consists of an appeal to prejudice or sympathy calculated to unduly influence a trial jury, the trial judge should not only sustain an objection to such improper conduct when objection is offered, but should so affirmatively rebuke the offending prosecuting officer as to impress upon the jury the gross impropriety of being influenced by improper arguments.

The trial court not only failed to rebuke the prosecution in this case, but actually overruled defense counsel's objections, thereby aggravating the prejudicial effect of the remarks. See Edwards v. State, 428 So.2d 357 (Fla.3d DCA 1983).

The prosecutor's inflammatory appeals to the fears and passions of the jurors not only infected the fairness of the trial itself, but that of the penalty phase as well. Since the

passions of the jurors had already been inflamed, they could not be expected to make a rational and unbiased decision as to whether Mr. Puiatti should live or die.

Accordingly, Carl Puiatti's convictions should be reversed, his sentence vacated, and this cause remanded for a new trial.

ISSUE IV.

THE TRIAL COURT ERRED BY OVER-RULING A DEFENSE OBJECTION TO THE PROSECUTOR'S CLOSING ARGUMENT WHICH ADVISED THE JURY THAT THEY COULD PRESUME PREMEDITATION FROM MR. PUIATTI'S INVOLVEMENT IN A FELONY MURDER.

In his closing argument to the trial jury, the prosecutor discussed the concept of premeditated murder and then went on to state:

The other type of first-degree murder--and both of these theories are available to you --is a thing called felony murder. And under a theory of felony murder, it is not necessary to prove premeditation because the law presumes premeditation. The Judge is going to instruct you again that the elements of a felony murder are that the victim is dead, secondly, that the death occurred as a consequence of and while the defendant was engaged in the commission of a robbery or a kidnapping, or that the death occurred as a consequence of and while the defendant or an accomplice was escaping the immediate scene of the crime of a kidnapping or a robbery.

If you find that this occurred under either one of those circumstances, the law does not require proof of premeditation. Premeditation is presumed. And, if every element is met, the verdict should be that of guilty of first-degree murder without proof of premeditation because the law presumes it. Those are the two theories.  
(R2110-2111)

At this point the defense objected, noting that "I don't recall any instruction which states that the law presumes premeditation in felony murder." (R2111) The court overruled the objection, reasoning that "I believe that's the law." (R2111) Thereafter, the prosecutor continued as follows:

As I was saying, the law presumes premeditation under the theory of felony murder in the first degree....  
(R2112)

Contrary to the trial court's ruling, premeditation is not presumed from a finding of felony murder. Fla.Stat., §782.-04(1)(a). Consequently, the prosecutor's argument constituted a misstatement of the law and the defense objection should have been sustained.

The prosecutor's argument was highly prejudicial to Mr. Puiatti because it struck at the heart of his defense while bolstering the State's case, particularly in the penalty phase. Mr. Puiatti's theory of defense was that the murder was not premeditated. Moreover, at the penalty phase, the jury was required to determine whether or not the murder was "cold, calculated, and premeditated." Thus, it is clear that the prosecutor's repeated misstatements of the law may have influenced the jury's recommendation of death as well as the guilty verdict.

The prejudice ensuing from the prosecutor's improper commentary was no doubt aggravated by the court's failure to sustain the defense objection. Furthermore, the court again aggravated this error during the penalty phase by refusing to instruct the jury that the factor of "cold, calculated, and premeditated" requires a heightened degree of premeditation. (R2447) The tendered instruction read as follows:

To establish this factor, the State must prove heightened premeditation and cold calculation beyond that required for mere premeditated murder.  
(R305)

The foregoing instruction is a correct statement of the law (Cannaday v. State, 427 So.2d 723 (Fla.1983)) and should have been given.

Therefore, because the jury's verdict and advisory recommendation may well have been influenced by the prosecutor's improper and prejudicial argument, Carl Puiatti's murder conviction must be reversed and his death sentence vacated.

ISSUE V.

THE TRIAL COURT ERRED BY REFUSING  
TO INSTRUCT THE ADVISORY JURY  
CONCERNING SPECIFIC NON-STATUTORY  
MITIGATING CIRCUMSTANCES.

