IN THE FLORIDA SUPREME COURT

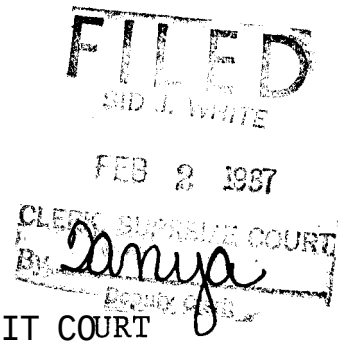
GUY REGINALD COCHRAN,

Appe11ant,

vs. Case No. 67,972

STATE OF FLORIDA, :

Appellee. :



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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

The Grand Jurors of Hillsborough County returned an indictment February 20, 1985, charging GUY REGINALD COCHRAN, Appellant, with First Degree Murder in the shooting death of Carol L. Harris. (R776-777)

On July 3, 1985, Appellant presented several pre-trial motions, including a Motion to Suppress Confession (R851-854), before the Honorable Donald C. Evans. (R700-766,1241-1245) The State argued that the Motion to Suppress Confession was untimely filed because defense counsel had been aware of the circumstances surrounding the confession since May 10, 1985, yet had not filed the motion until July 2, 1985. (R1242-1243) The Court denied the Motion to Suppress Confession, finding that it was untimely filed, and therefore refused to consider any argument. (R1245)

Trial was before Judge Evans and a jury on July 7 through 9, 1985. (R1-422) The jury returned a verdict of guilty of murder in the first degree. (R411,885) Proceedings in the penalty phase were held July 10, 1985. (R422-669) By a vote of 8-4, the jury recommended a sentence of life imprisonment. (R666,886) A pre-sentence investigation was ordered. (R668)

Cochran's Motion for New Trial was heard and denied August 12, 1985. (R887-888,770)

At sentencing, held October 11, 1985, Judge Evans overrode the jury recommendation and sentenced Appellant to death. (R690,976-977) A Sentencing Memorandum found as aggravating circumstances paragraphs (b), (d), (f) and (h) of Section 921.141(5),

Florida Statutes. (R978) The Court found that the statutory mitigating circumstances of emotional disturbance and age were proven, but outweighed by the aggravating circumstances. (R979) Letters from the victim's mother and brother were attached by the Court to the Sentencing Memorandum. (R981-984)

Appellant's Notice of Appeal was timely filed November 12, 1985. An Amended Notice of Appeal was subsequently filed November 19, 1985. (R991). Court-appointed counsel was permitted to withdraw and the Public Defenders of the Tenth and Thirteenth Judicial Circuits were appointed to represent Cochran on appeal. (R993)

Pursuant to Article V, Section 3(b)(1) of the Florida Constitution and Fla.R.App.P. 9.030(a)(1)(A)(i), Cochran now takes appeal to this Court.

STATEMENT OF THE FACTS

A. GUILT PHASE

On February 7, 1985, a motorist who had stopped on the shoulder of Route 301 in Hillsborough County saw a body lying in a field some distance from the highway. (R159-160) He telephoned the Hillsborough County Sheriff's Department. (R161)

Deputy Robert H. Cooke responded to the scene and observed the body of a white female lying on her back. *(R.164)* It appeared that she had been dragged to that position by her jacket. (R165) The investigating officers seized the victim's driver's license and her shirt, which had one bullet hole in the lower left area, at the scene. (R172-175) A five dollar bill and a one dollar bill were found in the victim's pants pocket. (R176)

Lee Robert Miller, Associate Medical Examiner of Hillsborough County, conducted an autopsy on Carol Harris on the afternoon of February 7, 1985. (R197) He found that the deceased had a gunshot wound on the left side of the abdomen. (R198) Powder soiling on the victim's shirt indicated that the gun was fired from close range, perhaps two inches to two feet. (R198-199) The bullet passed through a number of vital organs in the abdomen. (R199) Its direction was from left to right horizontally and slightly backward. (R199-200) The bullet was recovered from inside the body and turned over to police. (R200-201)

Dr. Miller said the wound track was consistent with a scenario where the shooter was seated on the left side of the

victim in an automobile. (R200) In the doctor's opinion, the victim could have remained alive with the wound for as much as an hour and could have been conscious during most of this time. (R205) On the other hand, the victim could have lost consciousness within moments after the shooting and lived for only a few minutes. (R206-207) Dr. Miller said it was within the realm of possibility that such a wound could cause instant death and loss of consciousness by shock. (R208)

Corporal David Rochelle of the Tampa Police Department was on patrol during the nighttime hours of February 8th and 9th, 1985, when he spotted a vehicle fitting the description of a stolen vehicle whose owner had been found murdered. (R190) The automobile was a black BMW with a sticker on the rear reading "parking for C.I.A. only." (R190) As Corporal. Rochelle followed the vehicle, all four doors opened. (R191) With the vehicle still moving, four black youths exited and disappeared into the night. (R191-192) Corporal Rochelle chased the vehicle on foot and impounded it. (R191)

Counsel stipulated that the seized BMW automobile belonged to the victim's mother, Katherine Harris. (R223) On February 9, 1985, Deputy Sheriff Arthur Picard lifted latent fingerprints off the vehicle. (211-2) Checks were recovered from the black BMW as well as a shell casing. (R213-214) Six of the latent prints were identified as Cochran's. (R228)

On February 10, 1985, Cochran was brought to the

Hillsborough County Sheriff's Operations Center to be interviewed concerning the victim's automobile. (R283-284) Detective Stephen Cribb testified that he advised Cochran of his Miranda rights and that Cochran signed a consent to interview form at 12:00 p.m. (R284-285,1070) At 5:20 p.m. Detective Cribb took a taped confession from Appellant. (R303,313)

Detective Cribb testified that he prepared a composite tape for use at trial from the original tapes. (R304) Defense counsel reviewed the composite tape and complained that one of Appellant's responses on the tape was incorrectly transcribed. (R299-300) The court overruled the objection. (R300) Defense counsel said she had no objection to the admissibility of the confession or to the jurors using the transcript while listening to the tape. (R307) Transcripts were distributed to the jury; the tape was played and the transcripts collected. (R311-312)[1/]

The substance of Appellant's confession was that he approached Carol Harris as she started to get into her car around 1:00 a.m. at 15th Street and 7th Avenue, Ybor City, Tampa. (R1078, 1081) He held a gun and forced her into the car. (R1077) Appellant was driving and holding the gun in one hand when Harris jumped at him and tried to stab him. (R1082,1077) The gun went off because it had "a real easy trigger." Harris asked Appellant to take her

