IN THE SUPREME COURT
OF THE STATE OF FLORIDA

**ERNEST FITZPATRICK, JR.**

Appellant,

vs.

**STATE OF FLORIDA,**

Appellee.

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Case No. 70,927



# APPELLANT'S MAIN BRIEF

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## STATEMENT OF THE CASE

This case arose out of the shooting of Escambia County Deputy Doug Heist on April 29, 1980, for which appellant was convicted of first degree murder. He also was convicted on two counts of attempted murder and three counts of kidnapping for acts arising out of a single, approximately ten minute episode. The jury recommended death and the judge imposed the death penalty. On direct appeal, this Court affirmed. Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983) ("Fitzpatrick I"), cert. den., 465 U.S. 1051 (1984).

Appellant later filed a habeas corpus petition in this Court, alleging that his appellate attorney was ineffective for failing to argue on direct appeal that the trial court had erred in allowing the State to present evidence (appellant's juvenile history) to prospectively rebut the "no prior criminal activity" mitigating circumstance, upon which appellant had waived reliance. This Court found appellate counsel to be ineffective, held that the admission of this evidence constituted reversible error, and ordered a new sentencing proceeding. Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 1986) ("Fitzpatrick II").

On May 4, 1987, a new sentencing jury was impanelled. After a five day sentencing hearing, the jury recommended, by a one vote seven (7) to five (5) margin, that Appellant be sentenced to death. The sentencing judge imposed a death sentence upon appellant, finding five (5) aggravating and three (3) statutory mitigating circumstances. The instant appeal followed.

## STATEMENT OF FACTS

### A. The Facts Concerning Appellant's Organic Brain Disorder and Severe Mental Illness

Dr. James Merikangas, a medical doctor specializing in neurology,[1] testified that appellant has organic brain syndrome, a neurological mental disorder, has had this disorder his whole life, and is "severely and diffusely impaired" (R.976). Organic brain syndrome and schitzophrenia can have the same symptoms (R. 975-76). Dr. Merikangas concluded appellant "has the mind of a child even though he is 27 years old." (R. 964-65).

Dr. Merikangas performed a battery of neurological tests including a CAT Scan. The results indicated that the cortex of appellant's brain had "shrunk". (R. 972). The "sulci", or spaces in the cortex, were visibly enlarged. In short, he has lost some brain tissue" (R. 973) and "does not have a normal brain". The doctor opined that because appellant was premature, weighing four pounds at birth, he had suffered "an injury prior

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[1] Dr. Merikangas served as a guided missile naval officer on the USS Kitty Hawk, graduated from Johns Hopkins University School of Medicine, was a resident in psychiatry and neurology at Yale University, and has been a member of the University of Pittsburgh School of Medicine (1973-79) and Yale University School of Medicine (1979-present), teaching neurology and psychiatry. He also has a private practice in these specialties. He has conducted "thousands of neurological evaluations" in sixteen years of practice, and is board-certified in both psychiatry and neurology. He has consulted with numerous governmental and private groups "about the competence and mental state of people," including the Connecticut State Police, a states' attorneys office, a juvenile court, a circuit court, the Social Security Administration, and the United States Navy. He also has published about two dozen articles in medical journals, edited one book ("Brain Behavior and Relationship"), and has been qualified and testified as an expert in a number of civil and criminal cases on behalf of state or federal courts. In this latter respect, he has performed a large number of competency and responsibility evaluations. (R. 958-964).

to birth" and has been brain "damaged all his life." (R. 974). The consequences of the injury include:

> Difficulty in learning, difficulty in abstracts, problems with judgment, problems with controlling your mood, problems with your ability to relate to other people and . . . symptoms like hallucinations, delusions, false ideas and marked [and] extreme lability.

