IN THE SUPREME COURT OF FLORIDA

WILBURN LAMB, Appellant, vs. STATE OF FLORIDA, Appellee.	CASE NO. 70,369

OCT 9 1987
By ____ Deputy Clerk

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER

JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER
CHIEF, CAPITAL DIVISION
112-A Orange Avenue
Daytona Beach, Fla. 32014
Phone: 904/252-3367

ATTORNEY FOR APPELLANT

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IN THE SUPREME COURT OF FLORIDA

WILBURN LAMB, Appellant, vs. STATE OF FLORIDA, Appellee.	CASE NO. 70,369

INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On February 6, 1986, the grand jury in and for Brevard County, returned an indictment charging Appellant, WILBURN AARON LAMB, with one count of first degree premeditated murder in violation of Section 782.04(1)(a)1, Florida Statutes (1985), one count of first degree felony murder in violation of Section 782.04(1)(a)2e, Florida Statutes (1985), one count of burglary of a dwelling with an assault therein in violation of Sections 810.02(1) and 810.02(2)(a), Florida Statutes (1985) and one count of grand theft in violation of Sections 812.014(1)(a)(b) and 812.014(2)(b)1, Florida Statutes (1985). (R3373-3374) Appellant filed numerous pre-trial motions including a motion to preclude imposition of the death penalty (R3090); a motion to declare Section 921.141, Florida Statutes (1985) unconstitutional (R3110-3112); motions to suppress physical evidence and confession (R3095-3096,3135,3150-3152) These motions were denied. (R3225,)

Appellant proceeded to jury trial on December 8-13, 1986, with the Honorable Charles M. Harris, Circuit Judge, presiding. (R1-1296) Following deliberations, the jury returned verdicts finding Appellant guilty as charged on all counts. (R1291,3234-3237) On December 19, 1986, Appellant filed a motion for judgment of acquittal, a motion for arrest of judgment and a motion for new trial. (R3278-3279,3280,3281-3283)

On January 20-22, 1987, the penalty phase was held resulting in a jury recommendation of 8-4 that Appellant be sentenced to death. (R1297-1846,3314) On February 24, 1987, Appellant appeared before Judge Harris for sentencing. (R1854-2017) Appellant was adjudicated guilty and sentenced to death as to the premeditated murder count. (R2253) Judge Harris found four aggravating circumstances and one mitigating circumstance. (R2210-2214,2222) Judge Harris imposed no sentence for the felony murder but sentenced Appellant to 40 years for the burglary charge and five years for the grand theft charge. (R2224,3325-3329) Judge Harris filed written findings of facts in support of the sentence of death. (R3330-3341) Appellant filed an addendum to his motion for new trial, a motion to interview the jurors and a motion to declare the death penalty unconstitutional. (R3345-3346,3347-3348,3349-3353,3354-3356) All post-trial motions were denied. (R226, 2340) Appellant filed a timely notice of appeal on March 26, 1987. (R3357) Appellant was adjudged insolvent and the Office of the Public Defender was appointed to represent him on appeal. (R3368)

STATEMENT OF FACTS

Guilt Phase:

On the evening of January 20, 1986, Karl Eberenz had dinner at Marie Atkinson's house. (R264) Because he had a doctor's appointment the next day, Eberenz left Marie's house at 8:10 pm to go home to bed. (R265-266) Eberenz lived in an apartment over a sand blasting and undercoating business that he co-owned in West Melbourne, Florida. (R264) Marie telephoned Eberenz the following morning just before 6:00 am but got no answer. (R267) Marie called several more times but never got an answer. (R268) Fearing that something was wrong, Marie went to Eberenz' apartment, banged on the door and called out for Eberenz but got no response. (R268) She looked for the hidden key to Eberenz' apartment but could not find it. (R269) Marie returned to her home and called Eberenz' son, Mike, and told him she was worried about his father. (R271) Marie also called 911 and informed the police of her concern about Eberenz. (R272) Marie returned to Eberenz' apartment where she met the police and Eberenz' son Roger and his wife. (R272-273) Roger had a key to get inside one of the ground floor car bays through which he could get to his father's apartment by way of an inside staircase. (R273,418) The lock on the door to the apartment had been broken. (R357,418) The entire apartment had been completely ransacked. (R273,361,419) Officer Louis Rice and Roger went through the apartment and found the body of Karl Eberenz lying on the floor in the hallway just outside the kitchen. (R361,419) An autopsy performed on the body revealed that the cause of death

was due to lacerations of the skull and brain and depressed skull fractures resulting in hemorrhaging caused by numerous blows to the head. (R308-309) The injuries could have been caused by a small gold hammer found in Eberenz' apartment. (R313) However no blood was found on the hammer which is unusual due to the large amount of blood. R(935,323) A search of the apartment revealed that several items of jewelry were missing including a gold ring with diamonds, a 14 carat gold necklace and a gold bracelet. (R421,432) Eberenz had received two awards from Mechanix Illustrated Magazine. (R420) These consisted of small gold hammers and certificates. (R420) Only one hammer was found in the apartment. (R451) Numerous footprints were found in the soft sand between the two buildings on the property. (R375-376, 465, 617) One footprint was found on a poster lying on the floor in front of the clothes washer in the apartment. (R482) An axe-handle was found in the field just outside the property compound. (R372,402,612) Traces of blood were found on the axe-handle. (R409,950) Numerous latent fingerprints were lifted from the area. (R489,609,634) None of the prints matched Appellant's prints. (R631-632,609)

Mary Holscher, Appellant's girlfriend, lived at the River Oaks Motel in Melbourne, with Bruce Haskell and Frank Clauser. (R647,649) On January 20, 1986, she spent the day at the motel with Appellant, Haskell and Clauser. (R650) About 6:30 pm, Appellant and Haskell left the motel in Clauser's car. (R751-752,651) They were gone for about 3½ hours. (R652,752) When they returned, Appellant and Haskell brought food from

Burger King and a $30 bag of Marijuana. (R652,760,863) Appellant also had a large gold and diamond ring and a gold necklace. (R652,760-761,865) Appellant had blood on his shoes. (R652,864) Appellant told Mary they had found a wallet in the dresser of the place they broke into. (R658) When asked about the blood, Appellant said he had run over a dog with the car and had to kick it off the road. (R658,864) Later that night, Appellant told Mary that he and Haskell had burglarized a Little Caesar's Pizza Restaurant and taken money from the safe after which they went to Eberenz' apartment in West Melbourne, totally ransacked it and took money from the wallet in the dresser and jewelry they found in a closet. (R659) The next evening, Mary spoke to Appellant's mother who was worried because she had heard that an old man in West Melbourne had been killed. (R660-662) Mary confronted Appellant with this information after which she claimed Appellant told her what had happened. (R662) He and Haskell went to Eberenz' apartment, ransacked it completely and found money and jewelry. (R663) Haskell then cooked some soup because he was hungry. (R663) Eberenz came home while they were still there so Appellant and Haskell hid. (R663) Appellant had an axe handle with him. (R663) However, because Appellant was so tall, the axe handle would scrape the ceiling, so he armed himself with a gold hammer. (R664) When Eberenz walked in and noticed something was wrong, Appellant hit him one time in the head. (R664) When Haskell saw what had happened, Appellant momentarily thought about killing Haskell to make it look like a struggle had occurred. (R664) Haskell and Appellant left, got some marijuana,

stopped at Appellant's mother's house, picked up some food at Burger King and returned to the motel. (R665) Appellant said they wore gloves and socks on their hands. (R698) Appellant took Mary out to Lake Washington where he said he had thrown Eberenz' wallet. (R666) After discussing the matter with her mother, Mary called the police. (R665,791) Five witnesses testified that Mary Holscher had a reputation for untruthfulness. (R1013,1024,1032,1040,1053)

On several occasions prior to January 20, 1986, Appellant and Haskell discussed breaking into an "old man's" house in West Melbourne. (R782,890) Haskell knew the man because he had previously worked there. (R783,691) Appellant did not know the man. (R783)

Timothy Kaye overheard Appellant and Haskell discussing the burglary. (R890) Although he cannot be sure who said what, Kaye heard Haskell and Appellant talking about hitting the man with a rubber mallet. (R891) Kaye told them that if they hit the man too hard they were liable to kill him. (R891) While they were watching a news report of the homicide, Kaye asked Appellant and Haskell if that had not been the place, but Haskell said no and he and Appellant laughed. (R894,900)

Appellant was arrested in the parking lot of the San Juan Apartments in Melbourne. (R793,848) Appellant was wearing the gold necklace taken from Eberenz. (R805) Appellant also had Eberenz' ring in his left front pocket. (R848) Appellant was advised of his rights and understood them. (R799,801) Although Lt. Fair knew Appellant was only 17 years old he was held for two

hours before his mother was called. (R808,810) Lt. Fair told Appellant he was facing the death penalty. (R856) Appellant was nervous. (R853) Deputy David McCormick gave Appellant a cigarette and asked him what happened. (R854) Appellant said that Haskell had been planning to rob the man for months because he had previously worked there and he knew the man had money. (R854) Haskell and a man named Bucky had gone to the man's house the previous night but nothing had happened. (R854) Appellant and Haskell returned the next night, went up the back stairs, found the place ransacked and the man dead. (R854) They freaked out, took some jewelry and left. (R854) Deputy McCormick left and when he returned he told Appellant that he knew he would not go to the house to purposely hurt the man and therefore asked if the man unexpectedly surprised them while they were burglarizing the apartment. (R854) Appellant then admitted that that was in fact what happened and that they never meant to hurt anyone. (R854)