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[1/] The court reporter did not transcribe the tape as it was played in the courtroom. A copy of the transcript furnished to the jury appears at R1077-1083.

to the hospital, but he got scared and let her out of the car on Route 301. (R1077,1082) Later, Appellant decided to go back to take Harris to a hospital, but was unable to find her. (R1077, 1082)

Cochran confessed that he intended to rob Harris and had gotten twelve dollars and some change from her. (R1078-1079) He didn't know where the knife was, only that it had been left in the car. (R1079) Appellant said the .25 caliber automatic gun he used was at "William's" (Willie Long), who lived in the Ponce de Leon housing. (R1078)

Detective Cribb said that no knife had been found in the vehicle; the only possible weapon he found was a fork. (R290,314) Detective Grossi testified that he seized a .25 caliber automatic pistol from the residence of Willie Long. (R257-258) FDLE firearms examiner Edward Bigler gave his opinion that the bullet taken from the victim during the autopsy had been fired from the pistol seized from Willie Long. (R276-277) The cartridge case found in the BMW was also fired from the same pistol. (R278-279)

Fifteen year old Willie Ray Long testified for the State as part of a plea agreement. (R229,236-237) Long identified the .25 caliber pistol in evidence as his. (R234) He lent it to Appellant sometime before Cochran acquired the BMW. (R232) Cochran returned the gun to him while he was in possession of the BMW. (R234)

Altogether, the witness Long saw Cochran driving the black BMW about four or five times. (R233) One night he went riding

in the BMW with Cochran, Charlie Smith and Darrell Shorter. (R233) When the police started following the car, Cochran told everyone to jump out, which they did. (R233-234)

Long testified at trial that he asked Cochran where he had gotten the car and Cochran replied that he got it from a lady whom he shot when she tried to stab him. (R235-236) Long admitted on cross-examination that he had given a different story at a deposition taken June 20. (R253) At that time, Long said only that Cochran told him he took the BMW from a girl at a bar. (R253-254) Willie Long testified at trial that he was not telling the truth under oath at the time of his deposition. (R253)

Darrell Shorter also testified for the State. (R179) Shorter said that on the morning of February 6, 1985, Cochran drove to Shorter's residence in a BMW automobile. (R181) According to the witness, Cochran said he went to a bar on 7th Avenue; took a girl somewhere, and shot her. (R181) That was how he acquired the BMW. (R181)

Shorter went riding several times in the BMW with Cochran over two or three days. (R182-183) He identified State Exhibits 7A and 7B as personal checks which Shorter found in the glove compartment of the BMW. (R182) He practiced signing them in the victim's name. (R182,1022-1066) Shorter said he saw a sharp instrument which looked like a letter opener on the dashboard of the BMW. (R187-188) He confirmed that he was in the BMW when the Tampa police car tried to stop them and that he jumped out and ran. (R184)

Shorter insisted that he had not been offered any deal in exchange for his testimony. (R185) He admitted that he was on probation in Judge Coe's division, had violated that probation by being arrested for strong-arm robbery and grand theft; yet was reinstated on probation. (R186-187)

Defense counsel moved for judgment of acquittal which was denied. (R315) The defense did not present any evidence in the guilt phase.

After the jury had retired to deliberate, the bailiff brought a request from the jurors that they be given a copy of the transcript of Cochran's confession or be allowed to hear the tape again. (R397) Defense counsel agreed that the jury could rehear the tape, but objected to allowing them to read the transcript again. (R398) The Court overruled the objection and said the jury would be permitted to examine the transcript while listening to the tape. (R399)

Defense counsel requested the Judge to instruct the jury that they should rely on what they hear on the tape and should consider anything they can understand on the tape even if it is marked inaudible on the transcript. (R399) The Court denied the request, saying that it might be confusing to the jury. (R400)

The verdict form prepared by the State for the jury was one page specifically listing all possible verdicts. (R265,331, 342-343,885) The jury returned a specific verdict of guilt to Murder in the First Degree which had been defined by the Court as premeditated murder. (R379-380,411,885)

B. PENALTY PHASE

In penalty phase, the State relied upon the evidence introduced at the guilt phase, offering no additional evidence. (R444)

For the defense, Dr. Arturo Gonzalez, a psychiatrist, testified that he conducted two psychiatric interviews with Cochran and also had four reports from psychological evaluations of Cochran that were done in the Hillsborough County School System. (R444-447) Dr. Gonzalez determined that Cochran suffered from a long standing mental deficiency. (R449) Cochran is in the borderline range of intelligence. (R449)

Dr. Gonzalez said that a person with borderline intelligence has a greater tendency to become emotionally disturbed and disorganized in stressful situations. (R450) It would take less stress for a person like Appellant to panic than for someone with a higher I.Q. (R452,464) Such an individual placed in an emergency situation could be impaired substantially in his ability to conform his conduct to the law. (R451,464)

The witness further noted that Cochran had been emotionally deprived because he was raised by his great-grandmother rather than his natural parents. (R454) In February, 1985, Appellant was further disturbed because he had difficulties with the mother of his child and consequently wasn't able to visit the child. (R454-455)

Caroline Barnard, supervisor of school psychological services in the Hillsborough County School District, presented

four psychological reports performed when Cochran was five, eight, eleven and thirteen. (R465-470,1188-1205) Dr. Barnard said that it was unusual to have a student referred this many times. (R470) The reasons for refereal were behavior problems in the classroom. (R473-474) Cochran's ability based on his test scores was termed borderline retarded. (R476) His verbal I.Q. tested out at 70. (R485) A student who scored 69 on this test would be placed in a special educable mentally handicapped class. (R485)

Dr, Barnard testified that the evaluations indicated that Cochran also had trouble concentrating and significant emotional problems. (R476-477) Individuals with test scores like Cochran's experience great stress in the school system although they may show it in different ways. (R489-491)

Susan Watson, Cochran's seventh grade teacher, testified. (R508-521) Cochran was thirteen when she taught him at the USF Center for Learning Disabilities. (R509-510) Mr. Watson said Cochran had a severe learning disability characterized by difficulty in understanding what he heard. (R512) He was anxious to learn how to read and was "highly motivated in class." (8513,516)

Ms. Watson made a home visit to the residenc of Cochran's great-grandmother. (R514) The teacher described the house as a small old house in poor condition in a rundown neighborhood. (R514) Although Cochran was a discipline problem at first, as the year progressed he behaved well during classroom instruction. (R515-516,519) Part of the problem was Cochran's shame at being placed in a special school. (R518-519) He would walk to a different bus stop to avoid having kids in his own neighborhood see him getting on the special school bus. (R519)

