IN THE SUPREME COURT OF FLORIDA

TIMOTHY C. HUDSON, :

Appellant, :

vs. : Case No. 70,093

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

STEVEN L. BOLOTIN
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## PRELIMINARY STATEMENT

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

## STATEMENT OF THE CASE

Timothy Hudson was charged by indictment returned June 25, 1986 with first degree murder of Mollie Ewings, armed burglary, and theft of an automobile (R769-70). Two days later, an affidavit charging appellant with violating his community control was filed, alleging the same offenses (R756).

On January 20, 1987, appellant moved to suppress his statements to the police, and all evidence obtained as a consequence of those statements, on the ground that the statements were involuntarily made as a result of promises, threats, and inducements (R801-02). After a hearing on January 23, 1987, the motion to suppress was denied (R801,701).

The case proceeded to trial on January 26-28, 1987 before Circuit Judge John P. Griffin and a jury. At the close of the state's case, and at the close of all of the evidence, the defense moved for judgment of acquittal as to (1) the premeditation

element of first-degree murder, and (2) the burglary count (which also served as the predicate felony for the felony-murder instruction)(R379-80,429-30). The trial court denied the motions (R380,430).

At 4:20 p.m. on the 28th, two hours into its deliberations, the jury submitted a question: "If we find the defendant guilty of 1st Degree Murder, do we need to decide now whether it is 1st Degree Felony or 1st Degree Premeditated?" (R861,496-97). With the assent of counsel, the jury was brought back into the courtroom, and informed by the trial court that the answer to their question was "No" (R497-98). The jury resumed its deliberations at 4:22 p.m., and eight minutes later (see R 498,822) returned a verdict finding appellant guilty as charged on all counts (R862,499-500).

The penalty phase of the trial began at 4:50 p.m. the same afternoon (R505). The only additional evidence offered by the state was a stipulation, signed by counsel for both parties, that on August 30, 1982, appellant was convicted of sexual battery of Linda Benjamin (R821,513-14). The defense presented a number of witnesses, including Dr. Robert Berland, a forensic psychologist who had also testified in the first phase of the trial (R526, et.seq.) A defense objection to the prosecutor's argument to the jury was overruled (R602-03), and several special jury instructions requested by the defense were denied (R825-30, see R578-96). The jury, by a 9-3 vote, returned an advisory recommendation of death (R863,625).

The sentencing hearing took place on February 6, 1987. In urging the trial court to impose three consecutive life sentences (see R717) instead of the death penalty, defense counsel contended that a death sentence would be disproportionate in light of (1) the fact that the only two aggravating circumstances were that the crime was committed in the course of a burglary, and the prior conviction (R717); (2) the fact that the killing, if premeditated at all, was upon reflection of very short duration[1/] (R719-21); and (3) the unrebutted testimony of Dr. Berland that appellant is a twenty-two year old, who suffers from a genetic disorder which causes him to be a paranoid schizophrenic (R717-18).

The trial court, nevertheless, imposed a sentence of death (R869,883-84,726-30).[2/] As aggravating circumstances, he found that the homicide was committed in the course of an armed burglary, and that appellant was previously convicted of

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1/ In support of his argument on this point, defense counsel cited Wilson v. State, 493 So.2d 1019 (Fla. 1986)(R719-21). Counsel pointed out that Wilson, like appellant, had a prior violent felony conviction; that the homicide in Wilson, unlike the instant case, was found to be especially heinous, atrocious, or cruel; and that the trial judge in Wilson, unlike the instant case, had found no mitigating circumstances (R720). Yet the Supreme Court in Wilson found that the death penalty was not proportionately warranted, on the basis, inter alia, that the killing was most likely upon reflection of short duration (R720).

2/ As to the remaining counts, the trial court departed from the sentencing guidelines and sentenced appellant to life imprisonment on Count II (burglary) and five years imprisonment on Count III (theft)(R884A,867-71,730-31). The trial court revoked appellant's probation in case no. 86-7794, and imposed a fifteen year sentence (Count I) followed by a consecutive life sentence (Count II)(R731,763-65).

a felony involving the use or threat of violence (R883,726-27). With regard to mitigating circumstances, the trial court made the following findings:

> 1. "THE CRIME FOR WHICH THE DEFENDANT (TIMOTHY CURTIS HUDSON) IS TO BE SENTENCED WAS COMMITTED WHILE HE WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE". Fla.Stat.921.141(6)(b)
>
> The facts of the case, as produced by the evidence, indicate that the defendant, TIMOTHY CURTIS HUDSON, was apparently surprised by the victim during the defendant's burglarizing of the home owned by the victim and shared with the defendant's ex-girlfriend. Although the Court allowed the jury to consider this mitigating circumstance in arriving at its decision, the evidence does not support the fact that any emotional or mental disturbance that the defendant may have been suffering from at the time of the commission of the crime of Murder, was in any way of an extreme nature. The facts show that he entered the home in a planned manner and after the killing, he attempted to dispose of the body and soiled bed clothes in a planned and devious manner.
>
> The Court gives this mitigating circumstance little or no weight.
>
> 2. "THE CAPACITY OF THE DEFENDANT ... TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED". Fla.Stat. 921.141(6)(f).
>
> Dr. Robert Berland, admitted by the Court as an expert forensic psychologist, testified that although the defendant had the capacity to appeciate the criminality of his conduct at the time of the commission of the killing, that he could not conform his conduct to the requirements of law, or that that conformance was substantially impaired. The extensive testing done by

> Dr. Berland on the defendant, together with the circumstances of the surprise of the defendant during the burglary when confronted by the victim, convinces the Court that at the time of the killing and for at least a short period thereafter, the defendant was unable, to a certain extent, to conform his conduct to the requirements of law. This in no way is to be construed to mean that the defendant, in the Court's opinion, did not know exactly what he was doing, but that in his mental state of panic, he temporarily took what he conceived to be an immediate solution to a very bad problem he was facing.
>
> 3. "THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME". Fla.Stat. 921.141 (6)(g)
>
> At the time of the commission of the felony of First Degree Murder, the defendant, TIMOTHY CURTIS HUDSON, was twenty-two (22) years of age.
>
> The Court gives slight weight to the matter of the defendant's age.
>
> 4. "ANY OTHER ASPECT OF THE DEFENDANT'S CHARACTER OR RECORD, AND ANY OTHER CIRCUMSTANCE OF THE OFFENSE".
>
> The Court finds that there are no other aspects of the defendant's character or record, and no other circumstances of the offense which could be used in mitigation of the Sentence to be pronounced by the Court.

(R883-84)

Notice of appeal was timely filed on February 17, 1987 (R873).

## STATEMENT OF THE FACTS

### A. Motion to Suppress

Detective James Noblitt of the Tampa Police Department became involved in the investigation when Mollie Ewings was reported missing by her roommate on June 18, 1986 (R646-47). Ms. Ewings' vehicle, a Mitsubishi, was also reported missing (R648). The roommate, Becky Collins, had been "having problems" with her boyfriend, Timothy Hudson (appellant) (R648). Det. Noblitt interviewed appellant at the Tampa Police Department in regard to the missing person investigation (R649-53). After being advised of his Miranda rights by Detectives Noblitt and Dirken, appellant initialed and signed a waiver form (R649-51, 908). He did not invoke his right to remain silent or ask for an attorney (R651). According to Det. Noblitt, appellant appeared sober and alert, and indicated that he had a twelfth grade education (R649,651).

Appellant told Det. Noblitt that on the evening of the 17th he had been with a friend named Gregg, who dropped him off at the Rembrandt Apartments (R652). Appellant visited his cousins Gerald and Anthony there, and later in the afternoon walked over in front of the residence where his girlfriend Becky Collins lived (R652). He did not go up to the house or knock on the door (R652). That night, he rode back home with Gregg, and still later that night he went out to Harney Rd. and Hillsborough, where he was flagging down trucks, in order to get a job unloading them (R652). He came

back to his mother's house around noon (R652-53). Later that afternoon, two detectives arrived and asked him to come down to the police department to be interviewed (R653). Appellant denied knowing anything of the whereabouts of Mollie Ewings (R653).

Later on the day of the first interview, appellant was arrested for violating his community control, by his admission of being out at night (R653). The next afternoon, Detectives Noblitt and Dirken interviewed appellant again (R653-54). He was readvised of his Miranda rights, after which he executed another waiver form (R654-56,912). Appellant still seemed to Noblitt to be alert and perceptive (R656). He did not invoke his right to remain silent or ask for an attorney (R655-56). Det. Noblitt began the interview by telling appellant that he had found a conflict in his story, in that appellant's mother and sister had told the detective that appellant had ridden the bus to Rembrandt Apartments, as opposed to riding with a friend named Gregg (R656).

Appellant acknowledged that his mother had given him some money to take the bus, but instead he met a black male by the name of Peabody who owned a large brown car (R656). Appellant said that he and Peabody spent the afternoon buying rock cocaine and getting high at various locations in the Ponce de Leon projects (R656). When they ran out of money, appellant told Peabody about a residence where they could break in and steal some money to buy more cocaine (R657). Appellant stood

at a nearby street corner and directed Peabody to the residence shared by his girlfriend Becky Collins and Mollie Ewings (R657). He told Peabody they always left the back door open because they had two dogs, and that there would be some money to steal in the bedroom on the left side of the hallway (R657).

Peabody walked toward the residence, while appellant waited on the corner (R657). Next thing ke knew, Peabody came up driving in Mollie's car with Mollie dead in the front seat beside him (R657). Appellant jumped into the car next to the body, getting blood on his red shorts (R657). Peabody drove by the Robinson High School football stadium, in the area where Peabody's own car was parked (R657). Appellant got out of Mollie Ewings' car, got into Peabody's car, and drove away, leaving Peabody there with the body (R658).

Appellant told Det. Noblitt that he had not seen Peabody since then (R658). When Noblitt asked for a description of Peabody, appellant said Noblitt would never be able to find him (R658). Noblitt told appellant he did not believe his story, and left the interview room (R658). Detectives Dirken and Childers continued talking to appellant while Noblitt was out of the room (R658).

Ten to twenty minutes later, Det. Noblitt was advised by the other detectives that appellant was going to take them to where he believed Peabody had left Mollie Ewings' body (R658). They drove to that location, a small lake north of Robinson High (R659). An hour-long search of that vicinity was already taking place, with no results (R659). At that point, Sgt. Price

(Noblitt's supervisor) said to let appellant get out of the van, as he wanted to talk with him (R660,669). At Sgt. Price's direction, he [Price] and appellant walked over to a picnic table bench, out of earshot of all the other officers, while Det. Noblitt remained by the van, 100 feet away (R660,669). Five to ten minutes later, they returned to where the other officers were, and Sgt. Price said "Tim is going to show us where the body and car are" (R660).

Appellant got back in the van with Sgt. Price and Det. Childers, and they drove to a dirt road off Harney Road near 301 (R660). Detectives Noblitt and Dirken followed in Sgt. Price's car (R660). There, they found a red Mitsubishi with a MacDill Air Force Base permit and the correct tag number for Mollie Ewings' vehicle (R660). Other officers arrived to process the vehicle, at which time Price, Childers and appellant got back in the van (R661). Price told Noblitt to follow them; appellant was going to show them where the body was (R661).

They next drove to an orange grove off Andrews Rd. (R661). Several feet into the grove, they came upon a green army blanket (R662). Appellant said that Peabody had put the body there, and somebody had taken the body (R662). Price and Childers were standing there, not believing that someone had stolen the body (R662). Noblitt and Dirken walked back to the cars, "waiting to see what we would do next" (R662).

A minute or two later, Sgt. Price came out and said "Follow us. He is going to show us where the body is" (R662).

They then drove southbound and eastbound for a number of miles, until they came to a large tomato field near Wimauma (R662). Price, Childers, and appellant exited the van and walked toward a high growth of underbrush (R662-63). Price took several steps into the growth, turned around, and told the others that he had found Mollie Ewings' body (R663). Appellant was crying, and he appeared to be somewhat nauseous or sick (R663,667). He was told to go back and get in the van (R663).