(R. 974). Dr. Merikangas also performed a physical neurological examination, finding that appellant has "bizarre facial mannerisms, gestures and involuntary movements" and "when you're talking to Ernest he . . . looks away and appears not to be listening." This made Dr. Merinkangas "suspect that he is listening to other voices, perhaps." (R. 966). A physical movement test further indicated that, as in stroke victims, appellant "tends to sway and to fall, particularly when trying to walk in a straight line." (R. 967). "He also carries his arms in an abnormal posture." (R. 967). In addition, appellant suffers from a "left, right disorientation"; he has trouble crossing his left arm across the "midline" of his body. (R. 968). Appellant also had a "positive Babinski reflex in the left foot," an involuntary action indicating "damage to the corticospinal track of the brain." (R. 968-69). This "track" is the "pathway from the cortex, the surface of the brain where motor motion is initiated and where your heart of thoughts are integrated, down through the brain stem, spinal cord, peripheral nerve to the foot." (R. 970). Finally, Dr. Merikangas had a "Halstead-Ritan" test performed, which measures the pattern and severity of brain damage. It demonstrated that appellant is "severely and diffusely impaired." (R. 976).

As a consequence of this organic brain disorder, appellant has had schizophrenic-type symptoms, including "delusions," "hallucinations," and "false ideas." He "hears voices" and has "rapidly shifting moods." Appellant's condition is permanent, and Dr. Merikangas believes that at the time of the crime appellant was "brain damaged," and subject to "poor judgment and poor ability to control himself." (R. 977-78). Dr. Merikangas testified that his opinion was entirely consistent with appellant's behavior as described by crime scene witnesses. His opinion also was entirely consistent with the testimony of appellant's other expert and lay witnesses. (R. 978-80).

Dr. Robert Dorsey,[2] the child psychologist at the high school appellant attended, testified that he saw appellant several times per week, for 30 minutes to an hour per time, during a four or five month period in 1974. He also tested appellant. Dr. Dorsey believes that appellant was then, and is now, psychotic and schizophrenic. Based on his evaluations and tests, "he recommended strongly" that "he be sent to a neurologist for a good neurological examination" because he thought appellant "had something organically wrong with his brain." (R. 911-12).

During his many hours of personally observing and talking to appellant, Dr. Dorsey concluded that "in lay terms," "he was crazy as a loon." (R. 908). Dr. Dorsey believed that appellant

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[2] Misspelled Dorskey in the record. Dr. Dorsey is a child psychologist who taught at the Louisiana State University Medical School, supervised graduate students in psychology, taught graduate and undergraduate courses, and performed court-appointed competency and responsibility evaluations for 11 years. (R. 903-07).

was "having auditory hallucinations" and suspected he was having "visual hallucinations" as well. (R. 911). This is because "whenever I was talking to him, he was never there." (R.910). He was "somewhere else," in "very little contact with me," and responding "to something outside of himself." He would "turn and talk . . . as though someone was behind him and he was answering questions or talking to them about something. . . ." (R. 910).

Dr. Dorsey specifically called appellant to the attention of other counselors as "a textbook case of a psychotic child." (R. 914). Dr. Dorsey concluded that appellant satisfied the two mental health-related statutory mitigating circumstances, and was "somewhere maybe 10, 11, 12 years old," "no older than that emotionally." (R. 909). Dr. Dorsey also thought he was operating at the "borderline" of intelligence. (R. 909).

Dr. George Barnard[3], a psychiatrist and physician who specializes in forensic psychiatry, concurred in the views of Drs. Merikangas and Dorsey. In sum, Dr. Barnard testified that appellant has been "seriously mentally ill for a number of years going back actually to his childhood." (R. 684). He stressed appellant's "very long history" of "delusional ideas" that were

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[3] Dr. Barnard graduated from the University of North Carolina Medical School. He is a retired Air Force Captain, who did portions of an internship and residency at Brook Army Hospital (Fort Sam Houston, TX), the Air Force Aerospace Medical Research Laboratory, and the Menninger School of Psychiatry. He has taught, practiced medicine and psychiatry, and supervised inpatient psychiatric units through the University of Florida since 1963, where he now is chief of the consultation and medical liaison section of the psychiatry department. Dr. Barnard has supervised several hundred medical doctors in this position, and published approximately 30 articles. Of the over 4,000 competency and criminal responsibility examinations over the past 15 years that Dr. Barnard has done, he has found the vast majority (approximately 85-90%) legally sane. (R. 671-80).

"not based on reality," including delusions that he was a "great inventor." (R. 687). "[T]his mental illness . . . was present at the time of the crime." Therefore, appellant's capacity to "think rationally and act in a rational manner was substantially impaired." Indeed, at the time of the crime, appellant "emotionally and mentally" was "operating" as a "pre-teenager." (R. 684-85). Dr. Barnard's opinions were based upon his own examinations of appellant, psychiatric, social and psychological records,[4] and the observations of other professionals and family members.