Dennis Namen, a high school SLD (Specific Learning Disabilities) teacher at Chamberlain High School, Tampa, testified. (R525-548) Namen was Cochran's SLD teacher for three years. (R526) The witness described Chamberlain as a suburban high school drawing students from primarily middle and upper-middle class families. (R526-527) A few students, like Cochran, were bussed from poor inner-city neighborhoods. (R527)

The witness said that Chamberlain students could be called "preppies." (R534) By and large, they dressed better than the teachers. (R534) Cochran, on the other hand, while neat in appearance sometimes had clothes that were patched together. (R534) He was different in appearance from the other students. (R534)

Like most SLD students, Cochran had emotional problems associated with the stigma attached to attending SLD classes. (R530-531) They would often come in the back door of the SLD classroom so that their friends wouldn't see them. (R531) Namen said Cochran was often frustrated in the regular classes and felt he was different than the other students because of his learning disability. (R531-532) The teacher considered recommending Cochran for the emotionally handicapped class at Chamberlain but decided against it because this would add an additional stigma and would likely have caused Cochran to drop out of school. (R533)

Cochran suffered from what Namen termed an "auditory deficit." (R529-530) As a practical matter, this meant that if he

had to listen to oral directions, he would be likely to confuse them. (R529) This would be likely to carry over into a work situation and create difficulties in holding employment. (R536,538-539)

In February, 1985, Cochran came to the witness and asked for help in getting a job. (R536-537) The two went to the school guidance counselor who said that Cochran had only completed 12 1/2 credits in his three years of high school and suggested that he consider enlisting in the military. (R537) After talking with the military recruiter, Namen realized that Cochran couldn't qualify. (R537) Namen recommended to Cochran that he attend Brewster Vocational School in the evenings and felt that the office maintenance program would be appropriate. (R538) Namen had noted in his calendar that this conversation with Cochran took place on February 4, 1985. (R542)

Several members of Cochran's family testified regarding the family background. (R551-580) Guy Cochran was born when his mother was fifteen. (R552) His father was in the military, stationed in Georgia, and never lived in the same household with the mother. (R560) Because his mother did not care for him properly, Guy Cochran's great-grandmother was appointed to be his guardian and Guy grew up in her residence. (R564-565)

The great-grandmother is a diabetic with poor eyesight. (R553,556) Appellant helped her with housework and paying her bills, since her vision was so poor. (R556,578) When Appellant was

working, he would contribute money to the household. (R578)

Cochran had a strong attachment to the baby he had fathered. (R558,566-567,572-573) In December, Cochran's girlfriend had put a lot of pressure on him to get money so that she could have an apartment in which to raise the baby. (R565-566) After he got money for her, she broke off the relationship and prevented him from seeing the baby. (R566) Cochran was deeply depressed over this and constantly inquired about the baby's welfare both before and after he was arrested. (R567) In order to support the baby, while in school Cochran had worked at Winn Dixie and had done some landscaping work. (R572-573,579)

Detective Kendall Glenn of the Hillsborough County Sheriff's Office testified that he was involved in the investigation of the Carol Harris homicide. (R612) When he found out that Cochran's fingerprints were discovered inside the BMW, he went to Cochran's residence and asked him to go downtown for questioning. (R614-615) Cochran cooperated. (R615-616)

Later that afternoon, Glenn participated in the questioning and asked Cochran to "do what is right.'' (R617) Cochran then admitted the homicide and described the circumstances. (R618-623)

Cochran confessed that he ran up behind the victim as she started to get in her car and pointed his gun at her head while demanding her money. (R618) She started screaming, "Don't shoot me.'' (R618) Cochran became scared because of the screaming and, not knowing what else to do, forced her into the car. (R618)

Cochran also related that he was confused about where he was driving and that the victim attacked him with what he believed to be a knife. (R619-620) A struggle ensued and he shot the victim. (R620) Cochran told Detective Glenn that he felt "real bad'' after the shooting and was confused about what to do. (R620-621)

Cochran was crying throughout this statement. (R622) Detective Glenn said that he didn't doubt the truth of the statement and said Cochran appeared to be remorseful. (R622-623)

By a vote of 8-4, the jury recommended that the judge sentence Cochran to life imprisonment. (R666) The court ordered a presentence investigation. (R668)

C. SENTENCING

At sentencing, held October 11, 1985, both Appellant and his father made brief statements to the court. (R673-675) Defense counsel objected to the judge considering a letter from the victim's mother in deciding what sentence to impose. (R675-676) The State argued that Section 921.143, Florida Statutes, was intended to give family members of victims a right to be heard. (R680-681) The Court announced that he had been provided with letters from the victim's mother and brother and that he had read both letters. (R682)

The sentencing judge then read from the sentencing memorandums prepared on both first degree murder convictions for which Cochran was to be sentenced. (R684-690) In Case No. 85-1509 (victim Orlando Arbelaez) the court imposed a sentence of life imprisonment

without possibility of parole for 25 years. (R686)

In Case No. 85-1510 (the instant case), the court found as aggravating circumstances, prior conviction of a capital felony, commission in the course of a kidnapping, for pecuniary gain; and especially heinous, atrocious or cruel. (R686-690) As mitigating circumstances, the court noted the same as in the Arbelaez case; emotional disturbance and age. (R688) The court found that the aggravating circumstances outweighed the mitigating and ordered a sentence of death imposed. (R690)

In response to the State's inquiry, the court said that the conviction for a capital felony in the Arbelaez case was "substantially the basis" for his decision to overrule the jury recommendation of life in the Harris (instant) case. (R690)

SUMMARY OF ARGUMENT

The jury verdict form included alternative verdicts of premeditated murder and first degree felony murder. The jury verdict found Cochran guilty of premeditated murder. However, there was insufficient evidence to prove the element of premeditation. Accordingly, Cochran's conviction should be reduced to second degree murder.

In a pre-trial "Motion to Vacate the Death Penalty," Cochran alleged that Florida's death penalty statute has been applied in violation of the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment. Specifically, he alleged that statistics showed that the race of the victim impermissibly affects capital sentencing. The court denied Cochran's motion without holding an evidentiary hearing.