Sgt. Price told Noblitt and Childers that appellant was going to give a statement, and that they should take him back to the police department (R663). They did not re-Mirandize appellant, but they reminded him he still had the same rights he had before (R664). Appellant said "I don't want to say this but once, so get it right the first time" (R664). However, he did not want a tape recorder (R666-67). According to Det. Noblitt, appellant was more composed now than he had been at the location where the body was found (R667). He was no longer crying, though he hung his head a lot (R667).

Appellant told the detectives that he had, in fact, ridden a bus to the Rembrandt Apartments on the afternoon of June 17 (R664). He was with his cousins Gerald and Anthony (R664). While there, he obtained a kitchen knife and put it in a paper bag (R664). Around midnight, he went over to 4407 Lackland, where his girlfriend Becky and her roommate lived (R664-65). He went in the back door, as he knew she always left it open for the dogs to go in and out (R665). He walked down the hallway and into Mollie's bedroom (R665). When she

saw him, she began screaming at him to get out of there (R665). He grabbed her, and started to stab her to quiet her so she wouldn't scream any more (R665). He didn't remember how many times he stabbed her, but he knew it was more than once (R665).

Appellant told the detectives that he then picked the body up, carried it out the back door, and put it in the trunk of the Mitsubishi (R665). He drove to the orange grove near Andrews Rd. (where the blanket was found) and took the body out in the blanket (R665). He either heard a car or saw headlights, which frightened him, so he left the blanket and put the body back in the trunk (R665). He then drove to the tomato field in Wimauma, where he laid the body in the drainage ditch where it was found (R665). He drove back to his house, changed clothes, and went to the Osborne Arms Apartments, where he bought some cocaine (R665). The following morning, he drove out to Harney Rd., left the car there, and walked back home (R666).

Sgt. Robert Price testified that he was already at Robinson High School when appellant was brought there (R673). Price made the decision to remove appellant from the van (R673). A towel was wrapped around appellant's hands to conceal his handcuffs (R673-74). Price walked with appellant down to a small picnic area about fifty yards from the van[3/] (R674).

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3/ Sgt. Price testified that he felt it was important to take appellant out of the presence of the other detectives, because his experience in law enforcement has taught him that "if you are going to confront a man on an emotional matter, don't do it in front of other men", because most times you won't get an effective response (R676). " 'For unknown reasons, since as far back as I can remember, men are not supposed to be emotional nor cry"(R676).

Sgt. Price introduced himself and explained his role in the investigation (R674). As Price was aware of appellant's story regarding Mr. Peabody, he asked appellant if he was aware of Florida's felony-murder rule, and proceeded to explain it to him (R674,675-76). Sgt. Price testified:

> I then appealed to Mr. Hudson's emotions in regard to the fact that I asked him if he had ever been to a funeral. And, obviously, he responded "Yes." I asked him if he had ever been to a funeral without a body. He said he had not.
>
> I then conveyed that most of us don't go to funerals without a body. And that for the family to put this situation to rest, due to the fact he had already advised us that he had seen the body, that the young lady was, in fact, dead, I was aware of that fact, I said, "The family has to know that." And the only way that he will ever know that is to observe and see the body."

(R674-75)

At that time, appellant said he understood that, but he still didn't know (R675). Sgt. Price testified, "We continued to talk about the necessity of a body for a burial. He began, he became emotional somewhat, crying slightly" (R675). According to Price, appellant was, however, alert and perceptive throughout the conversation (R675). Price further testified that he did not promise appellant anything (R675).

Appellant told Sgt. Price that he knew where the car was (R676-77). After appellant directed them to the car, he agreed to take the detectives to the body (R677). They ultimately

arrived at the orange grove where the green blanket was found (R677). Appellant made the remark "Oh my God. Someone has stolen the body" (R677-78) Sgt. Price testified:

> I could see in Mr. Hudson's face and his reaction that he was apparently reconsidering his cooperation.
>
> At that time I told Detective Childers to take a walk, which he did. He walked probably twenty to twenty-five yards, standing between the trees, where he could observe both Mr. Hudson and I.
>
> I again said, "Look, back at the school you advised me this was your chance to do something right. This was your chance to make the right decision. Help us find the body so we could have a burial. Now you are backing out of it."
>
> He began to cry again. He made statements that really didn't go along with anything. He just, you know he would say, "Oh, my God." He would turn around, he would clinch his hands a little bit. Finally he said, "Come on. Let's go. I will take you to the body."

(R678)

With appellant giving directions, they headed in the direction of Wimauma (R678). On the way, appellant was getting very emotional, and "[i]t was apparent we were getting close to upsetting him greatly" (R681,683). He asked Sgt. Price, "You promise you won't make me stay there?" (R681). Price replied, "No problem. As soon as we have located the body, I will get you out of there" (R681). Price said "Just take me to where she is at" (R683-84). In the van, appellant had his head buried in a curtain, and he was crying (R682). Price kept telling him that everything was going to be all right (R684).

Sgt. Price acknowledged that he periodically assured appellant that everything would be all right in order to make sure that appellant was going to give him directions to the body (R684).

When they arrived at the tomato field, appellant was taken out of the van (R682). He buried his face in the towel which had been provided to cover his handcuffs "and cried quite hard" (R682). They walked down a dirt road, where appellant pointed to some palmetto bushes and said she was in that area (R679). Sgt. Price walked about ten to fifteen feet into the palmettos and located the body (R678-79). Appellant was visibly upset, and requested that the officers move the van farther down the road, away from the body (R679). They did so (R679). Appellant reminded Sgt. Price, "You told me I could get out of here. I want to get out of here" (R681). Price testified "[h]e did not like the area or being in the area" (R681).

While they were back in the van, after the discovery of the body (see R684), Sgt. Price was saying things to appellant such as "I am proud of you. Takes a hell of a man to come this far, to do what you are doing. I appreciate it" (R684-85).

> I said, 'Why don't we just go ahead and get all the truth? You stabbed her, didn't you?' He would cry and then he shook his head in an affirmative motion, which can't be taped, photographed, or anything. I said, 'Timothy, did you or didn't you?' He said, 'Yes, I stabbed her. Please get me out of here.' Again, like I said, it was an emotional situation for him. He just wanted to leave the area. That is when I took him out of the van and we walked, getting much further away from the area.

> During that walk I asked him, 'You are Peabody; right?' He shook his head, Yes".

(R685, see R.679)

During this conversation, appellant made the comment "You never believed me from the beginning did you?" (R680). Sgt. Price replied "Well, I think, Timmy, it was obvious you were trying to tell us and transfered the blame to someone else. But, no, in fact, we never did believe there was a Peabody." (R680).

Appellant was then transported by Detectives Noblitt and Childers back to the Tampa Police Department (R681-82).

Appellant testified in the hearing on the motion to suppress that on the two occasions (at the picnic table at Robinson High School and at the location where the green blanket was found) when he was alone with Sgt. Price and separated from the other detectives, Price had told him that something was going to happen to him if he didn't show them where the body was (R686-88,690-93,695-96).

B. Trial

Becky Collins resided at 4407 West Lackland, in a house owned by her roommate Mollie Ewings (R239-40). Both women worked at the NCO Club on MacDill Air Force Base; Ms. Collins as a food service worker and Ms. Ewings as a bartender (R239-40). Ms. Ewings owned a 1984 Mitsubishi (R241-44).

Becky Collins had dated Timothy Hudson (appellant) for about a year, and at one time they were engaged to be

married (R244-45). In April, 1986, Ms. Collins broke off the engagement (R245-46). While they were engaged, appellant would come over to the house three of four times a week, though he didn't stay there long (R246-47). Occasionally, Mollie Ewings would be at home; appellant had been introduced to her, though he did not socialize with her (R246-47). When appellant would come to the house, he always entered through the front door (R246-47). Ms. Collins testified that they always left the back door open for the dogs to go in and out (R246-47). She testified that, after she broke the engagement, appellant did not have her permission to enter the residence (R247).

After their breakup, Ms. Collins did not want to see appellant any more, and she told him that (R248). Sometimes, however, he would call her on the phone, and "[w]e would have a conversation about getting back together. Also sometimes he would call me and he would be threatening me" (R248). According to Ms. Collins, appellant would tell her she would have to leave town, or he would find her (R248).

On the nights of June 16 and June 17, Ms. Collins did not sleep at her residence on Lackland because she was frightened (R249-52). On the 16th she had had a conversation with Jasmine Roberson, a co-worker (R250). On the 17th, appellant called her at work, and when she hung up, he called right back (R250). Ms. Collins asked Susan O'Neil to take the call (R251). After hanging up, Ms. O'Neil said she had a message to give her (R251). As a result of these conversations, Ms. Collins decided to sleep at a friend's house (R249-52).

The next morning, June 18, at 6:30 a.m., when Ms. Collins arrived at the Lackland residence, Mollie Ewings was not home and her car was not in the driveway (R252). This was unusual, because Ms. Ewings usually slept in late (R252). Her bedroom door was open, the fan was still on, and there appeared to be a blood stain on the bed up near the pillow, and another on the floor by the bed (R253-55,257). Ms. Ewings' glasses and cigarette case were still lying on the dresser, and her purse was on a bedroom table (R255-57). Ms. Collins called the police (R258-59).

On cross-examination, Ms. Collins testified that appellant was taking drugs at the time (R260). When he was on drugs, appellant was very quick to anger, but he did not seem to be "out of it" (R260-61).

Tammy Goff lives with her parents and siblings next door to the residence of Mollie Ewings and Becky Collins (R262). On the night of June 17, 1986, she was with her fiance Bill McCale on the carport of her house (R263-64). Between 12:30 and 1:00 a.m., her father came out and told her it was time to come inside (R264). As she was going in the house, between 1:00 and 1:15, she heard a scream; either "Stop" or "Help" (R264-65). She recognized the voice as Mollie Ewings' (R264-65). Ms. Goff thought she might be yelling at her dogs or her boyfriend, so she did not think of calling the police (R265). Bill McCale was with her at the time, but he did not hear anything (R266-67). About fifteen or twenty minutes later,

Ms. Goff heard Mollie Ewings' car screech out of the driveway (R265).

Officer Carlos Lastro of the Tampa Police Department was called to the residence at 4407 West Lackland, where he interviewed Becky Collins, and secured the scene (R268-70). He observed apparent blood stains on the pillow and on the rug by the bed (R269).

Jasmine Roberson lives in the apartment complex on Rembrandt Drive, and works in food service at the NCO Club (R271-73). She knew Mollie Ewings and Becky Collins from work, and had met appellant through Becky (R272-73). On the afternoon of June 16, 1986, she saw appellant in front of her apartment (R274). He said he wanted her to deliver a message to Becky (R274). According to Ms. Roberson, "I told him I didn't want no mess. I didn't want to deliver no bad messages" (R274). Appellant told her to tell Becky that when she went to Mrs. Ewings' house there would be a big surprise waiting on her (R274). Ms. Roberson related this message to Becky Collins (R274).

The next day, June 17, Ms. Roberson saw appellant again at her apartment (R274-75). He asked her if she had delivered the message for him, and she said that she had (R275). Around midnight she saw appellant on the sidewalk outside her apartment building (R275). He asked her where she was going, and she said he was going around the corner to visit a friend (R275).

Susan Caudill (formerly O'Neil) was the storeroom manager at the NCO Club (R277-78). She knew Mollie Ewings and Becky Collins from work, and knew appellant from his going with Becky (R278-79). On June 17, Becky had been talking with appellant on the phone; they argued and Becky hung up on him (R280). When the phone rang again, Ms. O'Neil volunteered to answer it (R280). She said, "This is Susan. Can I help you?" (R280). He said, "Yes, this is Becky's ex. Tell her I have something for her and she is going to get it tonight" (R280). Ms. O'Neil hung up, and told Becky what he had said (R280-81).

Dr. Charles Diggs, the deputy medical examiner, performed an autopsy on the body of Mollie Ewings, and determined that the cause of death was four stab wounds in the chest and shoulder area (R287,290-96,299-300). He also found what he described as a "defense-type wound" at the base of the fifth finger of the left hand (R296-99).