Dr. Barnard indicated that appellant's motive for robbing a bank was to get money so he could help the poor and further his inventions. (R. 722).[5] To escape, appellant would "just sort of mingle with the crowd" until "things had quieted down" and he "could get back on a bus and leave." (R. 726). The descriptions of appellant given by witnesses at the scene of the crime were consistent with Dr. Barnard's schizophrenic diagnosis and indi-

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[4] These records indicated that appellant was "withdrawn, isolated socially, and did not make friends easily" (R. 707), had "a great deal of stress" with "depression and suicidal ideation" (R. 707), had been prescribed stelazine, a powerful antipsychotic medication intended to stop hallucinations (R. 736-37), had seen "visions" on several occasions (R. 737-38), and had a history of severe mental illness in the family (a paternal grandfather and uncle were at Chattahoochee) that predisposed him to mental illness (R. 738).

[5] Dr. Ramos, who examined appellant for competency at the time of appellant's trial, agreed that the purpose of the kidnapping and proposed bank robbery was to "obtain enough funds to work on his inventions." (R. 732). As related by other witnesses, these inventions included "robots," "bionic men," and "bionic" body parts, including "bionic arms." (R. 881). Appellant also thought he could make a "box fly" and build a real airplane. He constructed "a long airplane wing," which he kept under the house "because it was so long." (R. 900).

cated "that he was under a lot of emotional turmoil" and was "autistic," i.e., "so focused in on his own world that he was not able to process some of the other kinds of information about him." (R. 689).[6]

The State did not call a single expert witness to rebut the uncontradicted testimony of appellant's psychiatric, psychological, and neurological experts.

The opinions of appellant's experts were bolstered and confirmed by several other professionals and family members who observed appellant on a daily basis. These witnesses included Ernest Bugg, a counselor who provided counseling to appellant on a regular basis,[7] Charles Stevens,[8] a special education teacher

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[6] In drawing his conclusions, Dr. Barnard noted that Dr. Ramos, a psychiatrist who had found appellant competent to stand trial, also found that appellant "suffers from a mental disorder . . . diagnosed as schizotypal condition," had a history of "grandiose bizarre ideation," was "delusional" or "at best borderline," and acted "impulsively." Appellant's "planning and preparation of the . . . robbery . . . was a by-product of this mental disorder," according to Dr. Ramos, because appellant was "suffering from a mental illness which had been manifest for many years." Dr. Ramos concluded that there were "strong mitigating factors against the death penalty." (R. 732-33).

Two additional psychologists, Drs. Gilgun and Fisher, were not called by defense counsel because of the failure of the sentencing Court to limit the scope of the cross-examination of experts. (R. 693). However, the record shows that Dr. Gilgun's opinions strongly confirmed those of the psychiatrist, psychologist, and neurologist who did testify. (R. 1853-54). Dr. Fisher's opinion was similar.

[7] Mr. Bugg testified that appellant "frequently heard voices," would "phase right out of the room," and would engage in a "rocking motion" during which he would "carry on conversation with himself." (R. 920-22). He would go from "high to low" moods "in a matter of minutes." (R. 923). Like other witnesses, he confirmed appellant's commitment to fantasy inventions.

[8] Charles Stevens, a career naval officer, counterintelligence officer, and former Commandant of the Chamberlin Academy (a military school), became a special education teacher after his (continued...)

who taught and observed appellant regularly, and two of his 12 siblings.[9] The most succinct evidence of appellant's life is contained in a single note card that summarizes his year or so in

