IN THE FLORIDA SUPREME COURT

JEFFREY A. MUEHLEMAN, :

Appellant, :

vs. : Case No. 65,546

STATE OF FLORIDA, :

Appellee. :

:

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ROBERT F. MOELLER
ASSISTANT PUBLIC DEFENDER

Hall of Justice Building
455 N. Broadway Avenue
Bartow, Florida 33830
(813)533-1184 or 533-0931

COUNSEL FOR APPELLANT

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STATEMENT OF THE CASE

On June 28, 1983 a Pinellas County grand jury returned an indictment charging Appellant, Jeffrey A. Muehleman, with the premeditated murder of Earl C. Baughman. (R14-15,102-103) Muehleman initially pled not guilty (R16), but changed his plea to guilty on May 1, 1984. (R631-642)

A penalty trial was conducted before a jury on May 2-6, 1984, with the Honorable Crockett Farnell presiding. (R643-1259,2230-2551) The jury recommended by a ten to two vote that Muehleman be sentenced to death. (R304,1254) On June 8, 1984 Judge Farnell imposed a sentence of death upon Muehleman. (R307-308,1340)

In support of the death sentence the trial court found the following aggravating circumstances:

(1) That the capital felony was committed while Muehleman was engaged in the robbery of Earl Baughman. (R309, A1-2)

(2) That the homicide was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. (R310-311,A2-3)

(3) That the crime was especially heinous, atrocious or cruel. (R311-312,A3-4)

(4) That the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R312-313,A4-5)

The court found the statutory mitigating circumstance of Muehleman's age of 18 at the time of the crime. (R315,A6)

He cited the fact that Muehleman pled guilty as being "probably the most mitigating factor." (R1340) The court also recognized that Muehleman's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, but did not find this impairment to be "substantial" enough to qualify for the statutory mitigating circumstance. (R314-315,A6-7)

Jeff Muehleman filed his notice of appeal to this Court on June 26, 1984. (R316) The Public Defenders for the Sixth and Tenth Judicial Circuits were appointed to represent him on appeal. (R318)

STATEMENT OF THE FACTS

When Jeffrey Alan Muehleman was born in Elmhurst, Illinois, forceps had to be used to deliver him. (R1188, "black book"[1/]) This resulted in a gross, but temporary, deformity of his skull which caused his mother to be depressed and fearful, and caused other people to shun the child. (R494,495,959-960,1008, 1134,1142,1153,1160-1161,1191-1192, "black book") He did not breathe spontaneously at birth, and a tube carrying oxygen had to be forced down his throat to stimulate his breathing. (R1008, "black book")

Muehleman also was born with club feet and had to wear plaster casts from the waist down only a few days after he was born, followed by braces and then corrective and orthopedic shoes after the casts were removed. (R960,1008-1009,1107-1108, 1134,1160-1161,1191,1197-1198, "black book") He had a number of other health problems during his early years, including a hernia, eczema, allergies, colic, high fevers, severe diarrhea, bronchial asthma, and assorted other respiratory tract infections. (R960, 1008-1011,1065,1160,1193-1194,1199-1201, "black book") He cried constantly. (R1159-1160,1192-1193)

[1/] The so-called "black book" was introduced at Muehleman's penalty trial as Defendant's Exhibit Number Five. (R928-935) It contained Muehleman's school record, medical and psychiatric history, a record of the times he was institutionalized, etc. (R928-935) The original "black book" was sent to this Court as a supplement to the record on appeal. (R2558) The court clerk did not, however, make copies thereof for the respective attorneys, and so counsel will be unable to make reference to specific pages of the record on appeal when referring to the "black book."

Muehleman was hyperactive and aggressive by age three. (R1011-1012,1124,1133,1142,1144,1162,1163-1164,1202,1207-1208, "black book") He was given tranquilizers and Ritalin, to no avail. (R1012,1144,1207-1208)

The health problems Muehleman experienced as a child prevented him from bonding with his mother and forming a normal, loving relationship. (R961-962,1004-1007,1011-1012,1203) His mother resorted to screaming and cursing at him. (R1142-1143, 1149-1150,1205)

When Muehleman was nine years old his father left the family. (R1158,1168-1169,1210-1212)

Muehleman turned to alcohol and drugs when he was in the third grade. (R1028,1048,1125,1172-1173,1303)

Several times Muehleman was placed in special schools for children with emotional or behaviorial problems, and seemed to function better while he remained in the structured environments they offered. (R962,993-994,1019-1021,1110,1166,1174-1175, 1216-1217, "black book")

When Muehleman was 14 his mother struck him, tied him up, and committed him to a mental hospital. (R1170-1171,1178, "black book")

Muehleman had two younger brothers, both of whom were developing normally. (R995,1208)

There was not a single year of Jeff Muehleman's life when he was not having significant problems with his growth, development, behavior, and interpersonal relationships. (R1019) He was deficient in social interpersonal judgment and moral

scruples. (R949,952) He probably suffers from organic brain damage. (R953-955,973,1027,1033-1036,1043-1044,1217-1218)

Finally, when he was 18 years old, Muehleman left Illinois and came to Florida to start over. (R1076-1077) Richard Wesley introduced Muehleman to his cousin, Marie Woodward, in April, 1983. (R690-691) Muehleman and Wesley were considering renting a garage belonging to Marie Woodward and her husband, Jeff, to do auto body work. (R625,690-691) In the meantime, the Woodwards let Muehleman stay in the garage until he could find a place to stay. (R690-691) Richard Wesley paid Jeff Woodward $40 or $60 rent for the garage, part of which came from Jeff Muehleman. (R626,630) This was not the full amount of rent Woodward had requested. (R626) While Muehleman was living in the garage, Jeff Woodward continued to have access to it. (R628)

On May 2, 1983, 97 year old Earl Baughman hired Jeff Muehleman as a "helper." (R649-650,659,665,672-673) The following day Muehleman took Baughman and Baughman's friend, Virginia Petersen, to the grocery store. (R651) That same day Muehleman returned to his residence to pick up his belongings. (R692) He was driving a 1961 Cadillac. (R693) He was drinking a can of beer in a brown paper bag. (R694)

Muehleman told Marie Woodward about the job he had gotten working for an old man for $60 a week, plus room and board. (R693) Woodward testified at the penalty trial that Muehleman said something about drugging the old man from month to month and bringing him around the first of the month to cash his check. (R695) She did not take this statement seriously,

but believed Muehleman to be joking. (R696,708) There were about 10 people present when the remark was made, and they laughed because they too believed Muehleman to be joking. (R695,707)

On May 4 Muehleman took Earl Baughman and Virginia Petersen to the bank so that they could cash their social security checks. (R651-652) Baughman had a check for $426, as well as a personal check for $100. (R652)

Jeff Muehleman was kind and polite to Baughman, and helped him in and out of his car. (R661-662)

Virginia Battle, Earl Baughman's daughter, visited him on May 4. (R664) She met his helper, Jeffrey, who said he was from Chicago. (R665) When Battle asked Jeffrey what his last name was, he wrote "Jeff Williams" in an appointment book her father had. (R666-668,850) When Battle left her father's house at around 8:30 p.m., everything seemed all right. (R668)

The next day, May 5, Baughman was missing. (R656,668) The page in his book on which his helper had written his name was torn out. (R668-669) Baughman's bed was ruffled, and was not like it normally was when he slept in it. (R669) In the kitchen there was a plate on the table with a little piece of bread or something on it. (R670) Baughman's car, a 1961 Cadillac, was gone. (R656,658)

Jeff Muehleman stayed at his garage apartment on the Woodward's property the night of May 5. (R709) He was arrested the next day. (R709-710)

Muehleman's arrest came about after Deputy Billie Lions of the Pinellas County Sheriff's Department responded to a

computer message to proceed to a certain address and detain a subject there regarding an investigation involving a missing person that was pending in the detective bureau. (R579-580) Lions made contact with Mr. Constable, who told him that the description of a vehicle he had seen on the news fit the description of a vehicle that had been at his residence several times, driven by a man who was staying at his garage. (R580-581) The man had just gone to the store on Constable's son's bicycle. (R581)

Lions left the residence and spotted the subject about 30 seconds later. (R582,584) The subject saw Lions, covered his face with his arm, looked up. (R582) He jumped off the bike and turned around, whereupon Lions grabbed him by the arm and brought him back to the patrol car, where he was detained in the back seat. (R582-583) Lions asked him his name, and he said it was Ed Buchanan. (R582-583) Constable advised Lions that the subject was definitely not named Ed Buchanan, but was named Jeffrey. (R583) Lions then arrested Jeff Muehleman for "obstructing by false information." (R583)

Muehleman was not free to leave at any time after Lions grabbed his arm. (R589-590) Lions did not have a warrant to arrest Muehleman, nor did he have any personal knowledge or information about any crime Muehleman had committed or was warranted for, nor probable cause to arrest him. (R590-591)

Another sheriff's deputy, John Daniels, arrived on the scene after Muehleman's arrest. (R592,596,606,680) He read Miranda to Muehleman, who agreed to talk. (R597,681) Muehleman

gave Daniels his true name. (R598,681) He said that he last saw Earl Baughman on May 4 at around 10:00 p.m. when he left him. At that time Baughman was fine. (R598,681,781) Muehleman denied any involvement in Baughman's disappearance. (R598,681,781) He indicated he had taken a cigarette lighter and some cosmetics and other small items without Baughman's permission. (R600,682, 782) He also said he had given a false name when he applied for employment with Baughman because he did not want any trouble if he decided to terminate his employment. (R600,682) Muehleman told Daniels he was leaving Florida right away and was not going back to his apartment. (R599)

Daniels felt the sheriff's deputies had sufficient cause to detain Muehleman because they needed him to answer some of the questions they had regarding Earl Baughman's disappearance, but the deputies did not have probable cause to arrest Muehleman on the basis of the BOLO that was issued. (R612-613)

Three searches were conducted of Muehleman's garage apartment. (R554) Muehleman gave consent for the first one after he was arrested, and the Woodwards gave consent for the other two. (R554,609,628-629,682-683,703,797-798)

Jeff Muehleman invoked his right to remain silent on May 9. (R568)

On May 14, 1983 Earl Baughman's body was found in the trunk of his Cadillac on a St. Petersburg street. (R716,785) It was badly decomposed. (R720) The medical examiner, Dr. Joan Wood, could not find injury to the brain or skull. (R722) Both sides of the hyoid bone were broken, and there was damage to the

cartilage in the neck, which Dr. Wood found to be consistent with manual strangulation. (R722-725) There were two plastic bags of the type used around newspapers in Baughman's mouth. (R723-724, 788) Dr. Wood conducted an autopsy on Baughman's body, and opined that asphyxiation was the cause of his death. (R724)

Dr. Wood could not say whether Baughman was conscious or unconscious when the bags were put into his throat and windpipe. (R725) She stated that if someone were being manually strangled, they would remain conscious for about 30 to 45 seconds. (R725-726)

After Baughman's body was found, on May 17 Deputies Ron Beymer and John Halliday interviewed Jeff Muehleman at the maximum security jail facility. (R785,788) At that point he was not in custody on any charges relating to Earl Baughman's disappearance. (R788) Muehleman continued to deny his involvement in Baughman's killing. (R841) However, Beymer noticed some inconsistencies with Muehleman's earlier statements. (R791-793)

During the May 17 interview Beymer fed Muehleman false information about finding gloveprints in the trunk of Baughman's car. (R834)

On May 18 Muehleman requested that Detective Halliday return to the jail by himself for another interview. (R795,841) During that interview Muehleman continued to deny his involvement in Baughman's disappearance, and said he would beat the charge if he was charged with the murder. (R842)

While he was in the Pinellas County Jail, Jeff Muehleman came into contact with an eight-time convicted felon

named Ronald Rewis. (R734-736,758) Jail personel placed Muehleman in the laundry on C-Wing to work with Rewis, who was working with Detective Halliday. (R410)

Muehleman discussed his case with Rewis on four or five different occasions. (R745) According to Rewis, Muehleman confessed to killing Baughman. Muehleman told Rewis he decided to rob and kill the old man on the afternoon of May 4. (R738-739) Muehleman had discussed doing the crimes with another man, but he did not show up. (R739) Muehleman first set out two cups and some bread crumbs on the table so that if someone checked the next morning, it would look as if he and Baughman had eaten breakfast and gone for a ride in the car. (R742-743) He also wiped down items inside the house from which his fingerprints could be taken. (R739) Muehleman then took a frying pan off the stove, entered Baughman's bedroom where he was sleeping, and hit him with it, opening Baughman's head. (R739,742) Muehleman told Rewis the pan made a "gong" sound, and laughed about that. (R739) The blow with the pan did not knock Baughman out, and so Muehleman tried to strangle him with his hands. (R739) This was unsuccessful because the windpipe was very flexible. (R739-740) Muehleman then took the plastic wrapper from a newspaper and stuck it down the man's throat. (R740) He laughed when he told Rewis this. (R740) The plastic bag was bubbling in and out. (R740-741) Muehleman took about $150 from Baughman, wrapped his body in the bedcovers, and put him in the car trunk. (R741-742) He returned to the house and began looking for more money. (R741) He took a hot water bottle and other items that had

blood on them from the bed and burned them in back of the house. (R742) He then returned to the garage apartment where he hid the money and dropped off some tapes he had taken from the house. (R742,744) From there he drove to some apartments where he parked Baughman's car and "wiped it down." (R744) He had breakfast, returned to his garage apartment, and went to bed. (R744)