At trial, Appellant testified that he went with Haskell to Eberenz' apartment because Haskell told him there were drugs there. (R1064-1065) After parking one block away, Haskell and Appellant split up with Haskell going upstairs to the apartment while Appellant searched downstairs in the work area for drugs. (R1065) Haskell carried a tire iron upstairs with him. (R1066) While Appellant searched downstairs, he heard things being strewn around upstairs and some glass breaking. (R1068) After finishing his search of the downstairs, Appellant went upstairs where he found Haskell in the kitchen leaning up against the

refrigerator, crying. (R1072-1073) Haskell told Appellant that he had just killed Eberenz. (R1073) Appellant saw Eberenz lying in a pool of blood, checked for a pulse and determined Eberenz was dead. (R1073-1074) Appellant was scared and suggested to Haskell that they leave. (R1075) Haskell held out his hand and dropped some jewelry and just cried. (R1075) Appellant picked up the jewelry and started to leave. (R1075) Haskell had a ring and a bracelet and as they left, he told Appellant to grab a necklace which was hanging on a nail in a closet. (R1076) When they got back to the motel, Haskell took out Eberenz' wallet and gave Appellant $145.00. (R1076) They went inside and ate, after which Haskell and Appellant went to a ditch where they threw the wallet. (R1076) Appellant never discussed the matter with Mary Holscher. (R1076) When arrested, Appellant had the ring and necklace which Haskell had given him to pawn. (R1078) Appellant admitted that he originally told Deputy McCormick that Eberenz was dead and the apartment was ransacked when they arrived. (R1097) Appellant further testified that although they discussed the fact that they would get drugs, they never planned on actually going into the apartment. (R1087,1082) Appellant did not recall any conversation concerning hitting anyone with a rubber mallet. (R1083) Appellant did not kill Eberenz. (R1082)

Penalty Phase:

Bruce Haskell testified that he and Appellant discussed on numerous occasions the plans to rob Eberenz, whom Haskell knew from the days when he worked for a sign company located on the premises of Eberenz' business. (R1319,1325) As originally planned, Appellant would hit Eberenz on the head with a stick and they would take his wallet. (R1326) Although he claimed he did not want to hit Eberenz, Haskell went along with the plan. (R1328) Appellant and Haskell went to Eberenz' on one occasion, but Haskell objected to hitting Eberenz so they left and decided to return when Eberenz was not home. (R1327) They returned when Eberenz was not at home and broke into the apartment. (R1331-1333) They searched the apartment, looking for drugs and/or money but found none. (R1334-1336) Haskell claimed he wanted to leave, but Appellant told him he intended to wait until Eberenz returned, hit him on the head and steal his wallet. (R1338) Haskell hid in the office and when Eberenz came home, Haskell heard Appellant hitting him. (R1339-1340) Haskell stopped Appellant by grabbing his hand. (R1341) Eberenz fell down, moaning. (R1341) Appellant kicked Eberenz and he stopped moaning. (R1342) Appellant took Eberenz' wallet and ran out of the apartment. (R1343) Haskell suggested calling 911 but Appellant said no. (R1344) They went to Appellant's house where Haskell waited in the car for approximately 45 minutes. (R1344) They went to a canal where they threw Eberenz' wallet, after which they purchased some marijuana. (R1345) After stopping at McDonald's, Appellant and Haskell returned to the motel. (R1345)

Originally, Haskell agreed to a deal with the state whereby he could plead to second degree murder in return for a sentence of 12-15 years; He rejected it because he felt he had not killed anyone so he should not have to plead to it. (R1347) The offer was renewed on December 13, 1986, the final day of Appellant's trial but he again refused. (R1348) After Appellant was convicted, on December 15, 1986, Haskell decided to accept the state's deal which was why he was testifying. (R1348)

Arthur Beaulier was a cellmate of Bruce Haskell in county jail. (R1562) Haskell discussed the case with Beaulier and told him that he (Haskell) had killed Eberenz. (R1571) Haskell also told Beaulier that he would testify "in a minute" that he saw Appellant commit the murder on the condition that he could get straight probation. (R1572-1573) At Haskell's request, Beaulier wrote a letter to Appellant in which Haskell offered to testify for Appellant in exchange for a "nice chunk of change." (R1589-1599) After Haskell learned that Beaulier had spoken with Appellant's lawyer, he spread the word that Beaulier is a snitch. (R1587) Beaulier got nothing in return for his testimony. (R1588)

Appellant was born prematurely on March 19, 1968. (R1374,1767) Appellant had two brothers and a sister, the youngest of which was seven years older than Appellant. (R1376-1377) Appellant had a weight problem as a child. (R1419) Appellant's brother Bill was jealous of Appellant and used to taunt him and beat him up. (R1417,1456) Bill eventually introduced Appellant to marijuana. (R1456)f As Appellant entered

adolescence, he underwent a change, becoming withdrawn and started doing poorly in school. (R1386,1453,1459) In November, 1984, Appellant entered Horizon Hospital in Tampa for treatment for psychiatric problems and drug abuse. (r1709) Appellant was diagnosed as suffering from a major mental disorder characterized by severe depression. (R1713-1714) Appellant was put on anti-depressant medication. (R1718) After 5½ weeks, Appellant was released with the recommendation that he remain on medication and continue therapy at home. (R1724,1726) Appellant's mental disorder could impair his ability to function in society. (R1728)

When Appellant was 14 years old he became active in scouting in the Firefighter Explorers. (R1463) Appellant was a leader among the boys. (R1404) In December, 1985, Appellant was in an auto accident, after which he started having bizarre moments during which he would stare absently. (R1406-1407) On one occasion Appellant was at a friend's house, Appellant went into a daze and urinated on the kitchen floor. (R1406) Later, he had no recollection of doing this. (R1406)

SUMMARY OF ARGUMENTS

POINT I: The Eighth and the Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution prohibit cruel and unusual punishment. The imposition of the death penalty on an individual who was a juvenile at the time of the crime violates these constitutional provisions.

POINT II: Appellant's death sentence cannot stand. The aggravating circumstances of previous conviction of a felony involving the use of violence, heinous, atrocious and cruel, and cold, calculated and premeditated are not supported by the evidence. The remaining aggravating circumstance, in the commission of a burglary, is insufficient to support a death sentence.

Assuming, arguendo, the constitutionality of the death penalty for juveniles, Section 921.141(6)(g), Florida Statutes (1985) mandates the finding of a juvenile's age as a mitigating factor which is entitled to great weight. While the weight accorded to mitigating circumstances is up to the trial judge to decide, it is error for the court to refuse to find the evidence to be mitigating.

POINT III: It is improper to permit a jury to convict a defendant of two counts of murder for a single death. It is similarly error to force the accused to defend against two counts of murder especially where the defense of one could entail an admission of guilt as to the other.

POINT IV: In determining the voluntariness of a confession the trial court must look to the totality of the circumstances. When the confession is by a juvenile, the trial court must consider whether the arresting officer complied with the requirements of Section 39.03(3), Florida Statutes (1985) which requires notification of the juvenile's parents. The court must also consider such things as the conduct of the police and the youth of the defendant.

POINT V: The combination of trial errors in the instant case deprived the Appellant of his constitutional right to due process and a fair trial. These errors included the admission of irrelevant and highly inflammatory photographs, the refusal of the trial court to allow Appellant to present evidence of bias and motive on the part of the key state witness, the improper admission of hearsay, the refusal to instruct the jury on circumstantial evidence, and the denial of the trial court of Appellant's motion for judgment of acquittal as to the count of premeditated murder.

POINT VI: Because the instant offenses occurred after October 1, 1983 it is mandatory that as to the non-capital offense a guideline scoresheet be prepared and sentencing proceed in accordance with the sentencing guidelines. The failure of the trial court to follow the procedures mandated by Rule 3.701, Florida Rules of Criminal Procedure requires resentencing as to the non-capital offenses.

POINT VII: Although this Court has previously rejected numerous attacks to the constitutionality of the death penalty in Florida Appellant urges reconsideration particularly in light of the evolving body of case law which in some cases has served to invalidate the very basic cases on which the death penalty was upheld in the State of Florida.

POINT I

THE IMPOSITION OF THE DEATH PENALTY ON AN INDIVIDUAL WHO WAS A JUVENILE AT THE TIME OF THE CRIME CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION. 1/

The murder of Karl Eberenz occurred January 20, 1986. At that time Appellant was seventeen years old. (R1063) Appellant filed a pre-trial motion to preclude imposition of the death penalty (R3090) and a pre-trial motion to declare Section 921.141, Florida Statutes (1983) unconstitutional. (R3110-3112) Appellant also filed a post-trial motion to declare Florida's death penalty statutes unconstitutional. (R3354-3356) Appellant asserts that imposition of the death penalty on an individual who was a juvenile at the time the crime was committed is fundamentally unconstitutional.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

The proscription against cruel and unusual punishment is applicable to the states by reason of the Due Process Clause of the Fourteenth Amendment. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed.422 (1947); Robinson v.