At the penalty phase proceeding, the defense presented substantial evidence relating to a number of factors which have been recognized by this Court as non-statutory mitigating circumstances. These factors included Mr. Puiatti's remorse for his crime (see Delap v. State, 440 So.2d 1242 (Fla.1983)); his lack of prior violent history (see Lightbourne v. State, 438 So.2d 380 (Fla.1983)); his potential for rehabilitation (see McC Campbell v. State, 421 So.2d 1072 (Fla.1982)); and his family background (see McC Campbell v. State, supra). The defense also tendered instructions which listed these factors a specific non-statutory circumstances which the jury could consider. (R306-309) The instructions were refused by the court. (R2448)

The trial court's refusal to instruct the jury as to the non-statutory mitigating circumstances which were supported by the evidence was error of constitutional dimension. Although the court did instruct the jury that they could consider "any other aspect of the defendant's character or record" in addition to the statutory mitigating circumstances (R2524), this general and perfunctory instruction was insufficient to guide the jury in their consideration of non-statutory mitigating factors. Where the instructions to the jury in the penalty phase of a capital trial fail to adequately inform the jury about the nature and function of mitigating circumstances, those instructions are constitutionally deficient. See, Chenault v. Stynchcombe, 581 F.2d

444 (5th Cir. 1978); Goodwin v. Belcom, 684 F.2d 794 (5th Cir. 1981).

In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Supreme Court held that the mitigating circumstances which are available to a capital defendant cannot be limited by statute. Under the logical interpretation of the Lockett decision, a capital sentencing statute which by its terms or application emphasizes certain specified mitigating circumstances at the expense of others would be unconstitutional. Accordingly, in State v. Johnson, 252 S.E.2d 597 (N.C. 1979), the North Carolina Supreme Court held that, when properly requested to do so, the trial court must instruct the jury on specific non-statutory mitigating circumstances. The Court reasoned:

The legislative did not intend to give those mitigating circumstances expressly mentioned in the statute primary over others which might be included in the "any other circumstances" provision. Such an intent, if it existed, might run afoul of Lockett v. Ohio....

\* \* \*

A death penalty sentencing statute...which by its terms or the manner in which it is applied, puts some mitigating circumstances in writing and leaves others to the jury's recollection might be constitutionally impermissible under the reasoning of Lockett. For if the sentencing authority cannot be precluded from considering any relevant mitigating circumstance supported by the evidence neither should such circumstances be submitted to it in a manner which makes some seemingly less worthy of consideration than others.  
257 S.E.2d at 616-617.

Therefore, the instructions which were given in this case failed to adequately inform the jury about the non-statutory aggravating circumstances which they could consider. These con-

stitutional deficient instructions reduced the capital sentencing proceeding in this case to a guessing game in which the advisory jury was required to speculate as to what factors may or may not constitute a non-statutory mitigating circumstance. Accordingly, Carl Puiatti's sentence should be vacated and this cause remanded for a new penalty phase proceeding at which the advisory jury will be properly instructed.



ISSUE VI.

THE TRIAL COURT ERRED BY SENTENCING  
CARL PUIATTI TO DEATH BECAUSE THE  
PENALTY WEIGHING PROCESS INCLUDED  
INAPPLICABLE AGGRAVATING CIRCUM-  
STANCES AND EXCLUDED APPLICABLE  
MITIGATING CIRCUMSTANCES THEREBY  
RENDERING MR. PUIATTI'S DEATH SEN-  
TENCE UNCONSTITUTIONAL UNDER THE  
EIGHTH AND FOURTEENTH AMENDMENTS TO  
THE UNITED STATES CONSTITUTION.

The record reveals that the trial court improperly applied the Florida death penalty statute (§921.141, Fla.Stat.) by erroneously finding an inapplicable aggravating circumstance while rejecting numerous applicable mitigating factors. The trial court's misapplication of the statute rendered Carl Puiatti's death sentence arbitrary and capricious in violation of the Eighth and Fourteenth Amendments. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

A.

The Trial Court Erred In Finding As An Ag-  
gravating Circumstance That The Homicide  
Was Committed In A Cold, Calculated, and  
Premeditated Manner.

This Court has held that the aggravating circumstance relating to the "cold, calculated, and premeditated" nature of the homicide (§921.141(5)(i), Fla.Stat.) requires a "heightened" degree of premeditation. Preston v. State, 444 So.2d 939 (Fla. 1984). In the present case, the murder resulted from an impulsive decision which was made by the codefendants after the victim had been released. Because these facts do not rise to the level of premeditation contemplated by Section 921.141(5)(i), the trial court erred in finding that the murder was cold, calculated, and premeditated.