At sentencing, the trial judge considered letters from the victim's next-of-kin before imposing sentence. These letters did not meet the statutory criteria for admissibility. Furthermore, Cochran's Sixth Amendment right to confront adverse witnesses was violated because the letter-writers were not available for cross-examination. Finally, the Eighth Amendment requirement that capital punishment not be imposed arbitrarily or capriciously is violated where statements by the victim's next-o'f-kin are allowed to enter into the sentencing decision.

The trial judge erred by finding that the homicide was especially heinous, atrocious or cruel. The judge impermissibly

considered an alleged lack of remorse as bearing on this aggravating circumstance. Failure to get medical attention for the victim is not a sufficient reason to sustain this aggravating circumstance. This Court has previously rejected this aggravating circumstance where the victim was shot once during the course of a felony.

The sentencing judge's override of the jury's life recommendation cannot be sustained. Although the sentencing judge considered an aggravating circumstance not proved before the jury, the propriety of the jury override must still be judged by the Tedder standard: The sentencing judge did not consider substantial non-statutory mitigating evidence to which the jury may have given great weight. Added to the two statutory mitigating circumstances actually found by the sentencing judge, the other evidence in mitigation provided a reasonable basis for a jury life recommendation. When compared with other cases in which this Court has undertaken a Tedder analysis, a sentence of life imprisonment is proportional in the case at bar.

ARGUMENTS

ISSUE I.

THE JURY RETURNED A SPECIFIC VERDICT OF GUILT TO PREMEDITATED MURDER. BECAUSE THERE IS INSUFFICIENT EVIDENCE OF PREMEDITATION, COCHRA"S CONVICTION MUST BE REDUCED TO SECOND-DEGREE MURDER.

During a charge conference, the clerk asked the trial judge what verdict form would be submitted to the jury. (R265) It was noted that the State had prepared a one page verdict form listing all possible verdicts. (R265) The court secured an on-the-record agreement from both parties as to the verdict form. (R342-343)

The verdict form, which appears in the record at R.885 (See Appendix), lists on one page as alternative verdicts:

a. The defendant is guilty of Murder in the First Degree

b. The defendant is guilty of Felony Murder, First Degree

as well as the lesser included homicide offenses and not guilty. The verdict form was returned by the jury with a check mark next to alternative (a) (guilty of Murder in the First Degree). (R885, see Appendix)

A.

The Verdict Returned Was A Specific Finding Of Guilt To Premeditated Murder.

Florida's murder statute, Section 782.04, Florida Statutes (1985) defines murder in the first degree as the unlawful killing of a human being with (as alternative elements) either:

1. When perpetrated from a premeditated design ... or

2. When committed by a person engaged in the perpetration of ... any:

* * *

d. Robbery

* * *

f. Kidnapping

Thus, the offense of murder in the first degree includes both premeditated murder and felony murder.

Cochran was charged by an Indictment specifying alternative theories of "premeditated design" or "while engaged in the perpetration of ... robbery and/or kidnapping." (R776) The verdict form lists as alternative verdicts "Murder in the First Degree" and "Felony Murder, First Degree." Although the verdict's provision of "Felony Murder, First Degree" may seem redundant, consideration of the entire record shows that the verdict provision "Murder in the First Degree" was intended to refer only to premeditated murder.

When a verdict in a criminal case appears ambiguous, it should be considered with reference to the entire record to ascertain the intention of the jury. Chavers v. State, 45 So.2d 180 (Fla. 1950). It is appropriate to consider the verdict in conjunction with the court's instructions to the jury. Id.

At bar, the trial court instructed the jury as follows:

> Murder in the first degree: Before you can find the defendant guilty of first-degree murder, the State must prove the following three elements beyond a reasonable doubt:
>
> 1. That Carol L. Harris is dead.

2. The death was caused by the criminal act or agency of Guy Reginald Cochran.

3. There was a premeditated killing of Carol L. Harris.

The term "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.

(R379,1216, see Appendix)

* * *

Felony murder first degree: Before you can find the defendant guilty of first-degree felony murder, the State must prove the following three elements beyond a reasonable doubt:

1. Carol L. Harris is dead.

2. The death occurred as a consequence of and while Guy Reginald Cochran was engaged in the commission of robbery and/or kidnapping.

The death occurred as a consequence of and while Guy Reginald Cochran was attempting to commit robbery and/or kidnapping.

(R380,1217, see Appendix)

Clearly, the trial court defined murder in the first degree as specifically limited to premeditated murder. The jury verdict of guilt to murder in the first degree must accordingly be given a specific interpretation as a finding of premeditated murder.

Significantly, the prosecutor prepared the jury instructions and represented to the court that they were taken verbatim from the standard jury instructions. (R319-320) Defense counsel approved the instructions on "Murder - First Degree" and "Felony Murder - First Degree" on the basis of that representation. (R320) In fact, there were significant differences between the jury

instructions presented at bar and the standard jury instructions.

To begin with, the Florida Standard Jury Instructions in Criminal Cases [2] specifies that an explanatory paragraph be read to the jury when instructions on both premeditated and felony murder will follow. This paragraph, which reads:

> There are two ways in which a person may be convicted of first degree murder. One is known as premeditated murder and the other is known as felony murder.

was omitted from the charge at bar. Secondly, the offense which has premeditation as an element is called "First Degree Premeditated Murder" in the standard jury instructions,?/ as opposed to "Murder in the First Degree" in the instructions at bar. (R379,1216, See Appendix)

The net effect of the prosecutor's modification of the jury instructions combined with the verdict form composed by the prosecutor was to present the jury with two distinct first-degree offenses, premeditated murder and felony murder. The jury was instructed to return only one verdict. (R392) In this context, the verdict returned ("guilty of murder in the first degree") must be viewed as a specific verdict that Cochran was guilty of premeditated murder.

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[2] 2d edition (1985), p.63.

[3] Id., p.63.

B.

There Was Insufficient Evidence To Convict Cochran Of Murder By Premeditated Design.

The medical examiner, Dr. Miller, testified that the victim was shot once at close range. (R198-199) The track of the bullet was from the left side of the abdomen to the right and slightly backward. (R199-200) Dr. Miller said that his observations were consistent with a factual scenario where the shooter was seated to the left of the victim in the front seat of an automobile. (R200)

Cochran's confession was entirely consistent with the medical evidence. The transcript of the confession describes the shooting as follows:

> ... down by 301 she pulled a knife out on me and tried to stab me and I had the gun and she fell over on me and I ... and I had the gun ... I didn't try to shoot her, it went off ... had a real easy trigger to it and it went off ...

(R1077)

> I was driving and had the gun in my hand. She jumped over me and I was trying to steer the car, right, (inaudible) and the gun went off (inaudible) and I was going to take her, she asked me to take her to the hospital, but I got scared ...

(R1082)

Cochran's statement that the victim had attacked him with a knife was partially corroborated by state witness Darrell Shorter's testimony that he saw a sharp instrument, perhaps a letter opener, on the dash of the BMW. (R187-188) The police search of the BMW, however, only turned up a fork. (R290)

Detective Cribb testified that he was satisfied with Cochran's statement because it fit the physical evidence obtained in his investigation. (R314)

This Court, in Larry v. State, 104 So.2d 352 (Fla.1958) summarized the nature of evidence required to prove premeditation. The Larry court wrote:

> Premeditation, like other factual circumstances, may be established by circumstantial evidence. Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it in so far as the life of his victim is concerned.

104 So.2d at 354.

Applying this standard, the facts at bar do not prove beyond a reasonable doubt that Cochran ever deliberated, even for an instant, before the shooting. His statement that the gun went off unintentionally when the victim lunged at him is consistent with the evidence of a single bullet wound crossing the victim's abdomen.

To prove a fact by circumstantial evidence, the circumstances must be inconsistent with any reasonable hypothesis of innocence. McArthur v. State, 351 So.2d 972 (Fla.1977). While the circumstantial evidence at bar cannot support a theory of

innocence as to the homicide of Carol Harris, it is not inconsistent with a reasonable exculpatory hypothesis as to the existence of premeditation. Cf. Hall v. State, 403 So.2d 1319 (Fla.1981).

The evidence at bar suggests that Carol Harris, already the victim of a robbery and kidnapping, became apprehensive when Cochran started driving away from the urban center. Thinking that a lunge at the driver might force the car off the road and perhaps attract attention, Carol Harris may well have jumped at Cochran with some type of weapon. Under these circumstances, the shooting itself was probably a reflexive action rather than intentional.

C.

Cochran's Conviction Must Be Reduced To Second-Degree Murder.

Unquestionably, there was sufficient evidence presented to sustain a conviction for first-degree felony murder had the jury returned such a verdict. However, there is no indication that the jury ever considered whether either of the charged underlying felonies (kidnapping and robbery) were proved. The Due Frocess Clause of the Fourteenth Amendment prohibits a criminal conviction without proof beyond a reasonable doubt of each element of a crime. Jackson v. Virginia, 443 U.S. 307,99 S.Ct. 2781,61 L.Ed.2d 560 (1979); In re Winship, 397 U.S. 358,90 S.Ct. 1068,25 L.Ed.2d 368 (1970).

Although Appellant has been unable to find any decisions which are directly on point, the case of People v. Jackson, 20 N.Y. 2d 440,231 N.E.2d 722,285 N.Y.S.2d 8 (1967), cert.den., 391 U.S. 928,88 S.Ct. 1815,20 L.Ed.2d 668 (1968) is instructive. Jackson was first tried on both theories of premeditated murder and felony

murder; the jury found him guilty on a premeditated murder verdict. In the landmark case of Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964) his conviction was reversed and a new trial ordered. At retrial, the jury found him guilty of first-degree felony murder. One of Jackson's issues on appeal was whether double jeopardy barred the felony murder conviction.

The New York Court of Appeals rejected Jackson's argument that the jury's silence on the felony murder charge at his first trial was equivalent to an acquittal. The court wrote:

> Since the jury was instructed to render only one verdict, it had no reason to consider the felony murder charge once it found the defendant guilty of premeditated murder.

285 N.Y.S. 2d at 19.

The same reasoning applies with full force to the facts at bar. Once the jury accepted the prosecutor's argument that Cochran was guilty of premeditated murder, it had no reason to consider the felony murder charge. Thus, the verdict is neither an acquittal nor a finding of guilt for first-degree murder on a felony-murder theory.

Under the reasoning of the Jackson court, the federal constitution would not prohibit the State from now retrying Cochran for first-degree murder on a felony-murder theory. However, the Florida legislature has directed in Section 924.34, Florida Statutes (1985):

> 924.34 When evidence sustains only conviction of lesser offense. -- When the appellate court determines that the evidence does not prove the offense for which the defendant was found guilty but does establish his guilt of a lesser statutory degree of the offense or a lesser offense necessarily included in the offense charged, the appellate court shall reverse the judgment and direct the trial court to enter judgment for the lesser degree of the offense or for the lesser included offense.

Where there is insufficient evidence of premeditation to support a first-degree murder conviction, the evidence may still support a conviction for second-degree murder. Hall v. State, 403 So.2d 1319 (Fla.1981). Accordingly, this case should be remanded to the trial court with directions to enter a judgment and sentence for second-degree murder.

ISSUE II.

THE TRIAL COURT ERRED BY DENYING COCHRAN'S MOTION TO VACATE THE DEATH PENALTY WITHOUT CONSIDERING THE EVIDENCE TO SUPPORT HIS CLAIM.

Prior to trial, defense counsel filed a motion entitled Motion to Vacate the Death Penalty. (R808-810) In a pretrial hearing held July 3, 1985, the court declined to consider the motion prior to a conviction. (R755-756) Then during the penalty phase proceedings, the court denied the motion summarily. (R611)

Of particular concern here is Part IV of the motion which alleges that Florida's capital sentencing statute is unconstitutional as applied because statistical studies show that the race of the victim is a statistically significant factor in death sentence imposition. The probability that a death sentence will be imposed is significantly greater when the victim of the homicide is white. At bar, the victim was a white female.

At this writing, the United States Supreme Court has yet to decide McCleskey v. Kemp, Case No. 84-6811 which directly presents the question of whether discrimination in capital sentencing based upon the race of the victim is intolerable under the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment. The decision in McCleskey will determine whether Appellant has a cognizable constitutional claim.

Appellant recognizes that this Court has already rejected a similar argument that the trial court should have granted an evidentiary hearing on the basis of preliminary studies in Thomas v.

State, 421 So.2d 160 (Fla.1982). Nonetheless, should the United States Supreme Court decide in McCleskey that race of the victim, as shown by statistical studies, is a constitutionally impermissible factor in capital sentencing, the further question of what evidence is sufficient to prove racial discrimination must be reached.

In Hitchcock v. Wainwright, Case No. 85-6756, the United States Supreme Court has agreed to hear whether a claim of systematic race-of-victim-based discrimination in Florida capital sentencing may be rejected summarily. Accordingly, any relief given Hitchcock on this claim should also be granted to Appellant.

ISSUE III.