1/ This issue is currently pending before the United States Supreme Court in the case of Thompson v. Oklahoma, Case No. 86-6169, review granted 40 Cr.L. 4183 (February 23, 1987). Oral argument scheduled November 9, 1987.

California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). Additionally, the Florida Constitution contains an express proscription against cruel and unusual punishment in Article I, Section 17. The execution of Wilburn Lamb who was a juvenile at the time of the crime in question offends the above-cited constitutional provisions because it constitutes cruel and unusual punishment.

A punishment is cruel and unusual if it "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or . . . is grossly out of proportion to the severity of the crime," Coker v. Georgia, 433 U.S. 584, 592, 97 S.Ct. 2861, 53 L.Ed.2d 982, 989 (1977). The degree of an accused's "moral guilt" is also to be considered in deciding whether a particular punishment is cruel and unusual. Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). In deciding whether a punishment violates the Eighth Amendment a court must consider "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630, 642 (1958). In this regard the court looks to such objective factors as the historical development of the punishment at issue, legislative judgments, and international opinion. Enmund v. Florida, supra.

Wilburn Lamb's death sentence also constitutes an unconstitutional application of the Eighth and Fourteenth Amendments as well as Article I, Section 17. In Tison v. Arizona, 481 U.S. __, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) the Court

reiterated that before imposing the death penalty the state must inquire into the relevant facets of the character and record of the individual offender. The same court held that the chronological age of a minor is "itself a relevant mitigating factor of great weight." Eddings v. Oklahoma, 455 U.S. 104, 116, 102 S.Ct. 869, 71 L.Ed.2d 1, 12 (1981)(emphasis added). In the instant case, Judge Harris refused to even find Appellant's age as a mitigating factor, let alone accord it great weight.

"Our history is replete with laws and judicial recognition that minors, especially in their early years, generally are less mature and responsible than adults." Eddings v. Oklahoma, 455 U.S. 104, 115-116, 102 S.Ct. 869, 71 L.Ed.2d 1, 11 (1981). As noted in In re: Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), every state in the country makes some separate provision for juvenile offenders. Florida law itself is protective of 17-year-olds, defining them as "minors" and "children" see Sections 1.01(12) and 39.01(7), Florida Statutes (1985), and treating them as children, not as mature adults capable of exercising judgment or discretion. 2/

2/ Florida Statutes contain numerous proscriptions on otherwise legal rights for unmarried 17-year-olds such as Appellant:
Section 97.041, Florida Statutes (1985) - right to vote;
Section 40.01, Florida Statutes (1985) - right to serve on jury;
Section 562.11, Florida Statutes (1985) - right to sell, purchase oR possess alcoholic beverages;
Section 550.04, Florida Statutes (1985) - right to attend horse or dog races;
Section 732.501, Florida Statutes (1985) - right to make a will;
Section 743.01, Florida Statutes (1985) - right to contract, sue or be sued [by implication];

It is perhaps the supreme irony that Appellant is deemed too immature to judge the criminal responsibility of accused defendants, and thus could not serve on a jury, but he may nonetheless be subjected to the ultimate liability of death for his supposed "responsibility". That juveniles are less mature and less responsible then adults is a fact that has historically been recognized by no less than the United States Supreme Court. Bellotti v. Baird, 443 U.S. 622, 636, 99 S.Ct. 3035, 61 L.Ed.2d 797, 809 (1979). "Children by definition, are not assumed to have the capacity to take care of themselves." Schall v. Martin, 467 U.S. 253, 265, 104 S.Ct. 2403, 81 L.Ed.2d 207, 218 (1984). As a result, the actions of adolescents "cannot be judged by the more exacting standards of maturity." Haley v. Ohio, 332 U.S. 596, 599, 68 S.Ct. 302, 92 L.Ed.224 (1948).

The development of separate juvenile justice systems in every state manifested a rejection of harsh, adult punishment for the unlawful acts of children. See Eddings, 455 U.S. at 116 n. 12; In Re Gault, 387 U.S. 1, 15-16 (1967). However, the perception that youths should not be subjected to the harshest punishments was an informal premise of Anglo-American criminal justice well before the development of separate juvenile justice

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2/ (continued)
Section 790.06, Florida Statutes (1985) - right to obtain license or carry concealed firearm
Section 741.04, Florida Statutes (1985) - right to marry without parental consent
Section 390.001(4)(a), Florida Statutes (1985) - right to obtain abortion without parental consent

systems. Although statutes did not always explicitly give younger offenders benefit of more lenient punishments, the young did receive de facto benefits, such as shorter sentences, special incarceration facilities, community-based sanctions or outright commutation of criminal sentences. See e.g., Fox, Juvenile Justice Reform: An Historical Perspective, 22 Stan. L.Rev. 1187 (1970). All states now set the jurisdictional age limit for their juvenile courts no lower than age sixteen. S. Davis, Rights of Juveniles: The Juvenile Justice System, app. B (2d ed. 1986).

The United States Supreme Court has explained the reasons for the law's lenient treatment of child offenders in Eddings:

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.
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> "Adolescents everywhere, from every walk of life, are often dangerous to themselves and to others." The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 41 (1967) "[A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults." . . . Twentieth Century Fund Task Force on Sentencing

Policy Toward Young Offenders, Confronting Youth Crime 7 (1978).

455 U.S. at 115-16 & n. 11 (footnote omitted).

Special treatment of juvenile offenders is also a reflection of the belief that the young must have time and opportunity to grow - and to escape from the disadvantages, deprivations and abuse that may account for their behavior. This special treatment derives from a prevalent, compassionate and decent sense that government must be restrained from adding undue punishment to whatever pain and handicaps have already been inflicted by fate and circumstance. This sense of restraint parallels the "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. __, 107 S.Ct. 837, 841, 93 L.Ed.2d 934, 942 (1987) (O'Connor, J., concurring). See also Eddings, 455 U.S. at 115 n. 11 ([Y]outh crime as such is not exclusively the offender's fault.")(quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978).

The debate over whether capital punishment is a deterrent to future crimes is one which is likely to continue for years. In Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) the court recognized that there was no convincing empirical evidence either supporting or refuting the deterrence theory of capital punishment. Nevertheless, Justice Stewart, writing for the plurality, stated:

> We may . . . assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act.

428 U.S. at 185-186. While deterrence may be logical, such logic only works for those cold, calculating individuals who do not act out of passion or impulse. Adolescents are particularly unlikely to fit this category. Threatening a child with death does not have the same impact as threatening an adult with death. Adolescents live for today with little thought of the future consequences of their actions. Kasterbaum, _Time and Death in Adolescence_, in _The Meaning of Death_, 99 (H. Feifel ed. 1959). The defiant attitudes and risk-taking behaviors of some adolescents are related to their "developmental stage of defiance about danger and death." Fredlund, _Children and Death from the School Setting_, 47 J.School Health 533 (1977). Some adolescents play games of chance with death from a feeling of unimportance. Miller, _Adolescent Suicide: Etiology and Treatment_, 9 Adolescent Psychiatry 327 (1981). They typically have not learned to accept the finality of death. R.Lonetto, _Children's Conceptions of Death_, 134-41 (1980); Hostler, _The Development of the Child's Concept of Death_, in _The Child and Death_ (O.Sahler ed. 1978). One of the problems with juvenile behavior is not that the juveniles are cold, calculating and careful in these judgments; it is that they have no judgment at all, _Parham v. J.R.,_ 442 U.S.

584, 603, 99 S.Ct. 2493, 61 L.Ed.2d 101, 119 (1979), at least in the sense of considering the consequence of their behavior and deciding to proceed nevertheless. Irwin & Millstein, Biopsychological Correlates of Risk-Taking Behaviors during adolescence, 7 J. of Adolescent Health Care 82S (Nov. 1986 Supp.). This absence of judgment derives from the adolescent's limited experience and lack of ability to calculate future consequences. The results are often tragic: Alcohol and drug abuse, reckless driving, sexual experimentation, and other self-destructive conduct. Id. "[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." Bellotti v. Baird, 443 U.S. 622, 635, 99 S.Ct. 3035, 61 L.Ed.2d 797, 808 (1929).

This generally accepted view of typical adolescent behavior leads to the conclusion that juveniles do not commonly engage in any "cold calculus that precedes the decision to act." Gregg v. Georgia, 428 U.S. at 186. Thus, the premises underlying an assumed general deterrence of the death penalty do not apply in any reasonable manner to adolescents.

The death penalty totally rejects the one sentencing goal normally thought most appropriate for young offenders - rehabilitation. See, e.g. People v. Hiemel, 49 A.D.2d 769, 770, 372 N.Y.S.2d 730, 731 (1975). Execution abandons and denies the promise of adolescence - that the impulsive, antisocial acts of teenagers will naturally moderate as they become adults. Killing

children and adolescents for their crimes offends the fundamental premises of juvenile justice:

> [I]ncorrigibility is inconsistent with youth; . . . it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life.

Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968).