After Rewis heard details of the crime from Muehleman, he alerted Detention Officer Jacobs, who put him in touch with the detectives. (R745-746) They asked Rewis to let them know if Muehleman said anything else, and asked Rewis if he was willing to try to get a tape of what Muehleman had been telling him. (R746,757) Rewis said he was willing to be "bugged," and the detectives equipped him with a tape recorder monitoring device, which was concealed in the front of his jail uniform. (R747-748) Rewis did in fact tape a conversation with Muehleman in the recreation yard. (R746-747) On the tape Rewis asked Muehleman why he did not merely take the old man's money, to which Muehleman responded that he had intentions of killing the man to start with. (R748) When Rewis asked Muehleman whether the killing bothered him, he said "no," and laughed about it. (R748)

On approximately three occasions Officer Jacobs called the sheriff's deputies to relay information which Rewis had gotten from Muehleman. (R796) In this way the detectives learned on May 18 that Muehleman was worried after they fed him the false information on the 17th concerning fabric marks being found in Baughman's car. (R834,856) This is also how they learned that money was still hidden in the garage apartment, and

where it was located. (R797-799) Rewis similarly provided them with information that another subject was involved in the planning of the crime, that Baughman had been struck on the head with an unknown object, and that there was blood on the bed that Muehleman had hidden. (R801,856-857) Rewis also conveyed information to them about a coffee cup and crumbs or items being strewn about Baughman's kitchen. (R800)

Detective Beymer interviewed Rewis on May 31, 1983 and learned for the first time that a frying pan was used to hit the victim and that something might have been burned in a barrel in Baughman's back yard. (R796-797,817) He took a taped statement from Rewis on June 7. (R806)

Ronald Rewis had given Officer Jacobs information about other inmates on C-Wing on one other occasion. (R863) He had also provided information to another correctional officer relating to a planned escape attempt by two inmates. (R772,863-864,943)

On April 21, 1983, Rewis had pled guilty to felonious possession of a firearm. (R461-462,760,943) The prosecutor had recommended that he be sentenced to five years in prison. (R943) Although no promises were made to Rewis regarding his sentence, in the back of his mind he thought he might get some help in this regard. (R750) And Detective Beymer did agree to be available for the sentencing hearing. (R808-809) When Rewis was finally sentenced on March 2, 1984, he received five years' probation, with a year of specified residency in the county jail (credit for 201 days already served) and two years community control. (R461-462)

Detectives Beymer and Halliday interviewed Jeff Muehleman again on June 8, 1983, at Muehleman's request. (R812, 843) He initially denied his involvement in the crime once again. (R813) But then the detectives confronted him with the evidence they had amassed against him, including the fact that they had received information from Ronald Rewis, and that Rewis had worn a body bug. (R814,844) Muehleman finally admitted killing Baughman, and gave a detailed statement. (R352-360,814,844) He said he killed the old man because he hated him and knew he had obtained $500 at the bank. (R814) The man was grumpy, would not bathe, and urinated on himself. (R815) Muehleman was homesick and needed money to fly home. (R814) He initially struck Baughman with a small frying pan about six times, and took $145 or $153 from his wallet and pockets. (R815,819) He then tried to strangle him with his hands for several minutes. (R816) Baughman was still breathing, and so he pushed a plastic bag down his throat. (R816-817) He could see the bag beginning to inflate, and so he pushed it further down the throat. (R817) A few minutes later Baughman had expired, and Muehleman wrapped him in a blanket. (R817) He cleaned up the residence and burned some items that had blood on them, as well as Baughman's wallet and identification, in the back yard. (R817)

It was unclear when Muehleman actually made the decision to kill Baughman. (R846-847) Muehleman said he had planned on doing "it" for two or three hours. (R816) But in his taped confession he said he did not plan to kill him, but only to knock him out. (R355) He only killed him to keep him from

suffering when he realized he had probably caused Baughman brain damage. (R353,355)

Muehleman cried during his taped interview. (R825)

It was on June 8 that Muehleman was formally booked on first degree murder charges. (R854)

Muehleman gave a statement to reporter Christopher Smart as well, which led to an article that appeared in the St. Petersburg Times on June 9. (R482,845,857)

On June 10 Muehleman gave his final statement to Detectives Halliday and Beymer. (R362-364,845-846) He again stated that he initially intended only to knock Baughman unconscious and take his money. (R363) But after being struck with the frying pan a few times, Baughman said, "Oh, Jeff," and reminded Muehleman of his grandfather. (R363) At that point Muehleman felt he had to put Baughman out of his misery, and not leave him brain-damaged or otherwise handicapped. (R363-364)

Before his penalty trial, Muehleman moved to suppress all statements he had made, as well as all physical evidence as the fruit of his illegal arrest. (R225-231) The motion was heard by Judge Farnell on May 1, 1984 (R547-631), and denied. (R232,620) Before penalty phase testimony began, Muehleman lodged a continuing objection to any evidence he had sought to suppress. (R2417-2418) The statements Muehleman made to the police and to Ronald Rewis were introduced by the State at the penalty trial, and reference was made to his statement to Christopher Smart. (R351-360,361-364,681-682,738-745,746-749,780-785,788-794,797-799,800,801,812-820,825,841-850,856-857)

Also introduced was physical evidence obtained from Muehleman's person or from his garage apartment, including Earl Baughman's cigarette lighter (R659), his hat, shoes, electric razor and tioletry items (R658,782-783,823-824), and money that was presumably the money stolen from Baughman. (R336,338,704-705,807-808)

During Jeff Muehleman's presentation of mitigating evidence, the State was permitted to introduce a document entitled "Juvenile Social History Report," which detailed Muehleman's juvenile record and contained a number of comments about him (R428-443,1059-1060), and to introduce tapes of the conversation with Muehleman that was secretly recorded by Ronald Rewis at the jail. (R1229-1231)

As rebuttal evidence the State was allowed to introduce, over objection, a transcript of a taped interview with Richard Wesley in which he described how Muehleman had tried to recruit him to assist in robbing and killing Earl Baughman and dumping his body. (R1224-1229)

The State also introduced in rebuttal, over objection, testimony concerning crimes Muehleman allegedly committed in Illinois, including an assault on his mother (R1237), burglary (R1240-1243), theft (R1243), battery (R1243), theft of gasoline (R1248-1250), possession of marijuana (R1250), and failure to appear. (R1251)

Muehleman raised several objections to the prosecutor's closing argument. (R2503-2504)

At the conference on jury instructions, where counsel waived Muehleman's presence (R2428), the defense asked the court

to instruct on all aggravating and mitigating circumstances, except the mitigating factor of no significant history of prior criminal activity, which was waived. (R1232,2429-2430,2450-2451) The court denied the request. (R2431) Counsel for Muehleman also requested a number of special instructions in writing, and specifically asked for an instruction on the statutory mitigating circumstance of the crime having been committed while the defendant was under the influence of extreme mental or emotional disturbance, with the limiting word "extreme" to be stricken. (R282-298,2441-2451) The court denied these requests as well. (R282-298,2434,2441-2451)

Over objection (R2432,2450-2451) the court instructed on the following aggravating circumstances, and gave an instruction on premeditation in conjunction with the fourth circumstance (R2543-2544): (1)The crime was committed while the defendant was engaged in a robbery. (2) The crime was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. (3) The crime was committed for financial gain. (4) The crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The court instructed on three mitigating circumstances (R2545): (1) Capacity of defendant to appreciate criminality of his conduct or to conform his conduct to requirements of law was substantially impaired. (2) Age of defendant at time of crime. (3) Any other aspect of defendant's character or record and any other circumstances of offense.

SUMMARY OF ARGUMENT

The statements Jeff Muehleman made to sheriff's deputies, a jailhouse informant, and a newspaper reporter should have been suppressed. All were products of his illegal warrantless arrest. Some were obtained after he had invoked his right to remain silent. Some were obtained by the informant acting as a state agent, violating Muehleman's self-incrimination privilege and right to counsel.

Physical evidence taken from Muehleman and his garage apartment likewise should have been suppressed as fruit of the illegal arrest. Muehleman had a reasonable expectation of privacy in the apartment. Muehleman's purported consent to search was tainted by the illegal arrest. The Woodwards had no authority to consent.

Jeff Muehleman's conviction and sentence should be vacated, as they were predicated upon inadmissible evidence, and because Muehleman was not present during part of the hearing on his motion to suppress, nor at the jury charge conference.

The jury's death recommendation was tainted by the State's presentation of inadmissible evidence against Muehleman. A document entitled "Juvenile Social History Report" detailed his entire criminal record as a juvenile, and contained damaging comments by various people. It was hearsay, totally irrelevant, and invaded the province of the jury. Furthermore, defense counsel was forced to furnish a copy of the report to the State despite the trial court's pretrial ruling that discovery would not apply at the penalty phase. The State also presented evidence,

some of it hearsay, concerning a number of offenses Muehleman allegedly committed in Illinois. This testimony again was irrelevant and, though introduced in rebuttal, did not serve to rebut any evidence Muehleman had presented. Also inadmissible as rebuttal evidence was a transcript of a tape-recorded interview with Richard Wesley, who said he agreed to help Muehleman kill Earl Baughman the day before the homicide actually occurred, but could not go through with it. The transcript was not authenticated by Wesley, was not the best evidence of what he told the sheriff's deputy, did not rebut any of the mitigating evidence Muehleman presented, and was hearsay denying Muehleman his rights of confrontation and cross-examination.

Muehleman was unduly restricted in his presentation of mitigating evidence when the court refused to allow the jury to read a newspaper article which a reporter wrote after interviewing Muehleman, and refused to allow them to consider testimony of Muehleman's maternal grandmother concerning her feelings for him. He was also improperly prevented from introducing a portion of the transcript of pre-trial conference in the case of Ronald Rewis, which would have helped Muehleman impeach the credibility of this important State witness.

The prosecutor below made a prejudicial closing argument to the jury which improperly appealed to passion and sympathy, suggested that Muehleman would kill again if he were not executed, misled the jury concerning the nature of the homicide and the aggravating and mitigating circumstances applicable thereto, expressed the prosecutor's personal beliefs concerning

the evidence and what it showed, called upon the jury to, in effect, "send a message," and included comment not based upon the evidence.

The instructions the court gave the jury were incomplete and misleading. They did not include all aggravating and mitigating circumstances, and specifically should have included an instruction on the crime having been committed while Muehleman was under the influence of extreme mental or emotional disturbance, as well as his proposed special instruction defining the aggravating circumstance of the homicide having been committed to avoid arrest. The jury was misled by the court's instruction on "killing with premeditation," given in connection with the "cold, calculated and premeditated" aggravating circumstance.

The trial court improperly included some aggravating circumstances in the sentencing weighing process and excluded legitimate mitigating circumstances. He should not have considered Muehleman's supposed lack of remorse, and his findings did not support his conclusions concerning the aggravating circumstances of commission of the murder for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, heinous, atrocious or cruel, and cold, calculated and premeditated. Also, the court failed to give adequate consideration to Jeff Muehleman's mental and emotional problems as a statutory or non-statutory mitigating circumstance, and failed to give any or adequate consideration to the evidence Muehleman presented of such non-statutory mitigating circumstances as his guilty plea and confessions, troubled home life, potential for rehabilitation, and conduct as a model prisoner.

ARGUMENT

ISSUE I.

A.

THE COURT BELOW ERRED IN REFUSING TO SUPPRESS STATEMENTS JEFF MUEHLEMAN MADE TO LAW ENFORCEMENT AUTHORITIES, TO STATE AGENT RONALD REWIS, AND TO REPORTER CHRISTOPHER SMART, AS THE STATEMENTS WERE THE FRUIT OF AN ILLEGAL WARRANTLESS ARREST, AND SOME WERE OBTAINED IN VIOLATION OF MUEHLEMAN'S RIGHT TO COUNSEL AND RIGHT TO REMAIN SILENT.

B.

THE COURT BELOW ERRED IN REFUSING TO SUPPRESS PHYSICAL EVIDENCE OBTAINED FROM MUEHLEMAN AND HIS GARAGE APARTMENT, AS SUCH EVIDENCE WAS THE FRUIT OF AN ILLEGAL ARREST, AND WAS OBTAINED WITHOUT A WARRANT IN VIOLATION OF MUEHLEMAN'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES.

A. Statements.

Jeff Muehleman was effectively under arrest from the moment Deputy Lions grabbed his arm. He was thereafter placed in the back of a sheriff's car and was not free to leave. (R582-583,589-590) See Melton v. State, 75 So.2d 291 (Fla.1954); Young v. State, 394 So.2d 525 (Fla.3d DCA 1981).

Even if he was not under actual arrest, Muehleman clearly was deprived of his freedom in a more significant way than the brief encounter authorized by the Supreme Court of the United States in Terry v. Ohio, 395 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

The deputies had no warrant to arrest Muehleman (R590), and conceded that they had no probable cause to arrest him

(R591,612), but wished to detain Muehleman in order to conduct an investigation and question him. (R579-580,612-613).[2/] There can be no doubt that they intended to hold onto him until their questions were answered.

In Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979) the Supreme Court refused to broaden its holding in Terry to justify intrusive investigative detentions of the type conducted here without probable cause. The Court thus expanded the scope of its earlier holding in Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) to make it clear that the probable cause requirement applies not only to formal arrests:

> ...[D]etention for custodial interrogation--regardless of its label--intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against traditional arrest.

60 L.Ed.2d at 838.

The Court again condemned detentions lacking in probable cause in Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229,237 (1983), where the Court noted that "...reasonable suspicion of crime is insufficient to justify custodial interrogation even though the interrogation is investigative. [Citations omitted.]" The Court explained the meaning of Dunaway and Brown:

> ...Dunaway and Brown hold that statements given during a period of illegal detention are inadmissible even though voluntarily given if

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2/ Clearly, the deputies could not have had probable cause to arrest Muehleman for Earl Baughman's murder on May 6, as they did not know what happened to Baughman until May 14, when his body was found.

> they are the product of the illegal detention and not the result of an independent act of free will. [Citations omitted.]

75 L.Ed.2d at 238.

The prosecution bears the burden of showing the admissibility of statements obtained after an illegal detention. Brown. The prosecutor below did not show that any of the statements Muehleman made were free of the taint of his illegal arrest. The statements were the fruit of that arrest, and should have been suppressed. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); State v. Rizo, 9 F.L.W. 2451 (Fla.3d DCA Nov. 20, 1984).

The fact that Muehleman was subsequently placed under formal arrest for obstruction by false information does not cure the illegality of the initial detention. Ward v. State, 453 So.2d 517 (Fla.2d DCA 1984); see also Knoble v. State, 399 So.2d 85 (Fla.1st DCA 1981); Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948); Melton v. State, 75 So.2d 291 (Fla.1954). Furthermore, the statute under which Muehleman was charged with this offense was declared unconstitutional by this Court in Bunnell v. State, 453 So.2d 808 (Fla.1984).

Another reason why Muehleman's statements of May 17, 1983, May 18, 1983, June 8, 1983 and June 10, 1983 should have been suppressed is that they were obtained after Muehleman invoked his right to remain silent on May 9. (R568) Once a defendant invokes his right to remain silent, law enforcement officials must scrupulously honor that right. Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).

With regard to the statements Muehleman made to Ronald Rewis while the two were in jail together, in addition to bearing the taint of the illegal arrest, they should not have been admitted because Rewis was acting as a State agent, and use of Muehleman's statements against him violated his privilege against self-incrimination and his right to counsel. Amends. V, VI, XIV, U.S. Const., Art. I, §§9,16, Fla.Const.; United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980); Malone v. State, 390 So.2d 338 (Fla.1980). The State's involvement may be seen most readily in the detectives' soliciting of Rewis to wear a body bug to obtain incriminating evidence against Muehleman (indeed, the prosecutor below conceded that Rewis was a state agent at that time (R566)), but even before then he was functioning as a state operative. Jail personnel deliberately assigned Muehleman a job where he would be working with Rewis, at a time when Rewis was working with Detective Halliday. (R410) Rewis continually provided the detectives with admissions Muehleman was making, using Detention Officer Jacobs as a conduit. (R796-799,800-801,817,834,856-857) Rewis acted as an informant for the State on at least two other occasions. (R772,863-864, 943) In gathering information from Muehleman, Rewis hoped to receive some consideration on the felony charge he was facing. (R750) And when he was actually sentenced on the charge of being a felon in possession of a firearm, he was not sentenced to prison, even though the prosecutor had recommended a five-year prison term, but was placed on probation. (R461-462,943)

As the informant in Henry did, Rewis "deliberately used his position to secure incriminating information from"

Muehleman, 65 L.Ed.2d at 122, and law enforcement officials were "aware that [Rewis] had access to [Muehleman] and would be able to engage him in conversations without arousing [his] suspicion." 65 L.Ed.2d at 122.

Rewis in effect was functioning as a surrogate detective for the Pinellas County Sheriff's Department. Pursuant to the Malone and Henry decisions, the confessions he gathered in this capacity should have been excluded from Muehleman's penalty trial.[3/]

The actions of Rewis in his capacity as a State agent are a further reason why Muehleman's confessions of June 8 and 10 were tainted. It was not until the detectives confronted Muehleman on June 8 with the fact that Rewis had been acting as an informant and had worn a body bug that Muehleman fully inculpated himself; his previous statements to the detectives had been primarily exculpatory. (R598-600,681-682,781-782,814,841-842,844)

The fact that he had just confessed to the authorities undoubtedly was the motivation for Muehleman to tell his story, on the same day (June 8), to the newspaper reporter. (R482) Indeed the article itself reflects Muehleman's need to explain himself to the public in light of his confession:

> Muehleman said he wanted to talk to a reporter "to make the public aware of my confession, so that maybe people will understand me

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[3/] The prosecutor used the tape recording Rewis surreptitiously made for dramatic effect at the end of his closing argument to the jury when he played a portion of the tape and said that Muehleman's laughter thereon was a reason why the death penalty was appropriate. (R2502-2503)

a little bit more, see where I'm coming from, things like that."

(R482)

Thus all the statements Muehleman made stemmed either from his illegal arrest, and/or the actions of Ronald Rewis in his capacity as a state agent, or were elicited after Muehleman had invoked his right to remain silent. They should have been suppressed, and because they were not, Muehleman should be afforded a new penalty trial.

B. Physical evidence.

At the suppression hearing below, the State challenged Muehleman's "standing" to allege an illegal search and seizure of physical evidence, because he was living in a garage belonging to someone else. (R549-550) The court ruled, rather ambiguously, that Muehleman "did have standing at the time of the arrest," but he did "not think it continued after that point." (R622)

Courts generally have recognized that a temporary occupant of a structure may have a reasonable expectation of privacy therein. For example, Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964)(hotel guest); Johnson, supra (hotel guest); Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961)(tenant renting house from landlord); Sheff v. State, 329 So.2d 270 (Fla.1976)(hotel guest); McGibiany v. State, 399 So.2d 125 (Fla.1st DCA 1981)(motel guest); Engle v. State, 391 So.2d 245 (Fla.5th DCA 1980)(motel guest); Brady v. State, 394 So.2d 1073 (Fla.4th DCA 1981)(non-paying overnight guest at friend's apartment).

The garage where Muehleman was staying was, in effect, his home. He paid rent on it. (R626,630) He kept belongings there. (R703) He slept there, including on the night before he was arrested. (R709) The deputies who investigated this case referred to the garage as Muehleman's residence. (R551) The fact that Jeff Woodward may have had continued access to the garage (R628) is not determinative of the "standing" issue. See Chapman and Sheff. This Court should recognize that Muehleman did have a reasonable expectation of privacy in his garage apartment.

Addressing the merits of Muehleman's claim, one should first be guided by the principle that warrantless searches such as those conducted here are per se unreasonable, subject only to a few well-delineated exceptions. Norman v. State, 379 So.2d 643 (Fla.1980); Engle, supra. Florida law places the burden on the State to show the reasonableness of a warrantless search. Raffield v. State, 351 So.2d 945 (Fla.1977); Norman, supra. The State would undoubtedly seek to justify the initial search on the basis of Muehleman's consent to it, and to justify the second and third searches on the basis of the Woodwards' consent. (R554, 609,628-629,682-683,703,797-798) However, Muehleman's consent to search was presumptively tainted by the unconstitutional detention. Norman; Robinson v. State, 388 So.2d 286 (Fla.1st DCA 1980). Ordinarily, consent given after an illegal arrest will not lose its unconstitutional taint. Bailey v. State, 319 So.2d 22 (Fla.1975). Here the State did not carry its burden of overcoming the presumption of taint. Furthermore, voluntary consent can rarely, if ever, be inferred where the defendant denies his

guilt, as Muehleman initially did. Mobley v. State, 335 So.2d 880 (Fla.4th DCA 1976). Also, at most the State showed Muehleman's acquiescence to lawful authority, which does not constitute valid consent. Mobley.

The Woodwards could not give valid consent to search Muehleman's part of the garage. It was his constitutional right that was at stake, not that of the Woodwards. Stoner. They were in the same position as a landlord or hotel clerk, not authorized to consent to a search of the space occupied by their tenant or guest. Stoner; Chapman; Sheff; McGibiany.

The items taken from Muehleman's garage apartment (and any taken from his person) were thus the product of unreasonable searches and seizures, Amends. IV and XIV, U.S. Const; Art. I, §12, Fla. Const., and were the fruit of an illegal arrest.[4/] They were subject to being suppressed, and because they were not, Jeff Muehleman is entitled to a new penalty trial.

4/ Also implicated in the search and seizure of the money presumably stolen from Earl Baughman is the violation of Muehleman's rights occasioned by Ronald Rewis acting as a state agent. The detectives only learned where the money was and seized it because Rewis obtained this information from Muehleman and conveyed it to the authorities. (R797-799)

ISSUE II.

JEFF MUEHLEMAN'S CONVICTION AND SENTENCE SHOULD BE VACATED, AS THEY WERE PREDICATED UPON INADMISSIBLE EVIDENCE.

Jeff Muehleman entered his plea of guilty to first degree murder immediately after his motion to suppress was denied. (R631-642) In reciting the factual basis for the crime, the prosecutor relied strictly upon Muehleman's confessions and admissions. (R633-636) Apart from these statements, there was no substantive evidence to prove that Muehleman committed the crime; that is why he was not formally booked for Earl Baughman's murder until June 8, 1983, when he gave his first fully inculpatory statement. (R854)

As discussed in Issue I. herein, Muehleman's confessions and statements should have been suppressed. If they had been, there would have been no basis for Muehleman's plea, conviction and sentence.

This Court faced a virtually identical issue in Anderson v. State, 420 So.2d 574 (Fla.1982). There the defendant pled nolo contendere and attempted to preserve the non-dispositive issue of the inadmissibility of his statements. He was adjudicated guilty of first degree murder and sentenced to die. This Court refused to be deterred by Anderson's procedural default and reached the merits of his claim, holding that his statements were inadmissible, and vacating the adjudication and sentence. In so doing, the Court stated:

> Certainly, if the predicate for the judgment of conviction is substantially impaired by the inclusion of an inadmissible statement,

> it is proper and necessary for this Court, in a death case, to review the record and determine whether that statement was in fact inadmissible.

420 So.2d 576. These words are fully applicable to Muehleman's case. The fact that he pled guilty rather than nolo contendere should not prevent this Court from vacating his conviction and sentence in the interest of justice. See LeDuc v. State, 365 So.2d 149 (Fla.1978); §921.141(4), Fla.Stat. (1983); Fla.R.Crim. P. 9.140(f).

ISSUE III.

JEFF MUEHLEMAN'S ABSENCE FROM PORTIONS OF THE PROCEEDINGS BELOW VIOLATED HIS CONSTITUTIONAL RIGHT TO BE PRESENT.

At least twice during the proceedings below, Jeff Muehleman was not present. The first occasion was during the suppression hearing of May 1, 1984. The prosecutor commented that Muehleman was absent when the court and counsel discussed "on the record various factual matters in the motion to suppress." (R578) He asked the court to "reflect that he [Muehleman] has waived any right that he might have to be present or make inquires [sic] as to that." (R578) Defense counsel commented that they could have a statement regarding waiver later. (R578) The record does not reflect that any such statement was forthcoming.

The second record instance of Muehleman's absence occurred as the jury charge conference was about to begin. Defense counsel stated (R2428):

> MR. McMILLAN: Your Honor, I have consulted with Jeff and it has been a long case, a long week for him. He's waiving his presence to be present during the jury instruction conference that we are holding at this time. He requested to be sent back to the facility at this time.

The Sixth and Fourteenth Amendments to the United States Constitution give a criminal defendant the right to be present at every stage of his trial. As the Supreme Court of the United States noted in Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353,356 (1970):

> One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every

> stage of his trial. Lewis v. United States, 146 U.S. 370, 36 L.Ed. 1011, 13 S.Ct. 136 (1892).

This Court has acknowledged that a defendant "...has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence." Francis v. State, 413 So.2d 1175,1177 (Fla.1982). This right extends to all phases of the trial. Shaw v. State, 422 So.2d 20 (Fla.2d DCA 1982). In a capital case in particular the defendant "...has a right to be, and must be, present...." Fails v. State, 60 Fla. 8, 53 So. 612,613 (Fla.1910).

In Proffitt v. Wainwright, 685 F.2d 1227,1256 (11th Cir. 1982), modified on pet. for reh., 706 F.2d 311 (11th Cir. 1983), pet.for cert.denied, __U.S.__, __S.Ct.__, 78 L.Ed.2d 697 (1983) the court recognized the right of a criminal defendant to be present at

> all hearings that are an essential part of the trial--i.e., to all proceedings at which the defendant's presence "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Snyder v. Massachusetts, 291 U.S. 97,105-106, 54 S.Ct. 330,332, 78 L.Ed. 674 (1934).

Applying this standard to Muehleman's case, his presence was required both of the times he was absent.

In Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884) the Supreme Court of the United States rejected the State's argument that a capital defendant could waive his right to be present at a portion of his trial:

> That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused; much

> less by his mere failure, when on trial and in custody, to object to unauthorized methods ....If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution.