Detective J.S. Noblitt[4/] testified with regard to his responding to the scene at 4407 West Lackland; the interrogation of appellant; the "Peabody" story; the eventual discovery of the Mitsubishi automobile, the green blanket, and then the body of the victim; and appellant's subsequent confession at the police

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4/ Defense counsel renewed his motion to suppress appellant's statements and all evidence obtained as a result thereof (R284-85,314-15). The defense also moved to exclude an 8" by 10" color photograph (blown up to that size by the prosecution) of the body in the underbrush, on the ground that its prejudicial effect exceeded any probative value it might have (R341-44, see R920,803-04, 614-45).

station (R315-52). Det. Noblitt's trial testimony was substantially consistent with his testimony given at the suppression hearing [set forth at p. 6-11 of this brief].

At the police station, after having directed the detectives to the body, appellant told Det. Noblitt that there was no Peabody; he was Peabody (R346). Appellant stated that he had met his cousins, Gerald and Anthony Bembo, at the Rembrandt Apartments, and while there he had taken a kitchen style knife and put it in a paper bag (R347). Det. Noblitt continued:

> He said that approximately midnight that night he went over to the address of 4407 Lackland, for the purpose of confronting his girlfriend, Becky Collins, as he wanted to get back with her. He advised when he arrived there the back door was open, as he knew it would be. He entered the house with the knife in his hand. He walked down the hallway, the bedroom on the left being that of Mollie Ewings.
>
> He saw Mollie Ewings and she saw him. She screamed at him to get out of there, began screaming. He said he then stabbed her to stop her from screaming. He did not know how many times he stabbed her. He advised he then picked up the body of Mollie Ewings, carried it out the back door, through the fenced gate and placed her in the vehicle. He said he drove to the area where the green army blanket was found, was going to leave the body there, but that he heard some noises, became frightened, and picked up the body without the blanket, placed it back in the vehicle, then he drove to the area off County Road 579 by the tomato field, where the placed the body.
>
> He said he then drove the victim's vehicle back up to the Osborne Arms Apartment at 34th and Osborne, where

> he then walked home at approximately 3:30 in the morning. He went in, he changed clothes, he went back to the Osborne Arms Apartments, he then drove the victim's vehicle out to the area of 301 and Sligh Avenue, where he left the vehicle and then walked home, arriving about noon.

(R347-48)

Herbert Bush, a crime scene technician for the Tampa police, processed the vehicle which belonged to Mollie Ewings (R353-56). A vacuum cleaner was found in the trunk (R356-58). Latent fingerprints were lifted from the extension tube of the vacuum cleaner (R358-60).

Fingerprint examiner Michael Bonanno testified that the fingerprint on the vacuum cleaner was made by appellant; specifically, by his right middle finger (R367-68, see R361-67).

Detective Rick Childers testified regarding the sequence of events leading to the discovery of the vehicle, the green blanket, and the body; and appellant's subsequent confession at the Tampa Police Department (R369-75). Det. Childers' recollection of the confession was substantially similar to that recounted by Det. Noblitt[5/], except that, according to Childers, appellant said the knife was in the paper bag when he entered the residence (R375), while according to Noblitt, appellant said the knife was in his hand (R347-48).

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5/ Appellant gave only the one oral statement at the police department, which was heard by both Det. Childers and Det. Noblitt (R346,374).

The only witness called by the defense was Dr. Robert Berland, a forensic psychologist (R388-91). Dr. Berland testified that during the first several years of his practice, he had a particular interest in malingering, and was working "to develop procedures for identifying people who were faking mental illness to avoid responsibility for their charges" (R390).

In conducting his diagnostic evaluation of appellant, Dr. Berland met with him on three occasions in January, 1987 (R392). The evaluation included both an interview and psychological testing (R393). According to Dr. Berland, it is fairly easy in an interview for the subject to manipulate the outcome; to appear either less mentally ill - or more mentally ill - than he actually is (R394). It is far more difficult to "fake" mental illness, or to conceal it when it is present, in the testing (R394-95, see R426-28). Dr. Berland gave appellant four major psychological tests, in order to assess whether there was mental illness present, to determine his level of intellectual functioning, and to see if there was any evidence of brain damage (R395).

One of the tests administered was the MMPI (Minnesota Multiphasic Personality Inventory), which Dr. Berland stated has been found to be highly reliable (R396). "[It] ... gives you an objective or numerical measure of what their test-taking attitude is, whether they are trying to be honest with you, whether they are trying to fake, good or bad. And to what degree" (R396, see R426-28).

Appellant's MMPI "came out with a psychotic profile" (R396). According to Dr. Berland, the results indicated that appellant "was making some efforts to hide his disturbance, but it was prominent enough that it showed up very significantly anyway" (R396-97). The main feature of appellant's disturbance was psychotic or paranoid thinking (R397). In addition, "while you are not measuring brain damage with [the] MMPI, the scale was fairly typical of someone who has some sort of brain damage" (R397).

The Rorschach test is another examination, which Dr. Berland uses as a secondary measure; "... when there is psychotic thinking present, it will usually pick it up in a way that people have been unable to fake in my experience" (R397-98). Appellant's responses were typical of paranoids, and indicated psychotic thinking (R398). Dr. Berland testified that the Rorschach, "by a very different means than the MMPI, confirmed in my opinion, the presence of a psychotic disturbance" (R398).

The summary of Dr. Berland's test findings[6/] was that appellant is psychotic, that he is nearly average in intelligence, and that there was some evidence of brain tissue impairment (R403, see R398-403). The significant difference between appellant's

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6/ Dr. Berland also administered the Wechsler Adult Intelligence Scale, and the Bender-Gestalt with Kinder Interference Procedure (R400). The Wechsler test measures IQ, and is "also a very good and sensitive measure for whether there is brain damage, and it even can give you an idea of where it's located" (R400). The Bender-Gestalt involves drawing certain figures, and looking for certain kind of errors indicative of brain damage (R400).

verbal IQ and performance IQ on the Wechsler scale (his verbal score was 17 points higher) was indicative of brain damage on the left side, since, according to Dr. Berland, appellant's psychotic thinking would reduce his left brain score "somewhat but not to the extent that this one was" (R400-402). The Bender test did not reveal any brain damage, but this did not change Dr. Berland's opinion that there was brain tissue impairment:

> But obviously one test or another may or may not tap the area where the damage is. And, so, it's not uncommon to have one test miss where another one catches it, which is why I give more than one test, so they compliment one another, to try to find damage, if it's there. I think that is what happened in this case.

(R403)

Dr. Berland testified that his interview with appellant confirmed the presence of a psychotic disturbance, and further convinced him that appellant was not faking his symptoms of mental illness (R407, see R403-07,425-28). The disorder apparently originated around the age of thirteen, getting noticeably worse at around age nineteen (R407). Dr. Berland's diagnosis of appellant's mental condition had two major components: he is a paranoid schizophrenic[7/] (and has been for many years), and he has an organic psychosis (R407-08). In addition to being psychotic, appellant has an antisocial-type character disorder (R408).

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7/ Dr. Berland described appellant as a "well-organized ambulatory paranoid schizophrenic" (R408); meaning that he has been a member of the "walking around psychotic population" - people who are seriously mentally ill but capable of maintaining a fairly normal appearance (R399).

Asked what effect appellant's brain damage would have on his behavior, Dr. Berland answered that it would make him less able to control his impulses, or "to exercise the restraints that other people who aren't similarly damaged could exercise" (R409). Such individuals would have a greater likelihood of acting on their disturbed behavior, "not just because they can't control their impulses but because there is an internal propulsion to do something" (R409).

It was Dr. Berland's opinion that appellant did not meet the legal standard of insanity at the time of the commission of the offense (R409-10). While he did meet the first criterion of having a mental illness which affected his ability to reason, he did not meet the other required criteria, "in that he appeared to know what he was doing at the time of the offense, he appeared to know the immediate consequences of what he was doing. And he appeared to know the wrongfulness of it" (R410).

However, Dr. Berland further testified that, while not legally insane, appellant was psychotic at the time of the offense (R411), and had an impaired capacity to make rational decisions and to control his own behavior (R410-11,428-29). From his testing of appellant, and from his experience, Dr. Berland believed that appellant "was paranoid all the time in his daily life" (R412). But, Berland continued, if appellant "got into a situation where he became frightened, he is going to be much more likely to behave irrationally and impulsively, and given the nature of his testing, aggressively" (R412).

C. Penalty Phase

The state introduced no evidence in the second phase, except for the stipulation that on August 30, 1982 appellant was convicted of the offense of sexual battery (R513).

Dr. Berland was recalled by the defense.[8/] He testified that, in his opinion, appellant suffers from both a genetically-based disorder, i.e. paranoid schizophrenia, and also from organic brain tissue damage which contributes to his psychotic thinking and inability to control his impulses (R529-30). Paranoid schizophrenia, being genetic in origin, "operates pretty much on a preprogrammed time table" (R530):

> People will become psychotic, basically, regardless of what their circumstances are. If they are under some stress in their life or living in very bad conditions, it might propel them into an active psychotic disturbance a little earlier. But probably not much more than six months difference. They are going to become psychotic if they have this disorder.

(R530, see R530-32)

Appellant also suffers from organic brain damage (R532). Dr. Berland testified concerning the effect of the brain tissue impairment in connection with the paranoid schizophrenia:

> When you combine that with a psychotic disturbance, in this case, paranoid schizophrenia, what you end up with is someone who has disturbed

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8/ To a substantial extent, Dr. Berland's penalty-phase testimony recapitualted his guilt-phase testimony [see p. 22-25 of this brief].

> impulses, disturbed ideas about what to do and how to react to things coming from his psychosis, his schizophrenic disorder. Then you have a reduced ability to control those impulses and a greater likelihood he is going to act on them, in part, because of the brain damage.
>
> What it does, really, is simply make it more likely that he is going to act on these impulses, be they disturbed or aggressive.

(R532-33)

After a more detailed explanation of the MMPI (R533-542), Dr. Berland stated that the results portrayed appellant as "somebody who is trying to keep a lid on his psychosis but [who is] a very disturbed individual" (R540). Dr. Berland testified that while appellant has both a psychotic disturbance and an antisocial personality disorder, it is the psychotic disturbance which is pre-eminent and which is the most controlling (R544). According to Dr. Berland, appellant's mental condition is not curable, but it is treatable with proper medication (R550-51). Asked whether there was a strong likelihood that this crime would not have occurred had appellant's disorder been diagnosed and treated at an earlier age, Dr. Berland replied that, while response to medication varies with the individual, the greatest number of people respond favorably to some degree, "and in my opinion, a reduction in the severity of his psychosis would have probably made it a lot less likely that he would have committed an act like this particularly under these circumstances (R550).

Appellant's reaction to Becky Collins' breaking of their engagement was, in Dr. Berland's opinion, stereotypical of paranoid individuals (R544-46). The "irrational or unrealistic or delusional jealousy is a part of the paranoid syndrome" (R546).

Asked whether, in his opinion, appellant was under the influence of extreme mental or emotional disturbance at the time the act was committed, Dr. Berland answered, "Taking that to mean a serious psychotic disturbance, yes, it appears that he was" (R549). Dr. Berland further expressed the opinion that, while appellant was able to appreciate the criminality of his conduct, he did not have the capacity to conform his conduct to the requirements of law (R549-50).

Appellant's mother and father, Maggie Hudson and Daniel Hudson, each testified that they have had a close relationship with appellant, and he has been a good son (R516-20). The parents were divorced when appellant was nine or ten years old (R518). Appellant lived with his mother, and would visit his father nearly every day after school (R516,518-19). He was always wanting to help his father with his work around the house, such as painting or repairing, and he always tried his best (R519-20). Mr. Hudson stated "Of course, in any kid you have got problems. But he would always try to do what I asked him to do" (R520).

Littleton Long was appellant's teacher in high school equivalency classes at Hillsborough Correctional Institution (R521-23). Appellant's reading ability was at a 10th or 11th grade level, but Long found him to be a very eager learner, with a positive and cooperative attitude (R522). After appellant's

release, he stayed in touch with Long, as their relationship had evolved from one of teacher-student to almost father-son (R522-25). Appellant had promised Long that he would go back and get the few remaining credits he needed for a GED (R523). In their conversations, appellant told Long that he was abstaining from drugs, but in a later conversation he related that he had somehow gotten himself involved back with drugs, but that he wasn't going to do that any more (R525).