Juvenile murderers tend to be model prisoners and have very low rates of recidivism when released. D. Hamperian, The Violent Few 52 (1978); T. Sellin, The Death Penalty, 102-20 (1982). Cf. Vitello, Constitutional Safeguards for Juvenile Transfer Procedure: The Ten Years Since Kent v. United States, 26 DePaul L.Rev. 23, 32-34 (1976).

Moreover, as children grow into adults, they generally leave behind criminality. F. Zimring, Background Paper: in Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 37 (1978). Crime statistics reveal that as people move from the turbulence of adolescence to the calmer period of the early twenties, they commit fewer crimes, whether or not they are apprehended or participated in a rehabilitation program. See Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, Assessing the Relationship of Adult Criminal Careers to Juvenile Careers: A Summary 4 (1982); President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 55-56 (1967). Cf. Federal Bureau of Investigation, U.S. Dept. of Justice, Crime in the United States: 1978 194-96 (1979); Zimring, "American Youth Violence: Issues and

Trends" in Crime and Justice: An Annual Review of Research 67 (Morris & Tonry eds. 1979)(rates of many kinds of criminality peak in mid-adolescence).

Despite the clear directive by the United States Supreme Court in Eddings v. Oklahoma that "the chronological age of a minor is itself a relevant mitigating of great weight," 455 U.S. at 116, the trial court refused to even find Appellant's age as a mitigating factor at all. Similarly the jury was not instructed that it had to accord great weight to Appellant's age in mitigation. So long as Florida's capital sentencing statute, which does list age of the defendant as a possible mitigating factor, does not mandate its finding in the case of a juvenile, it is constitutionally infirm. Since the beginning of the so-called "modern era" of capital punishment [commencing with the United States Supreme Court's approval of the death penalty statute in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) this Court has affirmed the imposition of the death penalty on a juvenile in only one instance, in Magill v. State, 428 So.2d 649 (Fla. 1983). However, in that case, unlike the instant case, the trial court found the defendant's age to be a mitigating factor. Significantly, the constitutionality of the death penalty for juveniles was not raised on direct appeal and thus Magill was precluded from later raising this challenge in a post-conviction motion. See Magill v. State, 457 So.2d 1367 (Fla. 1984). At least one Justice of this Court has expressed the view that the chronological age of a minor convicted of a capital crime should be given great weight:

> As additional mitigating circumstances, the trial court also found that appellant had no significant history of prior criminal activity and that he was only seventeen years old at the time of the offense. Appellant's age should have been given greater weight in mitigation in light of the fact that he was a dependent minor who was still living at home. This Court has thus far vacated the death sentence of every defendant who has been under the age of eighteen. See Vasil v. State, 374 So.2d 465 (Fla. 1979), cert. denied, 446 U.S. 967, 100 S.Ct. 2945, 64 L.Ed.2d 826 (19780); Brown v. State, 367 So.2d 616 (Fla. 1979); Thompson v. State, 328 So.2d 1 (Fla. 1976). That is not to suggest that the death penalty should never be imposed on a minor. However, because of society's special concern for its juveniles, great significance should be attached to the fact that a person accused of a capital felony is a minor, especially a minor who is unemancipated.

Magill v. State, 428 So.2d 649, 654 (Fla. 1983)(Boyd, J., concurring in part and dissenting in part).

As Justice Boyd observed, with the lone exception of Magill, this Court has never upheld a death sentence imposed on a juvenile. Thompson v. State, 328 So.2d 1 (Fla. 1976)[defendant 17 years of age, jury recommended life, defendant's age found to be a mitigating factor]; Brown v. State, 367 So.2d 616 (Fla. 1979)[defendant 16 years of age, jury recommended life, defendant's age found to be "only possible mitigating factor"]; Vasil v. State, 374 So.2d 465 (Fla. 1979)[defendant 15 years of age, jury recommended death, no mention of mitigating factors]; Ross v. State, 386 So. 1191 (Fla. 1981)[defendant 15 years of age, jury recommended death, defendant's age found to be a mitigating factor]; Morgan v. State, 392 So.2d 1315 (Fla. 1981) and 453

So.2d 394 (Fla. 1984)[defendant 16 years of age, jury recommended death both times, no mention of mitigating factors]; Peavy v. State, 442 So.2d 200 (Fla. 1983)[defendant 17 years of age, jury recommended death, defendant's age found to be a mitigating factor]. In light of the foregoing cases, Appellant asserts that this Court should take this opportunity to rule definitively that imposition of the death penalty on a juvenile is unconstitutional. [3/]

The imposition of the death penalty on an individual who was a juvenile at the time of the crime is per se unconstitutional as it constitutes cruel and unusual punishment. Even if this Court refuses to hold that the death penalty for a juvenile as per se unconstitutional, the imposition of the death penalty in the instant case cannot be upheld because the trial court failed to find that Appellant's age was a mitigating factor which must be accorded great weight. As such the sentence clearly violates the Eighth and Fourteenth Amendments to the United States Constitution as well as Article I, Section 17 of the Florida Constitution.

3/ To the author's knowledge, there are currently five persons on death row in Florida who were juveniles at the time they committed their crimes - Cleo LeCroy, Wilburn Lamb, Jesse Livingston, Paul Magill, and James Morgan. Of the five, this Court has affirmed the death sentence of only one - Paul Magil. The remaining cases are currently pending before this Court.

POINT II

THE IMPOSITION OF THE DEATH PENALTY IN THE INSTANT CASE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION BECAUSE IT IS BASED ON AGGRAVATING CIRCUMSTANCES WHICH WERE NOT PROVEN BEYOND A REASONABLE DOUBT AND CERTAIN MITIGATING FACTORS WERE TOTALLY IGNORED.

Following the eight to four jury recommendation of death, Judge Harris adjudicated Appellant guilty of first degree premeditated murder. In his written findings of facts in support of the death sentence, Judge Harris found four aggravating circumstances: that Appellant had previously been convicted of a felony involving the use of violence, that the murder was committed while Appellant was engaged in the commission of a burglary, that the murder was especially heinous, atrocious and cruel, and that the murder was committed in a cold, calculated and premeditated manner without any pretense of any legal or moral justification. (R3331-3334) Judge Harris found only one mitigating factor to exist, that being the fact that the co-defendant, Bruce Haskell was permitted to plead to second degree murder and received a maximum sentence of fifteen years in prison. (R3338-3339) Appellant asserts that the aggravating factors found by the court are improper and further that Judge Harris erred in his assessment of the mitigating factors.

A. THE AGGRAVATING FACTORS:

1. That Appellant was previously convicted of a felony involving the use of violence.

In finding this factor to exist, Judge Harris relied solely on Appellant's contemporaneous conviction for burglary of a dwelling with an assault therein. (R3331) The victim of the burglary was in fact the murder victim. While Hardwick v. State, 461 So.2d 79 (Fla. 1985) seems to offer support for such a finding, this Court has now clarified the law on the use of contemporaneous convictions. In Wasko v. State, 505 So.2d 1314 (Fla. 1987) [4/] this Court recognized that contemporaneous convictions prior to sentencing can qualify as previous convictions of a violent felony and may be used as aggravating factors. However, this Court went on to limit the situation to cases where the contemporaneous convictions involve victims other than the murder victim. Therefore, in Wasko, as in the instant case, where the contemporaneous conviction involves a crime against the same person who is then killed, such convictions do not qualify as previous convictions for a violent felony and may not be used as an aggravating factor. Consequently this aggravating factor must be stricken.

2. That the capital felony was especially heinous, atrocious and cruel.

This Court has defined "heinous, atrocious, and cruel in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) as such:

4/ The Wasko decision was not available to Judge Harris at sentencing.

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

Recognizing that all murders are heinous, in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this Court further refined its interpretation of the legislature's intent that this aggravating circumstance only apply to crimes especially heinous, atrocious and cruel. In light of this, the facts enumerated by the trial court do not support the finding of this factor.

In Herzog v. State, 439 So.2d 1372 (Fla. 1983), this Court held the evidence insufficient to prove beyond a reasonable doubt an especially heinous, atrocious, or cruel killing in a situation where the female victim had been induced by the defendant to take drugs, then gagged, placed on a bed and smothered with a pillow, and ultimately dragged into a living room where she was successfully strangled to death with a telephone cord. This Court stated:

> As to the manner by which death was imposed, we find that in this factual context the evidence is insufficient, standing alone, to justify the application of the section (5)(h) aggravating factor. We have previously stated that this factor is applicable "where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Tedder v. State, 322 So.2d 908, 910 n. 3 (Fla. 1975) (quoting State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

Id. at 1380 (emphasis added)

An example of the valid finding of the existence of this aggravating factor can be found in Gardner v. State, 313 So.2d 675 (Fla. 1975), where the female victim suffered at least one hundred bruises on her body, numerous cuts and lacerations, and severe injury to her genitals and internal organs due to a sexual battery performed with a "broom stick, bat or bottle" Ibid at 676. This aggravating circumstance should be reserved for murders such as the one in Gardner, which was "accompanied by such additional acts as to set the crime apart from the norm", Herzog, supra at 1380. It ill serves the continued viability of the death penalty in Florida if the aggravating circumstance can be upheld under the facts of the instant case; the facts do not comport with a finding of an especially heinous, atrocious, or cruel murder.