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[8](...continued)
retirement from the military. He taught and supervised appellant very closely after appellant was released from the juvenile system and was attending "Boys Base," a special learning center. (R. 928-33). Mr. Stevens saw "Ernest almost daily for the five days of the school week" for about a year. (R. 933). Mr. Stevens observed that appellant often seemed to be carrying on a conversation with someone that "he could probably picture mentally." Mr. Stevens testified that appellant told him that he "heard people talking to him." (R. 934). Mr. Stevens added that he brought this to his wife's attention because appellant was "carrying on a conversation like that" and "doing all this gesturing and posturing." He said "there is something wrong with that boy," and his wife "agreed that there was something definitely wrong." (R. 935). Mr. Stevens added that he thought appellant was emotionally 10 or 12 years old (although he was chronologically 16 at the time). (R. 936). In addition, Mr. Stevens observed "profound" mood swings. (R. 937). Among inventions that appellant shared with Mr. Stevens was a "helicopter" that had "jet pods on the rotor tips," an invention he was quite serious about. (R. 937). Indeed, appellant spent $200 to try to get his inventions patented. (R. 938). It took appellant 12 times to pass his G.E.D. examination (a high school equivalency test). (R. 942). Because the exams are standardized, he probably took the same three exams three or four times apiece. (R. 942).

[9] Two of appellant's sisters, Barbara and Ida, testified about the aberrational behavior identified by the witnesses. Physically, appellant never touched or hugged another person. (R. 880, 899). Both remembered him consistently stopping in the middle of a conversations (R. 883); "within a few minutes he can change to about five different moods." He can go from "calm" to "all of a sudden just agitated" back to "calm." (R. 899). Suddenly, he would become "a little child" and then "the next second he may just start laughing." (R. 898). Once he got his own room, he kept it padlocked at all times. Whenever he left the room he would padlock it, even if it was just to go to the bathroom. (R. 894-95). During the three years that he had his room, his sisters never saw the inside of it. (R. 895-96). He stayed in his room during the day, coming out at night when the family went to bed or early in the morning. (R. 895-98). He would be "walking around" and "talking with someone," although there was no one there. He would be "shaking his head" and "sometimes he would say things like he was disagreeing with someone." (R. 897). "He would just be strolling along like he had someone on the side of him." "He would shake his head a lot." Id.

the Florida juvenile system. Because these juvenile records are destroyed after five years, it is the only remaining original juvenile record of appellant. It says simply: "schizophrenic and suicidal" (R. 740).

B. The Facts Surrounding the Offense

The facts surrounding the offense, as they were presented at the trial, are set forth in this Court's first Opinion, at 437 So.2d at 1074-75. However, there were additional, critically important facts developed at resentencing that demonstrate 1) appellant was acutely mentally ill at, or near the time of the incident, and 2) the bullet fragment that killed the victim was **not** fired by appellant, but by another police officer.[10] The former set of additional facts are set forth immediately below; the latter are contained in Argument XIX.

Michael Hendrix, appellant's landlord, received a phone call from appellant on the morning of April 29, 1980, about 4:00 in the morning. Appellant did not seem to know what time it was and was "surprised" that he had awakened Mr. Hendrix. (R. 570-73).

In general, appellant was very secretive and isolated. When he paid the rent, he "would keep the door shut and open it just enough to stick his hand out." (R.575). He would then talk

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[10] Because the proceeding below was a resentencing proceeding, appellant was precluded from challenging his conviction for first degree murder based upon this new and rather conclusive evidence. If the sentence is affirmed, this challenge will be brought under Florida Rules of Criminal Procedure 3.850, because appellant's actions constituted second, not first, degree murder. At the resentencing hearing, this matter was raised as a mitigating circumstance, namely, that there is doubt (extraordinary doubt) that appellant was guilty of first degree murder. The trial judge refused to allow the jury to consider this as mitigating evidence and did not find it to be mitigating. (R. 1720).

through the door. (R. 575). He emphasized his inventions would make him a "very, very important" person. His inventions were, like "the invention of a light bulb," something "the world could not do without." (R. 575). Mr. Hendrix noted appellant's dramatic mood swings, including such swings on the Saturday before the Tuesday crime. (R. 572-74). Mr. Hendrix's nicknames for appellant were "goofy" and "crazy." (R. 576).

Appellant's "plan" was as delusional as many of his inventions. The evening before the incident occurred, appellant attempted to check into a local hotel under a supposed alias, "Freddie Slaughter." (R. 713). However, because appellant "had lived at the hotel from time to time" (R. 816), he was immediately recognized. Accordingly, he registered as Ernest Fitzpatrick, Jr. (R. 817).