Mitchell Walker, general manager for Bennigan's Restaurant in Tampa, where appellant worked as a cook for six months in 1985, testified that appellant was a hard worker who, at one point, was named "employee of the month" (R560-61). Walker stated that appellant's "pride and quality of work was outstanding" (R561).

Charles Bedford has been active working with young people in youth baseball leagues; he was the first black manager in the South Palomino League, he became president of the league, and he has been honored by the mayor and city council of Tampa for his work with youngsters by having a newly constructed baseball field named after him (R562,564,566). Bedford first met appellant when he was about eight or nine years old (R562). "Timmy, to me, appeared to be a boy struggling to make the best of a bad situation" (R562). The South Palomino League was predominantly white and upper class, but it encompassed the black areas of Port Tampa and Rembrandt; appellant was one of the relatively few blacks on the team (R563-64). Also, unlike most of the other boys, appellant's parents were rarely able to come

to the ball park (though his father came when he could), so appellant usually came by himself (R563-65). "Most of the managers didn't want to pick Timmy because they felt he would be a problem. He didn't know much about baseball" (R562).

At first, appellant was very distant with the other players, until Bedford encouraged him to reach out and become more involved (R563). To his own surprise, he then found that he fit in very well with the other boys on the team (R563-64). Once he saw that he was accepted and part of the team, appellant's attitude completely changed; he worked hard and was very productive (R563-64). Bedford testified, "He used to work after practice with me. He was very eager to learn all he could about baseball. That is what impressed me most about him. When he felt things, he was hard on himself, I think, at any point, more than any other players because he felt he had to be good in order to please me or his teammates to accept him as part of our team" (R565-66). When the team lost, appellant had a tendency to blame himself, and Bedford would have to console him and work it out with him, in order for him to realize that his coach thought as much of him after the game as he did before (R567).[9/]

Bedford testified

> I coached Tim up to, I think, [age] twelve or thirteen. I think given

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9/ Another witness, Freddie Williams, who works for the Tampa Recreation Department, testified that he had coached appellant - and played with and against him - in various sports in the neighborhood (R572-74). He described appellant as "a coachable kid" (R574).

> the skills he had when he came to me and how hard he worked, I think he showed me more effort and dedication than any kid I have coached in the league which I was in. And I have coached a team that won the world championship.

(R568)

Bedford testified that, while he does not condone the crime appellant has committed, and while he is aware of his prior conviction for sexual battery in 1982, appellant has some redeeming qualities and is a worthwhile person (R566, see R569-71). He further stated:

> I think listening to the psychiatrist's testimony a few minutes ago, I feel he was right on the line when he said that Timmy would take rejection or would feel inadequate if he felt that someone he cared about or someone important to him was about to be taken away or deprived. Handling it rationally was hard to him as a young man that would carry over, not with the proper mother or father that would be able to work him through disappointments.

(R567).

## SUMMARY OF ARGUMENT

Appellant's statements to detectives of the Tampa Police Department, which directly led, in sequence, to the discovery of the victim's automobile, the green army blanket, and the body, were not voluntarily made, but instead were procured by means of impermissible and psychologically coercive interrogation techniques employed by Sgt. Price. Specifically, Price on two separate occasions removed appellant from the presence of the other detectives and subjected him to a variation of the "Christian burial technique" - an interrogation practice which has been condemned by this Court as "a blatantly coercive and deceptive ploy." Roman v. State, infra. Sgt. Price intentionally brought appellant, step by step, to a point of emotional distress (and, on one occasion, administered a "booster shot" of the Christian burial technique when he thought appellant was "reconsidering his cooperation."). Unlike Roman (where the confession did not come as a direct result of the impermissible interrogation), here there was a direct and unbroken chain from (1) Sgt. Price's private conclaves with appellant, (2) to appellant's statements directing the police to the evidence and the body, (3) to the discovery of same, and (4) to appellant's confessions to Price at the scene, and to Dets. Noblitt and Childers at the police department. Appellant's statements were involuntary, and the admission of those statements (and the evidentiary fruits thereof) violated the Fourteenth

Amendment. See Brewer v. State, infra, DeConingh v. State, infra; cf Colorado v. Connelly, infra. [Issue I].

"The death penalty, unique in its finality and total rejection of the possibility of rehabilitation, was intended by the legislature to be applied 'to only the most aggravated and unmitigated of most serious crimes' " State v. Dixon, infra; Holsworth v. State, infra. Accordingly, proportionality review is an inherent - and a crucial - function of this Court's appellate responsibility. See Caruthers v. State, infra. In the present case, appellant submits that the death penalty is proportionally unwarranted in light of (1) the fact that the only two aggravating circumstances were that the crime was committed in the course of a burglary, and a prior conviction of a felony involving the use or threat of violence; (2) the fact that the killing, if premeditated at all, was upon reflection of very short duration, and in a mental state of panic; (3) the mitigating circumstances established by the unrebutted testimony of Dr. Berland, that appellant suffers from a mental illness (paranoid schizophrenia) and, at the time of the offense, he was under the influence of a serious psychotic disturbance, and his capacity to conform his conduct to the requirements of law was substantially impaired; and (4) the evidence of non-statutory mitigating circumstances, presented by a number of witnesses who knew appellant in different contexts of his life, which demonstrate that he has some redeeming qualities which,

considering his age (22 at the time of the offense) and mental illness, suggest that life imprisonment, rather than death, is the appropriate punishment for his crime. [Issue II]

Appellant further contends that the trial court erred in failing to give proper consideration to the evidence establishing statutory and non-statutory mitigating circumstances [Issue III], in overruling the defense's objection to the prosecutor's improper "golden-rule" argument in the penalty phase [Issue IV], in refusing to give several penalty phase jury instructions requested by the defense [Issue V], and in making a comment in his penalty phase jury instructions which tended to diminish the jurors' sense of the importance and responsibility of their role [Issue V].

## ISSUE I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENTS (AND ALL EVIDENCE DISCOVERED AS A DIRECT RESULT THEREOF), AS THE STATEMENTS WERE NOT VOLUNTARILY MADE, BUT INSTEAD WERE PROCURED BY MEANS OF IMPERMISSIBLE AND PSYCHOLOGICALLY COERCIVE INTERROGATION TECHNIQUES, AND BY DELIBERATE EXPLOITATION OF APPELLANT'S EMOTIONAL CONDITION.

In order to be admissible, a confession must be shown to have been voluntarily given. Brewer v. State, 386 So.2d 232, 235 (Fla. 1980); DeConingh v. State, 433 So.2d 501,503 (Fla. 1983). The burden is on the state to establish voluntariness by a preponderance of the evidence. Brewer, supra, at 236; DeConingh, supra, at 503; Nowlin v. State, 346 So.2d 1020 (Fla. 1977). "Any questioning by police officers which in fact produces a confession which is not the product of a free intellect renders that confession inadmissible" Townsend v. Sain, 372 U.S. 293, 309 (1963), quoted in DeConingh v. State, supra, at 503 (emphasis in Townsend opinion).[10/]

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10/Appellant wishes to make it clear at the outset that his argument is based solely on the Fourteenth Amendment claim that his statements were involuntary, and were procured by means of psychological coercion on the part of the police. Appellant is not contending that there was any violation of the Miranda decision or any deprivation of the right to counsel. Compare Edwards v. Arizona, 451 U.S. 477 (1981); Brewer v. Williams, 430 U.S. 387 (1977). While appellant concedes that Miranda warnings were given, that is clearly not dispositive of the issue of voluntariness, especially in light of the impermissible and psychologically coercive interrogation techniques used by police sergeant Price in this case to overcome appellant's free will. See Brewer v. State, supra; Rickard v. State, infra (confessions held involuntary, based on psychological coercion, notwithstanding Miranda warnings); cf. DeConingh v. State, supra, at 502 (resolution of voluntariness issue rendered Miranda issue moot).

For a confession to be deemed involuntary, so that its introduction into evidence violates the Due Process Clause of the Fourteenth Amendment, there must be some sort of "state action" which procures the confession by overbearing the accused's free will. Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473, 482-84 (1986). In other words, the accused's mental condition, in and of itself, is never sufficient to establish a constitutional violation in the introduction of his statements. Colorado v. Connelly, supra, 93 L.Ed.2d at 482. On the other hand, when the police employ coercive tactics - psychological as well as physical - in their attempt to wring a confession out of an unwilling suspect, any resulting statements (and the evidentiary fruits of such statements) are inadmissible under the Fourteenth Amendment.[11/]

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11/ The Connelly Court observed:

> While each confession case has turned on its own set of factors justifying the conclusion that police conduct was oppressive, all have contained a substantial element of coercive police conduct. Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law. Respondent correctly notes that as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the 'voluntariness" calculus. See Spano v. New York, 360 US 315, 3 L.Ed.2d 1265, 79 S.Ct. 1202 (1959). But this fact does not justify a conclusion that a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional "voluntariness."

Colorado v. Connally, supra, 93 L.Ed.2d at 482.

Brewer; DeConingh. This is particularly true when the police have intentionally taken advantage of a suspect's mental or emotional condition by using psychological coercion to overcome his free will. See DeConingh, at 503; see also Rickard v. State, 508 So.2d 736, 737 (Fla.2d DCA 1987)("An accused's emotional condition when giving [inculpatory] statements may have an important bearing on their voluntariness")

In Brewer v. State, supra, at 235, this Court said:

> When a question arises as to the voluntariness of a confession, the inquiry is whether the confession was "free and voluntary; that is [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however, slight, nor by the exertion of any improper influence ..." Bram v. United States, 168 U.S. 532, 542-43, 18 S.Ct. 183,187, 42 L.Ed.2d 568 (1897). For a confession to be admissible as voluntary, it is required
>
> > that at the time of the making the confession the mind of the defendant be free to act uninfluenced by either hope or fear. The confession should be excluded if the attending circumstances, or the declarations of those present at the making of the confession, are calculated to delude the prisoner as to his true position, or to exert improper and undue influence over his mind.
>
> Frazier v. State, 107 So.2d 16, 21 (Fla. 1958); Harrison v. State, 152 Fla. 86, 12 So.2d 307 (Fla. 1943).

This Court has specifically recognized that the use of the "Christian burial technique" by law enforcement personnel

"is unquestionably a blatantly coercive and deceptive ploy" Roman v. State, 475 So.2d 1228, 1232 (Fla. 1985).[12/]

In the present case, the testimony of the state's own witnesses, Detective Noblitt and Sergeant Price, establishes the following facts:

(a) Appellant was twice taken aside by Sgt. Price, out of the presence and out of the earshot of the other detectives, and subjected to a variation of the "Christian burial technique", in an atmosphere which was (as Sgt. Price acknowledged he intended for it to be) emotionally charged. That Sgt. Price's use of this "blatantly coercive and deceptive ploy" [Roman v. State, supra, at 1232] was an intentional attempt to overcome appellant's free will by manipulating his emotions is demonstrated by the sergeant's own testimony. Price testified that he felt it was important to take appellant out of the presencne of the other detectives, because his experience in law enforcement has taught him that "if you

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12/ In Roman, the Court, while registering strong disapproval of the interrogation technique, went on to hold that, under the particular circumstances of that case (notably including the fact that the use of the tactic did not directly result in Roman's statement), it did not render Roman's confession involuntary. As noted in Roman, the appellate court views the totality of the circumstances, in reviewing the trial court's ruling as to the voluntariness of a confession. See Frazier v. Cupp, 394 U.S. 731 (1969). In the instant case, the sequence of events in which appellant - after repeated doses of psychological pressure administered by Sgt. Price - led the police first to the Mitsubishi automobile, then to the green blanket, and finally to the body, before finally admitting his guilt, demonstrates that his statements were in fact involuntary, and were the direct result of the coercive tactics employed by the police. Thus, Roman is easily distinguishable on this point. See p. 40-42 of this brief.

are going to confront a man on an emotional matter, don't do it in front of other men", because most times you won't get an effective response (R676). "For unknown reasons, since as far back as I can remember, men are not supposed to be emotional nor cry" (R676). Price testified that, after explaining the felony-murder rule to appellant:

> I then appealed to Mr. Hudson's emotions in regard to the fact that I asked him if he had ever been to a funeral. And, obviously, he responded "Yes." I asked him if he had ever been to a funeral without a body. He said he had not.
>
> I then conveyed that most of us don't go to funerals without a body. And that for the family to put this situation to rest, due to the fact he had already advised us that he had seen the body, that the young lady was, in fact, dead, I was aware of that fact, I said, "The family has to know that." And the only way that he will ever know that is to observe and see the body."