In support of this aggravating circumstance, the trial court stated the following:

> In the case at bar the evidence indicated that the defendant hit the victim on the head six times with a claw hammer and that each blow was of sufficient force to penetrate the skull. One of the victim's hands was swollen indicating a possible defensive injury. The evidence further indicates that even after the hammer blows the victim continued to moan and move his feet and head. Multiple blows to the head with a claw hammer has previously been held to constitute heinous, atrocious or cruel conduct under similar conditions. Heiney v. State, 447 So.2d 210 (Fla. 1984).

(R3333) The evidence showed that the victim was "surprised" by his attackers. There is no indication that he knew what was

happening. Certainly this is not a case where the victim is subjected to prolonged torture with full knowledge of his impending demise. While the victim was hit about six times, it is likely that these blows were inflicted in rapid succession. That the victim did not instantaneously die is not necessarily determinative that the murder was heinous, atrocious and cruel. In Rembert v. State, 445 So.2d 337 (Fla. 1984) the victim was beaten with a stick between one and seven times. He did not die immediately. In fact, he lingered several hours before dying of severe injuries to the brain. On appeal, this Court held that while the murder was reprehensible, it did not meet the test for finding that it was heinous, atrocious and cruel. In Teffeteller v. State, 439 So.2d 840 (Fla. 1983) this Court rejected a finding that the shotgun murder was heinous, atrocious and cruel, holding:

> The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies.

Id at 846. In Simmons v. State, 419 So.2d 316 (Fla. 1982) this Court again disaproved a finding that the murder was heinous, atrocious and cruel where the victim was killed by blows to his head with a roofing hatchet. In so ruling, this Court noted that the victim was not aware that he was about to be hit with the hatchet and death was nearly instantaneous. This Court also noted that the finding that the victim was murdered in his own home offered no support for the finding. In Halliwell v. State, 323 So.2d 557 (Fla. 1975) this Court again rejected a finding of

heinous, atrocious and cruel, despite the fact that the defendant grabbed a 19-inch breaker bar and beat the victim's skull with lethal blows and then continued beating, bruising and cutting the victim's body with the metal bar. Surely the conduct in the instant case does not approach the level of the conduct of Halliwell.

In summary, there are no "additional acts" present in the instant case to set this murder apart from the norm of capital felonies. The finding that the murder was heinous, atrocious and cruel cannot be upheld.

3. The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

In Combs v. State, 403 So.2d 418 (Fla. 1981), this Court declared that Section 921.141(5)(i), Florida Statutes (1981) authorizes a factor in aggravation for premeditated murder where the premeditation is "cold, calculated and . . . without any pretense of moral or legal justification." Id. at 421. This Court further stated that "Paragraph (i) in effect adds nothing new to the elements" of premeditated murder, but does add "limitations to those elements for use in aggravation." Id. (emphasis added). Subsequently, in Jent v. State, 408 So.2d 1024, 1032 (Fla. 1982), this Court held:

> The level of premeditation needed to convict in the [guilt] phase of a first degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the

> elements of the premeditation aggravating factor - "cold, calculated . . . and without any pretense of moral or legal justification." (emphasis supplied)

The aggravating circumstance of murder committed in a cold calculated manner without any pretense of moral or legal justification applies only to crimes which exhibit heightened premeditation greater than is required to establish premeditated murder, and it must be proven beyond a reasonable doubt. Gorham v. State, 454 So.2d 556 (Fla. 1984). "This aggravating factor 'is not to be utilized in every premeditated murder prosecution,' and is reserved primarily for 'those murders which are characterized as execution or contract murders or witness elimination murders.' (citation omitted)." Bates v. State, 465 So.2d 490, 493 (Fla. 1985).

In Middleton v. State, 426 So.2d 548, 553 (Fla. 1982), this Court approved the finding of (5)(i) where according to the defendant's own confession, he sat with the shotgun in his hands for an hour, looking at the victim as she slept and thinking about killing her. In light of these facts, the Court stated:

> This is clearly the kind of intentional killing this aggravating circumstance was intended to apply to. The cold-blooded calculation of the murder went beyond mere premeditation. (emphasis supplied)

In Harris v. State, 438 So.2d 787 (Fla. 1983), this Court struck down a finding of (5)(i) where the defendant killed a seventy-three year old woman by repeatedly stabbing her and beating her with a blunt instrument. The evidence also showed

that the victim tried to escape and suffered numerous defensive wounds. This Court stated:

> We must, however, agree that the state failed to establish beyond a reasonable doubt that this murder met the requirements of having been committed in a cold, calculated, and premeditated manner, as we have defined this aggravating circumstance. This aggravating circumstance was not, in our view, intended by the legislature to apply to all premeditated-murder cases. [citations omitted] In this instance the state presented no evidence that this murder was planned and, in fact, the instruments of the death were all from the victim's premises.

In his findings of fact to support this aggravating circumstance, the trial court stated:

> In the case at bar the defendant and his co-defendant and friends had discussed this planned burglary for several days and had planned to hit the "old man" over the head. They had discussed various weapons to use to carry out this plan. The defendant even carried a weapon (a pick axe handle) to the victim's home for the purpose of hitting him with it. During the burglary and before the victim returned home, the "golden" hammer was found and replaced the pick axe handle as the weapon of choice.
>
> The defendant being unhappy with the results of the burglary decided to await the return of the victim. He cooked soup while he waited. Upon hearing the victim returning, the defendant concealed himself. Once the victim entered his home, the defendant struck him repeatedly with the claw hammer. The only sign of a struggle was a swelling in one of the victim's hands.
>
> The evidence convinces the Court that the defendant awaited the return of the victim with the intention of striking the victim from behind with the claw hammer to immobilize the victim. Because of the excessive force of those

> blows (each penetrating the skull), the Court is convinced that the defendant intended the death of the victim.
>
> Defendant's "heightened" premeditation is shown by his previous planning to hit the "old man" over the head [Dufour v. State, 495 So.2d 154 (Fla. 1986)] and his bringing a weapon to the murder site with him. This is not changed by the fact that he substituted a more suitable weapon once he arrived at the murder scene. See also Huff v. State, 495 So.2d 145 (Fla. 1986), Eutzy v. State, 458 So.2d 755 (Fla., 1984). (R3333-3334)

The evidence recited by the trial court supports the inference that Appellant and Haskell discussed in advance their plans to burglarize the Eberenz' home and to rob Mr. Eberenz. However, this advance planning did not include killing the victim. Robbery necessarily involves or at the least contemplates the use of force. Also, significantly, in Appellant's confession to Deputy McCormick, relied upon by the state, Appellant stated that he never intended to kill Eberenz. (R854) This Court has consistently held that planning to commit a crime other than the murder cannot automatically be transferred to the murder for the purpose of finding enhanced premeditation for the killing. See Gorham, supra; and Hardwick v. State, 461 So.2d 79 (Fla. 1984). Appellant's and Haskell's plan to rob Eberenz and burglarize his home cannot be transferred to show a heightened premeditation to kill Eberenz. This aggravating circumstance must fail.

4. The capital felony was committed while the defendant was engaged in the commission of a burglary. [5]

In light of the impropriety in finding that the aggravating factors of previous conviction for a violent felony, heinous, atrocious and cruel, and cold, calculated and premeditated were applicable (See arguments, Sections 1, 2 and 3, supra), the sole remaining aggravating factor found to apply by the trial court is that the murder occurred in the commission of a burglary. The use of the underlying felony as an aggravating circumstance would apply to every felony-murder situation and defeat the function of the statutory aggravating circumstances to confine and channel capital sentencing direction, and thus would defeat the principles enumerated in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). A death sentence for a felony-murder cannot be supported by an aggravating circumstance which takes into account the same underlying felony in which the murder was committed. Certainly, all felony-murders do not, and constitutionally cannot, mandate the death penalty. To the extent a death sentence is founded upon automatic aggravating circumstances, it is unconstitutional. Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). To uphold a death sentence simply because a murder was

5. Appellant recognizes this issue has been rejected by this Court in Breedlove v. State, 413 So.2d 1 (Fla. 1982) and Quince v. State, 414 So.2d 185 (Fla. 1982), but urges reconsideration in light of the fact that this aggravating circumstance is the only one which could remotely be upheld.

committed in the course of another felony would leave judges and juries with unfettered, unchanneled discretion, would provide no meaningful basis for distinguishing between those felony-murder cases which receive the ultimate penalty and those that receive life, and would render the Florida death penalty statute arbitrary and capricious as applied. _Cf_. _Proffitt v. Florida_, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); _Godfrey v. Georgia_, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

Applying such reasoning, the North Carolina Supreme Court invalidated the use of the underlying felony as an aggravating circumstance. _State v. Cherry_, 257 S.E. 2d 551 (N.C. 1979). The _Cherry_ court found that the death penalty in a felony-murder case would be disproportionately applied due to the "automatic" aggravating circumstance, and thus struck the use of the underlying felony as an aggravating circumstance. Likewise, in _Keller v. State_, 380 So.2d 926 (Ala.Ct.Cr.App. 1979)(_app_. _after_ _remand_ 380 So.2d 1162 (Ala.Ct.Cr.App. 1980), _writ_. _den_. 382 So.2d 1175 (Ala. 1980), the court held that the underlying felony of robbery could not be used as an aggravating circumstance to support the imposition of the death penalty. Accordingly, this Court should rule that the death penalty is improper in a case where this aggravating circumstance is the only one supported by the evidence. _Cf_. _Proffitt v. State_, 12 FLW 373 (Fla. July 9, 1987).