THE TRIAL COURT ERRED BY CONSIDERING LETTERS FROM THE VICTIM'S NEXT-OF-KIN WHEN IMPOSING SENTENCE.

At the sentencing hearing, the judge noted that he had been provided with two letters, one from the victim's mother and the other from her brother. (R682) The judge specifically stated for the record that he had read both letters. (R682) When filing the "Sentencing Memorandum" in support of the death sentence, the Court attached the letters from the next-of-kin. (R978-984, see Appendix).

As justification for submission of these letters to the judge for consideration in sentencing, the State cited Section 921.143, Florida Statutes (1985) and contended that the legislature "obviously intended" this provision allowing victims or their next-of-kin to make a statement to the Court to apply "even in first degree murder cases." (R680) Defense counsel objected to consideration of the letters on several grounds. (R675-676) First, the character of the victim cannot be used as an aggravating circumstance because the legislature has declared the list of statutory aggravating circumstances to be exclusive. (R675-676) Secondly, defense counsel complained that no notice was given regarding the letters; the writers were not present for cross-examination; and consequently Appellant had no opportunity to rebut the letters. (R676) Finally, defense counsel contended that consideration of the letters would violate the Eighth and Fourteenth Amendments to the United States Constitution. (R676) Each of these claims shall be argued separately.

A. Violation of Statutory Law

Section *921.143,* Florida Statutes *(1985)* provides in part:

> *921.143* Appearance of victim or next of kin to make statement at sentencing hearing; submission of written statement.--
>
> (1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has been convicted of any felony or who has pleaded guilty or nolo contendere to any crime, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced, or the next of kin of the victim if the victim has died from causes related to the crime, to:
>
> (a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or
>
> (b) Submit a written statement under oath to the office of the state attorney, which statement shall be filed with the sentencing court.
>
> (2) The state attorney or any assistant state attorney shall advise all victims or, when appropriate, their next of kin that statements, whether oral or written, shall relate solely to the facts of the case and the extent of any harm, including social, psychological, or physical harm, financial losses, and loss of earnings directly or indirectly resulting from the crime for which the defendant is being sentenced.

The letters submitted by Cathron B. Harris and Brinson M. Harris do not meet the criteria for admissibility provided by this statute. Since neither of the two made a statement under oath before the sentencing Court under subsection (1)(a), their written statements would have to qualify under (1)(b). Nowhere in the record is there any evidence that these letters were submitted

under oath as subsection (1)(b) requires.

Additionally, subsection (2) of the statute was apparently ignored. The statutory language indicates that statements from next-of-kin "shall relate solely to the facts of the case and the extent of any harm." The letters here, by contrast, highlight the character of the victim (R981,983), comment upon the evidence introduced at trial (R981-983), attack the mitigating evidence introduced in regard to Cochran's background and character (R982-983), and comment upon the judicial system. (R982,984) Plainly, the statute does not authorize the sort of emotional appeals to the sentencing court presented here.

The Florida legislature has not directly stated whether Florida Statute 921.143 applies in capital sentencing proceedings.4/ However, the legislature has clearly indicated in Section 921.141(5), Florida Statutes (1985) that aggravating circumstances are limited to those provided by statute; no others may be relied upon to support a sentence of death. Purdy v. State, 343 So.2d 4 (Fla.), cert. den., 434 U.S. 847, 98 S.Ct. 153, 54 L.Ed.2d 114 (1977). Thus, statements of the next-of-kin are irrelevant in determining whether to impose a sentence of death and, by 'legislative implication, should be excluded in a capital sentencing proceeding.

4/ Compare Code of Laws of South Carolina 1976 §16-3-1550 (Lawyers coop. 1985) (Victim Impact Statement to be presented at sentencing "excluding any crime for which a sentence of death is sought.")

B. Right of Confrontation

In Engle v. State, 438 So.2d 803 (Fla.1983), this Court held that the Sixth Amendment right to confront adverse witnesses by cross-examination applies to the final sentencing process before the judge in a capital proceeding. The Court has also held that a defendant who disputes the accuracy of a presentence investigation has the right to secure confrontation and cross-examination in regard to the disputed matters. Eutsey v. State, 383 So.2d 219 (Fla. 1980).

The same considerations should also apply when letters from a victim's next-of-kin are provided to the sentencing court. At bar, defense counsel noted that Appellant was denied any opportunity to rebut the material alleged in the letters because the writers were unavailable for cross-examination.

Defense counsel further noted that the letter from the victim's mother had just been brought to her attention on the morning of the sentencing. (R675) The notice and opportunity to defend inherent in due process of law were totally denied here (R676); even the minimum requirement that the defense have access to the letters with sufficient time to prepare rebuttal. Cf. Barclay v. State, 362 So.2d 657 (Fla.1978). Moreover, the sentencing judge explicitly stated on the record that he had read both letters from the next-of-kin prior to the sentencing hearing. (R682)

In Gardner v. Florida, *430* U.S.349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the United States Supreme Court distinguished the capital sentencing procedure because of the different kind of

punishment imposed. The Gardner court held that Fourteenth Amendment due process of law prohibited a sentence of death from being imposed on the basis of information contained in a presentence investigation report which the defendant had no opportunity to deny or explain. See also, Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967).

Because the letters from the victim's next-of-kin played a role in the sentencing proceeding analogous to that of a presentence investigation, Cochran's sentence was unconstitutionally imposed.

C. Eighth Amendment Considerations

The essential teaching of United States Supreme Court decisions dealing with capital punishment is that death is a qualitatively different punishment from any other which requires a correspondingly greater degree of scrutiny applied to the sentencing determination. See e.g., Turner v. Murray, 476 U.S. ___, 106 S.Ct. ___, 90 L.Ed.2d 27 (1986). Death sentences imposed under circumstances indicating an unacceptable risk of arbitrary or capricious action have been struck. Id. In holding Florida's death penalty statute constitutional, the Court specifically relied on provision of procedures which required the sentencing judge to focus on the individual circumstances of each homicide and each defendant. Proffitt v. Florida, 428 U.S. 242 at 252, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Allowing the victim's next-of-kin to be heard in regard to whether a death sentence should be imposed injects a substantial risk of arbitrary or capricious action into the capital sentencing process. Where a victim's family members are both incensed by the

killing and articulate, they are likely to have a more persuasive impact on the sentencing judge than next-of-kin from an uneducated family. The killer of a victim without a family might well receive the most favorable sentencing treatment. An unacceptable evaluation of the comparative worth of victim's lives will influence the capital sentencing decision.

At bar, there is a substantial chance that the letters from the victim's mother and brother were the determinative factor in Judge Evans' decision to impose a death sentence. Judge Evans stated on the record that his daughter was acquainted with the victim's brother (presumably the letter writer Brinson M. Harris). (R712-713) The jury's life recommendation was not unreasonable; indeed it was thoroughly consistent with the evidence presented. Above all, the sentencing judge displayed the importance of the letters in the sentencing decision by attaching them to his own "Sentencing Memorandum." *(R978-984,* see Appendix)

Because the Eighth Amendment to the United States Constitution as applicable to the States through the Fourteenth Amendment forbids the sort of arbitrary and capricious imposition of the death penalty evidenced at bar by consideration of letters from the victim's next-of-kin, Cochran's sentence of death must be vacated.[5/]

5/ A similar issue is presented in Booth v. Maryland, Case No. *84-5080,* currently before the United States Supreme Court.

ISSUE IV.

THE TRIAL COURT ERRED BY FINDING THAT THE HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

In his Sentencing Memorandum (R978), the sentencing judge found as an aggravating circumstance:

> (h) The capital felony was especially heinnous [sic], atrocious, and cruel. The defendant exhibited a lack of remorse by taking the wounded victim to a remote area, probably still alive, rather than taking some action which could result in her getting medical attention for the injury, thus reflecting a cold and calculating conscienceless act.

This finding does not comport with prior decisions of this Court defining the parameters of the HAC aggravating factor.

To begin with, citing lack of remorse in aggravation is clearly improper under this Court's decision in Pope v. State, *441* So.2d 1073 (Fla.1983). The Pope court held:

> absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor.

441 So.2d at 1078.

Secondly, failure to get medical attention for the victim does not rise to the level of the especially heinous, atrocious or cruel. In Tedder v. State, 322 So.2d 908 (Fla.1975), the defendant allowed the victim to languish without medical assistance. While this Court found that conduct to be cruel by "any standard of decency," it was insufficient to sustain the sentencing judge's finding of the HAC aggravating factor.

Finally, when a victim is shot only once during the

course of a felony where a stnuggle over the weapon is likely, the heightened cruelty necessary for finding the HAC aggravating circumstance is lacking. Jackson v. State, Case No. *66,510* (Fla. November *26,* 1986)[11 F.L.W. 609]; Fleming v. State, *374* So.2d *954* (Fla.*1979).*

Because the sentencing judge found substantial factors in mitigation, it is likely that the erroneous finding of the HAC aggravating factor distorted the weighing process. The result of the weighing process might have been a life sentence. Accordingly, remand to the trial court for a reweighing absent the improper aggravating circumstance is mandated. Elledge v. State, *346* So.2d *998* (Fla.*1977).*

ISSUE V.

THE TRIAL JUDGE ERRED BY OVERRIDING THE JURY RECOMMENDATION OF LIFE IMPRISONMENT AND IMPOSING A SENTENCE OF DEATH.

By a vote of 8-4, the penalty phase jury recommended a sentence of life imprisonment. (R 666,886) In conjunction with imposition of a death sentence, the judge filed a written "Sentencing Memorandum" (R978-979, see Appendix), detailing the statutory aggravating and mitigating circumstances he found.

Of the four aggravating circumstances found by the sentencing judge, three were proved by the evidence.[6/] Cochran was convicted of another capital felony prior to sentencing. Section 921.141(5)(b), Florida Statutes (1985). The homicide occurred during the commission of a kidnapping. Section 921.141(5)(d), Florida Statutes (1985). Pecuniary gain was the final legitimate aggravating factor, Section 921.141 (5)(f), Florida Statutes (1985).

The sentencing judge weighed two statutory mitigating circumstances against the aggravating factors. The homicide was committed while Cochran was under the influence of emotional disturbance. Section 921.141(6)(b), Florida Statutes (1985). Cochran's age (he had just turned eighteen) was the other mitigating factor found by the court. Section 921.141(6)(g), Florida Statutes (1985). The judge did not address any of the nonstatutory mitigating factors presented, neither at the sentencing hearing nor in the "Sentencing Memorandum."

6/ See Issue IV, supra. for argument regarding the improper aggravator.

Neither did the court address the weight given to the jury's life recommendation in the "Sentencing Memorandum." At one point during the sentencing hearing, the prosecutor inquired:

> MR. ATKINSON: Your Honor, for the record, again, so it's clear for appellate court purposes, does the Court also find that in the Harris case based on the totality of the aggravating circumstances that, in fact, the jury's recommendation of life was not reasonable under the additional factors that the Court had available to it. That is, the additional conviction in the Arbelaez murder?
>
> THE COURT: That is precisely the basis that is substantially the basis from which the Court has made its decision to override the recommendation of the jury in that case.

(R690)

A.

The Trial Court Did Not Give Appropriate Weight To The Jury's Recommendation.

In Tedder v. State, 322 So.2d 908 (Fla.1975), this Court established the appropriate standard for review of death sentences imposed over a jury's life recommendation. The Tedder court wrote:

> In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

322 So.2d at 910.

At bar, the judge did not consider the Tedder standard or otherwise indicate that he had given any weight to the jury's life recommendation. Rather, he appears to have disregarded the jury recommendation because the evidence heard by the jury did not include Cochran's subsequent conviction for another capital felony.

In Richardson V. State, 437 So.2d 1091 (Fla.1983), the sentencing judge overrode the jury's life recommendation on the ground that the jury had not heard all of the evidence. This Court reversed, noting the defendant's right to a jury advisory opinion and refusing to "countenance the denigration of the jury's role." 437 So.2d at 1095. The jury's recommendation is entitled to great weight and "should not be overruled unless no reasonable basis exists for the opinion." 437 So.2d at 1095. Richardson's sentence was reduced to life despite four properly found aggravating circumstances and an unchallenged finding of no mitigating circumstances.

Compared with Richardson, the facts at bar show even more reason to vacate the death sentence. Although Cochran's three proper aggravating factors may be comparable to Richardson's four, Cochran had substantial evidence in mitigation. In addition to the two statutory mitigating circumstances found by the trial court, there was evidence of a third statutory mitigating circumstance[7/] and numerous nonstatutory factors which the jury could reasonably have found.

By contrast, there was a lack of significant mitigating evidence in two cases where this Court approved the trial court's override of a jury life recommendation where the jury did not hear all of the factors in aggravation. In White v. State, 403 So.2d

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7/ Section 921.141(6)(f), Florida Statutes (1985).