(R674-75)

At that time, appellant said he understood that, but he still didn't know (R675). Sgt. Price testified, "We continued to talk about the necessity of a body for a burial. He began, he became emotional somewhat, crying slightly" (R675). Only then did appellant tell Sgt. Price he knew where the car was (R676-77).

(b) When they emerged from the first of these private sessions, Sgt. Price announced to the other detectives, "Tim is going to show us where the body and car are" (R660)

(c) After the discovery of the automobile, appellant directed the officers to where he said Peabody had left the body,

but when they got to that location they found only a green army blanket (R660-62,677-78). Appellant said that somebody had taken the body (R662,677-78). Sgt. Price and Det. Childers were standing there, not believing that someone had taken the body (R662). Detectives Noblitt and Dirken walked back to the cars "waiting to see what we would do next" (R662). Sgt. Price testified "I could see in Mr. Hudson's face and his reaction that he was apparently reconsidering his cooperation" (R678). Accordingly, Price "told Detective Childers to take a walk, which he did" (R678). Price then had another private conclave with appellant, in which he administered a booster shot of the Christian burial technique:

> I again said, "Look, back at the school you advised me this was your chance to do something right. This was your chance to make the right decision. Help us find the body so we could have a burial. Now you are backing out of it."
>
> He began to cry again. He made statements that really didn't go along with anything. He just, you know he would say, "Oh, my God." He would turn around, he would clinch his hands a little bit. Finally he said, "Come on. Let's go. I will take you to the body.

(R678)

(d) When they emerged from this second private session, Sgt. Price told the other detectives "Follow us. He is going to show us where the body is" (R662). As they headed in the direction of Wimauma, according to Sgt. Price's testimony, appellant was getting very emotional, and "[i]t was apparent we were getting close to upsetting him greatly" (R681,683). He asked Sgt. Price, "You promise you won't make me stay there?" (R681). Price replied,

"No problem. As soon as we have located the body, I will get you out of there" (R681). Price said "Just take me to where she is at" (R683-84). In the van, appellant had his head buried in a curtain, and he was crying (R682). Price kept telling him that everything was going to be all right (R684). Sgt. Price acknowledged that he periodically assured appellant that everything would be all right in order to make sure that appellant was going to give him directions to the body (R684). When they arrived at the tomato field, appellant was taken out of the van (R682). He buried his face in the towel which had been provided to cover his handcuffs "and cried quite hard" (R682). Appellant pointed out where the body was, in some palmetto bushes (R679). He was visibly upset, and appeared to be somewhat sick or nauseous (R663,667,679). He reminded Sgt. Price, "You told me I could get out of here. I want to get out of here" (R681). Price testified, "[h]e did not like the area or being in the area" (R681). Back in the van, Price was saying things to appellant such as "I am proud of you. Takes a hell of a man to come this far, to do what you are doing. I appreciate it" (R684-85).

> I said, 'Why don't we just go ahead and get all the truth? You stabbed her, didn't you?' He would cry and then he shook his head in an affirmative motion, which can't be taped, photographed, or anything. I said, 'Timothy, did you or didn't you?' He said, 'Yes, I stabbed her. Please get me out of here.' Again, like I said, it was an emotional situation for him. He just wanted to leave the area. That is when I took him out of the van and we walked, getting much further away from the area. During that walk I asked him 'You are

> Peabody; right?' He shook his head, Yes."

(R685)

This, then, is a case where the "Christian burial technique" succeeded, as intended by Sgt. Price, in procuring inculpatory statements, evidence, and a confession from an otherwise unwilling suspect. Appellant was deliberately brought, step by step, to a point approaching complete emotional breakdown, and thereby was induced to lead the police, in succession, to the car, the blanket, and the body, and then to confess. As this Court recognized in DeConingh v. State, supra, at 502, quoting the United States Supreme Court's comment in Blackburn v. Alabama, 361 U.S. 199 (1960):

> As important as it is that persons who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence. Thus, in cases involving involuntary confessions, this Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.

In Roman v. State, supra, as previously mentioned, this Court strongly disapproved of the "Christian burial technique", which it described as a "blatantly coercive and deceptive ploy", but held that, under the totality of the circumstances of that case, it did not render Roman's confession involuntary. In Roman, as the Court pointed out, the record established that the use of this tactic did not directly result in Roman's statement (475 So.2d at 1232). In addition, the questioning of Roman was

in a non-custodial setting; he was not handcuffed, and he would have been allowed to leave had he exercised his right to do so (475 So.2d at 1230). Moreover, there is no indication in Roman that the use of the "Christian burial technique" was repeated or ongoing in nature.

In the present case, in contrast, appellant was handcuffed and he was not free to leave. The psychological coercion applied by Sgt. Price began at the picnic area near Robinson High School, and was reinforced at the orange grove where the green blanket was found. At the orange grove (see R678), and in the van on the way to Wimauma (see R681-84), appellant was crying, and was in a state of emotional distress. This was a direct result - and the intended result - of the tactics employed by Sgt. Price to make sure that appellant would lead the police to the body, and to dissuade him from "reconsidering his cooperation" (R678, see R674-76,681-84). Thus, unlike Roman, appellant's statements were directly the product of the impermissible interrogation conducted by Sgt. Price.

Under these circumstances, the earlier Miranda warnings, or the fact that the detectives described appellant, at various times, as "alert and perceptive", are woefully insufficient to meet the state's burden of showing that appellant's statements were voluntarily made. See Brewer; DeConingh. To the contrary, the evidence rather plainly shows that the statements were given only because state law enforcement officers (specifically Sgt. Price) deliberately overcame appellant's will, by using psychological coercive interrogation techniques. See Colorado v. Connelly.

Therefore, due process forbids the introduction at trial of appellant's statements, all evidence discovered as a result of those statements, and the full confession given later that day at the police department (with no break in the chain of causation [13]). Appellant's motion to suppress should have been granted, and the error requires reversal for a new trial.

## ISSUE II

### IMPOSITION OF THE DEATH PENALTY IS PROPORTIONALLY UNWARRANTED IN THIS CASE.

A proportionality comparison among capital cases is an inherent part of this Court's review process. Caruthers v. State, 465 So.2d 496, 499 (1985). The function of this review is to determine whether death is the appropriate sentence in the particular case. Caruthers. In a number of decisions, this Court has determined that, notwithstanding a jury death recommendation, the death penalty was not proportionally warranted, and has therefore reversed (as to penalty) for imposition of a life sentence. See, for example, Rembert v. State, 445 So.2d 337, 340-41 (Fla. 1984); Caruthers v. State, supra, at 499; Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985); Wilson v. State, 493 So.2d 1019, 1023-24 (Fla. 1986); Proffitt v. State, 510 So.2d 896 (Fla. 1987).

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13/ "Once it is established that there were coercive influences attendant upon an initial confession, the coercion is presumed to continue", unless clearly shown to have been removed or dissipated prior to a subsequent confession. Brewer v. State, supra, at 236.

In the present case, appellant submits that the death penalty is proportionally unwarranted in light of (1) the fact that the only two aggravating circumstances were that the crime was committed in the course of a burglary, and a prior conviction of a felony involving the use or threat of violence; (2) the fact that the killing, if premeditated at all, was upon reflection of very short duration, see Wilson v. State, supra, at 1023; Ross v. State, supra, at 1174; (3) the mitigating circumstances, established by the unrebutted testimony of Dr. Berland, that appellant suffers from a mental illness (paranoid schizophrenia) and, at the time of the offense, he was under the influence of a serious psychotic disturbance (R549), and his capacity to conform his conduct to the requirements of law was substantially impaired (R549-50)[14/]; and (4) the evidence of non-statutory mitigating circumstances, presented by a number of witnesses who knew appellant in different contexts of his life, which demonstrate that he has some significant redeeming qualities which, considering his age (22 at the time of the offense) and mental illness, suggest that life imprisonment, rather than death, is the appropriate punishment for his crime.

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14/ The trial court, in his sentencing order, clearly found the mitigating circumstance of appellant's impaired capacity to conform his conduct to the requirements of law (R884). With regard to the other "mental mitigating circumstance" - under the influence of extreme mental or emotional disturbance - the trial court's finding is unclear. See Mann v. State, 420 So.2d 578, 581 (Fla. 1982). The court's statement that it "gives this mitigating circumstance little or no weight"(R884) is ambiguous. If he gave this factor no weight (i.e., refused to find and consider it as a mitigating circumstance), such determination was erroneous

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First, with regard to the aggravating circumstances, the only two which were found by the trial court were those set forth in Fla.Stat. §921.141(b)(prior conviction of a felony involving the use or threat of violence) and (d)(homicide committed in the course of a felony; in this case, burglary). Because there

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under this Court's analysis in Rogers v. State, 511 So.2d 526, 534-35 (Fla. 1987), and was also violative of the constitutional principles of Lockett v. Ohio, 438 U.S. 586 (1978) and its progeny. See also Magwood v. Smith, 608 F.Supp. 218, 225-27 (DC Ala. 1985), affd. 791 F.2d 1438, 1447-50 (11th Cir. 1986) (holding that the trial court's rejection of mental mitigating circumstances must be fairly supported by the record; otherwise, it is constitutionally infirm); Ross v. State, supra, at 1174. If, on the other hand, the trial court found the existence of the mitigating circumstance, but accorded it little weight, such determination might not be legally erroneous per se, but neither does it require this Court, in its proportionality inquiry, to similarly downgrade the unrebutted evidence that appellant suffers from a serious psychotic disturbance (paranoid schizophrenia)(R550,544); and that the burglary of Mollie Ewings' residence was in all probability the result of appellant's paranoid reaction to Becky Collins' breaking of their engagement (R544-47). See Rembert v. State, supra, at 340; Wilson v. State, supra, at 1023 (trial court's finding of no mitigating circumstances does not preclude this Court from considering evidence establishing mitigating factors in its proportionality review); Ross v. State, supra, at 1174 (trial court erred in not considering evidence establishing defendant's alcoholism and his intoxication at the time of the homicide as a significant mitigating factor).

For purposes of this proportionality argument, appellant will treat the trial court's order as finding both - or at least one-and-a-half - of the mental mitigating circumstances which were established by Dr. Berland's testimony. [Note that the trial court did not disbelieve Berland's testimony, but in fact relied on it to establish the "impaired capacity" mitigating factor. The trial court's rejection of the "extreme mental or emotional disturbance" factor was based solely on his interpretation of appellant's planned entry into the residence and his "planned and devious" attempt to dispose of the body and bed clothing]. Assuming arguendo, on the other hand, that the trial court's ambiguous finding means that he refused to find, and gave no weight, to the "extreme mental or emotional disturbance" mitigating factor, appellant will argue in Issue III-A that this was plain error.

are no decided cases which present the same mixture of circumstances as are involved here, the proportionality issue requires careful analysis. Specifically, if appellant did not have a prior felony conviction, and the only aggravating circumstance were that the crime occurred in the course of a burglary, this would be a definite and obvious case where the death penalty is disproportionate. Proffitt v. State, 510 So.2d 896 (Fla. 1987); Rembert v. State, 445 So.2d 337, 340 (Fla. 1984). If, on the other hand, there were no mitigating factors in this case, then the previous decisions of this Court would indicate that the presence of aggravating factors (b) and (d) would be sufficient to warrant imposition of the death penalty. See e.g. Maxwell v. State, 443 So.2d 967, 971 (Fla. 1983)("The commission of murder in the course of a robbery by one who has previously been convicted of a felony involving violence to the person of another, when there are no mitigating circumstances, warrants a sentence of death."); White v. State, 446 So.2d 1031, 1037 (Fla. 1984); Blanco v. State, 452 So.2d 520, 526 (Fla. 1984).