B. MITIGATING CIRCUMSTANCES

Initially, it must be noted that the trial court seemed a little confused with respect to his role in considering mitigating factors. Specifically, the court questioned whether he was required to find matters in mitigation and then determine what weight to give them or whether he was permitted to simply deny the existence of mitigating factors. (R1983-1985) As is apparent from his findings of facts, Judge Harris chose the latter view which Appellant asserts was improper.

1. The trial court erred in failing to find Appellant's age as a mitigating factor.

Section 921.141(6)(g), Florida Statutes (1985) provides:

> (6) MITIGATING CIRCUMSTANCES. - Mitigating circumstances shall be the following:
>
> * * *
>
> (g) The age of the defendant at the time of the crime. (emphasis added).

In refusing to find this mitigating circumstance, Judge Harris stated:

> (g) The age of the defendant at the time of the crime.
>
> The defendant was seventeen years of age at the time he committed the murder; two months shy of his eighteenth birthday. The defense argues that the fact that the Defendant was a juvenile at the time of the murder should itself constitute a mitigating factor. This Court is aware that the issue of whether it is constitutionally appropriate to ever impose the death penalty on one who commits the crime while a juvenile is presently before the United States Supreme Court. This Court

> is comforted by the knowledge that this issue will be resolved long before any final action can be taken in this matter.
>
> There is presently no definitive law that exempts a juvenile from the ultimate penalty for his criminal acts, nor -- at least by specific language -- provides him a mitigation factor merely because he is under eighteen years of age.
>
> Since the legislature did not establish an age below which a mitigating factor must be found, it seems to this Court that the better reasoned interpretation would be that before age becomes a mitigating factor it must be shown to have some effect on the reasoning ability or decision making processes of the defendant.
>
> There is nothing to indicate that the age of the defendant affected his mental or emotional maturity or affected his ability to take responsibility for his own acts or to appreciate the consequences flowing from them.
>
> The evidence showed him to be mature for his age. He visited with adult friends; he discussed adult topics; he gave advise [sic] to friends on serious topics; his opinions were valued; he was looked up to by his peers; he was a leader.
>
> The Court does not find that the defendant's age is a mitigating factor in this case. (R3337, emphasis added)

Appellant takes issue with these findings in several respects.

First, contrary to the court's findings, the evidence is replete with instances which show Appellant's lack of maturity which is certainly in keeping with his chronological age. Appellant had a somewhat normal upbringing until he entered adolescence. At this time he began abusing drugs, falling in with the "wrong" crowd, and ignoring his school work. (R1388-1389) Eventually, Appellant quit school. His drug abuse escalated to the point where he was sent to a drug treatment

program. Appellant suffered from a mental disorder characterized by recurring bouts of severe depression. (R1713-1714) Appellant had a brain chemical imbalance which was controlled by anti-depressant drugs. (R1718) If Appellant did not continue to take his medication, the disorder could manifest itself at any time. (R1730) If this happened, it is likely that Appellant would probably be unable to conform his conduct to that required by society. (R1730) Appellant still resided with his parents, having never had to exist on his own for any extended period of time.

The evidence of his leadership abilities among his peers referred mainly to his role in the Boy Scout Explorers when he was 14 years old. (R1403-1404) The fact that other 14 year olds looked up to Appellant does not alter the fact that Appellant was still only forced to exist and interact in the "world" of adolescence. His cares and worries were not those of an adult. His advice to his peers was on adolescent problems.

Appellant's ability to visit with adult friends and discuss adult topics still does not detract from the fact of his chronological age. Many of the adults with whom he was able to function were unaware of Appellant's drug problem which indicates that perhaps Appellant was engaging in some deception, a not uncommon adolescent trait.

Aside from the evidentiary contradictions to Judge Harris' findings, his failing to find Appellant's age as a mitigating factor is improper under the law. While it is true that Florida law has not set a minimum age at which this

mitigating factor must be applied, Appellant asserts that at the very least the factor must be applied to every juvenile. To hold otherwise would render the statute meaningless. The United States Supreme Court has mandated that a juvenile's chronological age must be considered a relevant mitigating circumstance and must be accorded great weight. In Eddings v. Oklahoma, 455 U.S. 104, 116, 102 S.Ct. 869, 71 L.Ed.2d 1, 12 (1982) the Court stated:

> . . . [J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the back ground and mental and emotional development of a youthful defendant be duly considered in sentencing.

Since 1976, this Court has decided seven cases involving persons who were juveniles at the time they committed murder. In five of these cases, the trial court expressly found age to be a mitigating factor: Thompson v. State, 328 So.2d 1 (Fla. 1976)[defendant 17 years of age]; Brown v. State, 367 So.2d 616 (Fla. 1979)[defendant 16 years of age]; Ross v. State, 386 So.2d 1191 (Fla. 1981)[defendant 15 years of age]; Magill v. State, 428 So.2d 649 (Fla. 1983)[defendant 17 years of age]; and, Peavy v. State, 442 So.2d 200 (Fla. 1983)[defendant 17 years of age]. In the remaining two cases, no mention was made of mitigating factors. Vasil v. State, 374 So.2d 465 (Fla. 1979)[defendant 15 years of age]; and Morgan v. State 392 So.2d 1315 (Fla. 1981) and 453 So.2d 394 (Fla. 1984)[defendant 15 years of age]. Magill, supra, is the only instance in which this Court upheld a death sentence on a juvenile.

Numerous other cases have approved various age as mitigating factors; Swan v. State, 322 So.2d 485 (Fla. 1975)[19 years old]; Meeks v. State, 336 So.2d 1142 (Fla. 1976)[21 years old]; Meeks v. State, 339 So.2d 186 (Fla. 1986)[21 years old]; Hoy v. State, 353 So.2d 826 (Fla. 1977)[22 years old]; Hargrave v. State, 366 So.2d 1 (Fla. 1978)[19 years old]; Jackson v. State, 366 So.2d 752 (Fla. 1978)[18 years old]; Mikenas v. State, 367 So.2d 606 (Fla. 1978)[22 years old]; Brown v. State, 381 So.2d 689 (Fla. 1979)[22 years old]; King v. State, 390 So.2d 315 (Fla. 1980)[23 years old]; McKennon v. State, 403 So.2d 389 (Fla. 1981)[18 years old]; Buford v. State, 403 So.2d 943 (Fla. 1981)[19 years old]; Adams v. State, 412 So.2d 850 (Fla. 1982)[20 years old]; Hitchcock v. State, 413 So.2d 741 (Fla. 1982)[20 years old]; Smith v. State, 424 So.2d 726 (Fla. 1982)[19 years old]; Washington v. State, 432 So.2d 44 (Fla. 1983)[19 years old]; Foster v. State, 436 So.2d 56 (Fla. 1983)[21 years old]; Lightbourne v. State, 438 So.2d 380 (Fla. 1983)[21 years old]; Herring v. State, 446 So.2d 1049 (Fla. 1984)[19 years old]; Bassett v. State, 449 So.2d 803 (Fla. 1984)[18 years old]; Thomas v. State, 456 So.2d 454 (Fla. 1984)[20 years old]; Randolph v. State, 463 So.2d 186 9Fla. 1984)[24 years old]. Surely, if it is proper to find these ages as mitigating factor, it is at the least an abuse of discretion to fail to find a juvenile's age as a mitigating factor. Resentencing is absolutely required.

2. Non-statutory mitigating factors.

Judge Harris listed numerous factors presented by Appellant in mitigation. After listing them and stating he "considered" them, Judge Harris then concluded:

> The Court finds that none of these factors rise to the level of a mitigating circumstance to be weighed in the penalty decision. (R3339)

Once again, Judge Harris' confusion as to his proper role in evaluating mitigating circumstances is highlighted. In _Eddings v. Oklahoma_, _supra_, the court stated:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, _as a matter of law_, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

_Id_ 455 U.S. at 113-115, 71 L.Ed.2d at 10-11. Clearly, then Judge Harris applied an improper standard. Remand is necessary so that Judge Harris can properly assess the weight to be given to the non-statutory mitigating factors presented. _See_ _Skipper v. South Carolina_, 476 U.S. __, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); _McCampbell v. State_, 421 So.2d 1072 (Fla. 1982); _Eddings v. Oklahoma_, _supra_; _Craig v. State_, 12 FLW 269 (Fla. May 28, 1987).

3. _The co-defendant's participation and the doctrine of proportionality_.

The trial court did find as a mitigating factor the fact that Appellant's co-defendant, Bruce Haskell was permitted

to plead to second degree murder in exchange for a prison term of fifteen years. This is, of course, proper. However, in assessing the degree of responsibility of Haskell, Judge Harris specifically found:

> But for the conduct of the co-defendant [Haskell] and his willingness to actively participate in a violent burglary, the victim would probably be alive today. (R3339, emphasis added).