28 L.Ed. at 265. See also Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984).

Even if Muehleman could waive his presence, any such waiver would have to be knowing and voluntary. Proffitt, Francis. In Johnson v. Zerbst, 304 U.S. 458,464, 58 S.Ct. 1019, 82 L.Ed. 1461,1466 (1938) the Supreme Court of the United States observed that

> "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights [footnote omitted] and [courts] "do not presume acquiescence in the loss of fundamental rights." [Footnote omitted.] A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.

The record does not reflect any waiver, either by Muehleman himself or by his counsel, at the suppression hearing. As to the purported waiver at the jury charge conference, this was made by counsel only. Muehleman was not himself present, and there was no inquiry by the court of Muehleman to ascertain whether he was fully aware of his right to be present and its significance, and whether he nevertheless wished to relinquish this important right. See Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). A statement by counsel that the defendant does not wish to return to the courtroom is insufficient to establish an intelligent and competent waiver by the defendant. Cross v. United States, 325 F.2d 629 (D.C. Cir.

1963). There is nothing in the record to show that Muehleman ratified the actions his counsel took in his absence. See State v. Melendez, 244 So.2d 137 (Fla.1971).

Because this is the most serious of all cases, a capital case, this Court should not presume a knowing and intelligent waiver when such does not appear in the record with unmistakable clarity. Capital cases demand strict adherence to the requirement of the defendant's presence throughout the proceedings.

In Amazon v. State, No. 64,117, another capital case pending in this Court, the Court refused to find a knowing and intelligent waiver on the basis of the record before it where Amazon's trial counsel had purported to waive his presence at a jury view of the homicide scene. Instead, in an order dated December 11, 1984 the Court, on its own motion, relinquished partial jurisdiction to the trial court "to conduct an evidentiary hearing to determine whether appellant knowingly and intelligently waived his right to be present at the jury view of the crime scene." The Court expressed concern "regarding the adequacy of notice and advice by defense counsel, and also the scope of the authority Amazon gave his counsel to waive his presence." If the Court is of the opinion that a capital defendant may waive his presence, Muehleman suggests that it would be appropriate for the Court to issue an order similar to the one issued in Amazon so that the Court will have a sufficient record for it to ascertain whether Muehleman knowingly and intelligently waived his presence each of the times he was absent from the proceedings below.

With regard to whether Muehleman was prejudiced by being absent, one may speculate that had he been present at the entire suppression hearing he could have provided additions or corrections to the facts that were developed at the hearing, and could have provided input at the conference on jury instructions as to what charges should and should not be given. Be that as it may, the case law indicates that he does not need to show prejudice. For example, in Francis this Court reversed the defendant's conviction for capital murder and awarded him a new trial due to his absence from his counsel's exercise of peremptory challenges, even though the Court was "unable to assess the extent of prejudice, if any, Francis sustained by not being present...." 413 So.2d at 1179 (emphasis supplied). Proffitt addressed this question directly:

> ...[W]hether or not appellant's absence likely prejudiced him is not the standard we must apply; rather if there is any reasonable possibility appellant's absence and inability to respond to [testimony produced at a hearing related to appellant's sentencing hearing] affected the sentencing decision, we will not engage in speculation as to probability that his presence would have made a difference.

685 F.2d at 1260. The court also noted:

> The right of a criminal defendant to be present at all critical stages of his trial is a fundamental constitutional right. [Citations omitted.] It is clear that once the defendant has established a violation of that right his conviction is unconstitutionally tainted and reversal is required unless the State proves the error was harmless beyond a reasonable doubt. [Citations omitted.]

685 F.2d at 1260 (footnote 49). The court thus found the burden to be on the State, not the defendant, to establish a lack of

prejudice. This approach is the only one which makes sense. It would place an intolerable burden on a criminal defendant to require him to establish prejudice resulting from what occurred at a proceeding to which he was not privy.

Because Muehleman was not present at all the proceedings below which resulted in his entry of a guilty plea and a sentence of death, his conviction and sentence should be vacated. (See Issues I. and II.) In the alternative, he should receive a new penalty trial.

ISSUE IV.

THE COURT BELOW ERRED IN ALLOWING THE STATE TO INTRODUCE DURING THE DEFENSE CASE A DOCUMENT ENTITLED "JUVENILE SOCIAL HISTORY REPORT," WHICH WAS HEARSAY AND CONTAINED EXTREMELY PREJUDICIAL IRRELEVANT MATERIAL, INVADED THE PROVINCE OF THE JURY, AND VIOLATED THE COURT'S PRETRIAL RULING ON DISCOVERY.

Dr. Glenn Galloway, a psychiatrist, was called as a defense witness. (R999) He testified in depth concerning Jeff Muehleman's family and psychiatric history. He concluded that Muehleman's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (R1036-1037) He also opined that Muehleman was under the influence of emotional distress at the time of the homicide. (R1037)

On cross-examination the prosecutor showed Dr. Galloway a 15-page document entitled "Juvenile Social History Report," which was prepared on December 15, 1981 by the Department of Probation and Court Services in Du Page County, Illinois, and asked if Dr. Galloway recognized the document as something he was considering in developing his diagnosis. (R429-443,1059) The witness responded that the document looked familiar, and he believed that he recognized it, but he had been flooded with material. (R1059) The report was then received in evidence over defense objections. (R1059-1060)

The report was inadmissible because it was hearsay. §§90.801(1), 90.802, Fla.Stat. (1983).

More importantly, the report was irrelevant and contained extremely prejudicial material. It set forth in great

detail Muehleman's entire juvenile history of criminal activity, including offenses for which he was not convicted. (R429-443) This evidence could only have been admitted for the purpose of establishing Muehleman's bad character and propensity to commit crimes, considerations wholly improper. (Please see discussion in Issue V. concerning the inadmissibility of this type of evidence of unrelated criminal activity.)

Perhaps even more devastating than the cold record of Muehleman's juvenile offenses were the comments contained in the report. For example, it contained a comment from a police detective regarding Muehleman, as follows (R432):

> "Jeff is a habitual offender, who has never shown any sign of rehabilitation, remorse or other signs that his behavior will ever be anything other than a propensity toward crime."

Another comment in the report referred to Muehleman's "apparent lack of remorse [for his juvenile offenses] and the lack of social conscience for social welfare on Jeffrey's part." (R441) These remarks, as well as others contained in the report, were not only hearsay, irrelevant, and prejudicial, they invaded the province of the jury charged with evaluating Muehleman's prospects for rehabilitation and recommending whether he should live or die. See Holliday v. State, 389 So.2d 679 (Fla.3d DCA 1980); Lamazares v. Valdez, 353 So.2d 1257 (Fla.3d DCA 1978).

It should be noted that the prosecutor referred to the fact that Muehleman could not be rehabilitated several times during his closing argument to the jury, at one point characterizing him as "a brutal and savage murderer who is beyond rehabilitation." (R2458,2490,2497,2498) The defense objected to these

remarks. (R2504) The prosecutor also urged the jury to read the Juvenile Social History Report "of all of the juvenile offenses." (R2497-2498)

The contents of the report did not relate to any of the statutory aggravating circumstances, which are exclusive; they are the only ones the jury and the court may consider. §921.141(5), Fla.Stat. (1983); State v. Dixon, 283 So.2d 1 (Fla. 1973); Elledge v. State, 346 So.2d 998 (Fla.1977).

The State may claim that the report was admissible because Dr. Galloway used it in formulating his opinions concerning Muehleman's mental condition. However, Dr. Galloway's testimony was equivocal on this point; he did not say for certain that he relied on the report. Furthermore, no limiting instruction was given to direct the jury to consider the report only as it related to the formulation of Dr. Galloway's opinions and not as substantive evidence. And any probative value the report may have had was outweighed by its prejudicial impact. See Tafero v. State, 403 So.2d 355 (Fla.1981).

Another reason the report should not have been admitted is that the trial court ruled before the penalty trial that the defense would not be required to provide discovery to the State, and then reversed himself in the middle of trial and required the defense to give the report to the State. (R928-942)[5/] In

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5/ The discovery issue is referred to several times in the record that is presently before the Court (R640,928-942,2212,2244-2250), but the actual hearing at which Judge Farnell ruled discovery inapplicable to the penalty phase, held April 24, 1984, is not in the record. Undersigned counsel will take steps to have the record supplemented with this item.

Maxwell v. State, 443 So.2d 967 (Fla.1983) this Court found no error in the trial court's ruling denying a defense motion for a list of witnesses and of tangible papers or objects the prosecutor intended to use at the sentencing hearing. If the prosecution may not be compelled to provide discovery, the defense should not be so compelled, especially where the court has already ruled that disclosure need not be made.[6/]

Admission of the "Juvenile Social History Report" was extremely damaging to Muehleman, and he should be afforded a new penalty trial.

6/ The court below also violated his pretrial ruling by requiring defense counsel to give the State a list of the witnesses they intended to call. (R2244-2250)

ISSUE V.

THE COURT BELOW ERRED IN ALLOWING THE STATE TO PRESENT DURING ITS CASE IN REBUTTAL EVIDENCE OF OTHER CRIMES ALLEGEDLY COMMITTED BY JEFF MUEHLEMAN.

As rebuttal evidence the State presented, over objection, the testimony of three police officers concerning crimes Muehleman allegedly committed in Illinois. Robert Schultz, a detective with the city of Des Plaines, Illinois, testified concerning an altercation between Muehleman and his mother. (R1235-1238) He did not witness the incident; his information came from a report filed by another officer and from Mrs. Muehleman. (R1236-1237) (Thus Schultz's testimony was inadmissible as hearsay, sections 90.801(1) and 90.802, Florida Statutes, as well as being inadmissible for the reasons stated hereinafter.) The report indicated that when Mrs. Muehleman tried to intervene in a fight between her son and another person, Jeff picked her up and carried her upstairs. He punched her numerous times about the arms, chest and back, and threw her down on the floor several times. When she tried to call the police, Jeff ripped the telephone from the wall. (R1237) Mrs. Muehleman elected not to prosecute. (R1238)

Another detective with the Des Plaines police department, Terry McAllister, testified that Muehleman confessed to burglarizing a neighbor's garage with another person on two occasions. (R1239-1243) Later the police filed two additional theft charges against Muehleman in connection with two car burglaries. (R1243) McAllister also testified that Muehleman said

"he had gotten in a fight with a subject and punched that subject in the head so many times, he did damage to his wrist." (R1243)

Fess Cloonan was a patrol officer with the Schaumburg Police Department in Illinois. (R1248) He testified that he responded to an office building in the early hours of the morning after receiving a call from a security guard who reported seeing two people "trying" a door. (R1248) Another person on the scene told Cloonan he had seen two people kneeling near a car, and they fled when he approached. (R1249) Cloonan and his partner found a length of hose and an open gas tank cap on a vehicle. (R1249) They searched the area and found Jeff Muehleman and another person crouched down in the weeds. (R1249) Muehleman was arrested for theft and searched. (R1250) The search yielded a baggie of marijuana for which he was also charged. (R1250-1251) Muehleman and his friend did not show up in court to answer the charges. (R1251)

All of this evidence the State presented of criminal activity by Muehleman was totally unrelated to the crime with which he was charged, and was inadmissible. Although it was presented as rebuttal evidence, it did not serve to rebut anything the defense had presented. It was not admissible to counter any anticipated argument that Muehleman qualified for the statutory mitigating circumstance of no significant history of prior criminal activity, as this factor had been waived. (R1232) Maggard v. State, 399 So.2d 973 (Fla.1981). Nor did it relate to any of the aggravating circumstances specified in

section 921.141(5) of the Florida Statutes, which are exclusive. State v. Dixon, 283 So.2d 1 (Fla.1973); Elledge v. State, 346 So.2d 998 (Fla.1977). The record does not show that Muehleman even was convicted of the offenses about which testimony was presented. Perry v. State, 395 So.2d 170 (Fla.1980). The only conceivable purpose for adducing this evidence was to show Muehleman's bad and violent character and propensity to commit crimes. These considerations were wholly irrelevant, and injecting them into the proceedings denied Muehleman his rights to due process and a fair trial. Amends. V, VI, XIV, U.S. Const.; Art. I, §§9,16, Fla. Const.; §90.404(2)(a), Fla.Stat. (1981); Williams v. State, 110 So.2d 654 (Fla.1959); Drake v. State, 441 So.2d 1079 (Fla.1983); Dillman v. State, 411 So.2d 964 (Fla. 3d DCA 1982); Perkins v. State, 349 So.2d 776 (Fla.2d DCA 1977); Green v. State, 190 So.2d 42 (Fla.2d DCA 1966). In Dixon v. State, 426 So.2d 1258,1259 (Fla.2d DCA 1983) the court observed as follows:

> The admission of evidence of an accused's prior arrests is ordinarily deemed so prejudicial that it automatically requires reversal of his conviction.

Similarly, in Nickels v. State, 90 Fla. 659, 106 So. 479 (Fla. 1925) this Court stated that it is generally "harmful error to admit evidence of other or collateral crimes independent of and unconnected with the crime for which the defendant is on trial." See also Colbert v. State, 320 So.2d 853 (Fla.1st DCA 1975); Whitehead v. State, 279 So.2d 99 (Fla.2d DCA 1973). So it was in this case, and Jeff Muehleman should be granted a new penalty trial to rectify the error.

ISSUE VI.

THE COURT BELOW ERRED IN PERMITTING THE STATE TO INTRODUCE AS REBUTTAL EVIDENCE THE TRANSCRIPT OF A TAPED INTERVIEW WITH RICHARD WESLEY.