However, the situation which actually exists in the present case is that there are two aggravating circumstances, (b) and (d), and there are significant mitigating circumstances as well. Since this Court does not have jurisdiction to review cases in which life imprisonment is imposed[15/], there is no way of knowing how many defendants, similarly situated, have been

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15/ See Alvord v. State, 322 So.2d 535, 542 n.2 (Fla. 1975) (England, J., concurring in part and dissenting in part).

sentenced to life. To the best of undersigned counsel's knowledge and research, however, there has only been one capital appeal decided by this Court in which factors (b) and (d) were the only aggravating circumstances found by the trial court. That case was (Derrick Tyrone) Smith v. State, 492 So.2d 1063 (Fla. 1986), and, since Smith's conviction was reversed for a new trial, no proportionality review of the sentence was conducted.[16/] There have been eight cases where the death sentence was affirmed on appeal in which the trial court found three or more aggravating factors, but (b) and (d) were the only ones upheld by this Court. In seven of these eight cases, however, there were no mitigating circumstances. Shriner v. State, 386 So.2d 525, 534 (Fla. 1980); Enmund v. State, 399 So.2d 1362, 1373 (Fla. 1981)[17/]; Maxwell v. State, 443 So.2d 967, 971-72 (Fla. 1983); White v. State, 446 So.2d 1031, 1037 (Fla.1984); Blanco v. State, 452 So.2d 520, 526 (Fla. 1984); Griffin v. State, 474 So.2d 777, 782 (Fla. 1985); Jackson v. State, 502 So.2d 409, 412 (Fla. 1986). In the eighth case, the only mitigating factor was that the defendant was "a good father, husband, and provider". Rogers v. State, 511 So.2d 526, 535 (Fla. 1987). In rejecting the proportionality arguments in this line of cases, this Court repeatedly cited the proposition of law first set forth in State v. Dixon, 283 So.2d 1, 9 (1973), that where there are aggravating factors counterbalanced by no mitigating factors death is presumed

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16/ The very rarity of death penalty appellate decisions where (b) and (d) were the only aggravating factors found by the trial court strongly suggests that, in that situation, life sentences have often been imposed.

17/ The death sentence in Enmund was subsequently held to be constitutionally invalid in Enmund v. Florida, 458 U.S. 782 (1982).

to be the proper sentence. Shriner; Maxwell, White; Blanco; Jackson.

In the instant case, the evidence clearly established that appellant suffers from a serious mental illness (of genetic origin) and probably from organic brain damage as well. In addition to (and related to) his psychotic disturbance, the record indicates that appellant was under great emotional turmoil caused by his paranoid reaction to the loss of his relationship with Becky Collins. The record shows (and the trial court found) that appellant's capacity to conform his conduct to the requirements of law was substantially impaired. The homicide was committed "in a mental state of panic" (trial court's sentencing order, R884), when appellant was surprised by the victim (his ex-girlfriend's roommate) while he was burglarizing their apartment[18/]. Assuming

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18/ The trial court's finding concerning the "impaired capacity" factor reads:

> Dr. Robert Berland, admitted by the Court as an expert forensic psychologist, testified that although the defendant had the capacity to appreciate the criminality of his conduct at the time of the commission of the killing, that he could not conform his conduct to the requirements of law, or that that conformance was substantially impaired. The extensive testing done by Dr. Berland on the defendant, together with the circumstances of the surprise of the defendant during the burglary when confronted by the victim, convinces the Court that at the time of the killing and for at least a short period thereafter, the defendant was unable, to a certain extent, to conform his conduct to the requirements of law. This in no way is to be construed to mean that the defendant, in the Court's opinion, did not know exactly what he was doing, but that in his mental state of panic, he temporarily took what he conceived to be an immediate solution to a very bad problem he was facing.

arguendo that the killing was premeditated at all [19], it was clearly a spur of the moment kind of premeditation, with appellant's ability to reason clouded by panic and paranoia. See Wilson v. State, supra, at 1023; Ross v. State, supra, at 1174, in which this Court, in finding the death sentence in each case to be proportionally unwarranted, took into account the fact that the killings, although premeditated, were "most likely upon reflection of short duration". In addition, appellant's age (22 at the time of the offense) was found by the trial court to be a mitigating circumstance, though he accorded it little weight. Finally, there was considerable evidence of non-statutory mitigating circumstances which the trial court should have considered [see Issue III-B, infra]; evidence which strongly indicates that appellant is a person with some worthwhile and redeeming qualities. See p. 28-31 of this brief. This evidence of non-statutory mitigating factors can and should be considered by this Court, notwithstanding the trial court's failure to find any non-statutory mitigating circumstances. See Rembert v. State, supra, at 340.

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19/ The verdict form provided to the jury did not require it to specify premeditated murder or felony murder as the basis for its first degree murder verdict (R862). However, the likelihood that the jury may not have been unanimously convinced that the killing was premeditated is indicated by the question it submitted two hours into its deliberations: "If we find the defendant guilty of 1st Degree Murder, do we need to decide now whether it is 1st Degree Felony or 1st Degree Premeditated?" (R861,496-97). When the trial court answered their question in the negative, they returned their verdict eight minutes after resuming deliberations (see R822,862,498-500).

The state may contend that the testimony of the respected baseball coach and community youth worker, Charles Bedford, should carry little weight because of its remoteness. [Bedford coached appellant from the age of eight or nine to the age of twelve or thirteen]. However, the testimony of Littleton Long and Mitchell Walker, both of whom knew appellant as a young man, demonstrates that the good character traits which Mr. Bedford described so eloquently - his eagerness to learn, his capacity for hard work, his cooperative attitude when given some acceptance - did not disappear in appellant's adolescence. In addition, Bedford's testimony gives recognition to the darker side of appellant's emerging personality; to the boy struggling against his own feelings of being an outsider (R563-67). As a youth, appellant's effort was successful; as Bedford put it "I think given the skills he had when he came to me and how hard he worked, I think he showed me more effort and dedication than any kid I have coached in the league which I was in." (R568) However, even at that age, Bedford was aware of appellant's self-doubts and his extreme sensitivity to any kind of rejection (R564,567). Dr. Berland testified that appellant's mental illness was genetic in origin; with psychotic symptoms appearing around the age of thirteen and getting noticeably worse at around nineteen (R405-07,530-32). Paranoid schizophrenia, according to Dr. Berland, operates pretty much on a pre-programmed biological time table (R530), and the developmental course of appellant's illness fit the typical pattern (R407). Therefore, it is no

great wonder that appellant may have lost the ability to overcome adversity through sheer effort and hard work, as described by Charles Bedford. But, as the testimony of Walker and Long shows, he did not lose the character traits of hard work, cooperativeness, and eagerness to learn. These are traits which strongly suggest that society's interest in punishing appellant for his crime would be better served by life imprisonment than by the death penalty. This is particularly true in light of the fact that appellant's mental illness, while incurable, is treatable with proper medication (R550-51).[20/] Moreover, as previously discussed, in light of the existence of only the aggravating circumstances (b) and (d), and considering the fact that the killing occurred on the spur of the moment and "in a mental state of panic" (R884)[see Wilson; Ross], it should be taken into account that this homicide, while reprehensible as all murders are reprehensible, is no more aggravated than the norm of capital felonies. See State v. Dixon, 283 So.2d 1, 8 (Fla. 1973)("Review of a sentence of death by this Court ... is the final step within the State judicial system. Again, the sole purpose of the step is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again presents evidence of legislative intent to extract the penalty for only the most aggravated, the most indefensible of crimes").

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20/ Dr. Berland testified that, if appellant's mental illness had been diagnosed and treated at an earlier age, it would have been much less likely that he would have committed the acts for which he was on trial, "particularly under these circumstances" (i.e., his paranoid reaction to his break-up with Becky Collins, which led to the burglary of her residence, and the killing of her roommate when she surprised appellant during the burglary) (R550, see R544-47).

While no two cases are exactly alike (and while, as previously discussed, there are no decided cases which present the same configuration of aggravating and mitigating circumstances that are present here), appellant would call this Court's attention, for purposes of comparison, to three decisions in particular: Wilson v. State, 493 So.2d 1019 (Fla. 1986); Peavy v. State, 442 So.2d 200 (Fla. 1983); and Thompson v. State, 456 So.2d 444 (Fla. 1984). [Wilson and Peavy are cases in which the jury recommendation was death; in Thompson, the jury recommended life]. In Wilson, the trial court found two valid aggravating factors[21/] - (1) that the crime was especially heinous, atrocious, and cruel, and (2) the defendant was previously convicted of a felony involving the use of violence - and found no mitigating circumstances. This Court said:

> We find it significant that the record also reflects that the murder of Sam Wilson, Sr. was the result of a heated, domestic confrontation and that the killing, although premeditated, was most likely upon reflection of a short duration. See Ross v. State, 474 So.2d at 1174. Therefore, although we sustain the conviction for the first-degree, premeditated murder of Sam Wilson, Sr. and recognize that the trial court properly found no mitigating circumstances, we conclude that the death sentence is not proportionately warranted in this case. See Ross, 474 So.2d 1170; Blair v. State, 406 So.2d 1103 (Fla. 1981).

Wilson v. State, supra at 1023.

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21/ The trial court in Wilson found a third aggravating circumstance (cold, calculated, and premeditated) which was rejected by this court.

Accordingly, Wilson's sentence was reduced to life imprisonment without possibility of parole for twenty-five years.

In the present case, as in Wilson, there are two valid aggravating factors, one of which is that of prior violent felony. Wilson's second aggravating factor, "especially heinous, atrocious, or cruel", is at least as significant, if not more so, than appellant's second aggravating factor (homicide committed in the course of a felony), since the "heinous, atrocious, or cruel" factor requires proof of acts which set the crime apart from the norm of capital felonies [State v. Dixon, supra, at 9], while the "course of a felony" aggravating circumstance is inherent in every case of felony-murder [Proffitt v. State, supra, at 898]. As in Wilson, the killing in this case, if premeditated at all, was upon reflection (if it can even be called that) of a short duration. In fact, the trial court here found that the killing was done "in a mental state of panic" when appellant was surprised by the victim during the burglary, and was done while appellant's capacity to conform his conduct to the requirements of law was impaired (R884).[22/] While it would be stretching it to argue that

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22/ In Wilson, by way of contrast, this Court (in finding the evidence legally sufficient to establish premeditated first degree murder, said:

> There was substantial evidence of an attack on Wilson, Sr. which continued throughout the house, moving back and forth between bedroom and hall, finally ending with the fatal shooting in the living room. There was more than adequate time for any cloud on the appellant's mental faculties to have lifted and for him to have realized the probable consequences of his actions.

Thus, the level of premeditation (if any) in the instant case is even less than in Wilson. [Undersigned counsel is not raising a

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appellant's crime was a result of a domestic confrontation, it is true that appellant's relationship with Becky Collins, and his paranoid reaction to their breakup, was in all likelihood what impelled him to commit the burglary (see R544-47). Most importantly, in appellant's case, unlike Wilson's, there is compelling and unrebutted evidence of mental mitigating circumstances, as well as evidence of good character traits and youthful age. Therefore, appellant submits that, by comparison with Wilson, the death penalty is a fortiori unwarranted in the present case.