Appellant asserts that with this finding alone entitles him to a life sentence. See Messer v. State, 330 So.2d 137 (Fla. 1976).

C. SUMMARY

Appellant's death sentence must be vacated and the cause remanded with instructions to sentence him to life in prison. This is mandated because the aggravating circumstances were not proven beyond a reasonable doubt and because the mitigating factors heavily outweigh the sole valid aggravating factor.

POINT III

IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION APPELLANT WAS CHARGED WITH, STOOD TRIAL ON AND WAS CONVICTED OF TWO COUNTS OF FIRST DEGREE MURDER FOR A SINGLE MURDER.

The Grand Jury in and for Brevard County returned an indictment charging Appellant with one count of first degree premeditated murder and one count of first degree felony murder. (R3373-3374) He was convicted of both counts. (R1291,3234-3235) Judge Harris adjudicated Appellant guilty of only premeditated murder and imposed a sentence of death. First degree murder may be proven in two ways: either by showing that the defendant formed a premeditated intent to effect the death of another or by showing that while the defendant engaged in the commission of certain enumerated felonies he did kill someone. In the latter case, premeditation is presumed as a matter of law. Fleming v. State, 374 So.2d 954 (Fla. 1979).

It is well-settled that the state may not obtain two homicide convictions for a single death. Houser v. State, 474 So.2d 1193 (Fla. 1985); State v. Gordon, 478 So.2d 1063 (Fla. 1985). This applies specifically to premeditated murder and felony murder convictions. Goss v. State, 398 So.2d 998 (Fla. 5th DCA 1981). It follows, then, that it was improper to submit both charges to the jury without an instruction that it could return only a single verdict. The prejudice that follows is that in attempting to cast reasonable doubt as to the premeditated count, the accused may be forced to admit to the felony murder

charge. Due process demands that an accused not be placed in such an untenable position. Appellant requests this Court to vacate his convictions for the two murder charges and remand the cause for a new trial.

POINT IV

IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS TO SUPPRESS HIS STATEMENTS AND PHYSICAL EVIDENCE.

Appellant filed several pre-trial motions to suppress his statement and the physical evidence seized from him. (R3095-3096,3135,3150-3152) A hearing was held on the motion on July 24, 1986. (R1028-2113) Deputy David McCormick testified that he personally arrested Appellant for murder and burglary in the parking lot of the San Jaun Apartments. (r2046) Deputy McCormick had previously arrested Appellant on two occasions. (R2041) Appellant had been given his Miranda rights on the prior occasion and understood them, evoking his right to an attorney on one occasion. (R2041-2043) When he arrested Appellant for the instant offenses, Deputy McCormick searched him and found a man's ring in his left front pocket and a gold chain around his neck. (R2049) Lieutenant Thomas Fair arrived at the scene and also informed Appellant he was under arrest and read him his Miranda rights. (R2051,2083) Lieutenant Fair told Appellant he was facing the electric chair for the murder. (R2088,2093) At Lieutenant Fair's direction, Deputy McCormick sat with Appellant in the rear of a police car. (R2051) Deputy McCormick understood that his "job" was to elicit an incriminating statement from Appellant. (R2069) Deputy McCormick gave Appellant a cigarette and chatted with him. (R2053) He asked Appellant what happened and Appellant told him that he and Haskell had planned

for months to rob Eberenz. (R2054) Haskell and a guy named Bucky went to Eberenz' house the night before his death but nothing happened. (R2054) Haskell and Appellant returned the next evening, found the back door broken and Eberenz dead. (R2055) They took some jewelry and left. (R2055) Deputy McCormick left the car for a few minutes. (R2055) When he returned, he told Appellant that he "knew" Appellant would never go there to deliberately hurt someone and asked if perhaps the man had come home unexpectedly. (R2055) Appellant told Deputy McCormick that that is in fact what happened. (R2055) When he asked Appellant if he had actually hit Eberenz, Appellant hung his head in silence. (R2055) Although he tried to get Appellant to make an incriminating statement, Deputy McCormick made no threats or promises and used no coercion. (R2056-2057) Appellant testified that he requested that Deputy McCormick call his parents, but was told it could not be done immediately. (R2092) Deputy McCormick testified that no mention was made of any request by Appellant to call his parents. (R2127) When they got to the Sheriff's office, Appellant's parents and his attorney were contacted. (R2130) Appellant asserts that based on the totality of the circumstances, Appellant's statements should have been suppressed.

Section 39.03(3), Florida Statutes (1985) provides that whenever a juvenile is taken into custody, the arresting officer is required to notify the juvenile's parents. In Doerr v. State, 383 So.2d 905 (Fla. 1980), this Court ruled that failure to notify a juvenile's parents will not *per se* invalidate any

statements made by the juvenile to the officers. However, the lack of notification of the child's parents is a factor to be considered in determining the voluntariness of any child's confession. Id. at 908.

The conduct of police is one of the most important factors in determining the voluntariness of a confession. Ashcraft v. Tennessee, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed.2d 1192 (1944). A confession is not admissible if it was "extracted by any sort of threats or violence [or] obtained by any direct or implied promises, however slight [or] by the exertion of any improper influence." Bram v. United States, 168 U.S. 532, 542-543 18 S.Ct. 183, 42 L.Ed. 568 (1897). See also Lawton v. State, 152 Fla. 821, 13 So.2d 211 (Fla. 1943); Fullard v. State, 352 So.2d 1271 (Fla. 1st DCA 1977); Fillinger v. State, 349 So.2d 714 (Fla. 2d DCA 1977); M.D.B. v. State, 311 So.2d 399 (Fla. 4th DCA 1974). Case law has held that a confession should be excluded if the interrogators attempt to delude a prisoner as to his true position or if they attempt to exert an improper influence over his mind. Frazier v. State, 107 So.2d 16 (Fla. 1958); Harrison v. State, 152 Fla. 86, 12 So.2d 307 (1943).

In the instant case, the avowed intention of the officers was to get Appellant to give an incriminating statement. (R2069) In this regard, they used Deputy McCormick who knew Appellant from the past. (R2051) The threat of the electric chair was used. (R2088,2093) Deputy McCormick used methods designed to make Appellant comfortable enough with him so he was more likely to talk to him. (R2069-2070) Appellant indicated

his desire to speak "in confidence." (R2054-2071) When these factors are combined with Appellant's youth and the failure of the officers to comply with the requirements of Section 39.03(3), Florida Statutes (1985), it is clear that Appellant's statements were involuntary and thus the trial court should have granted the motion to suppress. A new trial is required.

POINT V

APPELLANT IS ENTITLED TO A NEW TRIAL WHERE THE CUMULATIVE EFFECT OF NUMEROUS ERRORS DURING HIS TRIAL RESULTED IN A VIOLATION TO HIS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 2, 15, 16 AND 22 OF THE FLORIDA CONSTITUTION.

Appellant asserts that numerous errors occurred during his trial which individually might not rise to the level of reversible error but when considered together lead to the conclusion that Appellant's right to a fair trial has been violated. Appellant will discuss these issues briefly in individual fashion:

A. Admission of Gruesome Photographs

During trial, the state successfully admitted over defense objection, photographs of the deceased. Many of these photographs were autopsy photos. (R3429,3430,3431,3432,3433, 3434) The relevance of these photographs is questionable. The non-autopsy photographs show the wounds sufficiently to support the state's case. When a photograph is relevant it is admissible, unless what it depicts is so shocking in nature as to overcome the value of its relevancy. Alford v. State, 307 So.2d 433 (Fla. 1975) cert. denied 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976); Williams v. State, 228 So.2d 377 (Fla. 1969). Where the primary purpose of photographs is to inflame the jury, a conviction will be reversed. Jackson v. State, 359 So.2d 1190 (Fla. 1978)

B. The Refusal of the Trial Court to Allow Evidence Which Would Tend to Show Bias on the Part of the Main State Witness, Mary Holscher

The main state witness against Appellant at trial was his girlfriend, Mary Holscher. She testified that Appellant had told her that he killed Eberenz and related in detail what had transpired that evening. (R650-667) Appellant testified that he never discussed the incident with Mary Holscher. (R1076) In an effort to show bias and possible motive for Mary Holscher to fabricate her testimony, Appellant sought to elicit evidence that Mary Holscher was involved in a sexual relationship with the co-defendant Haskell. (R789)

The impeachment of a witness embraces all lawful means of impairing his credibility including proof of his bias or motive for fabricating his testimony. Dukes v. State, 442 So.2d 316 (Fla. 2d DCA 1982) Such impeachment may be accomplished through other witnesses. Id. Where the excluded evidence went directly to the credibility of the crucial state witness, reversal is mandated. Russo v. State, 418 So.2d 483 (Fla. 2d DCA 1982). The evidence of Mary Holscher's sexual relationship with the co-defendant was relevant as it tended to show her motivation in fabricating her testimony which placed the responsibility for the murder solely on Appellant and not on Haskell. Appellant had also specifically denied having discussed the matter with Holscher. (R1076)

C. Improper Admission of Hearsay

Over objection, the trial court permitted Timothy Kaye to testify that he heard Appellant and Haskell planning the burglary of the victim's house. Specifically, Kaye testified that he heard someone state his intention to "hit the old man over the head." (R893) Kaye could not remember who said this statement. (R899) Because Kaye could not attribute this statement to Appellant, it was not admissible as a statement against interest. See Section 90.804(2)(c), Florida Statutes (1985). The prejudice in admitting such statement is that Appellant's theory of defense is that he did not contemplate the death of Eberenz and had no knowledge of it until after Haskell had killed him.