The evidence established that Carl Puiatti and codefendant Glock abducted a woman from a shopping mall, robbed her, and drove her to a rural grove where they let her out of the car. It was not until they had released the woman and driven away that a decision was made to shoot her. The codefendants returned and drove past the woman three times, firing a series of shots which resulted in her death.

The foregoing facts are not indicative of the type of preparation, reflection, and execution which has been held by this Court to constitute a cold, calculated, and premeditated murder under Section 921.141(5)(i). See, e.g., Jent v. State, 408 So.2d 1024 (Fla.1984) (eyewitness related a particularly lengthy series of events which included beating, transporting, raping, and setting victim on fire); Bolender v. State, 422 So.2d 833 (Fla.1982) (defendant held victims at gunpoint for hours and ordered them to strip and then beat and tortured them before they died); 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).

Significantly, unlike either Combs v. State, 403 So.2d 418 (Fla.1981) or Hill v. State, 422 So.2d 816 (Fla.1982) where the murders had been planned long in advance, the murder in this case resulted from a decision made on the spur of the moment. Here, there was absolutely no evidence tending to indicate that the defendants intended to murder the victim when they picked her up. Contra, the evidence indicates that the decision was not made until after the woman had been released. Under these circumstances, it was not established beyond a reasonable doubt that the murder

was committed in a "cold, calculated, and premeditated" manner.

B.

The Trial Court Totally Ignored Substantial And Persuasive Expert Testimony In Concluding That Mr. Puiatti Was Not Under The Influence Of Mental Or Emotional Distress.

In rejecting the statutory mitigating circumstance relating to mental or emotional distress (§921.141(6)(b), Fla.Stat.), the trial court reasoned:

[T]here was no credible evidence whatsoever to support a finding that either of these defendants suffered from any disturbance that would mitigate a calculated, premeditated murder.  
(R315-316)

The foregoing finding is simply erroneous. A review of the record reveals that Mr. Puiatti was in fact under the influence of mental and emotional distress at the time of crime. Although the weight to be given to this evidence is largely discretionary, the trial court is not free to ignore it altogether as was done in this case.

Dr. Delbeato, who was recognized by the court as an expert in the field of clinical forensic psychology, testified that he performed a series of neuro-psychological tests upon Mr. Puiatti. (R2225,2228,2303) These objective tests revealed that Mr. Puiatti suffered from a dysfunction in the right hemisphere of his brain. (R2238) Dr. Delbeato explained that the right side of the brain is associated with emotional behavior. (R2245) The right side of Mr. Puiatti's brain functioned "borderline retarded" (R2243), thereby causing him to become "more easily aggressive, more easily violent, more easily influenced, and to ultimately

"do something [he] ordinarily would not have done." (R2249) Dr. Delbeato noted that the dysfunction was "highly related to stresses" (R2649), and "the higher the stress, the lower his ability to behave correctly." (R2650) The symptoms of stress include anxiety, fear, and fatigue. (R2649) Dr. Delbeato opined that Mr. Puiatti was under stress at the time of the crime and as a result his brain "short circuit[ed]." (R2651-2654)

Psychiatric expert Dr. Meadows testified that he was "certain" that Mr. Puiatti was suffering from brain damage at the time of the crime. (R2425,2659) Dr. Meadows' opinion was based upon his subjective evaluation of Mr. Puiatti combined with a review of the facts of the case, Dr. Delbeato's objective tests, and interviews with Mr. Puiatti's family. (R2405-2406) Dr. Meadows further opined that Mr. Puiatti was suffering from a mental illness termed avoidance personality. (R2409-2411) Dr. Meadows detailed a series of personal and emotional crises which Mr. Puiatti had incurred prior to the crime which were exacerbated by the brain damage and mental illness. (R2415-2421) This led to a sense of futility and depression, as well as a progressive deterioration in judgment. (R2418-2420,2660) Accordingly, Dr. Meadows concluded that at the time of the crime Mr. Puiatti was "under the influence of extreme mental or emotional disturbance." (R2424-2425)

In light of the extensive, consistent, and certain testimony of these recognized experts, it is clear that the trial court erred in concluding that there was "no credible evidence whatsoever" to support a finding that Mr. Puiatti was under the

influence of mental or emotional distress. Therefore, because the trial court ignored this evidence and failed to even consider it in the weighing process, Carl Puiatti's death sentence must be vacated.

C.

The Trial Court Misconstrued The Evidence  
In Concluding That Carl Puiatti Had Not  
Acted Under Extreme Duress Or Under The  
Substantial Domination Of Another Person.

In rejecting the statutory mitigating circumstance of extreme duress or substantial domination" (§921.141(6)(e), Fla. Stat.), the court stated:

This court finds that neither of these defendants acted under extreme duress or under the substantial domination of another person. Psychologists for both defendants testified that in their opinions, it was only the unique chemistry created by the association of these two defendants that allowed or caused them to commit this murder. Each psychologist also testified that each defendant was dominated in this murder by the other.

\* \* \*

[T]here is no evidence, other than the rationalized opinions of these two psychologists, to support any finding that either of these defendants dominated the other. They were both about the same age and the same intelligence. They both had about the same education. They were both raised in middle class surroundings. The opinions by the two psychologists that each respective defendant was dominated by the other are simply devoid of credibility.

(R316)

A review of the record reveals that the foregoing findings are premised, at least in part, upon a misinterpretation of the expert testimony presented by codefendant Glock's psychiatrist.

While Dr. Meadows testified that Mr. Puiatti had acted under the "substantial domination of another person" (R2425), no such testimony was elicited from any of the expert witnesses as to codefendant Glock. Contra, codefendant Glock's psychologist opined merely that crime would not have occurred but for the interaction of the two individuals. (R2342) The trial court's erroneous finding that the opinions of the respective experts were contradictory was no doubt a significant factor in the court's conclusion that "[t]he opinions of the two psychologists that each respective defendant was dominated by the other are simply devoid of credibility." This is because absent the court's erroneous belief that Dr. Meadows' opinion had been directly contradicted, the record reveals no justifiable reason for concluding that Dr. Meadows' testimony was "devoid of credibility."

Dr. Meadows had been recognized by the court as an expert in the field of psychiatry. (R2405) Dr. Meadows stated that he was "certain" that Mr. Puiatti suffered from brain damage (R2659), and as a consequence of his mental condition Mr. Puiatti was easily influenced and had extreme difficulty resisting encouragement. (R2425,2664) Dr. Meadows' findings were corroborated by the objective psychological testing conducted by Dr. Delbeato which indicated that Mr. Puiatti suffered from a brain dysfunction which caused him to be particularly susceptible to manipulation and domination in terms of stress. (R2250-2251) Dr. Meadows' opinion was further supported by the post-arrest statement, given by the defendants which indicated that the idea for the murder had originated with codefendant Glock.

In sum, Dr. Meadows' testimony was clear, certain, consistent, and corroborated by other evidence. On the other hand, the State neither cross-examined Dr. Meadows nor presented any evidence in rebuttal. Under these circumstances, the court's finding that Mr. Meadows' testimony was "devoid of credibility" could only have resulted from the court's erroneous belief that there had been conflicting expert testimony that "each respective defendant was dominated by the other."

Therefore, because the trial court misconstrued the evidence and erroneously rejected an applicable mitigating circumstance, Carl Puiatti's death sentence should be vacated.

D.

The Trial Court Misconstrued The Evidence And Relied Upon Improper Criterion In Rejecting Psychological And Psychiatric Testimony Relating To Mr. Puiatti's Inability To Conform His Conduct To The Requirements Of Law.

In finding that Mr. Puiatti's ability to conform his conduct to the requirements of law was not substantially impaired (§921.141(6)(4), Fla.Stat.), the court reasoned:

It is true that both psychologists and the psychiatrist who testified in this case expressed opinions that the respective defendants were unable to conform their conduct to the requirements of law. Dr. Mussenden justified this opinion about Mr. Glock on the chemistry created by the association of these two defendants. Dr. Meadows and Dr. Delbeato justified their opinions on medical speculations that Mr. Puiatti had some disfunction in his brain. Dr. Delbeato testified that his psychological testing (on which both he and Dr. Meadows founded their opinions) was often used by neurosurgeons and neurologists to form differential diagnosis. But

differential diagnoses are not used by physicians to justify treatment, only to narrow the possible diagnoses for further medical testing.

Furthermore, there was no independent evidence whatsoever introduced that would in any way support the opinions of these three professionals that the capacity of either of these defendants to either appreciate what cold, calculated, premeditated murder was criminal or conduct himself in such manner as to not coldly and calculatedly murder Mrs. Ritchie was to any relevant extent impaired.  
(R347)

The foregoing findings are premised upon several mistaken factual conclusions, improper criterion, and erroneous assumptions.