In Peavy v. State, supra, the trial court found four aggravating circumstances, three of which were upheld by this Court. The valid aggravators were (1) especially heinous, atrocious, or cruel, (2) previous conviction of a violent felony, and (3) homicide committed in the course of a felony. [The latter two are the same aggravating factors found in the instant case]. This Court rejected the fourth aggravating circumstance found by the trial court, saying, "This murder

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sufficiency of the evidence argument in this appeal only because he believes the evidence makes out a prima facie case of felony murder, in that he cannot credibly argue that the jury could not find that appellant intended to confront Becky Collins with the knife he was carrying. This would be an aggravated assault, and thus the jury could find that appellant's entry into the house was an armed burglary and not merely an armed trespass. However, appellant wishes to make it absolutely clear that there is no evidence whatsoever that appellant intended to physically hurt or to kill Becky Collins; that was sheer speculation on the part of the state (see R450). Moreover, the trial court made no such finding in his sentencing order (see R883-84)].

occurred during the commission of a burglary and robbery and is susceptible to other conclusions than finding it committed in a cold, calculated, and premeditated manner." Peavy v. State, supra, at 202. As there were two mitigating circumstances present (the defendant's age and his lack of a significant history of criminal activity), this Court remanded to the trial court for a new sentencing hearing. On August 2, 1984, Peavy was sentenced to life imprisonment by Circuit Judge Arthur I. Snyder (Circuit Court in and for Dade County, case no. 82-3193).

A comparison of Peavy with the instant case shows that Peavy had the same two aggravating circumstances as appellant, plus an additional one, "especially heinous, atrocious, or cruel". The weight to be given to Peavy's prior violent felony may be diminished somewhat by the finding in mitigation that he lacked a significant history of criminal activity. But, on the other hand, the evidence of appellant's mental illness, his impaired capacity to conform his conduct to the requirements of law, and the evidence of non-statutory mitigating circumstances are all elements which were not present in Peavy. As in Peavy, the trial court found appellant's age to be a mitigating circumstance (although he chose to accord it slight weight). As in Peavy, the killing here did not involve heightened premeditation; rather, as in Wilson and Ross, it was, at most, committed upon reflection of short duration (and in a mental state of panic). Therefore, by comparison with Peavy, inflection of the death penalty upon appellant is proportionally unwarranted.

As previously discussed, in every case in which this Court has affirmed a death sentence where the only valid aggravating circumstances were (b) and (d), there have been no mitigating circumstances or (in one case, Rogers) virtually no mitigating circumstances. Shriner; Enmund; Maxwell; White; Blanco; Griffin; Jackson. In each of these decisions, the Court emphasized the absence of mitigation, in holding that the death penalty was appropriate. See Maxwell v. State, supra, at 971 ("The commission of murder in the course of a robbery by one who has previously been convicted of a felony involving violence to the person of another, when there are no mitigating circumstances, warrants a sentence of death"). In Thompson v. State, supra, a life override case, (b) and (d) were the only valid aggravating circumstances and the trial court found no mitigating circumstances. However, there was considerable evidence of mental mitigating factors and non-statutory mitigating factors. In light of the mitigating evidence, this Court concluded that the jury's recommendation of life imprisonment was reasonable and should be given effect. Similarly, in Holsworth v. State, 522 So.2d 348 (Fla.1988) (case no. 67,973, opinion filed February 18, 1988)(13 FLW 138,141) the trial court found as aggravating circumstances (1) especially heinous, atrocious, or cruel, (2) previous contiction of a violent felony, and (3) homicide committed in the commission of an armed burglary, and found nothing in mitigation. This Court held that the jury's life recommendation was reasonably based on evidence of Holsworth's drug and alcohol problem, which it may have found impaired his capacity to appreciate the criminality of his conduct

or to conform his conduct to the requirements of law. The Court said:

> The death penalty, unique in its finality and total rejection of the possibility of rehabilitation, was intended by the legislature to be applied "to only the most aggravated and unmitigated of most serious crimes." State v. Dixon, 283 So.2d 1,7 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). Despite the depravity of the crime, we find the mitigating evidence sufficient to support a life recommendation.

Holsworth v. State, supra, 13 FLW at 141.

While Thompson and Holsworth can be distinguished on the basis that the jury in those cases recommended life, Wilson and Peavy cannot be distinguished on that basis. Moreover, the principle that the death penalty is reserved "to only the most aggravated and unmitigated of crimes" applies to proportionality review as well as to review of life overrides. See e.g. Wilson; Ross; Caruthers; Rembert; Proffitt.

This is not such a case. Appellant's crime, while deserving of severe punishment, was certainly not unmitigated. The evidence indicates that his mental illness, while incurable, is treatable, and his character traits of being hard working, cooperative, and eager to learn strongly suggest the possibility of rehabilitation. Appellant's death sentence should be reversed and the case remanded for imposition of a life sentence without possibility of parole for twenty-five years.[23/]

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23/ Appellant would note, as defense counsel did below (R717), that there is no impediment to the trial court's running the life sentence for the murder consecutively to the life sentences imposed for the burglary and on the probation revocation.

## ISSUE III

THE TRIAL COURT ERRED IN REFUSING TO FIND STATUTORY AND NON-STATUTORY MITIGATING CIRCUMSTANCES WHICH WERE (a) ESTABLISHED BY THE EVIDENCE AND (b) OF A KIND CAPABLE OF MITIGATING PUNISHMENT.

### A. Extreme Mental or Emotional Disturbance

The testimony of Dr. Robert Berland established unequivocally that appellant suffers from a major mental illness (paranoid schizophrenia) of genetic origin. Also, while Dr. Berland was less certain of this aspect, his testing indicated the probable existence of organic brain tissue damage. Appellant's reaction to the loss of his relationship with Becky Collins was, according to Dr. Berland, typical - even stereotypical - of paranoid individuals (R544-47); he would harass her and threaten her, all the while trying to get back together with her (see R248,274,280,347). Notwithstanding this unrebutted evidence, the trial court either refused to find (or, at best, denigrated) the mitigating circumstance of extreme mental or emotional disturbance [See p.43-44, n.14 of this brief].

Interestingly, the trial court's rejection of this mitigating factor was not based on any disbelief of Dr. Berland's expert testimony. Contrast Bates v. State, 506 So.2d 1033 (Fla. 1987). Indeed, the trial court relied on "[t]he extensive testing done by Dr. Berland on the defendant" (sentencing order, R.884), along with the circumstances of the killing, to establish the other statutory "mental mitigating circumstance" - that of [appellant's] impaired capacity to conform his conduct to the requirements of law. Rather, the trial court explained its rejection of the

extreme mental or emotional disturbance mitigating factor as follows:

> The facts of the case, as produced by the evidence, indicate that the defendant, TIMOTHY CURTIS HUDSON, was apparently surprised by the victim during the defendant's burglarizing of the home owned by the victim and shared with the defendant's ex-girlfriend. Although the Court allowed the jury to consider this mitigating circumstance in arriving at its decision, the evidence does not support the fact that any emotional or mental disturbance that the defendant may have been suffering from at the time of the commission of the crime of Murder, was in any way of an extreme nature. The facts show that he entered the home in a planned manner and after the killing, he attempted to dispose of the body and soiled bed clothes in a planned and devious manner.

(R883-84)

Based, then, only on appellant's manner of entry into the residence, and his attempt to dispose of the body and bed clothing, the trial court gave "little or no weight" to the evidence that appellant suffers from a mental illness of psychotic proportions, which was the driving force behind his burglarizing his girlfriend's residence in the first place. Appellant submits that, apart from the question of proportionality [Issue II], the trial court erred in refusing to consider appellant's extreme mental or emotional disturbance, caused by his mental illness, as a significant mitigating factor. See Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985).

It is important to recognize that the two mental mitigating factors are directed to different aspects of the defendant's mental state, which may, but do not necessarily,

overlap. Roman v. State, 475 So.2d 1228, 1231 (Fla. 1985); see also Toole v. State, 479 So.2d 731, 733-34 (Fla. 1985). Where the evidence establishes that the defendant suffers from paranoid schizophrenia, both mental mitigating circumstances must be taken into consideration before imposing a death sentence, Toole v. State, supra, at 733-34; Mines v. State, 390 So.2d 332, 337 (Fla. 1980); and in the instant case the testimony of Dr. Berland clearly and explicitly established both (R549-50). As defined by this Court in State v. Dixon, 283 So.2d 1, 10 (Fla. 1973):

> Extreme mental or emotional disturbance is a second mitigating consideration, pursuant to Fla.Stat. §921.141(7)(b), F.S.A., which is easily interpreted as less than insanity but more than the emotions of an average man, however inflamed.

In this regard, consider Dr. Berland's guilt phase testimony, in which he stated that appellant met the first criterion of insanity, in that he had a mental illness which affected his ability to reason accurately, but he did not meet the second criterion, in that he appeared to know the wrongfulness and the immediate consequences of his actions (R409-10,414). Dr. Berland testified, "... I believe that his psychotic disturbance represents the kind of mental defect under consideration here in that it did significantly interfere with his ability to reason accurately or to understand things" (R414).

Under these circumstances, the record does not fairly support the trial court's total - or nearly total - rejection

of the mitigating circumstance of extreme mental or emotional disturbance. See Rogers v. State, 511 So.2d 526, 534-35 (Fla. 1987); Ross v. State, supra, at 1174; Kampff v. State, 371 So.2d 1007, 1110 (Fla. 1979); Magwood v. Smith, 608 F.Supp. 218, 225-27 (D.C. Ala. 1985), affd., 791 F.2d 1438, 1447-50 (11th Cir. 1986). Cf. Stano v. State, 460 So.2d 890, 894 (Fla. 1984)(trial court's rejection of a proffered mitigating circumstance should be upheld "if it is supported by competent substantial evidence"). Especially in view of the fact that the trial court clearly did not disbelieve the results of Dr. Berland's psychological testing of appellant (see R884), the question is whether the circumstances surrounding the entry into the house and the attempted disposal of the body constitute "competent substantial evidence" to overcome the evidence of appellant's serious psychotic disturbance. Appellant submits that they clearly do not, and therefore the trial court's failure to accord any meaningful mitigating weight to appellant's mental illness was error as a matter of law. See Ross v. State, supra, at 1174; Kampff v. State, supra, at 1010; see also Magwood v. Smith, supra (where trial court's rejection of a mitigating circumstance is not fairly supported by the record, the capital sentencing standards required by the Eighth and Fourteenth Amendments to ensure reliability are violated).

B. Non-Statutory Mitigating Circumstances

Lockett v. Ohio, 438 U.S. 586 (1978) and its progeny stand for the constitutional principle that any mitigating evidence, statutory or non-statutory, offered by a capital defendant, which is relevant to either the character of the offender or the circumstances of the offense, must be considered by the sentencer before a sentence of death can be imposed. See Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. __, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); Hitchcock v. Dugger, 481 U.S. __, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Sumner v. Shuman, 483 U.S. __, 107 S.Ct. __, 97 L.Ed.2d 56 (1987). As stated in the opinion of the Court in Sumner v. Shuman, supra (quoting the plurality opinion in Woodson v. North Carolina, 428 U.S. 280, 304 (1976)):

> While the prevailing practice of individualized sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

(97 L.Ed.2d at 65)

As further stated in Sumner v. Shuman, supra, 97 L.Ed.2d at 66, not only does the Eighth Amendment permit the defendant to present any relevant mitigating evidence, but "Lockett

requires the sentencer to listen." See Eddings v. Oklahoma, supra, supra, 455 U.S. at 115, n.10.

In the instant case, appellant presented a number of witnesses - an employer, a teacher, and a coach, as well as his mother and father - whose testimony, taken collectively, establishes that appellant has some worthwhile and redeeming character traits (R516-25,560-74, see P28-31,48-50 of this brief). Specifically, he has demonstrated, in various contexts of his life, a willingness to work hard, eagerness to learn, and a cooperative attitude. Nevertheless, the trial court refused to find or weigh any non-statutory mitigating factors, stating in his sentencing order "The Court finds that there are no other aspects of the defendant's character or record, and no other circumstances of the offense which could be used in mitigation of the sentence to be pronounced by this Court" (R884).