331 (Fla.1981), cert. den., 463 U.S. 1229, 103 S.Ct.3571, 77 L.Ed.2d 1412 (1983), there were five valid aggravating factors (including two not established before the jury) and no mitigating factors. This Court held the trial judge's override proper; he imposed death "consistently with Tedder." 403 So.2d at 340.

Again in Porter v. State, 429 So.2d 293 (Fla.), cert. den., 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983), aggravating evidence not considered by the jury was proved before the sentencing judge. There was no significant mitigating evidence and a lurid description of electrocution might have created an emotional basis for the jury's life recommendation. Specifically according deference to the jury recommendation, the Porter court found that the death sentences met the Tedder standard. 429 So.2d at 296.

To summarize, this Court has clearly mandated that a deat sentence cannot be upheld where a trial court overrides a jury's life recommendation, unless the jury's recommendation is unreasonable within the parameters of the Tedder standard. When the sentencing judge has access to evidence in aggravation not considered by the jury, the jury's recommendation still retains great weight. The additional aggravating evidence is considered insofar as it may affect the rationality of the life recommendation; a death sentence, however, which fails to meet the Tedder standard cannot be upheld.

B.

The Sentencing Judge Did Not Consider Non-statutory Mitigating Evidence Presented In Penalty Phase Which Could Have Influenced The Jury Recommendation.

The Eighth and Fourteenth Amendments to the United States Constitution require that a defendant be allowed to present to the sentencer all evidence which might mitigate against a sentence of death. 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). Although Cochran was not restricted from presenting evidence in mitigation, the record of the sentencing hearing (R671-698) and the judge's "Sentencing Memorandum" (R978-979, see Appendix) indicate that the judge did not consider any mitigating factors other than the statutory ones. The record does not reveal the reason; ie whether the judge believed he was limited to the statutory circumstances or whether he considered the nonstatutory mitigating evidence but gave it no weight. Regardless, the jury clearly could have given the nonstatutory mitigating evidence substantial weight in their penalty recommendation.[8/] To summarize the most significant nonstatutory mitigating evidence presented to the jury:

8/ It also should not be overlooked that Dr. Gonzalez testified that placed in an emergency situation, Cochran could be substantially impaired in his ability to conform his conduct to the law. (R451,464) Thus, the jury might have found the additional statutory mitigating circumstance of Section 921.141(6)(f), Florida Statutes (1985) applicable.

1. Emotional deprivation because Cochran was raised by his great-grandmother rather than one or both parents. (R454) Due to his great-grandmother's medical problems, Cochran's assistance in the household was critical. He accepted this responsibility and would also contribute financially when he was working. *(R553-556,578)*

2. Educationally disadvantaged in the school system because Cochran's intelligence was borderline. (R449,476,485) This handicap caused great stress and frustration in learning as well as a social stigma attached to being placed in special classes. *(R489-491,* 513-516,518-519,530-532)[9/]

3. Conflict between Cochran's poor, inner-city background and the suburban high school to which he was bused. The majority of his classmates wore designer clothes and had upscale expectations. *(R526-527,534)*

4. Concern for his baby's welfare. *(R558-573)*

5. Remorse shown while confessing the homicide to Detective Glenn. (R620-623)

A more intangible factor should also be considered in regard to the weight given the nonstatutory mitigating evidence by the jury. While capital defendants often present testimony of family members and psychiatrists in mitigation, it is unusual to have two classroom school teachers and a police detective testify. The jury may have been especially impressed with the character of the witnesses testifying on Cochran's behalf and, accordingly, may have given their testimony great weight in deciding the appropriate penalty.

9/ Cf., Neary v. State, *384* So.2d *886* (Fla.1980).

The case at bar is similar to Jacobs v. State, 396 So.2d 713 (Fla 1981) where the trial judge mistakenly thought that non-statutor mitigating circumstances could not be considered. In Jacobs, this Court reversed the override of the jury's life recommendation, citing the nonstatutory mitigating evidence before the jury. Again, in Welty v. State, *402* So.2d 1159 (Fla.1981), this Court held that despite four valid aggravating factors and no statutory mitigating factors, the jury's life recommendation was reasonable because it might have been influenced by nonstatutory mitigating evidence.

Similar considerations should govern the case at bar. The jury may well have given considerable weight to the evidence of nonstatutory mitigating factors in determining that the mitigating factors outweighed the aggravating factors. This nonstatutory mitigating evidence added to the already strong statutory mitigating evidence (the two factors found by the trial court and the evidence regarding a third presented before the jury). The jury override was improper because there was ample evidence in mitigation which could influence a reasonable jury to recommend a life sentence.

C.

A Sentence Of Death Is Not Proportional When Compared To Other Decisions Of This Court.

Consistent with this Court's proportionality review of capital sentencing, the facts at bar should be compared with other decisions where this Court has applied the Tedder standard to review

the propriety of a jury override. In one such decision, McCampbell v. State, *421* So.2d *1072* (Fla.1982), the defendant killed during the course of a robbery. The three applicable aggravating factors were comparable to those at bar. However, McCampbell had no statutory mitigating factors, only nonstatutory ones, while Cochran has both. Because the weight of the mitigating evidence at bar is greater than in McCampbell and the weight in aggravation comparable, the result of the Tedder analysis in McCampbell (reduction to life) is clearly warranted at bar.

In Amazon v. State, *487* So.2d 8 (Fla.1986), the defendant murdered two victims during the course of a burglary, kidnapping and sexual battery. The trial court found four aggravating circumstances and nothing in mitigation when overriding the jury's life recommendation. This Court reversed, noting that the jury could have found emotional disturbance and the defendant's age of nineteen in mitigation.

At bar, even the trial judge found these two statutory mitigating factors applicable.10/ As explained in subsection B, supra, a great deal more mitigating evidence was offered on Cochran's behalf. The jury life recommendation at bar was at least as reasonable as the one in Amazon. Proportionality analysis requires that Cochran's sentence also be reduced to life.

10/ Note that Cochran was one year younger at the time of the offense.

CONCLUSION

Based on the foregoing argument, reasoning and authorities, Guy Reginald Cochran, Appellant respectfully requests this Court to afford him the following relief:

Issue I - Reduction of his conviction to second degree murder and remand for a proper sentence.

Issue II-IV - Vacation of his sentence of death and remand for further proceedings.

Issue V - Reduction of his death sentence to life imprisonment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida, 33602, by mail on this 29th day of January, 1987.

Douglas S. Connor

DOUGLAS S. CONNOR