First, the court erred by characterizing the opinions of Dr. Delbeato and Mr. Meadows that Mr. Puiatti suffered from a brain dysfunction as "medical speculations." Dr. Delbeato's opinion was based upon "a reasonable degree of medical certainty," (R2650) while Dr. Meadows was "certain" that Mr. Puiatti was suffering from brain damage. (R2659)

Second, the court applied improper and irrelevant criterion as a basis for rejecting the psychological and psychiatric testimony. After noting that the psychological tests relied upon by Dr. Delbeato and Dr. Meadows were "often used by neurosurgeons and neurologists to form differential diagnosis," the court rejected the resultant opinions of these experts by reasoning "differential diagnoses are not used by physicians to justify treatment, only to narrow the possible diagnoses for further medical testing." The mere fact that differential diagnoses are not used to justify medical treatment is completely irrelevant to the issue of whether Mr. Puiatti suffered from a brain dysfunc-



tion, and it certainly does not make the resultant expert opinions unworthy of belief as the court suggested.

Moreover, the court overlooked the fact that Dr. Delbeato testified not only that these tests were relied upon by neurosurgeons and neurologists, but the tests were routinely used for court evaluations, Social Security disability evaluations, and commonly relied upon by both mental health and general practitioners. (R2229-2231)

Third, the court erred by concluding that the expert opinions were based solely upon psychological testing and supported by "no independent evidence whatsoever." The opinions were based not only upon psychological testing but also upon Mr. Puiatti's medical history, background information, clinical interviews, and the facts relating to the instant offenses. (R2227,2234,2254, 2406) In fact, Dr. Meadows testified that his opinion was the result of a subjective evaluation which was corroborated by the objective testing (R2659), as opposed to being solely dependent on as the court had suggested.

Finally, the court erred by improperly requiring the defense to establish a degree of impairment sufficient to mitigate a "cold, calculated, premeditated" murder. As was noted in Argument A (supra), the court erred by finding that the murder was cold, calculated, and premeditated.

Therefore, because the court's rejection of this mitigating circumstance was premised upon erroneous factual findings and improper criterion, Carl Puiatti's death sentence should be vacated.

E.

The Trial Court Overlooked Relevant Evidence  
In Rejecting Mr. Puiatti's Age As A Mitigating  
Circumstance.

The trial court found that Mr. Puiatti's chronological age of twenty years was not a mitigating circumstance. This finding is not contested on appeal. However, the defense presented expert testimony which indicated that because of a brain dysfunction, Mr. Puiatti actually functioned at an emotional level of ten to twelve years of age. The trial court found that this expert testimony "lack[ed] credibility" because it was "inconsistent with the other evidence in this case." (R348) The trial court reasoned:

The statements of these defendants, including the tape recorded statements, which were introduced at trial clearly demonstrate that both of these defendants are reasonably mature for their chronological age. The planning and execution of these series of crimes also indicate maturity, although some naivete. Furthermore, Mr. Puiatti, at sentencing, made a statement to this court that showed some appreciable level of maturity and social conscience.  
(R348)

The foregoing reasoning of the trial court exhibits a basic misunderstanding of the expert testimony which was presented by the defense. The facts recited by the court, while perhaps indicating that Mr. Puiatti possessed average intelligence, are not inconsistent with the expert evidence which indicated that he was emotionally immature.

Dr. Delbeato explained that his objective testing revealed that although the left side of Mr. Puiatti's brain functioned normally, a dysfunction existed with respect to the right

hemisphere. (R2268) Dr. Delbeato explained that the left side of the brain controls the thought processes and the right side controls the emotions. (R2239-2240) Thus while Mr. Puiatti possessed average intelligence, his emotional condition was "borderline retarded." (R2243) These are the facts which led Dr. Meadows to conclude that Mr. Puiatti operated emotionally "at the level of a very young adolescent, somewhere around twelve or in that age limit." (R2664)

The expert testimony of Dr. Delbeato and Dr. Meadows was not inconsistent with the facts recited by the court. Accordingly, the trial court's finding that the expert testimony "lack[ed] credibility" was based on a misunderstanding of the evidence. The court obviously overlooked the distinction between the right and left hemisphere of the brain and their respective functions.

Therefore, because the court's rejection of this mitigating circumstance was premised upon an erroneous assessment of the evidence, Carl Puiatti's death sentence should be vacated.

F.

Although The Trial Court Properly Found That The Defense Had Presented Favorable Evidence In Mitigation With Respect To Several Factors, The Trial Court Erred By Refusing To Characterize These Factors As Nonstatutory Mitigating Circumstances.

In its findings in support of the death penalty, the court stated:

This court must admit that it did weigh the fact of the confessions favorable to the defendants in reaching its judgment to sentence these defendants to death, but does not believe their confessions should be counted as a mitigating factor.

There was expert testimony indicating that both of these defendants were capable of rehabilitation. This court also considered this factor in the defendants favor, but again does not believe it should rise to the level of a mitigating factor.

Mr. Puiatti also argued that he had a strong family background and that he feels genuine remorse for his victim and that these factors should be considered by the court as mitigating factors. This court does not know if he genuinely feels remorse for his victim or not, but is convinced that he comes from a very fine family. This court does not consider any of these factors to mitigate this crime however.  
(R349)

The foregoing findings are erroneous in that the court failed to consider favorable mitigating evidence merely because, in the trial judge's opinion, the evidence did not reach the undefined and subjective "level of a mitigating circumstance."

It is well recognized that the mitigating circumstances available to a capital defendant, if established by the evidence, cannot be limited to those in the statute. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Songer v. State, 365 So.2d 696 (Fla.1978). Moreover, mitigating circumstances need not be proven beyond a reasonable doubt. Lockett v. Ohio, supra.

Here the trial court found that the defense established several factors which have previously been recognized by this Court as nonstatutory mitigating circumstances. These factors included Mr. Puiatti's potential for rehabilitation (See McC Campbell v. State, 421 So.2d 1072 (Fla.1982)); his strong family background (See McC Campbell v. State, supra); and the fact that he cooperated with the police and admitted his participation in the

offense charged (See Washington v. State, 362 So.2d 658 (Fla. 1978)). However, while finding these factors in Mr. Puiatti's favor, the court refused to consider them as nonstatutory mitigating circumstances because they didn't rise to a certain undefined "level." This constituted error under Lockett and effectively eliminated relevant mitigating factors from the weighing process which requires the court to determine:

Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist.  
§921.141(z)(b), Fla.Stat.

Although the weight to be given a particular mitigating factor is in large part discretionary, the court cannot completely eliminate relevant mitigating factors from the weighing process.

Accordingly, Carl Puiatti's death sentence should be vacated.

#### Summary

Whether considered cumulatively or individually, the trial court's misapplication of the foregoing aggravating and mitigating factors requires that Carl Puiatti's death sentence be vacated. Consequently, this Court should either reduce the sentence to life imprisonment or remand this cause for a new penalty phase proceeding.

ISSUE VII.

THE EXCLUSION FROM THE TRIAL STAGE OF PROSPECTIVE JURORS OPPOSED TO THE DEATH PENALTY RESULTED IN A CONVICTION-PRONE JURY AND DENIED CARL PUIATTI HIS SIXTH AMENDMENT RIGHT TO A JURY DRAWN FROM A FAIR CROSS-SECTION OF THE COMMUNITY.

Prior to trial, the defense moved to empanel two separate juries--one to determine guilt of innocence and another for the penalty phase of the trial. (R172) The motion alleged that this procedure was necessary because the exclusion from the trial phase of prospective jurors who were opposed to the death penalty would violate Mr. Puiatti's Sixth Amendment right to a trial jury drawn from a fair cross-section of the community. (R172-173) The motion was denied. (R216)

The denial of the motion constituted reversible error. The Eighth Circuit Court of Appeals recently held that the exclusion of jurors opposed to the death penalty from a capital trial results in a jury that is conviction-prone and violates the defendant's Sixth Amendment right to a jury drawn from a fair cross-section of the community. Grigsby v. Mabry, \_\_F.2d\_\_, 36 Cr.L. 2345 (8th Cir. 1985).

Therefore, Carl Puiatti's convictions should be reversed and this cause remanded for a new trial.

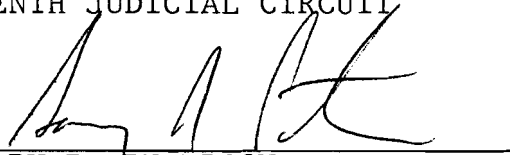
CONCLUSION

For the foregoing reasons, Carl Puiatti respectfully requests this Honorable Court to reverse his convictions and remand this cause for a new trial. Alternatively, this Court should either reduce Mr. Puiatti's sentence of death to life imprisonment or remand this cause for a new penalty phase proceeding.

Respectfully submitted,

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