The first witness the State called during its case in rebuttal was Detective John Halliday. (R1223) Halliday had taken a taped statement from Richard Wesley in Nebraska. (R1223) Over defense objections the State was permitted to introduce into evidence a transcript of that interview. (R449-459,1224-1229) In it Wesley stated that Jeff Muehleman solicited his help in killing the old man for his money and dumping his body. (R449-459,1228-1229) Wesley agreed to help kill the man, but "got scared," and did not go through with it. (R451) The conversation between Muehleman and Wesley took place on Tuesday, May 3, 1983. (R452)

The transcript of Wesley's statement should not have been admitted into evidence for several reasons. Firstly, it did not serve to rebut any evidence put on by the defense, although the State used it as rebuttal evidence.

Secondly, where a person makes a confession that is transcribed by another, the confessor must acknowledge the correctness of the writing before it is admissible. Marshall v. State, 339 So.2d 723 (Fla.1st DCA 1976); Williams v. State, 185 So.2d 718 (Fla.3d DCA 1966). Here Wesley confessed to his guilt of conspiracy to commit murder, but did not sign or otherwise acknowledge his transcribed statement. (R449-459)

Even if Wesley had signed or authenticated the transcript, it was inadmissible because it was not the best evidence

of the statement. See, Grimes v. State, 244 So.2d 130,134-135 (Fla.1971); Waddy v. State, 355 So.2d 477,478 (Fla.1st DCA 1978); Duggan v. State, 189 So.2d 890 (Fla.1st DCA 1966). The transcript was not merely used as an aid to understanding a tape recording that was admitted into evidence. See, Golden v. State, 429 So.2d 45,50-55 (Fla.1st DCA 1983). It was improperly used and admitted as evidence of the statement without the actual tape recording being available for comparison. (R1277-1278,1355-1356) Waddy, 355 So.2d at 478; Brady v. State, 178 So.2d 121 (Fla.2d DCA 1965).

Finally, and most importantly, the transcript was hearsay, and its use in evidence denied Jeff Muehleman his constitutional rights to confrontation and cross-examination. §§90.801(1) and 90.802 Fla.Stat.; Amends. V, VI and XIV, U.S. Const.; Art. I, §16, Fla. Const. In Hall v. State, 381 So.2d 683 (Fla.1979) this Court reversed the defendant's conviction and sentence of death where the statements of his accomplice implicating Hall were admitted into evidence, and the accomplice rendered himself unavailable for cross-examination by invoking his fifth amendment privilege. The Court cited Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) in support of its holding, and explained what constitutes a Bruton violation:

> The crux of a Bruton violation is the introduction of statements which incriminate an accused without affording him an opportunity to cross-examine the declarant.

381 So.2d at 687. This is the precise situation that exists in Muehleman's case.

In Hall the Court rejected an argument that the Bruton violation was cured by a limiting instruction directing the jury to consider the improper statements only as impeachment evidence. Here no instruction was given to prevent the jury from considering the transcript of Wesley's statement as substantive evidence.

This Court applied the rationale of Hall and Bruton to the sentencing hearing of a capital case in Engle v. State, 438 So.2d 803 (Fla.1983). There the Court held it to be a violation of the defendant's rights of confrontation and cross-examination for the judge to consider information obtained from confessions and statements of Engle's accomplice, who was not subject to cross-examination, and vacated Engle's death sentence. Here Richard Wesley was not present at Jeff Muehleman's trial, nor could Muehleman have compelled him to testify, as Wesley was liable to be prosecuted for conspiracy to commit murder, and could have invoked his right to remain silent. (And, of course, Wesley was out of the state.)

The inadmissible transcript did double damage here, as, unlike in Engle, it was not only relied upon by the sentencing judge, who used it extensively in his findings in support of the death penalty (see Issue X.), but tainted the jury's recommendation as well. It was devastating evidence because of the level of planning it showed.

Hall and, particularly, Engle compel vacation of Muehleman's sentence of death and remand for a new penalty trial.

ISSUE VII.

THE COURT BELOW ERRED IN RESTRICTING JEFF MEUHLEMAN'S PRESENTATION OF EVIDENCE IN MITIGATION AND EVIDENCE RELEVANT TO THE CREDIBILITY OF A KEY STATE WITNESS.

The mitigating circumstances set forth in section 921.141(6) of the Florida Statutes are not exclusive. White v. State, 403 So.2d 331 (Fla.1981). In fact,

> a defendant may not be precluded from offering as a mitigating factor any aspect of his character and record or any evidence concerning the circumstances of the offense which might justify a reduction of a death sentence to life imprisonment.

Perry v. State, 395 So.2d 170,174 (Fla.1980)(emphasis in original). See also Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Yet on at least two occasions during the proceedings below the court refused to allow Jeff Muehleman to present relevant mitigating evidence. The first such instance came when the court would not allow into evidence the newspaper article written by Christopher Smart that appeared in the St. Petersburg Times on June 9, 1983. (R922-924) The article was proffered for the record. (R481-482) It had been referred to during the State's case. (R845,857) It contained material that was relevant in mitigation, such as Muehleman's statements that he intended only to render Baughman unconscious when he entered the bedroom, and killed him only after he realized the man had probably suffered brain damage. (This was particularly relevant to the aggravating circumstance of the homicide having been committed in a cold, calculated and premeditated manner, without

any pretense of moral or legal justification.) Also relevant was Muehleman's statement in the article that he was trying to straighten out his life with God and hoped he would be "given the chance to rehabilitate." (R482) The jury should have been permitted to read and consider this evidence.[7/]

Also removed from the jury's consideration was part of the testimony of Jeff Muehleman's maternal grandmother, Edith Argustein. She was asked by defense counsel on direct examination how she felt about Jeffrey, to which she responded:

> He has always been my special child. He has meant a great deal to me. He was my first grandchild and we were so proud of him because he was my first grandchild.

(R1133) On motion of the prosecutor the court struck this testimony and instructed the jury to disregard it. (R1133,1135) Mrs. Argustein's testimony was relevant to show that Muehleman had people who cared about him, which would aid in his rehabilitation if his life were spared. But even if her testimony was introduced solely to elicit sympathy, it should have been permitted. Lockett and Eddings dictate that it is not only appropriate but necessary for a jury to consider sympathy elements of the defendant's background against those elements presented by the prosecution that might offend the jury's sensibilities. People v.

7/ Muehleman is not taking inconsistent positions by arguing on the one hand that all his statements should have been suppressed and on the other hand he should have been permitted to introduce the newspaper article into evidence. But for the introduction by the State of his statements to Ronald Rewis and the sheriff's deputies, Muehleman would have had no need to introduce the article. Furthermore, reference to it had already been made by the State's witnesses.

Eady, 671 P.2d 813 (Cal.1983). This type of testimony was particularly needed in this case to offset the State's attempts to elicit sympathy for the victim and his family. (See Issue VIII.) In Romine v. State, 305 S.E.2d 93 (Ga.1983) the court ruled that the defendant's grandfather's testimony that he did not wish to see his grandson die would have been admissible in mitigation. Similarly, in Cofield v. State, 274 S.E.2d 530 (Ga.1981) the court held testimony of the defendant's mother that she loved him and did not want to see him die admissible. And in Perry this Court found error under Lockett and Songer v. State, 365 So.2d 696 (Fla.1978) when the trial court excluded testimony from Perry's mother relating to his age and upbringing. The Cofield court stated:

> We are unwilling to foreclose a defendant seeking to avoid the imposition of the death penalty from appealing to the mercy of the jury by having his parents testify briefly to their love for him.

274 S.E.2d at 542. This Court likewise should be unwilling to condone foreclosure by the trial court of Mrs. Argustein's testimony concerning her feelings for her grandson.

The trial court also erred in precluding the defense from presenting evidence relating to the credibility of Ronald Rewis. Muehleman sought to introduce portions of the transcript of the pre-trial conference and change of plea hearing held on April 21, 1983 when Rewis pled guilty to being a felon in possession of a firearm and obstruction by false information. The court allowed defense counsel to read part of the transcript, but held the following portion, in which the prosecutor is speaking of Rewis, inadmissible (R924-928,943):

> It seems to me that we've got to start thinking of what's best for the public, and, personally, I think that he has had many opportunities--maybe he has not been through these programs they have suggested, but certainly he had many opportunities to straighten out his life. He's been before many different courts on many different occasions.[8/]

A defendant in a criminal prosecution should be afforded wide latitude to demonstrate bias or possible motive of a witness against him to testify as he has. Harmon v. State, 394 So.2d 121 (Fla.1st DCA 1980); Blair v. State, 371 So.2d 224 (Fla.2d DCA 1979). See also Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). In particular, if a witness for the State is

> presently or recently under actual or threatened criminal charges or investigation leading to such criminal charges, a person against whom such witness testifies in a criminal case has an absolute right to bring those circumstances out on cross-examination or otherwise so that the jury will be fully apprised as to the witness' possible motive or self-interest with respect to the testimony he gives. Testimony given in a criminal case by a witness who himself is under actual or threatened criminal investigation or charges may well be biased in favor of the State without the knowledge of such bias by the police or prosecutor because the witness may seek to curry their favor with respect to his own legal difficulties by furnishing biased testimony favorable to the State.
>
> The constitutional right to confront one's accuser is meaningless if a person charged with wrongdoing is not afforded the opportunity to make a record from which he could argue to the jury that the evidence against him comes from

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8/ The Rewis transcript has not been included in the record on appeal that is presently before this Court, but undersigned counsel will take steps to see that the record is supplemented with this item.

> witnesses whose credibility is suspect because they themselves may be subjected to criminal charges if they fail to "cooperate" with the authorities. See Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347, decided by the United States Supreme Court in February 1974.

297 So.2d at 580. Here Rewis entered his plea less than a month before Jeff Muehleman was put into contact with him by the authorities at Pinellas County Jail. (R410) The fact that the State was pushing very hard for a five year prison sentence for Rewis, as evidenced by the paragraph the court would not let the jury hear, was relevant to his motive in testifying against Muehleman. It was also pertinent for the jury to have this information when they considered that Rewis ultimately was not sentenced to prison, despite the prosecutor's plea on April 21 for a five-year term. The jury was deprived of all the information they needed to evaluate the credibility of key State witness Ronald Rewis, to the detriment of Jeff Muehleman.

The court below unduly restricted Muehleman's presentation of evidence, and he is therefore entitled to a new penalty trial.

ISSUE VIII.

THE COURT BELOW ERRED IN PERMITTING THE PROSECUTOR TO MAKE A NUMBER OF IMPROPER AND PREJUDICIAL COMMENTS TO THE JURY DURING HIS CLOSING ARGUMENT.

As soon as the prosecutor concluded his final argument to the jury, defense counsel lodged a number of objections thereto. (R2503-2504) The court did not specifically rule on the objections, but merely said, "Very well." (R2504)

Numerous remarks of the prosecutor were improper. Considered together they deprived Muehleman of an impartial jury recommendation.

Much of the prosecutor's argument was calculated to inflame the jury and engender sympathy for the victim and his family.[9/] Here is a sampling:

> And when he [Earl Baughman] didn't die, he [Jeff Muehleman] began to choke him, face-to-face with a feeble, sickly, 97-year-old man. (R2453)
>
> * * *
>
> On that day, this man sentenced Earl Baughman to death without a proceeding, without the opportunity to present evidence to talk about his life, his family, his expectations, his joys and sorrows. (R2454)
>
> * * *
>
> The State continues to believe, as we told you in voir dire, that this crime in which a helpless, defenseless 97 year-old-man was brutally and savagely killed for money and so that this man could avoid the consequences of his actions. (R2457)

9/ It should be noted that the prosecutor attempted to elicit sympathy for Baughman earlier in the trial by introducing into evidence an irrelevant picture of the white-mustachioed man sitting at a table. (R365,840-841)

* * *

I expect that there will be emotionalism, perhaps indications to God. I expect as the Defense did in the presentation of their case, they play upon your sympathies. Obviously, that witnesses were called who had no relevant testimony but who would be asked questions to make these displays of emotions on the stand. That was a tactic only the Defense can utilize. I'm not entitled--I'm not allowed to tell about the victim or the victim's family.

And if you are influenced by that sympathy, by the emotion, by feelings for the people who testified as opposed to feelings for that man there, to consider--consider the situation of the victim and disspell [sic] that sympathy and that emotion. (R2461-2462)

* * *

Mr. Baughman, as you know from the evidence, was 97 years old. One of the few momentoes [sic] that exist from his long life is that silver dollar dated 1886. You know from the evidence that he was almost blind, he could walk only short distances without assistance, he lost his license at the age of 90 and could not drive. You know, unfortunately, although it's unfortunate that--and particularly an innocent victim has to be exposed to this thing--you know he was incontinent.

You also know that despite his disabilities and affirmaties [sic] he possessed because of age, that he was independent, did not make the family question the people he hired, didn't like them intervening. He certainly loved them. He wanted, still at his age, to control his life. (R2464-2465)

* * *

A victim is selected as a wolf trails a herd of deer; the young, the feeble who trail behind are selected out as victims and Mr. Baughman is dead because he was an easy victim. This man saw an opportunity, an aged and infirmed [sic] man, who couldn't resist, who couldn't defend himself. The callousness with which the events occurred are incredible. Incredible. (R2485)

* * *

> He's [Muehleman] a brutal and savage murderer who is beyond rehabilitation. (R2498)
>
> * * *
>
> The Defense has tried to get you to focus on why is Jeff the way he is but the legally appropriate question is what is he and what should we do about him and the answer to those two questions, the ones that are really appropriate, are indeed damaging because all of the evidence suggests he's a terrible individual who has committed a terrible crime and is deserving of no penalty other than death.
>
> Having sentenced Earl Baughman to die and having given the defendant his chance to convince you of mitigating circumstances, we ask you to consider the evidence and reach the conclusion that there is only one thing that can be done with this man, that there is only one thing that justifies. (R2500)

Arguments of the type used here, appeals to jurors' passions, have no place in a criminal proceeding. See Goddard v. State, 143 Fla. 28, 196 So. 596 (Fla.1940); Harper v. State, 411 So.2d 235 (Fla.3d DCA 1982); Meade v. State, 431 So.2d 1031 (Fla.4th DCA 1983); Harris v. State, 414 So.2d 557 (Fla.3d DCA 1982). (The remark of the prosecutor that Jeff Muehleman "sentenced Earl Baughman to death without a proceeding, etc." is very similar to one of the remarks in Meade that the victim "did not get his day in court." 431 So.2d at 1032.) They had no relevance to the aggravating circumstances specified in Florida Statute 921.141(5).

> While the jury's recommendation of life or death is only advisory, it is of critical importance that a prosecutor not play on the passions of a jury with a person's life at stake. [Citations omitted.]

Hall v. Wainwright, 733 F.2d 766,774 (11th Cir. 1984). Accord: Hance v. Zant, 696 F.2d 940 (11th Cir. 1983).

The prosecutor also conveyed to the jury the prohibited message that Jeff Muehleman was a brutal murderer, a criminal without a conscience who could not be rehabilitated and, hence, would kill again if not sentenced to death. See Teffeteller v. State, 439 So.2d 840 (Fla.1983); Grant v. State, 194 So.2d 612 (Fla.1967); Gomez v. State, 415 So.2d 822 (Fla.3d DCA 1982); Sims v. State, 371 So.2d 211 (Fla.3d DCA 1979); Chavez v. State, 215 So.2d 750 (Fla.2d DCA 1968); Davis v. State, 214 So.2d 41 (Fla.3d DCA 1968). The offending remarks in this regard follow:

> The State continues to believe, as we told you in voir dire, that this crime in which a helpless, defenseless 97-year-old man was brutally and savagely killed for money and so that this man could avoid the consequences of his actions. And in particular, this defendant, whose record indicates not just a record we presented but the evidence that the Defense presented, has had in his lifetime innumerable opportunities to change. Psychologists, loved ones, chances, everything the system had to offer. Their evidence shows him to be what he is: A brutal murderer, an incorrigible juvenile, a person beyond rehabilitation. (R2457-2458)
>
> * * *
>
> And if one thing was evident through all of the testimony is that this man cannot be rehabilitated. Psychologists, aunts, uncles, grandparents, mother and father, they weren't perfect but they tried and the frustration about ate them alive because you can lead a horse to water but you can't make him drink. (R2490)
>
> * * *
>
> Now, it should be obvious to you that psychiatrist and psychologist are professionals that label people. If someone does not act normally, they have to label him something other than normal. The fact you have three words to describe this man is a criminal without a conscience who can commit a cold-blooded murder doesn't change what he did and doesn't change who he is or what he is. Simply words to direct your attention in some other direction. (R2496)

* * *

> What you have and I think Dr. Mourer conceded is an anti-social personality and I suggest that is basically a psychologist's label for someone who has obviously chosen to be a criminal and to continue to be a criminal and who will, despite everyone's best efforts, continue to be a criminal yesterday, today, and tomorrow and 25 years from now. He will be unchanged. (R2497)

* * *

> One witness testified about how incredulous they were when the father didn't support the defendant when he was charged with stealing a motorcycle and the defendant said it wasn't stolen. You read that report and see how many motorcycles he has stolen and this man in the period up to this point in his life not only in terms of what he criminally accomplished and criminally been involved in but also in terms of the rehabilitation efforts that he's had. Some people maybe get the first real chance at 35, some people at 40. This man has had numerous chances not only through professionals or expert programs--you see he went to a wilderness program and went to the Carribean [sic], Santo Domingo and was given that opportunity. And those were opportunities every juvenile, every kid doesn't have a chance with but he's had many many chances to reform and change and he's rejected them all.
>
> His age does not justify or mitigate what he has done and in light of his history and his record indicates what he is. He's a brutal and savage murderer who is beyond rehabilitation. (R2498)

Again, few, if any, of these remarks related to the statutory aggravating circumstances.

Also prejudicial were incorrect and misleading statements on the nature of the homicide and the aggravating and mitigating circumstances. Said the prosecutor:

> You first look at the aggravating circumstances and determine how many exists [sic] and the Judge will instruct on five and I think you'll see from the nature of that aggravating circumstances

> this is no ordinary homocide [sic] for five factors to apply in a single killing. You're to consider if those factors have been proven beyond a reasonable doubt and I can indicate to you the evidence is overwhelming and unconstricted [sic], they are indeed. (R2456)
>
> * * *
>
> It should be evident to you that this is not an ordinary homocide [sic]. Certainly, the taking of any life is a terrible, terrible thing no matter what the manner or means and certainly that is an act worthy of condemnation of life in prison. But you don't have a situation here where someone is acting out of anger or panic. It's not a crime committed with the instantaneousness of the pulling of a trigger. (R2458)
>
> * * *
>
> Those are the aggravating circumstances and I would suggest to you that the fact that that many circumstances applies [sic] in a single crime is rather extraordinary in itself. Your common sense tells you that is not an ordinary homocide [sic], not an ordinary crime or ordinary murder. Even those factors certainly would justify the imposition of the death penalty. To do otherwise would be to suggest to the defendant that, sure, after you rob, after you've beaten, after you've stolen, go ahead and murder. (R2486)

The prosecutor's argument that this was an extraordinary homicide because five aggravating circumstances were applicable (R2456,2486) was very similar to the prosecutor's comment in Lara v. State, 10 F.L.W. 79 (Fla.Jan. 24, 1985) that the murder there was more aggravated than a "normal" murder. The trial court had sustained an objection by Lara's counsel, but there was neither a request for curative instruction, nor motion for mistrial. "Under the circumstances," this Court found no error, suggesting that the comment was nevertheless improper. The prosecutor's remark was misleading, because the jury could not

know how many other aggravating circumstances did not apply to Muehleman's case. Furthermore, the trial court did not instruct the jury on five aggravating circumstances, but on only four. (R2543-2544)(As will be discussed in Issue IX., the trial court refused Muehleman's request to instruct on all aggravating and mitigating circumstances.)

The prosecutor then addressed mitigation:

> What is the evidence they have attempted to show and the mitigating factors? Again, the three you are instructed on are the three that are potentially applicable depending on what you determine from the evidence. No other mitigation is even potentially applicable. What are they?
> One--and I think we battered this around--of the excerpts is that of the defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Substantially impaired.
> I suggest to you there is no real evidence of this at all. (R2488)
>
> * * *
>
> As I recall in the shift back and forth, Dr. Mourer told you, I think he might have some impairment. I'm kind of confused about the results frankly. He didn't reach Dr. Galloway's conclusion. I'm not sure about substantially but I think he might have been impaired. That's not the question. Substantially means substantially. Maybe Dr. Mourer didn't understand that but I do and the Florida Legislature does and the Supreme Court and everybody in this courtroom understands there is a difference of degree, a big difference of degree between some impairment and substantially impaired. (R2491)
>
> * * *
>
> I'd like you to consider the evidence, the fact that he's pled guilty is not a mitigating circumstance in any way. As Mr. McMillan told you, it was not an acknowledgment of what he has done, simply a recitation that the evidence

> was overwhelming and indeed it was. You know that if he had taken the case to trial and you sat as jurors, you would have found him guilty. It was obvious to everyone. Don't let the fact that he has taken the expeditious route to gain credibility in this part of the trial, don't let that influence your decision. It is not a mitigating circumstance. (R2501)

Here the prosecutor attempted unduly to restrict the jury's consideration of mitigating evidence, in violation of the constitutional principles discussed in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 793 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). See also White v. State, 403 So.2d 331 (Fla.1981) and Perry v. State, 395 So.2d 170 (Fla.1980). His assertion that the fact Muehleman pled guilty was not "a mitigating circumstance in any way" (R2501) was a clear misstatement of the law; in an appropriate case a guilty plea may be a mitigating circumstance. Washington v. State, 362 So.2d 658 (Fla.1978). See also Agan v. State, 445 So.2d 326 (Fla.1983); Caruthers v. State, 10 F.L.W. 114 (Fla. Feb.7, 1985). In fact, at the sentencing hearing the trial court found Muehleman's plea of guilty to be "probably the most mitigating factor." (R1340) The prosecutor should not have foreclosed the jury from considering this non-statutory mitigating circumstance.

The prosecutor also committed impropriety in expressing personal beliefs concerning the evidence and what it showed. See Cummings v. State, 412 So.2d 436 (Fla.4th DCA 1982); Buckhann v. State, 356 So.2d 1327 (Fla.4th DCA 1978). The following excerpts from his closing argument show some of these remarks (emphasis supplied throughout):

We believe that this defendant is deserving of the death penalty, the defendant who already sentenced one man to die: Earl Baughman. (R2458)

* * *

Because of that, he decided to kill the victim and he also threw in, well, out of my respect for older people and because this man reminded him of his grandfather, I felt the only right thing to do was to kill him.

Now, if you can believe that, if you can accept that statement in light of the evidence, then you've seen it differently that I have. (R2479)

* * *

The last aggravating factor is that the crime for which the defendant is to be sentenced was cold, was committed in a cold, calculated and premeditated manner without any pretense of moral or legal excuse or justification.

It's hard for me to image a crime more befitting, that characterization of what this man has done. Think of that brief period of time that the State has access to this case, the brief period of time where we can see what the defendant is really like, those minutes surrounding the commission of this offense. (R2484)

* * *

And certainly they called every witness in every attempt, spared no effort to try to present mitigating circumstances. It's difficult for me to imagine any amount, any number, any degree of mitigating circumstances that could override or outweigh the aggravating factors that exist. Let's consider what they have even attempted to show. (R2487)

And it is incredible to me that anyone can take the stand to offer you an excuse to avoid punishment of the death penalty no matter how much they may want to help and someone can take the witness stand and say this man--and he is a man--didn't appreciate the consequences of his actions. (R2489)

* * *

What have the experts said in that regard? You had an opinion from Dr. Mourer that went back and forth and I'm not sure what he found and wound up with. He confused me and forgot the questions most of the time and had to ask me to repeat the questions. That confused me a little bit, too. I'll be honest with you.

As I recall in the shift back and forth, Dr. Mourer told you, I think he might have some impairment. I'm kind of confused about the results frankly. He didn't reach Dr. Galloway's conclusion. I'm not sure about substantially but I think he might have been impaired. That's not the question. Substantially means substantially. Maybe Dr. Mourer didn't understand that but I do and the Florida Legislature does and the Supreme Court and everybody in this courtroom understands there is a difference of degree, a big difference of degree between some impairment and substantially impaired. (R2490-2491)

* * *

And finally we get to the theory and I think the bottom line theory of Dr. Galloway's testimony--and I'm not saying Dr. Galloway was intentionally lying to us. I think experts have their own biases. One of the main problems you see with that testimony is that some who has a medical degree is working in an inertia that is largely speculation and because he has a degree, these are scientific conclusions. (R2494)

* * *

One other point and I'll go on, again, I don't think that is really--really a salient point because I think the experts miss the mark. They don't relate to the offense but his basic theories, as I understand it from the letter, is that this defendant because of factors happening before the age of three developed no conscience and I would concede as far as conclusions, the man sitting across the courtroom from you doesn't have much of a conscience. I don't disagree with that but I don't think that is a mitigating factor. (R2494)

* * *

> And I don't see how Dr. Galloway knows this man has no conscience because I believe, as I described it, that at the two year old stage, the two year old conscience perceives a good mom and a bad mom and if they don't get from that stage to realize it's only one mom and if they wait long enough, the bad mom will go away and the good mom will come back, they develop a disorder. (R2495)

* * *

> I think it should be obvious to you the facts are being stretched, the expertise is being stretched and the science of psychology and psychiatry which legitimately deal with theoretical aspects--these are simply attempts to speculate about the through [sic] process of someone when you were not present and ignore the facts and should not be passed off as a scientific diagnosis. (R2495-2496)

* * *

> The final aggravating [sic] circumstance they would argue, I assume, is that any aspect of the defendant's character or record or circumstances of the offense--we dealt with the circumstances of the offense. Nothing mitigating there. It's extremely aggravated. His record. They put a lot about his record. I didn't hear anything good. Everything I heard was bad. (R2498-2499)

Several times during his final argument the prosecutor came close to using the "send a message" type of language which has been condemned in a number of cases. See, for example, Williard v. State, 10 F.L.W. 213 (Fla.2d DCA Jan.16, 1985); Boatwright v. State, 452 So.2d 666 (Fla.4th DCA 1984); Perdomo v. State, 439 So.2d 314 (Fla.3d DCA 1983); Chavez v. State, 215 So.2d 750 (Fla.2d DCA 1968). This may be seen in the following excerpts:

> All we are asking is a reasonable judgment to reflect justice. The family, the community, the legal system are all looking to you to render justice. (R2461)
>
> * * *
>
> Those are the aggravating circumstances and I would suggest to you that the fact that that many circumstances applies in a single crime is rather extraordinary in itself. Your common sense tells you that is not an ordinary homocide [sic], not an ordinary crime or ordinary murder. Even those factors certainly would justify the imposition of the death penalty. To do otherwise would be to suggest to the defendant that, sure, after you rob, after you've beaten, after you've stolen, go ahead and murder. (R2486)
>
> * * *
>
> We are not just talking about what should happen to the defendant but what verdict, what recommendation reflects justice, what serves the needs of the community, the family, of the legal system, not which verdict--which recommendation is most pleasing for the defendant. (R2500-2501)

In the first and third excerpts above, the prosecutor was, in effect, urging the jury to send a message to "the community." In the middle example he was asking them to send a message to others who might commit robberies of the type committed by Muehleman.

Finally, the prosecutor made the following remark, which was improper because not supported by the evidence:

> And consider if you will that this is a defendant who has just quit a job at Sunken Gardens probably because he did not want to work and was being paid $60 a week and room and board simply to take care of this elderly gentleman. (R2459--emphasis supplied)

A prosecutor must confine his remarks to matters which are in evidence. Huff v. State, 437 So.2d 1087 (Fla.1983);

Thompson v. State, 318 So.2d 549 (Fla.4th DCA 1975); Goddard. Here the assistant state attorney prejudiced Muehleman by going beyond the evidence to suggest that he was lazy.

> The prosecuting attorney in a criminal case has an even greater responsibility than counsel for an individual client. For the purpose of the individual case he represents the great authority of the State of Florida. His duty is not to obtain convictions but to seek justice, and he must exercise that responsibility with the circumspection and dignity the occasion calls for. His case must rest on evidence, not innuendo.

Kirk v. State, 227 So.2d 40,43 (Fla.4th DCA 1969). The prosecutor below failed to exercise his responsibility with the "circumspection and dignity" called for by this most important of cases, a capital case.

There is no way for the Court to determine from the record before it that the cumulative effect of the prosecutor's remarks did not prejudice Jeff Muehleman. Therefore, his death sentence must be reversed and remanded for a new sentencing trial. Teffeteller.

ISSUE IX.

THE COURT BELOW ERRED IN GIVING INCOMPLETE AND MISLEADING INSTRUCTIONS TO THE JURY.

In Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859,885-886 (1976) the Supreme Court of the United States discussed the importance of complete and accurate jury instructions:

> The idea that a jury should be given guidance in its decisionmaking is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. [Footnote and citations omitted.] When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

Gregg was, of course, a death penalty case, and the need for correct instructions in such cases is particularly great in view of the severity and irrevocability of the penalty involved. The instructions the court gave to the jury which recommended the death penalty for Jeff Muehleman were incomplete and misleading in the following particulars, distorting the sentencing process and tainting the jury recommendation, rendering Muehleman's death sentence unconstitutional under the Eighth and Fourteenth Amendments.

A. Failure to Instruct on All Statutory Aggravating and Mitigating Circumstances.

Jeff Muehleman's request that the trial court instruct on all aggravating and mitigating circumstances (except the mitigating circumstance of no significant history of prior criminal activity, which was waived) was denied. (R2429-2431,2450-2451) The court then instructed on only four aggravating and three mitigating circumstances. (R2543-2545)

The judge was apparently following the Florida Standard Jury Instructions when he limited the instructions to those aggravating and mitigating circumstances he thought appropriate. Notes to the trial judges in the standard jury instructions direct that instructions should be given only upon the aggravating and mitigating circumstances for which there is evidence. Before the aggravating circumstances instructions the following appears:

> Give only those aggravating circumstances for which evidence has been presented.

Fla.Std.Jury Instr. (Crim.) Penalty Proceedings--Capital Cases at page 78. A similar note appears before the instructions on mitigating circumstances:

> Give only those mitigating circumstances for which evidence had been presented.

Id., at page 80. However, in Cooper v. State, 336 So.2d 1133, 1140 (Fla.1976), this Court held that limiting the aggravating and mitigating circumstances instructions to those the judge considers appropriate distorts the death penalty sentencing scheme:

> If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The

> jury's advice would be preconditioned by the judge's view of what they were allowed to know.

Similarly, in Straight v. Wainwright, 422 So.2d 827,830 (Fla.1982) this Court noted:

> It was proper for the judge to instruct on all the statutory aggravating circumstances. For the judge to have instructed only on those factors which she found supported by evidence would have improperly invaded the province of the jury.

As discussed in Issue VIII., the prosecutor used to his advantage the fact that the court did not instruct on all aggravating and mitigating factors. In his closing argument he emphasized to the jury that this was an extraordinary murder because "five" (not four) aggravating circumstances applied. (R2456,2486) Had the jury been instructed on all aggravating circumstances, they would have seen that five did not apply, and the State's closing argument would not have had such a prejudicial impact. The prosecutor also attempted to confine the jury to consideration of only the three mitigating circumstances on which they were instructed by emphasizing that no other mitigation was "even potentially applicable." (R2488)

B. Failure to Instruct on Crime Having Been Committed While Defendant Under Influence of Mental or Emotional Disturbance.

Counsel for Jeff Muehleman asked the court below to instruct the jury on the mitigating circumstance of the crime having been committed while the defendant was under the influence of extreme mental or emotional disturbance. (R2433,2450) Counsel also proposed that the instruction be modified by striking the

limiting word "extreme." (R2433-2434) The court refused to instruct on this aggravating circumstance in either form. (R2434, 2450-2451)

The requested circumstance is one of those enumerated in section 921.141(6) of the Florida Statutes. Even if the court was only instructing on circumstances for which evidence had been presented in support thereof, he should have instructed on this one. The evidence showed that Jeff Muehleman probably suffers from organic brain damage. (R953-955,973,1027,1033-1036,1043-1044,1217-1218) Furthermore, Dr. Stephen Mourer testified at one point that the crime for which Muehelman was to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance. (R970-971)(He later testified otherwise (R979).) And Dr. Glenn Galloway testified that Muehleman was under the influence of emotional distress at the time of the homicide. (R1037)

Just as a defendant has the right to a theory of defense instruction which is supported by any evidence, e.g., Bryant v. State, 412 So.2d 347 (Fla.1982), Motley v. State, 155 Fla. 545, 20 So.2d 798 (Fla.1945), he is also entitled to an instruction on mitigating circumstances supported by any evidence. A trial judge cannot substitute his opinion for that of the jury and deprive the defendant of the jury's consideration of the issue by denying jury instructions. Particularly is this true in light of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), which require unfettered consideration of mitigating circumstances.

C. Instruction on Premeditation.

The trial court instructed the jury on the aggravating circumstance found in section 921.141(5)(i) as follows (R2544-2545):

> The fourth aggravating circumstance, the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> Killing with premeditation is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact amount of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.
>
> The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing.

This definition of "killing with premeditation" is found at page 63 of the Florida Standard Jury Instructions in Criminal Cases, to be read at the guilt phase in a trial for first degree murder. Muehleman objected to the giving of this instruction. (R2436,2450-2451)

This Court has repeatedly made it clear that premeditation alone is insufficient to support a finding of the (5)(i) aggravating circumstance. See, e.g., Herzog v. State, 439 So.2d 1372 (Fla.1983); Maxwell v. State, 443 So.2d 967 (Fla.1983); Preston v. State, 444 So.2d 939 (Fla.1984). The "cold, calculated, and premeditated" aggravating circumstance was not intended by the legislature to apply to all premeditated murder cases.

Harris v. State, 438 So.2d 787 (Fla.1983). Rather, the evidence must show a degree of heightened premeditation beyond that necessary to support a finding of premeditated first-degree murder. Mills v. State, 10 F.L.W. 45 (Fla.Jan. 10, 1985); Hardwick v. State, 461 So.2d 79 (Fla.1984); Stano v. State, 460 So.2d 890 (Fla.1984); Jennings v. State, 453 So.2d 1109 (Fla. 1984); Card v. State, 453 So.2d 17 (Fla.1984); White v. State, 446 So.2d 1031 (Fla.1984); Maxwell. The instruction the court gave failed to apprise the jury that anything more than simple premeditation was needed for this aggravating circumstance to apply.

This Court should also consider the impact of a portion of the prosecutor's closing argument, where he said (R2485):

> The Judge will instruct you that premeditation that is only one part of this aggravating circumstance but premeditation means killing after consciously deciding to do so, no time set forth. It can be a second, half a second, can be a day or can be a year. Time is not important. What is important is it's a mental decision this person should die.
>
> The defendant in his confession, even although he says he didn't decide to do it until after the robbery, indicates at that point he decided to kill. That is premeditation and can there be any doubt in your minds this was a cold and calculated offense?

Given these remarks and the trial court's misleading instruction, it is impossible to imagine that the jury did not find this aggravating circumstance to apply, especially as they had been informed that Muehleman pled guilty to premeditated murder. (R2232, 2234-2235)

D. Failure to Give Defendant's Proposed Penalty Phase Instruction No.8.

One of the written jury instructions Muehleman proposed and the trial court denied read:

> In order that you might better understand and be guided concerning the meaning of aggravating circumstance (e), the Court hereby instructs you:
>
> > That an intent to avoid arrest is not present, at least when the victim is not known to be a law enforcement officer, unless it is clearly shown that the dominant or only motive for the murder was the elimination of a witness.

(R290)

This instruction was fully congruent with decisions of this Court construing the aggravating circumstance set forth in section 921.141(5)(e) of the Florida Statutes. E.g., Bates v. State, 10 F.L.W. 97 (Fla.Jan. 31, 1985); Menendez v. State, 368 So.2d 1278 (Fla.1979); Riley v. State, 366 So.2d 19 (Fla.1978). It was necessary that it be given in order properly to define this aggravating factor and channel the jury's deliberations (see Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)), particularly in view of the conflicting evidence regarding the intent with which Muehleman killed Earl Baughman.

E. Conclusion.

The jury's sentencing recommendation must be invalidated due to the incorrect instructions that the court gave and a new penalty trial held before a new jury.

ISSUE X.

THE TRIAL COURT ERRED IN SENTENCING JEFF MUEHLEMAN TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court improperly applied Section 921.141 of the Florida Statutes in sentencing Jeff Muehleman to death. This misapplication of Florida's death penalty sentencing procedures renders Muehleman's death sentence unconstitutional under the Eighth and Fourteenth Amendments to the Constitution of the United States. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973). Specific misapplications are addressed separately in the remainder of this argument.

A.

The Trial Court Erred In Finding As An Aggravating Circumstance That The Homicide Was Committed For The Purpose Of Avoiding Or Preventing A Lawful Arrest Or Effecting An Escape From Custody.

In order to establish this aggravating circumstance where, as here, the victim was not a law enforcement officer, proof of the requisite intent to avoid arrest and detection must be very strong. Caruthers v. State, 10 F.L.W. 114 (Fla.Feb. 7, 1985); Riley v. State, 366 So.2d 19 (Fla.1978); Menendez v. State, 368 So.2d 1278 (Fla.1979). The mere fact that the deceased might have been able to identify his assailant is not enough; it must clearly be shown that elimination of the witness was the dominant

or only motive for the homicide. Bates v. State, 10 F.L.W. 97 (Fla.Jan. 31, 1985); Oats v. State, 446 So.2d 90 (Fla.1984); Doyle v. State, 460 So.2d 353 (Fla.1984). The State did not prove this aggravating circumstance beyond a reasonable doubt.

Most of the facts cited by the court in his sentencing order fail to support this factor. The fact that Jeff Muehleman gave a false name upon taking the job with Earl Baughman (R310, A2) is irrelevant, particularly in light of Muehleman's explanation that he did this only to avoid trouble if he decided to terminate his employment. (R600,682)

The fact that more force was used than was necessary to accomplish the robbery of Baughman (R310,A2) likewise is irrelevant. The mere fact that a death resulted does not establish this aggravating circumstance. Caruthers; Riley.

The court's reliance upon steps Muehleman took after the homicide, for example, driving the body to another location, etc. (R310,A2), is misplaced. Herzog v. State, 439 So.2d 1372 (Fla.1983).

Finally, the court should not have relied upon Richard Wesley's and Jeff Muehleman's statements to support this aggravating circumstance, because the statements were inadmissible, as discussed in Issues VI. and I.A. Furthermore, Muehleman's statements concerning his motive in killing Earl Baughman were not consistent. They tended to show that his desire to alleviate Baughman's suffering and not to leave him brain-damaged or handicapped was at least as prevalent as his desire to eliminate Baughman as a witness. (R353,355,482, 825-826,847,852-853,1053-1054) The evidence thus did not

show beyond a reasonable doubt that the dominant or only motive was to eliminate the witness.

B.

The Trial Court Erred In Finding As An Aggravating Circumstance That The Homicide Was Especially Heinous, Atrocious Or Cruel.

Muehleman would first note that this aggravating circumstance was not submitted to the jury for its consideration. (R2543-2544)

Furthermore, the facts relied upon by the court were gleaned largely from Muehleman's statements, which were inadmissible for the reasons discussed in Issue I.A.

The second paragraph in the court's discussion of this aggravating circumstance is rife with speculation. This is evidenced, in part, by the court's use of such qualifying words as "apparently" and "undoubtedly." (R311,A3) He also describes the pain, fear, and mental anguish of the victim as "incalculable." (R311,A3) It is "incalculable" because there is no concrete proof of it. This paragraph further states that the victim "did beg his assailant, the defendant, for mercy." (R311,A3) There is no evidentiary support for this assertion. The only thing Baughman said during the incident was "Jeff, oh, Jeff." (R363) This was hardly begging for mercy.

The trial court relied heavily on events occurring after Baughman was unconscious to establish this aggravating circumstance. Dr. Joan Wood testified that one who was being manually strangled would lose consciousness within 30 to 45 seconds. (R725-726) And in his closing argument the prosecutor

conceded that the evidence showed that Baughman lost consciousness, but was still breathing. (R2483) The only reasonable inference from the evidence as a whole is that Baughman was not conscious when the plastic newspaper bags were placed in his throat.

Herzog v. State, 439 So.2d 1372 (Fla.1983) is particularly instructive. There the trial court found that the victim had been beaten, suffocated with a pillow, and strangled with a telephone cord. This Court rejected his finding that the homicide was especially heinous, atrocious or cruel, in large part because the victim was unconscious part of the time, even though the actual period of unconsciousness was unclear. The situation here is very similar. Baughman was unconscious for some period of time, and it is reasonable to infer that he was unconscious from the time he was manually strangled until his death. See Herzog. Therefore, this Court should reject this aggravating circumstance just as it did in Herzog.

C.

The Trial Court Erred In Finding As An Aggravating Circumstance That The Homicide Was Committed In A Cold, Calculated And Premeditated Manner Without Any Pretense Of Moral Or Legal Justification.

The trial court relied upon Richard Wesley's statement to support this aggravating circumstance. Again, the tape of his statement was inadmissible for the reasons expressed in Issue VI., and the court should not have used it to support his findings.

The evidence did not prove beyond a reasonable doubt that Muehleman acted with the "heightened premeditation" required to prove this circumstance. Mills v. State, 10 F.L.W. 45 (Fla. Jan. 10, 1985); Hardwick v. State, 461 So.2d 79 (Fla.1984); Stano v. State, 460 So.2d 890 (Fla.1984); Jennings v. State, 453 So.2d 1109 (Fla.1984); Card v. State, 453 So.2d 17 (Fla.1984); White v. State, 446 So.2d 1031 (Fla.1984); Maxwell v. State, 443 So.2d 967 (Fla.1983). His statements showed that he did not intend to kill Earl Baughman when he entered his bedroom, but intended only to render him unconscious. (R355,363,482, 825-826,847,852-853, 1053-1054) The fact that he may have pre-planned the robbery is irrelevant to this issue. Hardwick. Nor should the court have considered the "strong determination to effect the victim's death" displayed by the "manner of commission of the murder." (R312,A4) See Hardwick and Cannady v. State, 427 So.2d 723 (Fla. 1983).

Also, Muehleman's statements that he killed Baughman to put him out of his misery and to prevent him from living in a handicapped, brain-damaged state exhibited at least a pretense of moral justification for the killing. See Cannady. The court specifically rejected Muehleman's explanation as being "overwhelmingly disproven by the evidence" (R313,A5), but did not say to what evidence he was referring. Only Muehleman himself could know what his motives were. The only evidence that even arguably rebutted his explanation was the inadmissible tape of Richard Wesley's interview with the authorities.

Muehleman would note that the trial court may have misinterpreted this aggravating factor as requiring little or nothing

more than the premeditation needed to convict of first-degree murder. He did, after all, instruct the jury on premeditation in conjunction with this aggravating circumstance, as discussed in Issue IX.C.

D.

The Trial Court Erred In Considering Lack Of Remorse In Sentencing Jeff Muehleman To Death.

A defendant's lack of remorse may not be considered in aggravation, but may be considered to negate mitigating circumstances. Doyle v. State, 460 So.2d 353 (Fla.1984); Agan v. State, 445 So.2d 326 (Fla.1983); Pope v. State, 441 So.2d 1073 (Fla. 1983).

During the sentencing hearing of June 8, 1984, the prosecutor referred to Muehelman's supposed lack of remorse at least twice (R1321,1327), and the court did "not find any remorse in his [Muehleman's] actions." (R1340)

It is unclear whether the court was considering lack of remorse as an element in aggravation, or was merely responding to the argument of defense counsel that Muehleman was remorseful. (R1278) At the least, this cause should be remanded for clarification of this point.

Furthermore, Muehleman's statements and the fact that he cried when interviewed about the homicide showed that he was sorry for what he did. (R363-364,482,827-828)

E.

The Trial Court Erred In Failing To Give Adequate Consideration To The Evidence

Muehleman Presented Of His Substantial Mental And Emotional Problems.

Jeff Muehleman presented a great amount of evidence that he had suffered from mental and emotional problems throughout his life. This evidence came primarily through the testimony of Dr. Mourer (R944-996) and Dr. Galloway. (R999-1071) All the evidence in this regard cannot be reproduced in this brief, but Muehleman urges the Court to read the testimony of the defense witnesses in its entirety for a full understanding of its magnitude. Among other things, it showed that Muehleman is deficient in social interpersonal judgment and moral scruples. (R949,952) He probably suffers from organic brain damage. (R953-955,973,1027, 1033-1036,1043-1044,1217-1218) Dr. Mourer expressed his opinion within the bounds of reasonable psychological probability that Muehleman's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired at the time he killed Earl Baughman. (R964,966) At one point he testified that the crime was committed while Muehleman was under the influence of extreme mental or emotional disturbance (R970-971), but then testified otherwise. (R979) Dr. Galloway similarly testified that, within the bounds of reasonable psychiatric probability, Muehleman's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, and that Muehleman was under the influence of emotional distress at the time of the homicide. (R1036-1037) This evidence was not rebutted by the State's witnesses.

The trial court did not find either of the mental mitigating circumstances set forth in section 921.141(6) of the Florida Statutes to apply to Muehleman. His written sentencing order found that there was no testimony which indicated that Muehleman was operating under a disturbance sufficient in degree to establish that he was under the influence of extreme mental or emotional disturbance at the time of the homicide. (R313,A5)(He refused even to submit this circumstance to the jury, as discussed in Issue IX.B.) With regard to Muehleman's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, the court found some impairment to exist, but did not deem it "substantial" enough to rise to the level of the statutory mitigating circumstance.

The sentencing court adopted a much too narrow approach in considering the mitigating evidence of Muehleman's mental and emotional condition. Under the principles expressed in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the mitigating circumstances which are available to a capital defendant, if established by the evidence, cannot constitutionally be limited to those in the statute. See Songer v. State, 365 So.2d 696 (Fla.1978). Thus, where the evidence shows any impairment of the defendant's faculties, whether or not rising to the level of "substantial" or "extreme," that evidence must be considered in mitigation. In the instant case, moreover, the evidence was so compelling that the court should have found the existence of the statutory mental mitigating circumstance;

Muehleman's capacity to appreciate the criminality of his conduct or to reform his conduct to the requirements of the law was substantially impaired, particularly when one considers the presence of organic brain damage. See Mines v. State, 390 So.2d 332 (Fla. 1980) and Huckaby v. State, 343 So.2d 29 (Fla.1977).

F.

The Trial Court Erred In Refusing To Give Consideration To Comments Jeff Muehleman's Family Presented At The Sentencing Hearing.

Muehleman's mother addressed the court at the sentencing hearing of June 8, 1984. She told the court that Muehleman's father was unable to be there to support his son because of a high blood pressure condition, and that Muehleman's former girlfriend, Nancy Hansen, had been placed under psychiatric care. (R1282) At that point the State lodged an objection to this testimony from family members as not "relevant for any mitigating circumstances" and "not within the statutory, non-statutory guidelines." (R1282-1283) The court ruled as follows (R1284):

> Well, I have to agree with Mr. Crow [the prosecutor], and I don't think it has any way, one of the mitigating factors, but I think they have wide lattitude [sic] and they have the right to put on whatever they want to, Mr. Crow.

Mrs. Muehleman then continued her comments (R1284-1290), and Muehleman's grandmother spoke very briefly. (R1291)

The court's comments show again that he adopted an unduly narrow approach as to what constituted mitigating evidence. He said, in effect, that the defense could present what it wanted, but he did not consider the comments of the family members to be relevant. However, a sentencing judge in a capital

case must consider and weigh all evidence offered in mitigation. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Songer v. State, 365 So.2d 696 (Fla.1978). The comments of Mrs. Muehleman were not merely a repetition of information already before the court, as she was speaking of events which had transpired since Muehleman's trial, and explaining why more of his friends and members of his family were not with him at sentencing to lend their support. Therefore, the court should at least have considered her remarks. See Perry v. State, 395 So.2d 170 (Fla.1980).

G.

The Court Below Erred In Failing To Give Adequate Consideration To The Evidence Jeff Muehleman Presented Of Non-Statutory Mitigating Circumstances.

The trial court's sentencing order dealt with non-statutory mitigating circumstances but briefly (R315,A7):

> 8) Any other aspect of the defendant's character or record and any circumstance of the offense. The Court has also considered all the evidence presented to see if any non-statutory circumstances exist which in conjunction with defendant's age might outweigh the aggravating circumstances. Specifically, the Court has considered the psychiatric testimony as to the defendant's possible impairment, the testimony of relatives and friends concerning the defendant's troubled background and family life, his character and his past physical and emotional problems, previous opportunities and help offered to the defendant, and the testimony of jail officials as to his conduct within the jail system as well as the voluminous documents and other evidence presented by the defense.
>
> The Court rules that there are no non-statutory mitigating factors.

In view of the tremendous amount of mitigating evidence adduced by the defense, the court should have given more serious and detailed consideration to non-statutory mitigating circumstances. See Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

The court's findings in mitigation ignored the fact that Muehleman pled guilty and confessed, even though at the sentencing hearing the court found the plea of guilty to be "probably the most mitigating factor." (R1340) These are elements which could and should have been considered in mitigation. See Washington v. State, 362 So.2d 658 (Fla.1978); Agan v. State, 445 So.2d 326 (Fla.1983); Caruthers v. State, 10 F.L.W. 114 (Fla. Feb. 7, 1985).

The court also made only a brief reference in his findings to Muehleman's "troubled background and family life." (R315,A7) The evidence concerning Muehleman's conflicts with his mother, the departure of his father when he was nine years old, etc. was so compelling that it deserved more than a mention in passing. Again these are legitimate factors mitigating against a death sentence. See Neary v. State, 384 So.2d 881 (Fla.1980); McCampbell v. State, 421 So.2d 1072 (Fla.1982); Eddings.

Particularly glaring is the omission of any specific consideration of Muehleman's potential for rehabilitation. See McCampbell. The testimony showed that Muehleman has some talents and is brighter than normal. (R1021-1022) He functions best in a structured environment, such as a prison setting. (R493,962, 1019-1022) In fact, he was a model prisoner during his pre-trial

incarceration. (R878-880,885-886,890-891,903,1021) See McCampbell and Delap v. State, 440 So.2d 1242 (Fla.1983). The court at least should have discussed whether he felt this important mitigating factor to be applicable.

Also, there is no indication the court considered Muehleman's considerable mental and emotional problems, including the possibility of organic brain dysfunction, as a non-statutory mitigating factor. (See Issue X.E.)(The court merely mentioned the psychiatric testimony Muehleman's "past physical and emotional problems" in his findings. (R315,A7))

Patten v. State, 10 F.L.W. 51 (Fla. Jan. 10, 1985) is relevant to this discussion. The background of the defendant in that case was quite similar to that of Jeff Muehleman. In sentencing Patten to death, the trial court found no mitigating circumstances. This Court vacated Patten's death sentence because the court had given an Allen charge during the sentencing phase. At the end of the opinion the Court provided the following guidance for the lower court:

> In view of the evidence that was presented during the sentencing proceeding, we direct the trial court's attention to the United States Supreme Court decision in Eddings v. Oklahoma, 455 U.S. 104 (1982), and its possible application to the facts of this case.

10 F.L.W. at 53.

The court below did not clarify why he was rejecting all non-statutory mitigating circumstances. Did he feel they were not supported by sufficient evidence? Did he not believe he could consider them due to some unarticulated legal constraint? We cannot tell from his findings.

One must read the record in its entirety to truly appreciate the volume and the persuasive nature of the mitigating evidence Jeff Muehleman presented. It requires much more analysis and discussion than it was afforded by the lower court.

CONCLUSION

For the reasons expressed in Issues II. and III., Jeff Muehleman prays this Honorable Court to vacate his judgment and sentence. For the reasons expressed in Issues I., III., IV., V., VI., VII., VIII. and IX., he asks the Court to vacate his death sentence and remand this cause for a new penalty trial before a new jury impaneled for that purpose. For the reasons expressed in Issue X., Muehleman requests vacation of his death sentence and remand for a new sentencing hearing before the court.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: Robert F. Moeller
ROBERT F. MOELLER
Assistant Public Defender

Hall of Justice Building
455 North Broadway Avenue
Bartow, Florida 33830-3798
(813)533-0931 or 533-1184

COUNSEL FOR APPELLANT