This was error as a matter of law, and, in view of the considerable amount of other mitigating evidence in the case (especially that concerning appellant's mental illness and his impaired capacity to conform his conduct), it impermissibly compromised the trial court's weighing process. In Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), this Court, after discussing the constitutional principle of Lockett and Eddings, said:

> Mindful of these admonitions, we find that the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether

> the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

Under this analysis, this Court went on to conclude that four of the five non-statutory mitigating factors which Rogers asserted the trial judge should have weighed were either (1) not supported by the evidence, (2) not presented at the trial level, or (3) not, in the totality of the defendant's life or character, of a kind capable of mitigating punishment. However, with regard to Rogers' contention concerning the evidence that he was a good husband and father, and that he had a good service record, the Court observed:

> In the same vein and in light of the admonition that judges may not refuse to consider relevant mitigating evidence, Eddings, 455 U.S. at 115-16, 102 S.Ct. at 877, we agree that being a good husband and father or having a good service record are factors to be weighed in mitigation. Evidence of contributions to family, community, or society reflects on character and provides evidence of positive character traits to be weighed in mitigation. See Lockett, 438 U.S. at 604-05, 98 S.Ct. at 2964-65. The record does not disclose that the state contested the testimony of Rogers' wife that he was a good father, husband and provider. However, we find that the record contains

> an insufficient factual basis establishing the decorations Rogers received while in the Navy and the purpose of them. Rogers did not raise this issue until his appeal and bases his argument on a single sentence in his presentence investigation that says only that Rogers claims to have received decorations. Absent proof of the decorations, we cannot fault the trial court for finding no mitigating factor under these circumstances.

Rogers v. State, supra, at 535

This Court therefore held that the trial court erred in refusing to give any mitigating weight to the evidence that Rogers was a good husband, father, and provider. However, applying the test set forth in State v. DiGuilio, 491 So.2d 1129,1138 (Fla. 1986), the Court determined that the error in Rogers could not have affected the trial judge's weighing process, and thus was harmless beyond a reasonable doubt. [As appellant will show, infra, application of the DiGuilio standard leads to the opposite result in the instant case].

Using the Rogers analysis, in addition to the testimony of both of appellant's parents (who were divorced when he was a child) that he was a good son (R516-20), the record contains uncontested evidence to establish the good character traits which the trial court refused to consider in mitigation. Appellant was, at one point, employee of the month at Bennigan's restaurant; and according to his general manager, "His pride and quality of work was outstanding." (R561). Appellant was an eager learner in his GED classes, with a good attitude toward his studies (R522). The most eloquent testimony was given by the baseball coach and

community youth worker, Charles Bedford: "I think given the skills he had when he came to me and how hard he worked, I think he showed me more effort and dedication than any kid I have coached in the league which I was in" (R568). Bedford also testified regarding appellant's efforts to overcome his personal problems, arising from his family situation, his socioeconomic background, and his own hypersensitivity and self-doubt.

None of this, of course, means that appellant deserves a medal, or that his very serious crime should go unpunished. It does mean, however, that appellant deserves, under the constitutional principles of individualized sentencing, to have the good and worthwhile aspects of his character fairly considered and weighed against the aggravating factors, before a sentence of death can be imposed. Lockett; Eddings; Skipper; Hitchcock; Sumner v. Shuman. This is particularly true in light of the fact that the positive aspects of appellant's character, viewed in combination with his youth and the treatability of his mental illness, allow for some hope of rehabilitation. Therefore, even assuming arguendo that this Court were to reject appellant's proportionality argument presented in Issue II, that would not obviate the trial court's error in flatly refusing to give any mitigating weight to the evidence of appellant's good character traits.

Unlike the situation in Rogers (where the testimony of Rogers' wife that he was a good father, husband, and provider amounted to the only mitigating circumstance, statutory or

non-statutory, in the entire case), the trial court's failure to give any mitigating weight to the evidence of good character traits in the instant case clearly could have affected the weighing process, and thus cannot be written off as "harmless." Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977); State v. DiGuilio, supra, 491 So.2d at 1136-39. In view of the fact that the only aggravating circumstances found by the trial court were that the crime was committed in the course of a burglary, and that the defendant was previously convicted of a felony involving the use or threat of violence; in view of the fact that the killing, if premeditated at all, was upon reflection of short duration, and in a mental state of panic; in view of appellant's age, and especially in view of the substantial evidence of his mental illness (paranoid schizophrenia) and his impaired capacity to conform his conduct to the requirements of law, then even assuming arguendo that death could be a proper sentence in this situation [see Issue II, supra, arguing to the contrary], it is not necessarily the proper sentence. See Nibert v. State, 508 So.2d 1,5 (Fla. 1987). Therefore, at minimum, the trial court's error of law in concluding that "there are no other aspects of the defendant's character or record ... which could be used in mitigation of the Sentence to be pronounced by the Court" (R884) requires that appellant's death sentence be vacated, and the case remanded for a new sentencing hearing. Elledge; Nibert; DiGuilio.

## ISSUE IV

THE TRIAL COURT ERRED IN OVERRULING THE DEFENSE OBJECTION TO IMPROPER PROSECUTORAL ARGUMENT.

"Golden rule" argument - the technique of inviting the jurors to place themselves in the victim's shoes - has long been held to be improper and destructive of the right to a fair trial. Lucas v. State, 335 So.2d 566 (Fla.1st DCA 1976); see e.g. Adams v. State, 192 So.2d 762 (Fla. 1966); Grant v. State, 194 So.2d 612 (Fla. 1967); Bullock v. Branch, 130 So.2d 74 (Fla. 1st DCA 1961); Davis v. State, 214 So.2d 41 (Fla. 3rd DCA 1968). In the present case, in the penalty phase, the prosecutor argued to the jury:

> Ladies and gentlemen, most human beings, most human beings, pray at night that they will live to a ripe old age and die a normal peaceful death. The thought of being stabbed with a knife in one's own bedroom in the middle of the night --

(R602)

Defense counsel's objection was overruled (R603). The prosecutor continued:

> As I was stating, the thought of being attacked with a knife in one's own bedroom in the middle of the night is such a horrendous thought, most human beings dare not even think about it.

(R603)

The trial court's error in overruling the objection to this argument was compounded by another instance of prosecutorial

misconduct.[24/] Engaging in exactly the same argument device which this Court found improper and inflammatory in Jackson v. State, 522 So.2d 369 (Fla. 1988)(case no. 68,097, opinion filed February 18, 1988)(13 FLW 146) - a device which was especially prejudicial in the instant case given the considerable evidence in mitigation - the prosecutor exhorted the jury:

> How can Timothy Hudson commit this savage crime and expect to live if he is convicted? He cannot. Now, I anticipate that Mr. Conrad will get up here and argue to you that life in prison without possibility of parole for twenty-five years is sufficient punishment in this case. That is a long time, ladies and gentlemen, he may argue. Twenty-five years before he is eligible for parole. Life imprisonment. Is that sufficient punishment in this case? Consider life imprisonment as a punishment.
>
> What about life in prison? What about it? He may tell you it's torture. It's a living hell.
>
> But what about life imprisonment, ladies and gentlemen? What about life in jail? Now I would not want to spend one day in jail. Not one day in jail. But what can you do in prison? All right?
>
> You can laugh. You can cry. You can eat. You can sleep. You can read a book. You can make friends. You can

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24/ Although no objection was made to the latter, it can be considered if the cumulative effect of the prosecutor's argument was such as to deprive appellant of a fair penalty hearing. See Darden v. Wainwright, 477 U.S. ___, 106 S.Ct. ___, 91 L.Ed.2d 144, 156-58 (1986); Pait v. State, 112 So.2d 380, 385-386 (Fla. 1959); Ailer v. State, 114 So.2d 348, 351 (Fla.2d DCA 1959); Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979); Jones v. State, 449 So.2d 313 (Fla. 5th DCA 1984); Ryan v. State, 457 So.2d 1084 (Fla.4th DCA 1984); Tuff v. State, 509 So.2d 953, 955-56 (Fla. 4th DCA 1987).

> participate in sports. In short, it is life. You live to learn the wonders that the future holds. Life imprisonment is life. And people want to live.
>
> If Mollie Ewings had a choice, to spend the rest of her life in prison or be in that photograph in Wimauma, in the grove, stabbed to death, what choice would Mollie Ewings have made? But she didn't have that choice. And you know why she didn't have that choice? Because that man right there, in the middle, in the blue coat, right there, that man decided for himself that Mollie Ewings should die, and for making that decision, for making that decision, he, too, deserves to die.
>
> People who are it ninety years-of-age long desparately to live with the youthful passion. Animals fight desperately for life. That choice was taken away from Mollie Ewings.
>
> I respectfully ask this jury to recommend to Judge Griffin to sentence Timothy Curtis Hudson to die in Florida's electric chair for this killing.

(R605-07)

While this kind of argument may not have been sufficiently egregious to taint the validity of the jury's penalty recommendation under the circumstances which existed in Jackson (aggravating circumstances of (1) "cold, calculated, and premeditated", (2) "especially heinous, atrocious, or cruel", and (3) previous conviction of a violent felony; only mitigating factor was that Jackson has been, and would likely continue to be, a "model prisoner"), a different result is called for in the instant case, where the balance between the aggravating and mitigating circumstances does not point clearly in the

direction of death. [See Issue II, supra]. The argument here "serve[d] no other purpose than to inflame the jury and to divert it from deciding the case on the relevant evidence concerning the crime and the defendant." Booth v. Maryland, 482 U.S. ___, 107 S.Ct. ___, 96 L.Ed.2d 440, 452 (1987). As emphasized in Booth (96 L.Ed.2d at 452), "any decision to impose the death penalty must 'be, and appear to be, based on reason rather than caprice or emotion.' "

Appellant's death sentence should therefore be reversed, and the case remanded for a new penalty trial before a newly impaneled jury.

## ISSUE V

IN HIS PENALTY PHASE JURY INSTRUCTIONS, THE TRIAL COURT ERRED IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTIONS NOS. 4,5,6,7,9, and 11, AND ERRED IN DIMINISHING THE IMPORTANCE OF THE JURY'S DEATH RECOMMENDATION.[25]

In the penalty phase of the trial, the court denied six of appellant's requested jury instructions (R825-30, see R578-96). Appellant submits that the requested instructions correctly stated the law, were not adequately covered by the "standard" instructions, were consistent with the principles of Lockett v. Ohio, supra, and its progeny (requested instructions

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25/ Because similar arguments have been rejected by this Court, and in order to prevent this brief from greatly exceeding the page limits established by Fla.R.App.P. 9.210(a), appellant is presenting this issue in summary form.

5,6, and 7, R826-28), and were necessary to adequately inform the jury regarding the nature and function of mitigating circumstances (requested instructions 7,9,11, R828-30). The trial court's refusal to instruct the jury accordingly was constitutional error. See Goodwin v. Balkcom, 684 F.2d 794, 802 (11th Cir. 1982); see also Hill v. Thigpen, 667 F.Supp. 314, 325-27 (N.D. Miss. 1987).

At the beginning of his charge to the jury, the trial court said, "As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge." (R618) Based on the constitutional principles of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), and for the reasons explained in Mann v. Dugger, 817 F.2d 1471, reh'g granted and opinion vacated, 828 F.2d 1498 (11th Cir. 1987), and Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987), petition for cert. filed, 56 USLW 3094 (U.S. July 20, 1987) (No. 87-121)[26/], appellant submits that the trial court's instruction diminished the importance of the jury's recommendation and "presented an intolerable danger that the jury [would] in fact choose to minimize the importance of its role." Caldwell v. Mississippi, supra (105 S.Ct. at 2641-42). The death sentence imposed on appellant, pursuant to the jury's recommendation of death, therefore violates the eighth amendment standards of reliability in capital sentencing.

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26/ Mann is pending rehearing en banc. Undersigned counsel has recently learned from newspaper reports that the U.S. Supreme Court has accepted review in Adams. Therefore, a definitive holding as to the federal constitutional issue involved here may be forthcoming.

## CONCLUSION

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

As to Issue I: Reverse the convictions and death sentence and remand for a new trial.

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

As to Issue III: Reverse the death sentence and remand for a new penalty hearing.

As to Issues IV and V: Reverse the death sentence and remand for a new penalty trial before a newly impaneled jury.

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, 8th Floor, 1313 Tampa Street, Tampa, FL 33602, and to the appellant, Timothy C. Hudson, Inmate No. 085756, Florida State Prison, Post Office Box 747, Starke, FL 32091, by mail this 11th day of March, 1988.

Steven L. Bolotin

STEVEN L. BOLOTIN