D. The Trial Court Erred in Denying the Motion for Judgment of Acquittal as to Premeditated murder

At the close of the state's case, defense counsel moved for a judgment of acquittal as to the premeditated murder count. (R971,1160) This was denied. (R971) The evidence produced by the state clearly points out that the murder was a classic felony murder situation. There was evidence of advanced planning on the part of Appellant and Haskell to burglarize Eberenz' apartment and/or to rob him. (R782,890) However, there was no discussion of any plan to kill the victim. There was discussion concerning a plan to hit the man over the head and rob him but this evidence only tends to show a plan to commit a robbery, which by its definition contemplates the use of force. This plan to commit robbery cannot be transferred to a premeditated design to effect the victim's death. Evan Appellant's own admissions to the

police negate any premeditation. (R854) A judgment of acquittal should have been granted. See also Jaramillo v. State, 417 So.2d 257 (Fla. 1982).

E. Refusal to Give Jury Instruction on Circumstantial Evidence.

Defense counsel timely requested a jury instruction on circumstantial evidence which was denied. (R1129-1133) The only evidence of premeditation was circumstantial and thus the jury was entitled to such instruction.

It is recognized that the standard jury instructions have deleted the specific instruction on circumstantial evidence. However, in its opinion publishing the new jury instructions, this Court stated that the instruction could still be given in an appropriate situation:

> The elimination of the current standard instruction on circumstantial evidence does not totally prohibit such an instruction if a trial judge, in his or her discretion, feels that such is necessary under the peculiar facts of a specific case. In the Matter of Florida Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981)

The Appellant submits that the instant case is precisely the situation envisioned in the above-quoted matter, where the requested instruction was necessary to afford Appellant due process of law.

As shown in Point D, supra, the prosecution relied solely on circumstantial evidence to convict the Appellant of first-degree premeditated murder. In such a situation, Florida courts have always held that a trial court is compelled to

instruct the jury upon the law governing circumstantial evidence. State v. Anderson, 270 So.2d 353, 357 (Fla. 1972); Leavine v. State, 109 Fla. 447, 147 So.2d 897 (1933); Boyd v. State, 122 So.2d 632, 634 (Fla. 1st DCA 1960). A trial court's refusal to so instruct deprives a defendant of due process, Marsh v. State, 112 So.2d 60 (Fla. 1st DCA 1959), notwithstanding any change in the standard jury instructions. See also Perez v. State, 371 So.2d 715 (Fla. 2d DCA 1979).

F. SUMMARY.

Because of the cumulative effect of the issues presented above in Sections A - E, Appellant asserts he is entitled to a reversal of his conviction for premeditated murder and a new trial on the remaining charges. The errors set forth above denied Appellant his constitutional guarantees to due process and a fair trial.

POINT VI

IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW, THE TRIAL COURT ERRED IN SENTENCING HIM ON THE BURGLARY AND GRAND THEFT CHARGES WITHOUT COMPLYING WITH THE SENTENCING GUIDELINES.

In addition to the capital felony, Appellant was also convicted of burglary and grand theft. At sentencing, Judge Harris imposed sentences of 40 years for the burglary and 5 years for the grand theft. No mention is made of a guideline scoresheet. Because the offenses occurred after October 1, 1983, it was mandatory that a scoresheet be prepared and sentencing proceed in accordance with the sentencing guidelines. See Rule 3.701, Florida Rules of Criminal Procedure; Waring v. State, 504 So.2d 786 (Fla. 2d DCA 1987); Stokes v. State, 476 So.2d 313 (Fla. 1st DCA 1985).

POINT VII

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. The issues are presented in a summary form in recognition that this Court has specifically or impliedly rejected each of these challenges to the constitutionality of the Florida statute and that detailed briefing would be futile. However, Appellant does urge reconsideration of each of the identified constitutional infirmities.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (Fla. 1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). This leads to arbitrary and capricious imposition of the death penalty.

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, supra; Witt v. State, 387 So.2d 922, 931-932 (Fla. 1980)(England, J. concurring). Herring v.

State, 446 So.2d 1049, 1058 (Fla. 1984)(Ehrlich, J. concurring in part and dissenting in part).

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and factors. See Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 59 L.Ed.2d 973 (1978). Compare Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

The failure to provide the defendant with notice of the aggravating circumstances which make the offense a capital crime and on which the state will seek the death penalty deprives the defendant of due process of law. See Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); Amend. VI and XIV, U.S. Const.; Art. 1, §§9 and 15(a), Fla. Const.

Execution by electrocution imposes physical and psychological torture without commensurate justification and is therefore cruel and unusual punishment. Amend. VIII, U.S. Const.

The Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law.

The Florida capital sentencing system allows exclusion of jurors for their views on capital punishment which unfairly

results in a jury which is prosecution prone and denies the right to a fair cross-section of the community. See Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

The Elledge Rule [Elledge v. State, 346 So.2d 998 (Fla. 1977)], if interpreted to automatically hold as harmless error any improperly found aggravating factor in the absence of a finding by the trial court of a mitigating factor, violates the Eighth and Fourteenth Amendments to the United States Constitution.

The amendment of Section 921.141, Florida Statutes (1979) by adding aggravating factor 921.141(5)(i) (cold and calculated) renders the statute unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution because it results in arbitrary application of this circumstance and in death being automatic unless the jury or trial court in their discretion find some mitigating circumstance out of an infinite array of possibilities as to what may be mitigating.

Additionally, a disturbing trend has become apparent in this Court's decisions and its review of capital cases. This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction. Quince v. Florida, 459 U.S. 895, 103 S.Ct. 192, 74 L.Ed.2d 155 (1982)(Brennan and Marshall, J.J., dissenting from denial of cert.); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Appellant submits that

such an application renders Florida's death penalty unconstitutional.

In rejecting a constitutional challenge to the statute, the United States Supreme Court assumed in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), that this Court's obligation to review death sentences encompasses two functions. First, death sentences must be reviewed "to insure that similar results are reached in similar cases." Proffitt, supra at 258. Secondly, this Court must review and reweigh the evidence of aggravating and mitigating circumstances to determine independently whether the death penalty is warranted. Id at 253. The United States Supreme Court's understanding of the standard of review was subsequently confirmed by this Court when it stated that its "responsibility [is] to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." Harvard v. State, 375 So.2d 833, 834 (Fla. 1978) cert. denied 414 U.S. 956 (1979)(emphasis added).

In two recent decisions, this Court has recognized previous decisions were improperly decided. In Proffitt v. State, 12 FLW 373 (Fla. July 9, 1987) this Court reduced a death sentence to life despite having previously affirmed it on three prior occasions in Proffitt v. State, 315 So.2d 461 (Fla. 1975) affirmed 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Proffitt v. State, 360 So.2d 771 (Fla. 1978); and Proffitt v. State, 372 So.2d 1111 (Fla. 1979). The basis of the holding was this Court's duty to conduct proportionality review. Similarly in King v. State, 12 FLW 502 (Fla. September 24, 1987) this Court

invalidated a finding of the aggravating factor that the defendant caused a great risk of death to many persons despite having approved it in King's direct appeal in King v. State, 390 So.2d 315 (Fla. 1980). In so doing, this Court acknowledged that the factor had not been proven beyond a reasonable doubt. What these two cases clearly demonstrate is that the death penalty as applied in Florida leads to inconsistent and capricious results.

In view of this Court's abandonment of its duty to make an independent determination of whether or not a death sentence is warranted, the constitutionality of the Florida death penalty statute is in doubt. For this and the previously stated arguments, Appellant contends that the Florida death penalty statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Based on the foregoing reasons and authorities Appellant respectfully requests this Honorable Court to grant the following relief:

As to Points I and II, vacate the sentence of death and remand for imposition of a life sentence;

As to Point III, reverse the conviction for murder and remand for a new trial;

As to Points IV and V, reverse his judgments and sentences and remand for a new trial;

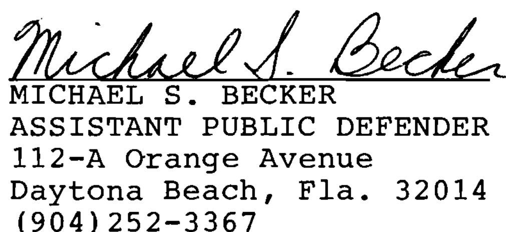
As to Point V, reverse his judgment and sentence for premeditated murder and remand with instructions to discharge him as to that count;

As to Point VI, to vacate the sentences imposed for burglary and grand theft and remand for resentencing pursuant to the guidelines;

As to Point VII to vacate his sentence of death and remand with instructions to sentence him to life imprisonment.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER
112-A Orange Avenue
Daytona Beach, Fla. 32014
(904)252-3367

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Fla. 32014 and to Mr. Wilburn Lamb, #105546, P.O. Box 747, Starke, Fla. 32091 on this 5th day of October 1987.

Michael S. Becker
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER