ORIGINAL

IN THE SUPREME COURT

OF FLORIDA

CASE NO. 65,507
65637

FILED

OCT 1984

CLERK, SUPREME COURT
By Chief Deputy Clerk

CHARLES WILLIAM PROFFITT,

APPELLANT

V.

STATE OF FLORIDA,

APPELLEE

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

INITIAL BRIEF OF APPELLANT

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HISTORY OF THE PROCEEDINGS

Appellant Charles W. Proffitt was indicted on July 31, 1973 by a Hillsborough County grand jury on a charge of murder in the first degree. [T.R. 1].* Jury trial commenced on March 11, 1974 [T.R. 74], and Mr. Proffitt was convicted of first degree murder on March 13, 1974. [T.R. 491]. After a penalty hearing conducted the same day, the jury recommended a sentence of death. [T.R. 535]. The trial court, Burnside, J., sentenced Mr. Proffitt to death on March 21, 1974. [T.R. 556].

Mr. Proffitt's conviction and sentence were affirmed by this Court on May 28, 1975. Proffitt v. State, 315 So.2d 461 (Fla. 1975). The United States Supreme Court thereafter granted certiorari to consider the constitutionality of Florida's death penalty statute, and held on July 2, 1976, that the Florida statute does not on its face violate the Eighth Amendment prohibition of cruel and unusual punishment. Proffitt v. Florida, 428 U.S. 242 (Fla. 1976). The Supreme Court did not, however, address the actual application of the statute to the facts of Mr. Proffitt's case. See Proffitt v. Wainwright, 685 F.2d 1227, 1233-34 n.2 (11th Cir. 1982), reh. denied, 706 F.2d 311, reh. en banc denied, 708 F.2d 734, cert. denied, ___ U.S. ___, 104 S.Ct. 508 (1983).

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*References to the portions of the record from the 1974 trial and sentencing are cited here as "T.R." References to the portions of the record from the 1984 resentencing are cited here as "R."

After state post-conviction relief was denied, Mr. Proffitt instituted an action for federal habeas corpus relief in the United States District Court for the Middle District of Florida. On September 10, 1982, the United States Court of Appeals for the Eleventh Circuit unanimously held that there had been error in Mr. Proffitt's sentencing proceedings in the trial court's consideration of improper and unsupported aggravating circumstances,[1] in the denial of Mr. Proffitt's right to confrontation, and in the denial of his right to be present at the sentencing hearing.[2] The Court of Appeals remanded Mr. Proffitt's case for resentencing. The State's petition for writ of certiorari was denied by the United States Supreme Court on November 20, 1983.

Resentencing proceedings were convened in the Circuit Court for the County of Hillsborough on May 21, 1984. [R. 56]. Mr. Proffitt's motion to impanel a new jury on the issue of penalty was denied [R. 156], and the resentencing was conducted solely before the trial court. The trial court also denied Mr. Proffitt's motion to bar application of a statutory aggravating factor added to Florida's death penalty statute in 1979, more than five years after his trial and the date of the crime alleged. [R. 112]. The trial court did, however,

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1. This Court has taken approving note of the Eleventh Circuit's ruling in this regard in Jones v. State, 440 So.2d 570, 579 (Fla. 1983).

2. One member of the Court of Appeals also believed that Mr. Proffitt had been denied the effective assistance of counsel in the penalty proceedings by his counsel's failure to present any underlying evidence or argument of his character or background at the sentencing. See Proffitt v. Wainwright, supra at 1270-72.

grant Mr. Proffitt's motion to exclude the testimony of Dr. James Crumbley, a witness called by the State at the original penalty hearing.[3] [R. 230-31]. At the resentencing, the State offered no new evidence regarding the circumstances of the offense, but relied on the evidence presented at the 1974 trial.

On May 24, 1984, the trial court, Griffin, J., reimposed a sentence of death [R. 340-43], and this appeal followed.

STATEMENT OF THE FACTS

A. The Guilt/Innocence Trial.

At Mr. Proffitt's trial in 1974, evidence was introduced that shortly before 5:00 a.m. on July 10, 1973 [T.R. 251], Joel Medgebow was stabbed once in the chest [T.R. 229] in his ground floor apartment in Tampa, Florida. [T.R. 252].

There were no witnesses to the actual homicide. The crime was discovered when Mr. Medgebow's wife awoke and found him sitting up in bed. [T.R. 251]. According to Mrs. Medgebow, her husband, a wrestling coach, was a light sleeper. [T.R. 250, 256]. After she awakened and saw her husband holding what appeared to be a ruler, a man jumped up, came around the bed to where she was and hit her, knocking her down.

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3. The State's motion for stay of the resentencing to allow an appeal of this ruling was denied by the trial court. [R. 231]. The State thereupon instituted an "appeal" to the District Court of Appeals and moved to stay the resentencing. The State's motion for stay was denied by the District Court of Appeals, and the appeal was construed as a petition for certiorari. That proceeding has now been consolidated with the State's cross-appeal in this action.

[T.R. 251]. Mrs. Medgebow then observed the individual run out of the bedroom. [Id.] When she got up he was gone. [Id.] Mrs. Medgebow then discovered that her husband had been stabbed and that the "ruler" was a bread knife. [Id.; T.R. 282; State's Exhibit 4 (photograph)]. Mr. Medgebow was taken by ambulance to the hospital where it was determined that he was dead on arrival. The autopsy revealed that he had died as the result of a single stab wound in the chest. [T.R. 229]. No other wounds were inflicted. [Id.]

No physical evidence was introduced to link Mr. Proffitt to the scene of the crime. Mrs. Medgebow was unable to identify Mr. Proffitt as the individual who had hit her on the morning of the murder. [T.R. 254]. The only testimony connecting Mr. Proffitt to the crime was that of Mary Bassett, a 16-year old boarder who lived with him and his wife in their trailer. [T.R. 367]. Mary Bassett testified that at approximately 5:00-5:30 a.m. on the morning of July 10, 1973, she woke up and overheard Mr. Proffitt and his wife talking in their bedroom. [T.R. 375-76]. Mary Bassett testified that she overheard Mr. Proffitt say that he had just stabbed a man while burglarizing a place, and that he had hit a woman at the same time. [T.R. 376, 379]. She also heard him tell his wife to call the police. [T.R. 379-80].

There was evidence that on the night of the crime Mr. Proffitt left work at approximately 7:00 p.m. and went drinking with several of his co-workers at a bar in Tampa. [T.R. 303]. Although Mr. Proffitt did not ordinarily stay out past 10:00 p.m. [T.R. 371], particularly

when his wife was not with him [T.R. 381-82], that night he remained drinking at the bar for approximately seven and one half hours, leaving the bar at 3:15 a.m. after it closed. [T.R. 309, 313]. He then drove a friend home, talking for a while in the car before departing at approximately 3:30-3:45 a.m. [T.R. 310-11]. There is no evidence that Mr. Proffitt made any statements that night indicating any intention to commit a crime. He had no knife with him that night. [T.R. 313; R. 236].

B. The 1974 Penalty Hearing.

At the penalty hearing conducted in 1974, the State presented the testimony of Dr. James Crumbley, a physician employed by the Hillsborough County Sheriff's office as a psychiatric consultant for inmates at the Hillsborough County Jail. Crumbley's testimony regarding the content of psychiatrist-patient conversations he had with Mr. Proffitt was suppressed and excluded by the trial court at Mr. Proffitt's resentencing [R. 230-31] and is, therefore, not applicable to this appeal. No other testimony was presented at the 1974 sentencing proceeding before the jury.[4]

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4. In addition to Dr. Crumbley's testimony, the State introduced, over defense counsel's objection, a certified copy of a record of conviction of Mr. Proffitt in 1967 for breaking and entering without permission in Stamford, Connecticut. [T.R. 494-95] Mr. Proffitt's conviction for this offense was vacated by the Connecticut court prior to his resentencing. [See defendant's Exs. 1 - 2 and R. 257-59]. Although the Connecticut offense involved, §53-75, Conn. Gen. Stat., was a misdemeanor, see R. 255-56, and although the record of conviction indicates that Mr. Proffitt received a suspended sentence, [see R. 260], the prosecutor erroneously argued to the jury that Mr. Proffitt had previously been convicted of a felony and served time in jail on the offense. [T.R. 509, 512].

Mr. Proffitt's counsel offered no evidence at the penalty hearing regarding Mr. Proffitt's character or background, believing --as he has since testified -- that such information was excluded from consideration by Florida's death penalty statute. See Proffitt v. Wainwright, supra at 1248. The jury thus heard no evidence or argument concerning Mr. Proffitt's history, marriage, employment record, non-violent background, family, difficult upbringing -- or any other element in mitigation.

The jury recommended a sentence of death [T.R. 535], and the trial court accepted the jury's recommendation. [T.R. 556].[5]

C. The 1984 Resentencing Proceedings.

At his resentencing in 1984, Mr. Proffitt presented substantial evidence concerning his background and character. The evidence in mitigation demonstrated that Mr. Proffitt is a non-violent man who throughout his life had avoided confrontation. [R. 235, 245, 269, 279-80, 290].[6] He has no prior criminal record, nor any history of

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5. The trial court's (1974) findings are not before the Court in this appeal. It should be noted, however, that three of the four findings relied upon by the trial court in 1974 in support of the death penalty were legally inapplicable or factually unsupported and were not even argued by the State at the resentencing. The only remaining factor was murder during the course of a burglary. Proffitt v. Wainwright, supra at 1268.

6. Mrs. Proffitt testified that when she and her husband had a disagreement, he would respond by watching television and ignoring her or taking a walk. [R. 279-80]. Mary Bassett, the boarder, testified that Mr. Proffitt could not even cope with having a puppy with distemper killed, and her husband had to do it instead. [R. 246].

violent behavior. [R. 28, 235, 245, 252, 279-80]. His co-workers and family members testified that they had never seen him in a physical fight with another person [R. 235, 245, 252, 269], nor had they ever seen him carry a weapon. [R. 235, 236, 245, 252, 280, 296].

Mr. Proffitt comes from a difficult background. His father became an alcoholic early in Mr. Proffitt's childhood after the death of Mr. Proffitt's baby sister, [R. 264, 267], and his mother was forced to work two jobs to support the family. [R. 268]. Mr. Proffitt and his five siblings moved from Virginia to Connecticut, where his parents were unable to keep the family living together for a period of time, sending the children to different homes to live. [R. 266]. Mr. Proffitt grew up living in housing projects and shanties. [R. 263, 264, 266-67, 297].

Mr. Proffitt responded to his family situation responsibly by starting work at a young age and contributing to the support of his family. [R. 268]. After marriage, he continued to be steadily employed, supporting his wife (and other family members in need[7]) until the day he was arrested for this offense. [R. 252-53, 268, 279]. He was also thoughtful of others in need, opening his home to Mary Bassett and her husband "until [they] could get on [their] feet again" after the birth

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7. When Mr. Proffitt's mother was forced to stay at home after an operation, Mr. Proffitt stayed with her and took care of her until she recovered. [R. 297]. She described him as "a loving, caring boy." [R. 296].

of their baby. [R. 244].[8] He was a good and responsible worker who got along with with his fellow workers. [R. 234, 235, 236, 252].

Mr. Proffitt had a "very loving, happy, tender, caring relationship" with his wife, which he has maintained throughout the ten years of his incarceration. [R. 245, 253, 277-78, 281-82]. His mother, brother and three sisters have maintained close contact with him, reflecting strong family ties. [R. 271, 288, 293, 307]. After his initial flight, Mr. Proffitt surrendered voluntarily to his brother, a Stamford, Connecticut police officer. [R. 262, 271]. He was "distraught," "going to pieces [and] ... sorry for everything that had happened." [R. 270]. Prior to the offense, he had been drinking for close to eight hours. [R. 238].

Mr. Proffitt also introduced evidence of his character and adjustment in prison. Father Robert Baker, a priest who counselled inmates on death row for several years, testified that Mr. Proffitt was someone who has sincere and deeply held religious beliefs [R. 287] and who expressed a real concern for other people. [R. 288]. Father Baker testified that Mr. Proffitt has adjusted with understanding rather than hositility or antagonism to his incarceration even though he has never before been incarcerated. [R. 290].[9]

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8. Mr. Proffitt was responsible for convincing Mary Bassett's husband, who was A.W.O.L., to turn himself in to the military authorities at his base. [R. 247].

9. Father Baker made clear that he was ordinarily very suspicious of inmates trying to use him or religion, but believed Mr. Proffitt's religious feelings to be genuine. [R. 292].

Father Baker also testified that Mr. Proffitt has unique family support [R. 293, 288], providing a strong potential for future growth. [R. 288]. [10] There is no evidence of any violent behavior by Mr. Proffitt in the ten years he has been on death row.

At the resentencing, the State presented the testimony of Drs. Daniel J. Sprehe and Robert Coffer, two psychiatrists who had been appointed by the trial court in 1974 to examine Mr. Proffitt prior to his original sentencing. The psychiatrists testified that, in their opinions, Mr. Proffitt was competent at the time of his 1974 trial [R. 181, 196], was not suffering from any extreme emotional distress at the time of the examinations or the crime [R. 181-82, 196], and could appreciate the criminality of his conduct and conform his conduct to the requirements of the law. [R. 180-81, 197]. The doctors' opinions were based solely upon their fifty-minute interviews with Mr. Proffitt in March 1974. Defendant's objections to the testimony on constitutional, statutory and relevancy grounds were denied by the trial court. [R. 158-67]. [11]

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10. Father Baker's testimony pertained to his frequent contacts with Mr. Proffitt over a three-year period commencing in 1979. [R. 294]. Mr. Proffitt's attempt to proffer evidence concerning his adjustment, character and behavior on death row prior to 1979, in the form of a letter from a now-deceased officer at the prison who served as death row counsellor, was rejected by the trial court, in response to the State's hearsay objection. [*See* R. 304].

11. It should be noted that the State expressly declined any reliance on the written reports prepared by Dr. Sprehe and Dr. Coffer at the time of the original sentencing. [R. 186-87, 198]. Such reports are, therefore, not part of the record considered by the trial court at the 1984 resentencing nor included in the record for review by this Court.

The trial court resentenced Mr. Proffitt to death, finding two aggravating circumstances, one statutory mitigating circumstance and non-statutory mitigating evidence.[12]

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12. The trial court found, in relevant part:

> AS TO AGGRAVATING CIRCUMSTANCES: (A) That the Defendant, CHARLES WILLIAM PROFFITT murdered JOEL RONNIE MEDGEBOW from a premeditated design and while the Defendant, CHARLES WILLIAM PROFFITT, was engaged in the commission of a felony, to-wit: burglary.
>
> (B) That prior to, or after entering the living premises of the victim, JOEL RONNIE MEDGEBOW, the Defendant, CHARLES WILLIAM PROFFITT, armed himself with a knife and thereafter did murder the said JOEL RONNIE MEDGEBOW by stabbing him in the heart with said knife. The homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
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> ....
>
> AS TO MITIGATING CIRCUMSTANCES: ... (A) The Defendant has no significant history of prior criminal activity.
>
> ....
>
> (H) That the Court has weighed carefully the testimony of the Defendant, CHARLES WILLIAM PROFFITT'S, family, former co-workers, religious advisor and others in a search for mitigating factors, and has accorded that testimony the weight the Court feels is appropriate.

[R. 27-28].

SUMMARY OF THE ARGUMENT

1. The principal aggravating circumstance relied upon by the trial court in sentencing Mr. Proffit to death -- that the homicide was "cold, calculated and premeditated" -- was improperly found and applied. The evidence does not support a finding that the murder was committed with any heightened level of premeditation. Rather, the evidence of Mr. Proffitt's character and behavior before, during and after the offense negates any inference that the murder was committed in a cold, calculated and premeditated manner. Morever, since the factor was not added to the death penalty statute until many years after Mr. Proffitt's offense and original trial, application of the factor at Mr. Proffitt's resentencing violated the ex post facto, due process, right to counsel, privilege against self-incrimination, equal protection, and cruel and unusual punishment provisions of the Florida and United States Constitutions.

2. Death is an excessive and inappropriate sentence for Mr. Proffitt based on his character and background and the circumstances of the offense. There was substantial mitigating evidence demonstrating Mr. Proffitt's non-violent character and history, his lack of prior criminal record, his close marital and family ties, his good employment record, his intoxication on the night of the offense, and his voluntary surrender to the authorities. Mr. Proffitt was convicted of a burglary-homicide without any additional acts of abuse to the victim. This Court has never sustained a death penalty for such an offense for a person of Mr. Proffitt's character and record.

3. The trial court improperly excluded mitigating evidence relevant to Mr. Proffitt's character and background before and after the offense, in violation of constitutional requirements as well as the statutory provisions of Fla. Stat. §921.141(1).

4. The trial court erred in resentencing Mr. Proffitt without benefit of a new jury recommendation of sentence. The 1974 jury proceedings on penalty contained no information about Mr. Proffitt's character or background and were tainted by improper evidence, argument and instruction.

ARGUMENT

A. THE "COLD, CALCULATED AND PREMEDITATED" AGGRAVATING FACTOR IS NOT SUPPORTED BY THE EVIDENCE AND, IN THE CIRCUMSTANCES OF MR. PROFFITT'S CASE, CANNOT BE APPLIED RETROACTIVELY TO SENTENCE HIM TO DEATH.

In resentencing Mr. Proffitt to death, the trial court relied on only one aggravating circumstance that was in existence at the time of Mr. Proffitt's 1974 trial and original sentencing -- that the murder was committed during a burglary. Fla. Stat. §921.141(5)(d). As this Court has held, the felony-murder factor alone is insufficient to support a sentence of death, even where there are no mitigating circumstances. *See e.g.*, *Rembert* v. *State*, 445 So.2d 337, 340 (Fla. 1984).

At Mr. Proffitt's resentencing in 1984, the State sought to avoid the import of *Rembert* by relying on an aggravating circumstance added to the statute in 1979, arguing that the murder was committed in a "cold, calculated and premeditated" manner. Fla. Stat. §921.141(5)(i)

(Ch. 79-353, Laws of Florida). The trial court resentenced Mr. Proffitt to death in the face of the substantial statutory and non-statutory mitigating evidence presented at the resentencing by relying on the additional factor. [R. 27].

The cold, calculated and premeditated factor, however, was not supported by the evidence in this case. Moreover, it cannot be applied to Mr. Proffitt's case without violating his rights under the _ex post facto_, due process, right to counsel, privilege against self-incrimination, equal protection and cruel and unusual punishment provisions of the Florida and federal Constitutions.

1. The Factor is Not Supported by the Evidence.

This Court has held that the cold, calculated and premeditated factor only applies in cases where the evidence establishes a contract or execution-style murder, _McCray_ v. _State_, 416 So.2d 804, 807 (Fla. 1982), or a "particularly lengthy, methodical or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator." _Preston_ v. _State_, 444 So.2d 939, 946 (Fla. 1984). This was not such a crime.

The evidence of Mr. Proffitt's conduct and character before, during and after the crime negates any finding that he acted from a cold and calculated intent to commit a homicide. Mr. Proffitt had been drinking for over seven hours on the night of the crime. [T.R. 309, 313]. He made no statements that night of any criminal intentions,

and had no weapon with him. [T.R. 313, R. 236]. The victim was stabbed only once [T.R. 229], without torture or abuse [id.], and even more important, when Mr. Proffitt ran from the apartment, the victim was visibly still alive. [T.R. 251]. Although Mr. Proffitt struck Patricia Medgebow with his fist when she awoke [id.], he made no attempt to inflict mortal injuries on her, but rather fled. [Id.]. Mr. Proffitt immediately went home, where he confessed to his wife and told her to call the police. [T.R. 379-80]. After his initial flight, he voluntarily surrendered to the authorities, expressing remorse over the crime and inability to live with himself. [R. 270]. He has no prior or subsequent history of any violence and no criminal record. [R. 28, 235, 245, 252, 269, 279-80, 290].

These facts -- which indicate little if any premeditation,[13] and certainly no previously-conceived homicidal plan -- are the only evidence relating to premeditation. There is no evidence in the record as to how the crime occurred. No one saw the actual crime or testified

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13. Indeed, because the evidence of premeditated murder was weak, the felony-murder theory was prominent in the State's presentation throughout the trial, particularly during the voir dire [T.R. 99, 100, 101-03, 105, 107, 109, 156, 157, 178-80, 189-90, 199], and the state attorney's closing argument. [T.R. 437, 441, 444]. The only arguable evidence of premeditation was circumstantial, inferential and negligible, while there was direct evidence of Mr. Proffitt's unlawful entry into the apartment (and thus, the State argued, a burglary) through Mr. Proffitt's statements to his wife. The trial court instructed on both felony-murder and premeditated murder [T.R. 473, 475, 478-79], and the jury returned a general verdict of guilt. [T.R. 491]. It is more likely than not under these circumstances that the jury convicted on the felony-murder theory. See Franklin v. State, 403 So.2d 975, 976 (Fla. 1981).

as to the events leading up to its commission.[14] There was no evidence of how the victim was stabbed, no evidence of whether he was awake or asleep when attacked, no evidence of where the murder weapon, a bread knife, had come from, no evidence of how the assailant and victim encountered each other, i.e., of whether the victim, a wrestling coach and light sleeper, had awakened and confronted the defendant, no evidence of the defendant's prior motivation or state of mind, no evidence to refute the logical conclusion that the defendant had been surprised during a burglary of the apartment and had, in panic and perceived self-defense, assaulted the victim.

This Court has held on at least four occasions -- on facts virtually identical to those here -- that evidence of a murder committed during a residential burglary does not warrant a finding of cold, calculated and premeditated murder. Peavy v. State, 442 So.2d 200, 202 (Fla. 1983); Blanco v. State, 452 So.2d 520, 526 (Fla. 1984); Richardson v. State, 437 So.2d 1091, 1094 (Fla. 1983); Harris v. State, 438 So.2d 787, 797-98 (Fla. 1983).

In Peavy, the victim had been found lying dead of stab wounds in his bed in his apartment, which had been ransacked. There was no evidence of how the murder had occurred, although Peavy's involvement was established by the presence of his fingerprints in the apartment and by his own admissions. This Court overruled the trial court's

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14. Mrs. Medgebow awoke after the crime had occurred. She had no knowledge of how, when, or even where the stabbing had occurred. She could only testify that she awoke and saw her husband sitting on the bed, alive, holding what later turned out to be a knife. [T.R. 251].

finding that the murder was cold, calculated and premeditated, stating:

> This murder occurred during the commission of a burglary and robbery and is susceptible to other conclusions than finding it was committed in a cold, calculated and premeditated manner. The trial court improperly found the existence of this aggravating circumstance because the evidence does not establish it beyond a reasonable doubt.

442 So.2d at 202.

In _Richardson_, the victim was found dead in his house of massive head injuries and cutting wounds. Richardson had been seen leaving the house, which had been forcibly entered, covered with blood. After initially assaulting the victim, Richardson returned to the house to complete the murder. This Court nonetheless invalidated the trial court's finding that the murder was committed in a cold, calculated and premeditated manner:

> The facts and circumstances show that the victim discovered appellant, a person known to him, committing a burglary and that the murder was extemporaneously committed for the purpose of avoiding a lawful arrest. The evidence does not show beyond a reasonable doubt that there was any heightened degree of premeditation, calculation or planning.

437 So.2d at 1094.

The same holding was reached in _Blanco_, where the Court again declined to find this factor established by evidence of murder committed during a residence burglary. In _Blanco_, the Court stated:

> A reasonable interpretation is that appellant entered the dwelling with the intent to steal and was surprised by Ryan's attempt to take the gun from him. The subsequent shots followed

> quickly and do not show any heightened premeditation, calculation or planning.

452 So.2d at 526. Accord, Harris v. State, supra at 797-98 (factor overruled -- elderly woman found stabbed and beaten to death during burglary of her home).

Like Peavy, Richardson, Blanco and Harris, the facts of Mr. Proffitt's case support a reasonable conclusion that the murder occurred when he was surprised in the Medgebow apartment by the victim. Indeed, the prosecutor urged the jury to convict Mr. Proffitt of felony-murder based upon exactly such an argument, arguing that the murder was committed when defendant was surprised while

> "casing the apartment. Joel, restless in his sleep, makes some comment, makes some noise, moves, whatever he does. The defendant thinks he is caught and then he takes his life."

[T.R. 444].

The trial court identified no facts in its finding to support this aggravating circumstance other than the fact of the stabbing itself. The trial court made no finding of any preconceived plan or intention to commit the murder.[15] This Court's prior decisions repeatedly hold

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15. The trial court did not, for example, find that Mr. Proffitt armed himself prior to entering the apartment. Rather, reflecting the lack of evidence in the record, the trial court merely stated that Mr. Proffitt armed himself "prior to or after entering [the Medgebow apartment]." [R. 27 (emphasis added)]. This Court has held that the use of a weapon found at the scene is inconsistent with the cold, calculated and premeditated factor. Harris v. State, supra at 798. The State did not prove -- and the trial court did not find -- that Mr. Proffitt came to the apartment armed to kill.

that the fact of a stabbing cannot and does not justify application of this factor. See Preston v. State, supra at 946 (factor overruled -- victim's throat slashed);[16] Peavy v. State, supra at 202 (factor overruled -- victim stabbed to death in apartment during burglary); Harris v. State, supra at 797-98 (factor overruled -- victim stabbed to death in apartment during burglary); Drake v. State, 441 So.2d 1079, 1082-83 (Fla. 1983) (factor overruled --victim stabbed eight times); Wilson v. State 436 So.2d 908, 912 (Fla. 1983) (factor overruled -- five-year-old child stabbed once in chest).

The burden is on the State to prove, beyond a reasonable doubt, affirmative facts establishing the heightened degree of premeditation necessary to sustain this factor. Thompson v. State, ___ So.2d ___, 9 F.L.W. 349, 350 (Sept. 6, 1984); Williams v. State, 386 So.2d 538, 542 (Fla. 1980). The burden is not on defendant to prove that he acted in panic or (unjustifiable) self-defense or for any other unknown reason.

As the Court has recently made clear, speculation regarding a defendant's unproven motives cannot support this factor. Thompson v. State, supra. In Thompson, the Court declined to "speculate" as to possible reasons for the killing and overruled a trial court's finding of this factor:

> No evidence was produced to set the murder apart from the usual hold-up murder in which

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16. Indeed, in Preston, the victim's throat was cut from one side to the other, in a classical and obviously intentional act of murder. This Court overruled the trial court's reliance on this fact as a basis for the finding of cold, calculated and premeditated murder and overturned the finding. 444 So.2d at 946.

> the assailant becomes frightened or for reasons unknown shoots the victim either before or during an attempt to make good his escape.

Thompson v. State, supra at 350.

As in Peavy, Richardson, Blanco and Harris, the evidence plainly "is susceptible to other conclusions than finding it was committed in a cold, calculated and premeditated manner." Peavy v. State, supra at 202.[17] The case law thus establishes that there was insufficient evidence to prove a cold, calculated and premeditated murder. Peavy v. State, supra at 202; Jackson v. Virginia, 443 U.S. 307 (1979). Under such circumstances, the factor was improperly found.

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17. The Court's holdings in Peavy, Richardson, Blanco and Harris -- which involve burglary or robbery of a dwelling -- are consistent with the Court's decisions overruling reliance on the cold, calculated and premeditated factor in other felony-murder cases involving burglary or robbery.

Thus, in the past year alone, the Court has, on at least six occasions, overruled a finding of the cold, calculated and premeditated factor in cases where the victim was found murdered, even "intentionally and deliberately," during the course of a burglary or robbery, because the record failed to establish the required additional evidence of contract or execution-style killing or other heightened premeditation. See Thompson v. State, supra (factor overruled -- gas station attendant found shot to death during robbery); Gorham v. State, 454 So.2d 556 (Fla. 1984) (factor overruled --victim found in warehouse bathroom shot to death during "cold and calculated" robbery); Rembert v. State, supra at 340 (factor overruled -- victim found bludgeoned to death with club during burglary of his store); Preston v. State, supra at 946 (factor overruled --convenience store clerk abducted and found stabbed to death after robbery of store); White v. State, 446 So.2d 1031, 1037 (Fla. 1984) (factor overruled --grocery store proprietor found shot to death during store robbery); Maxwell v. State, 443 So.2d 967, 971 (Fla. 1983) (factor overruled --"intentional and deliberate" murder of robbery victim).

This Court has carefully defined the "cold, calculated and premeditated" aggravating circumstance to make clear that it only applies in the specific factual circumstance where a contract, execution or similar kind of killing is involved. McCray v. State, supra at 807; Preston v. State, supra at 946. The facts of this case do not support a finding under that standard. Thus, application of the factor to this case would violate the established limits imposed by this Court on this circumstance, expanding the definition of the factor, and consequently rendering it unconstitutionally overbroad as applied. Godfrey v. Georgia, 446 U.S. 420 (1980).[18]

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18. The cold, calculated and premeditated factor is an aggravating circumstance which, if not carefully construed -- like "especially heinous, atrocious or cruel" murder, Fla. Stat. §921.141(5)(h) -- could apply to virtually any homicide, rendering the factor unconstitutionally overbroad or void for vagueness under Godfrey. Evidence of the factor's susceptibility to overbroad interpretation is demonstrated by the history of this Court's review of the application of this factor in the trial courts. In the little more than three years that this Court has had occasion to review the factor, the Court has had to reverse the trial court's finding on at least nineteen occasions. See Appendix A.

2. Retroactive Application of the Factor is Barred by the Ex Post Facto, Due Process, Right to Counsel, Privilege Against Self-Incrimination, Equal Protection and Cruel and Unusual Punishment Provisions of the Florida and United States Constitutions.

The cold, calculated and premeditated factor was added to the Florida death penalty statute in 1979. It was thus not in effect at the time of Mr. Proffitt's offense, trial, jury penalty hearing or original sentencing.[19] While Mr. Proffitt submits that the factor does not apply to the facts of his case, even were there facts to support a finding, the circumstance could not constitutionally be applied retroactively to his case.

The Court has held that where an entire trial and sentencing is conducted after July 1, 1979 (the effective date of the legislation adding the factor) and where application of the factor inures to a defendant's benefit, the cold, calculated and premeditated factor may be retroactively applied without violating ex post facto prohibitions. Combs v. State, 403 So.2d 418 (Fla. 1981).

In Mr. Proffitt's case, his guilt/innocence trial and jury penalty hearing were conducted prior to July 1, 1979, and application of the cold, calculated and premeditated factor at his 1984 resentencing demonstrably disadvantaged him. The rationale of Combs thus prevents

19. Defendant's offense occurred on July 10, 1973. He was indicted on July 31, 1973 and sentenced to death on March 21, 1974. The cold, calculated and premeditated factor was added to Florida's death penalty statute, §921.141(5)(i), effective July 1, 1979. See Ch. 79-353, Laws of Florida.

retroactive application of the factor to his case. In addition, because of the unique posture of Mr. Proffitt's case --where evidence was received at proceedings conducted before the amendment was passed -- retroactive application of the factor violates his rights to due process, the assistance of counsel, privilege against self-incrimination, equal protection and to the even-handed application of the law under the Fifth, Sixth, Eighth and Fourteenth Amendments. None of these rights were implicated in Combs, and have not been addressed by this Court.

a. Application of the Factor Did Not "Inure to [Mr. Proffitt's] Benefit" and Therefore Violated Ex Post Facto Prohibitions.

This Court's holding in Combs rests on its finding that application of the cold, calculated and premeditated factor inured to Combs' benefit. Combs v. State, supra at 421. The Court recognized that if the factor disadvantaged, rather than benefited, Combs, retroactive application would violate ex post facto prohibitions. Id. In Mr. Proffitt's case, the factor did not inure to his benefit, but demonstrably prejudiced him.

Other than the cold, calculated and premeditated factor, the only other aggravating circumstance found by the trial court is that the murder was committed during a felony (burglary). This Court has twice held, however, that this aggravating circumstance does not, by itself, warrant imposition of a death sentence, even if no mitigating circumstances are found by the trial court. Rembert v. State, 445

So.2d 337, 340-41 (Fla. 1984); Menendez v. State, 419 So.2d 312, 315 (Fla. 1982). In this case, where statutory and non-statutory mitigating circumstances are present, there can be no question that felony-murder alone would be insufficient to warrant a death sentence. Menendez v. State, supra at 315. Application of the cold, calculated and premeditated factor thus disadvantaged Mr. Proffitt in the most critical sense: it prevented imposition of a life sentence as a virtual matter of law. But for the application of the factor, Mr. Proffitt could not be sentenced to death.[20]

The trial court specifically recognized that application of the factor could only serve to disadvantage Mr. Proffitt. [R. 113]. The court stated on the record that while it felt bound to follow Combs, it believed it was "error" to do so in Mr. Proffitt's case [R. 114]:

> By adding [the cold, calculated factor] and by allowing the court, a trial court, to use that as an aggravating factor, I cannot see any way how that inures to the benefit of the defendant. I believe that gives the court, as Justice Marshall had said, an additional factor which may well allow trial courts to get beyond other case law [Rembert] which has been argued by the defendant on another motion, that when there is only one aggravating factor, that the felony murder is committed during a

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20. The circumstances of Combs' offense are markedly different from Mr. Proffitt's. The evidence in Combs revealed a torturous and brutal execution-style murder-robbery, with a finding by the trial court that the murder was "especially heinous, atrocious or cruel." Combs coldly taunted the victims about their imminent deaths, and shot both despite their pleas and entreaties for mercy. One of the victims miraculously survived to describe Combs' crime.

> burglary, that that, in itself, is not sufficient.
>
> . . .
>
> By adding this other factor and allowing it to be administered ex post facto, it allows the court a wider latitude in imposing the death penalty. I believe that is error, but at the same time this Court is bound by the pronouncements of its Supreme Court and by the pronouncements of the U.S. Supreme Court in Dobbert.

[R. 113-14].[21]

As this Court has recognized, a law violates ex post facto prohibitions if (1) it applies retrospectively, that is, attaches legal consequences to crimes committed before the law took effect; and (2) disadvantages the offender affected by it. State v. Williams, 397 So.2d 663, 665 (Fla. 1981); see Weaver v. Graham, 450 U.S. 24, 29 (1981). Use of the statutory amendment of the cold, calculated and premeditated factor in Mr. Proffitt's case falls within this test: the factor became effective in 1979, six years after the offense at issue, and, as applied to Mr. Proffitt, it meets the classic ex post facto definition of a "law that aggravates a crime, or makes it greater

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21. During the argument on defendant's Motion, defense counsel twice challenged the State to explain how application of the factor could possibly inure to the benefit of this defendant. [R. 109, 92]. The State, although invited to respond by the trial court, never provided a single explanation of how this defendant could be benefited.

than it was when committed." Calder v. Bull, 3 U.S. (Dall.) 386, 390 (1798) (emphasis in original); accord, Dobbert v. Florida, 432 U.S. 282, 292-94 (1977); Weaver v. Graham, supra at 28 n.9. Only because this factor was added has Mr. Proffitt been sentenced to death. The 1979 amendment adding the factor is, therefore, as to this defendant, an ex post facto violation of the Florida and United States Constitutions. State v Williams, supra; Weaver v. Graham, supra.

It is clear that Mr. Proffitt's case is factually and legally different from the situation upheld in Combs, and the Court need not overrule the holding in Combs to disallow reliance on the factor in this case. Combs was, however, decided by a sharply divided Court, and defendant respectfully suggests that the holding of Combs be reexamined.

Prior to July 1, 1979, premeditation -- and even heightened premeditation -- could not be considered as an aggravating factor in support of a death sentence. Brown v. State, 381 So.2d 690, 695-96 (Fla. 1980); Blair v. State, 406 So.2d 1103, 1108 (Fla. 1981); Riley v. State, 366 So.2d 19, 21 (Fla. 1978).[22]

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22. In both Brown and Blair, the trial court found as an aggravating factor in support of the death sentence that the defendant "murdered [the victim] from a premeditated design." Brown, supra at 695; Blair, supra at 1108. In both cases, this Court overruled the trial court's reliance on such premeditation, holding that premeditation was not a statutory aggravating circumstance and could not be considered in aggravation. Id.; Brown, supra at 696.

In Riley, this Court ruled that even heightened premeditation could not be considered in aggravation, holding that the trial court's finding "that the length of [defendant's] premeditation for the crime was great," id. at 21 n.2, "clearly must be disregarded as not having been listed" in the statute, id. at 21, even though the Court characterized the murder as "an execution-type killing." Id. at 22.

Because the cold, calculated and premeditated factor added a form of premeditation as a statutory circumstance to be considered in aggravation, three Justices of this Court dissented in Combs on the ground that even in Combs' case the new statutory factor clearly "increased the likelihood" that a death sentence could be imposed. Id. at 422 (Sundberg, C.J., dissenting). Two Justices of the United States Supreme Court have called the State's argument that the factor inures to the benefit of a defendant "simply untenable." Justus v. Florida, ____ U.S. ___, 79 L.E.2d 726, 727 (1984) (Marshall and Brennan, JJ., dissenting from denial of certiorari). The trial court below was similarly unable to accept the State's position, finding that "it allows the court a wider latitude in imposing the death penalty" and "is error." [R. 114].

Defendant respectfully submits that the factor does not, under any circumstances, inure to a defendant's benefit.[23] The rationale of Combs should be reexamined and its holding reversed.[24]

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23. In addition, under the Florida Constitution, Article X, §9, even an ameliorative law -- i.e., "one that inures to a defendant's benefit" --may not be retroactively applied to an offense committed before the law's enactment. See Castle v. State, 330 So.2d 10 (Fla. 1977) (defendant not entitled to benefit of reduction in maximum punishment enacted after commission of offense).

24. Defendant recognizes that the holding in Combs has been followed by this Court. See e.g., Justus v. State, 438 So.2d 358 (Fla. 1983). The Court has, however, essentially reaffirmed Combs without further analysis.

b. The Factor Cannot Be Applied Because Mr. Proffitt Has Been Denied the Benefit of Jury Consideration of Its Applicability.

Should this Court determine that application of the cold, calculated and premeditated factor can, in some way, be deemed to "benefit" this defendant, then Mr. Proffitt's death sentence cannot stand because he was improperly denied jury consideration of this benefit. Unlike the situation in Combs, the jury at Mr. Proffitt's 1974 penalty hearing was not instructed on the cold, calculated and premeditated factor and thus was not limited in their consideration of the evidence of normal premeditation as an aggravating circumstance, as Combs requires. Combs v. State, supra at 421. Defendant's motion at his 1984 resentencing for a new jury hearing on penalty for this reason was denied by the trial court. [R. 145-46, 156].

It is fundamental to the Florida death penalty system that the trial court must give due weight to a properly instructed jury's sentence recommendation. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). The trial court's reliance on the factor, without benefit of jury consideration, invalidates the death sentence imposed.

c. <u>Application of the Factor Would Violate Mr. Proffitt's Rights to Due Process of Law, the Effective Assistance of Counsel, Privilege Against Self-Incrimination, Equal Protection of the Law and Prohibition Against Cruel and Unusual Punishment.</u>

In finding the cold, calculated and premeditated factor, the trial court necessarily relied upon the evidence presented at the 1974 guilt or innocence trial.[25] Mr. Proffitt had no notice in 1974 when he defended at trial that the evidence could be used to establish this factor.

Under Florida law, the death penalty statute provides notice of the only factors in aggravation that may be considered by the jury and judge. <u>Menendez</u> v. <u>State</u>, 368 So.2d 1278, 1282 n.21 (Fla. 1979). At the time of Mr. Proffitt's 1974 trial, the statute did not include the cold, calculated and premeditated factor and the jury was not instructed on the factor. Indeed, to the contrary, under then applicable Florida law, evidence of normal or even heightened premeditation was not a statutory aggravating circumstance and could not be utilized in aggravation of sentence. <u>Brown</u> v. <u>State</u>, <u>supra</u> at 695-96 (normal

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25. The only evidence presented by the State at the resentencing was the testimony of Drs. Coffer and Sprehe, who testified that, in their opinions, Mr. Proffitt was competent and not emotionally disturbed at the time of the offense and at the time of their 1974 examinations of him. This testimony shed no light on defendant's motivation or level of premeditation, if any, at the time of the offense. It therefore is not relevant to and does not support the trial court's finding. Moreover, that testimony was obtained in violation of Mr. Proffitt's Fifth and Sixth Amendment rights and could not, in any case, be used to support a death sentence. See n. 26, <u>infra</u>.

premeditation disallowed as aggravating circumstance); Riley v. State, supra at 21 n.2 (heightened premeditation disallowed as aggravating circumstance).

It is a fundamental aspect of due process of law that a defendant is entitled to notice of the factors that will be utilized against him in aggravation of sentence. Presnell v. Georgia, 439 U.S 14 (1978); Cole v. Arkansas, 333 U.S. 196 (1948).

Equally important, defense counsel in 1974 had no opportunity to prepare or defend against this then-nonexistent factor, nor could he properly advise Mr. Proffitt as to the law and Mr. Proffitt's legal liabilities and options, including the advisability of negotiating a plea. Mr. Proffitt would, therefore, be denied effective assistance of counsel if evidence from the 1974 proceedings is, ten years later, utilized to support an aggravating finding never considered by trial counsel or defended against at trial.[26]

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26. In particular, defense counsel's agreement to allow examination of Mr. Proffitt by Drs. Coffer and Sprehe in 1974 was made without notice or consideration of the new factor. The doctors' testimony was obtained in violation of Mr. Proffitt's Fifth and Sixth Amendment rights, as set forth in Estelle v. Smith, 451 U.S. 454 (1981), since Mr. Proffitt and his counsel had no notice that the psychiatric examinations in 1974 would be used to establish an aggravating circumstance that did not then exist, and defendant was not warned of his privilege against self-incrimination or afforded the assistance of counsel in regard to such examinations. Mr. Proffitt timely moved to exclude the doctors' testimony on these grounds at resentencing after the trial court refused to bar application of the cold, calculated and premeditated factor. [R. 158-62, 167-68, 191]. Mr. Proffitt further objected to the testimony as irrelevant to any aggravating circumstance, and as improper prospective rebuttal of mitigating circumstances. [R. 160, 165-66, 174, 179, 180, 181, 182, 191, 194, 196, 197]. See Maggard v. State, 399 So.2d 973, 977-78 (Fla. 1981). Mr. Proffitt's objections were overruled by the trial court. [R. 166-67, 168, 179-80, 181, 182, 191, 196, 197].

The trial court's reliance on the cold, calculated and premeditated factor also violates defendant's constitutional right to equal protection of the laws and to the even-handed application of capital sentencing under the Eighth and Fourteenth Amendments. Lee v. State, 340 So.2d 474, 475 (Fla. 1976); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). No other defendant accused of first degree murder in 1973 and tried in 1974 could be sentenced to death because his offense was premeditated. Brown v. State, supra at 696; Blair v. State, supra at 1108. Similarly, no other defendant convicted in 1974 could receive a death sentence because of heightened premeditation. Riley v. State, supra at 21 and n.2.

Only this defendant stands in such jeopardy, and only because his legal challenges to his 1974 death sentence were not finally upheld until 1983. This Court has previously held that the constitutional mandate of equal protection will not allow a death sentence to be imposed under such circumstances. Lee v. State, supra at 475.

In Lee, this Court originally allowed a defendant convicted in 1972 under Florida's pre-Furman death penalty statute to be retried under the new statute because, unlike all other pre-Furman death sentences, the reduction in Lee's sentence was not final prior to enactment of the new statute. Lee v. State, 294 So.2d 305 (Fla. 1974). Upon reconsideration of its holding after Lee had again been sentenced to death, the Court overruled its prior decision. Lee v. State, supra, 340 So.2d at 475. Taking note of its constitutional "responsibility

to ensure that similar results are reached in similar cases," id. at 475, the Court stated:

> We do not think that the question of whether a person should live or be put to death by a state should be determined by the legal procedures of when his request for reduction of sentence was made....
>
> [I]t is our judgment that the constitutional mandate of equal protection requires reduction of appellant's sentence from death to life.

Id.

As in Lee, only the chronological accident of when his legal challenge to his sentence was finally upheld separates Mr. Proffitt from all other defendants sentenced prior to July 1, 1979. The equal protection clause and Eighth Amendment requirement of consistency in capital sentencing preclude Mr. Proffitt's death sentence based upon an aggravating factor not applicable at any other pre-July 1, 1979 capital trials. Lee v. State, supra at 475.

The cold, calculated and premeditated factor was improperly found on the facts and improperly applied to Mr. Proffitt's case as a matter of law.[27] His death sentence must, therefore, be reversed. Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977).

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27. Defendant also challenges the trial court's reliance on the statutory aggravating circumstance of burglary on the ground that the underlying felony found in a felony murder conviction cannot, consistent with the Eighth Amendment, be utilized to aggravate sentence. State v. Dixon, 283 So.2d 1, 8 (1973) (aggravating factor requires "facts in addition to those used to prove the commission of the crime"); see Shue v. State, 366 So.2d 387, 390 (Fla. 1978); Purdy v. State, 343 So.2d 4, 6 (Fla. 1977). Defendant recognizes that this Court has, however, previously rejected this argument. Menendez v. State, supra, 419 So.2d at 315. Defendant also contends that the State's evidence failed to prove, beyond a reasonable doubt, Williams v. State, supra; Jackson v.

B. MR. PROFFITT'S DEATH SENTENCE IS EXCESSIVE AND DISPROPORTIONATE IN LIGHT OF HIS BACKGROUND AND CHARACTER AND THE CIRCUMSTANCES OF THE OFFENSE.

This Court's ultimate "function in reviewing a death sentence is to consider the circumstances in light of the other decisions and determine whether or not the punishment is too great." State v. Dixon, 283 So.2d 1, 10 (Fla. 1973); see also Menendez v. State, 419 So.2d 312, 315 (Fla. 1982); McCaskill v. State, 344 So.2d 1276, 1278-79 (Fla. 1977). Mr. Proffitt submits that a death sentence in his case is excessive and disproprotionate and should be reduced by this Court to life imprisonment.

This Court has never affirmed a death penalty for a homicide during a burglary, unaccompanied by any additional acts of abuse or torture to the victim, where the defendant has no prior record of criminal or violent behavior. Rather, it has consistently reversed death sentences in such felony-murder cases, with or without a jury recommendation of life, finding the death sentence to be disproportionate for such an offense. See, e.g., Rembert v. State, 445 So.2d 337, 340 (Fla. 1984); Menendez v. State, supra; Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983).

(fn. 27, cont.) Virginia, supra, the elements of burglary, as set forth, at the time, in the applicable Florida statute, §810.01. See Robles v. State, 188 So.2d 789, 792 (Fla. 1966). Defendant recognizes, however, that he is bound by this Court's ruling on his prior appeal, where the Court upheld the jury instructions on felony murder and based on different elements. Proffitt v. State, supra. See Menendez v. State, supra at 315. In light of this Court's prior rulings, defendant will not, therefore, brief these claims further.

Mr. Proffitt is thirty-eight years old. He has no prior criminal record and has never before been incarcerated. [R. 28, 257-59]. He has no history of violent behavior prior or subsequent to the offense. [R. 235,245, 252, 279-80]. He was described without exception by his family, friends and co-workers as a non-violent person who avoided confrontations. [R. 235, 245, 269, 279-80, 290].

At the time of the offense, Mr. Proffitt was happily married. His relationship with his wife has been described by the principal witness against him at trial as "very loving, happy, tender [and] caring," [R. 245], and he remains married to this date. [R. 253]. His family, which includes his mother, brother and three sisters, has been described as uniquely close and supportive throughout Mr. Proffitt's ten years on death row. [R. 271, 288, 293, 307].

Although raised in a difficult environment, living in projects and shanties with an alcoholic father, working mother and five siblings, [R. 263, 264, 266-67, 297] Mr. Proffitt's background reflects a stable, productive and non-criminal life. He has worked hard to support his wife and other family members [R. 252-53, 268, 279] from his teen-age years [R. 268] until the date of his arrest. [R. 237, 252-53, 268, 279]. Mr. Proffitt was employed at the time of the offense and was described as a good worker and responsible employee by his supervisor. [R. 234, 236]. He had good relations with his fellow workers and was well-liked. [R. 236, 252].

The crime for which Mr. Proffitt was convicted was "not beyond the norm of capital felonies" and does not itself require the extreme sentence of death. State v. Dixon, supra at 7. The victim was not tortured or abused, and there was no attempt to inflict mortal injuries on the only witness at the scene. The evidence suggests a panic reaction by a man who had been drinking for over seven hours prior to the crime upon his being discovered in the apartment by Mr. Medgebow. Mr. Proffitt showed genuine remorse after the offense.

Although never before incarcerated, Mr. Proffitt has responded with "understanding and patience" rather then hostility or antagonism to his incarceration. [R. 290]. He has evidenced sincere religious beliefs and concern for other people, convincing even a skeptical death row chaplain. [R. 287, 288, 292]. There is no evidence that in the more than ten years he has been on death row, he has been involved in any violent behavior.

As reflected in this Court's decisions, no other death-sentenced appellant has appeared before this Court with Mr. Proffitt's background for a burglary-homicide with no additional acts of abuse to the victim. As the State even conceded in Rembert, such cases do not ordinarily result in the imposition of a death sentence. Rembert v. State, supra at 340 n.; see, e.g., Copeland v. State, 435 So.2d 842 (Fla. App. 1983) (burglary of dwelling, victim stabbed with knife and bludgeoned with hammer in her trailer; conviction for first degree murder, life sentence imposed); Garmon v. State, 434 So.2d 1036 (Fla. App. 1983)

(burglary of dwelling, defendant, in advance, formed intent to kill if interrupted; conviction for first degree murder, life sentence imposed); Mainor v. State, 415 So.2d 827 (Fla. App. 1982) (burglary of dwelling, after initial unsuccessful attempt, defendant returned to rape and kill victim; conviction for first degree murder, life sentence imposed); Williams v. State, 397 So.2d 1049 (Fla. App. 1981) (burglary of dwelling, both occupants shot, one killed; conviction for first degree murder, life sentence imposed).

Thus, when similar unaggravated felony-murder cases have been presented to this Court, it has not hesitated to reverse the death sentence. Rembert v. State, 445 So.2d 337, 340 (Fla. 1984); Menendez v. State, 419 So.2d 312, 315 (Fla. 1982).[28]

This Court reversed in Rembert even though there were no mitigating circumstances found by the trial court. It reversed in Menendez with only a portion of the mitigating evidence in Mr. Proffitt's case. It must reverse in this case as well.

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28. Moreover, where the jury recommended life, the Court has reversed the death sentence even when a burglary felony-murder was accompanied by additional acts of abuse, or where the defendant had a prior violent record, or both. See, e.g. Neary v. State, 384 So.2d 881 (Fla. 1980) (elderly victim robbed, raped and strangled during burglary; life sentence imposed); Norris v. State, 429 So.2d 688 (Fla. 1983) (two elderly victims beaten to death by drug addict; life sentence imposed); Richardson v. State, supra (victim beaten and stabbed to death, significant history of prior criminal activity, life sentence imposed); Welty v. State, 402 So.2d 1159 (Fla. 1981) (victim beaten and strangled, significant history of prior criminal activity; life imposed); Swan v. State, 322 So.2d 485, 488-89 (Fla. 1975) (victim beaten and strangled during burglary of residence, crime "especially heinous, atrocious or cruel;" life sentence imposed).

C. THE TRIAL COURT IMPROPERLY EXCLUDED RELEVANT EVIDENCE IN MITIGATION OF SENTENCE IN VIOLATION OF FLORIDA'S DEATH PENALTY STATUTE AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As this Court held in Perry v. State, 395 So.2d 170 (Fla. 1980), "a defendant may not be precluded from offering as a mitigating factor any aspect of his character and record ... which might justify a reduction of a death sentence to life imprisonment." Id. at 174 (emphasis in original); accord, Simmons v. State, 419 So.2d 316, 320 (Fla. 1982); see Lockett v. Ohio, 438 U.S. 586 (1978).

Thus any evidence "reasonably related" to an "element of [a defendant's] character may not be excluded from consideration as a possible mitigating factor." Simmons v. State, supra at 320.

The trial court, over defendant's objections, excluded relevant evidence of Mr. Proffitt's character and background proffered by him, including:

1. a letter from a former correctional officer at Florida State Prison regarding Mr. Proffitt's character on death row from 1974-1978, his adjustment to prison, his respect for authority, his efforts to avoid physical confrontations with other inmates, his supportive family and his future capacity to be productive [R. 304-305];

2. testimony from Mr. Proffitt's brother concerning Mr. Proffitt's impoverished upbringing [R. 264-65];

3. testimony from a priest of Mr. Proffitt's feelings of remorse over the crime while on death row [R. 289].

4. affidavits from Mr. Proffitt's teen-aged nephews reflecting Mr. Proffitt's loving and gentle relationship with them while they were growing up [R. 302-04];

5. a letter from Mr. Proffitt's school principal describing Mr. Proffitt's character as a youth and behavior in school [R. 308].

Such evidence was relevant to Mr. Proffitt's character and background and should not have been excluded. Lockett v. Ohio, supra; Simmons v. State, supra; Perry v. State, supra.

The exclusion of the correctional official's letter was particularly prejudicial.[29] The letter contained the insights of a trained penological professional with experience in assessing the character of inmates on death row. The letter was based on information obtained over several years of daily contact with and knowledge of Mr. Proffitt. No other evidence presented by Mr. Proffitt dealt with this period or could be based on such extensive involvement with him by an unbiased observer. The letter was, thus, important evidence to support Mr. Proffitt's argument at the resentencing that imprisonment, rather than death, is an appropriate sentence for him, and that the crime did not reflect his true character or his future potential. See

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29. The letter was written in 1979 for submission to the Governor in connection with a petition for clemency. Defendant was unable to locate the writer, S. R. Johns, at the time of resentencing and was advised that Sgt. Johns was deceased. [R. 304].

Simmons v. State, supra at 320; Menendez v. State, supra, 419 So.2d at 315 (capacity for rehabilitation is a mitigating factor).

The trial court excluded the letter -- and other documentary evidence proffered by Mr. Proffitt -- in response to the State's hearsay objections. [R. 304-05]. This basis for the ruling was erroneous. Fla.Stat. §921.141(1) expressly provides that the formal rules of evidence do not apply at penalty proceedings.[30] As this Court has expressly held, hearsay evidence is admissible under the statute at capital sentencing proceedings. Swan v. State, 322 So.2d 485, 488 (Fla. 1975) (report admissible under §921.141(1) over hearsay objection). As the Court has stated, "there should not be a narrow application of the rules of evidence in the penalty hearing, whether in regard to relevance or to any other matters except illegally seized evidence." State v. Dixon, 283 So.2d 1, 7 (Fla. 1973).

This statutory interpretation is mandated by constitutional requirements. The United States Supreme Court has held that state hearsay rules cannot be applied to exclude evidence in mitigation in a capital case without violating the Eighth Amendment. Green v. Georgia, 442 U.S. 95, 97 (1979) (reversing death sentence where mitigating evidence excluded on hearsay grounds).

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30. Fla. Stat. §921,141(1) provides in pertinent part:

> Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

The excluded testimony of Father Baker of Mr. Proffitt's feelings of remorse in 1979-81, when Father Baker visited with defendant at the prison, was also highly relevant. Evidence of remorse is a recognized mitigating factor, Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983), and here, where the testimony would show Mr. Proffitt's continuing feelings of sincere remorse years after the offense, the evidence would further serve to underscore Mr. Proffitt's non-violent character.[31]

Direct evidence of Mr. Proffitt's impoverished childhood and upbringing was also relevant in mitigation, especially in light of his efforts to establish a stable and law-abiding marital and work history in adult life. Eddings v. Oklahoma, 455 U.S. 104 (1982) (reversing death sentence where the trial court had refused to consider evidence of the defendant's difficult circumstances in childhood as evidence in mitigation). The trial court's exclusion of such mitigating evidence as "irrelevant" [R. 264-65] was error.

The documentary evidence from Mr. Proffitt's nephews and former school principal was also relevant to Mr. Proffitt's background and character and was also improperly excluded on hearsay grounds by the trial court. Fla. Stat. §921.141(1); Swan v. State, supra at 488; Green v. Georgia, supra.

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31. The State objected to this evidence on the ground that Father Baker -- who has a doctorate in theology and was the Catholic chaplain at the University of Florida and Pastor of St. Augustine Church in Gainesville [R. 295] -- was not qualified to answer the question asked. Even assuming that the question called for an opinion -- as opposed to a statement of what the witness had heard or observed --Father Baker was clearly qualified to answer the question.

Because the trial court erroneously excluded relevant evidence in mitigation proffered by defendant, in violation of the Florida death penalty statute and the Eighth and Fourteenth Amendments to the United States Constitution, the death sentence imposed must be reversed.

D. THE TRIAL COURT ERRED IN DENYING MR. PROFFITT'S MOTION FOR IMPANELING OF A JURY.

At his 1984 resentencing, defendant moved for a new jury penalty proceeding. The trial court denied the motion and reimposed a death sentence on Mr. Proffitt without the benefit of a new jury recommendation as to sentence. The court's failure to afford Mr. Proffitt a new jury proceeding denied him the benefit of a reliable advisory verdict to guide the trial court in determining sentence.[32]

The original jury verdict was rendered on the basis of what is now recognized to be a misguided understanding by defense counsel of Florida's death penalty statute. At the time of Mr. Proffitt's 1974 penalty proceeding, Mr. Proffitt's counsel believed he was precluded from offering non-statutory mitigating evidence of Mr. Proffitt's character and background for the jury's consideration. See Proffitt

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32. It is not clear from the trial judge's sentencing order whether he considered the 1974 jury recommendation in imposing sentence. The Order states "the court has carefully reviewed and considered the testimony, the evidence and the previous verdict by the Jury of Charles William Proffitt's guilt of murder in the first degree." [R. 27]. The order makes no mention of the jury's advisory verdict, perhaps

v. Wainwright, supra at 1248. The jury thus heard no evidence or argument concerning Mr. Proffitt's background, his non-violent history, his marriage, employment record, family ties, difficult upbringing -- or any of the other elements of character and background traditionally considered by the sentencing authority in any criminal case.

The consideration of such information is a constitutionally indispensable part of a capital sentencing process. Eddings v. Oklahoma, 455 U.S. 104, 112 (1982); Woodson v. North Carolina, 428 U.S. 280, 304 (1976). As the United States Supreme Court has reiterated:

> [T]he fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

Eddings v. Oklahoma, supra at 112 (quoting from Woodson v. North Carolina, supra at 304).

In this case, whether counsel rightly or wrongly construed the law, the effect was the same: the jury was deprived of the most basic and essential information about Mr. Proffitt needed to render a constitutionally reliable recommendation as to sentence. A jury recommendation

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(fn. 32, cont.) because the trial court was convinced, as Mr. Proffitt argued, that the jury's 1974 recommendation was tainted and unreliable. See Defendant's Motion to Empanel Jury on Resentencing. [R. 37]. A trial court may not (absent waiver) impose sentence without consideration of a jury recommendation, and if the trial court did so, its sentence is invalid. Richardson v. State, supra at 1095.

returned under such circumstances is invalid and cannot be relied upon by the sentencing trial court ten years later. Eddings v. Oklahoma, supra; Richardson v. State, supra at 1095.[33]

Equally important, the only testimony actually presented to the jury (by the State) at the 1974 penalty hearing -- the testimony of Dr. James Crumbley -- was excluded by the trial court in 1984 as obtained in violation of Mr. Proffitt's rights.[34] The only other evidence at penalty -- Mr. Proffitt's 1967 misdemeanor conviction --

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33. In addition, the jury in 1974 obviously could not consider Mr. Proffitt's character as it existed ten years later, nor any changes in the law affecting the determination of sentence. Reliance on the 1974 jury proceeding thus deprived Mr. Proffitt of a complete and updated factual and legal evaluation of the community's judgment of whether a death sentence is now appropriate.

34. Dr. Crumbley was a sheriff's deputy who served as physician and psychiatric consultant at the Hillsborough County jail where Mr. Proffitt was incarcerated before trial. He assured Mr. Proffitt that any communication between them would be kept confidential. He then reported the substance of their conversations to the state's attorney. At trial, he related what Mr. Proffitt had told him and rendered an opinion that Mr. Proffitt was a dangerous individual who would kill again unless treated psychiatrically. Even without regard to the reasons which led the trial court to exclude Dr. Crumbley's testimony, his predictions of future dangerousness did not relate to any statutory aggravating circumstance and should not have been presented to or considered by the jury. Miller v. State, 373 So.2d 882, 886 (Fla. 1979); Huckaby v. State, 343 So.2d 29, 33 n.11 (Fla. 1977).

has since been vacated as unconstitutionally obtained.[35] As this Court held in Oats v. State, 446 So.2d 90, 95 (Fla. 1984), a vacated conviction may not be considered in the imposition of a death sentence. The jury thus not only lacked fundamentally important facts about Mr. Proffitt's background and character but premised their recommendation on improper information.[36]

Moreover, the trial court's instructions in 1974 failed properly to guide the jury as to their consideration of aggravating and mitigating circumstances in numerous critical respects.

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35. Even without considering the subsequent invalidation of Mr. Proffitt's conviction, the state's attorney erroneously argued that Mr. Proffitt had been convicted of a felony in Connecticut in 1967 and served ninety days in jail. [T.R. 432]. In fact, Mr. Proffitt was not convicted of a felony, but of a misdemeanor trespass, and did not serve ninety days in jail, but received a suspended sentence. [R. 255-56, 260]. Mr. Proffitt had no other criminal history. The jury was thus seriously misled regarding a matter of great concern to most jurors --the extent and nature of the defendant's criminal record.

36. The error in admitting Dr. Crumbley's testimony was exacerbated by its inherent unreliability. Dr. Crumbley had only two fifteen minute conversations with Mr. Proffitt. Although holding himself out as a psychiatrist to Mr. Proffitt, he was, in fact, only a general physician with some psychiatric training. The state's attorney, after having elicited Dr. Crumbley's opinions on direct examination, argued to the Court and jury that Dr. Crumbley was unqualified to render opinions about Mr. Proffitt's mental state. [T.R. 510-11, 502-03]. The trial court in 1974 doubted the reliability of Dr. Crumbley's testimony and ordered the appointment of two "court-approved" psychiatrists. [T.R. 536]. Dr. Crumbley's "opinion" of Mr. Proffitt's emotional disturbance was contradicted by these doctors. [R. 180, 181, 182, 196-8]. The unreliability of Dr. Crumbley's testimony is further underscored by the fact that Mr. Proffitt's character and past and subsequent conduct are completely at odds with the testimony Dr. Crumbley gave.

The trial court did not instruct the jury that the "great risk of death to many persons" factor applies only to situations where the actual act resulting in the homicide endangers many people [T.R. 531], White v. State, 403 So.2d 331, 337 (Fla. 1981), allowing the jury to accept --as the trial court itself did -- the prosecutor's erroneous argument that the factor could apply because Mr. Proffitt did not know how many people were in the apartment. [T.R. 507].

The trial court did not advise the jury that they could not rely on both the burglary and pecuniary gain aggravating circumstances [T.R. 530-31], Provence v. State, 337 So.2d 783, 786 (Fla. 1976), again allowing the prosecutor's mistaken argument to the contrary to be accepted by the jury. [T.R. 509]. The trial court did not instruct the jury that proof of additional acts of physical or psychological torture of the victim are required to establish the "especially heinous, atrocious or cruel" factor [T.R. 531], Demps v. State, 395 So.2d 501, 506 (Fla. 1981), allowing a misapplication of this factor by the jury -- as the court itself did. The trial court did not instruct the jury to disregard the prosecutor's argument for a death sentence based on Mr. Proffitt's alleged future dangerousness [T.R. 513] -- and, again, itself erroneously accepted that argument.[37] See Miller v. State, supra at 886.

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37. The prosecutor's summation also contained a highly improper plea to juror passions, fears and desire for vengeance, arguing that a death sentence was warranted because the victim was "well-liked", "respected" and young [T.R. 512] and because his death was senseless and had caused "many, many, many sorrows." [T.R. 516]. Teffeteller v. State, 439 So.2d 840, 844-45 (Fla. 1983).

The trial court further misadvised the jury on the burden of proof, telling them that a death sentence was required unless the mitigating circumstances were found to outweigh the aggravating circumstances [T.R. 533]. See Arango v. State, 411 So.2d 172, 174 (Fla. 1982) (aggravating circumstances must outweigh mitigating circumstances); Mullaney v. Wilbur, 421 U.S. 684 (1975). The trial court further erroneously precluded the jury from granting mercy if they deemed it appropriate notwithstanding the relative weight of the aggravating and mitigating circumstances. [Id.]. See Gregg v. Georgia, 428 U.S. 153, 192-93 (1976) (right to mercy); Alvord v. State, 322 So.2d 533, 540 (Fla. 1975) (same).

The trial court misadvised the jury that a majority vote was required for return of a sentence recommendation. [T.R. 533-34]. See Harich v. State, 437 So.2d 1082, 1086 (Fla. 1983) (six-six vote requires life sentence recommendation). The trial court did not, despite express defense request, instruct the jury on the minimum penalty of life imprisonment without possibility of parole for twenty-five years [T.R. 535], Sirianni v. State, 411 So.2d 198 (Fla. App. 1981), even though the prosecutor misleadingly warned the jury not to risk Mr. Proffitt's release on parole. [T.R. 513-14].[38] See Norris v. State, 429 So.2d 688, 690 (Fla. 1983).

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38. The trial court also did not correct the prosecutor's repeated misstatements [T.R. 106, 107, 110, 118, 120, 506] to the jury that the mitigating circumstances were limited to those specified in the death penalty statute. Lockett v. Ohio, supra. To the contrary, the trial court told the jury at the beginning of the penalty hearing that it would later instruct them on the mitigating circumstances they could consider [T.R. 494], which it did by reading the statutory circumstances in the closing instructions. [T.R. 531-32].

Mr. Proffitt does not contend that a capital defendant is always entitled on resentencing to a new jury proceeding.[39] Where the jury proceedings are error-free, a trial court may clearly resentence a capital defendant without a new jury hearing. Menendez v. State, supra, 419 So.2d at 314 (where no error in evidence or instructions at jury proceeding found, resentencing by trial court upheld). If error exists, however, a new jury proceeding is mandated. Messer v. State, 330 So.2d 137, 142 (Fla. 1976); see Richardson v. State, supra at 1095.

This Court has repeatedly emphasized the crucial role the jury plays in the Florida capital sentencing system. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); State v. Dixon, supra at 8. The jury recommendation represents the judgment and conscience of the community as to whether the death sentence is appropriate, and thus is entitled to great weight. McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982). A life recommendation by the jury, while not binding, cannot be overriden unless "no reasonable person could differ" that death was the appropriate punishment. Tedder v. State, supra at 910. "[T]he advisory opinion ... could be a critical factor in determining whether or not the death penalty should be imposed. This is an essential right of the defendant under our death penalty legislation..." Lamadline v. State, 303

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39. Defendant also acknowledges that a new jury proceeding was not required by the mandate of the District Court in defendant's federal habeas corpus action. The District Court did, however, require the resentencing to be conducted in accordance with the requirements of Florida law.

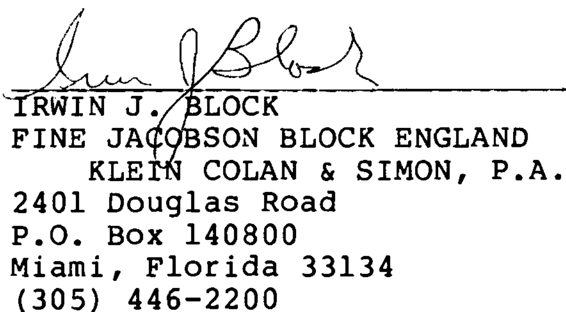
State, 303 So.2d 17, 20 (Fla. 1974)(emphasis added).[40]

The trial court's failure to afford Mr. Proffitt a new jury recommendation of sentence deprived him of this essential right and requires reversal of the death sentence imposed.

CONCLUSION

For the foregoing reasons, Mr. Proffitt's death sentence was improperly imposed. The sentence of the trial court must be vacated, and a life sentence imposed.

Respectfully submitted,



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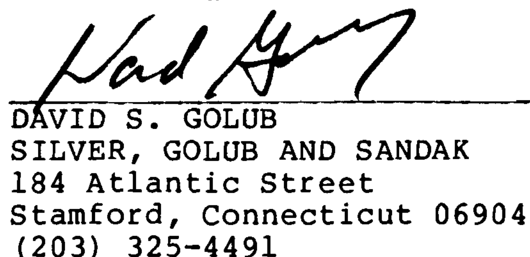

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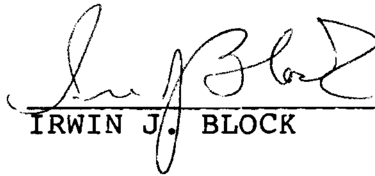
40. The statute having created a right to an advisory jury recommendation, the Eighth Amendment requires that the right be consistently and evenhandedly applied. Eddings v. Oklahoma, supra at 112. Similarly, the State cannot abrogate the statutory right to a jury recommendation of sentence without violating the due process and equal protection clauses. Hicks v. Oklahoma, 447 U.S. 343 (1980); Griffin v. Illinois, 351 U.S. 12 (1956).

CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing Brief of Petitioner-Appellant have been mailed, postage prepaid, to Charles Corces, Esq., Assistant Attorney General, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida 33602, this 22nd day of October, 1984.



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