The next morning, appellant took a bus to the scene of the crime. He "planned" to take a hostage, march that hostage 500-900 feet up an open highway in broad daylight to a bank (R. 587, 613), rob the bank, and then "just sort of mingle with the crowd [afterwards] until things had quieted down and get back on a bus and leave." (R. 726).

Upon entering the real estate office, his "plan" collapsed within a minute or two. (R. 612). He waited in the waiting room, "pacing" (R. 586), even though there was no obstruction between him and people in the back of the real estate office. (R. 610). When Mary Ellen Spann came out to wait on him, she noticed that something was wrong with him right away. (R.586). She thought he had been drinking or was "high on drugs" and, accordingly, tried to smell his breath and peer into his eyes to

see if they were dilated. His breath was sour and he had not been drinking. (R. 605-06). He was very "spacey" and "very high, excited." (R. 605-06). He repeated that "he wasn't going to hurt me," "shoot me," or "rape me" (R. 586, 609), although he did threaten to shoot her "in the leg" (R. 588), and later said that he might shoot himself and the hostages if the police came. During the entire ten minute episode, he was oblivious to his surroundings. (R. 605). He did not notice people around him, see police cars going by, or hear various noises, although the other people in the office did. (R. 590, 606-08). He was "surprised" when Eric Shaw, a delivery boy, came in the real estate office, since "he was not expecting to come across anyone else." (R. 588). Mrs. Spann added: "I don't think he really wanted to hurt us, he was just so nervous." (R. 609).

Within two minutes or less, he asked Eric Shaw to lock the front door of the real estate office, with him inside. (R. 612). Then, he took the three hostages and himself into a small room within the office, tried to have that door locked, sat, and waited. Within eight minutes, he was under arrest. (R. 635).

Eric Shaw testified that appellant seemed "excited," "scared all the way through the whole thing," "pretty wild," "jumpy," "panicky." (R. 626). "He did not know what to do. He just seemed like he didn't plan everything that happened." (R. 626).

Joy Sibila, a registered nurse of twenty years who was working at the real estate office on the day of the crime, observed appellant closely. She said, based upon her experience as a nurse, appellant appeared to be "psychotic", sounded "child-like" and behaved like a "psycho." (R. 953-54).

Despite his "plan" to take a hostage and rob a bank, appellant turned down all offers of assistance. He refused Eric Shaw's offer to take his car, which was parked outside with the motor running. (R. 618-19). He refused the offers of Paul Parks, a realty office employee, to chauffeur him to the bank and to give appellant money. (R. 612, 630). He also refused Parks' offer to be the hostage for the bank robbery. (R. 618, 630). And appellant ignored several easy opportunities to walk out of the office and flee. (R. 612, 621-22, 630).

Things happened quickly when the two deputy sheriffs arrived, having been called at 9:03. (R. 935, 956). Deputy Heist stuck his head and gun through the interior office window immediately next to which appellant was seated. (R. 599). Thereafter, eight shots were fired, six by appellant and two by Deputy Smith. Some witnesses testified that appellant fired the first shot, whirling around towards Heist in a reflexive action as Heist's gun approached his head (R. 602, 631, 639). However, Deputy Smith testified that the first shot came through the wall towards him, virtually 180 degrees from where Heist was standing. (R. 648, 657).

Mr. Parks immediately jumped on appellant, wrestling him to the floor. (R. 632, 649). Eric Shaw, and Mrs. Spann quickly went out the door next to Deputy Smith's location. Id. Mr. Parks, while wrestling with appellant, intentionally tried to get him to discharge the bullets from his gun in order to prevent him from shooting someone. (R. 637). Mrs. Spann and Eric Shaw were outside the inner room during most of the shooting. (R. 594-95, 632-33, 649-51). Deputy Smith testified he then shot appellant

and [appellant's] "last rounds went up, came through the door and broke a light in the other room." (R. 649-50). Thereafter, appellant was subdued and arrested before the arrival of any other deputy sheriffs.

Deputy Smith testified that appellant said:

> My God, what have I done? What have I done? They are going to electrocute me. Why did I do this? Why did I do this here?

(R. 651). However, according to the recorded tape of the phone call between Deputy Smith and the Sheriff's Department (the "911" tape), appellant said: "I didn't shoot him, did I? Please don't die . . . please don't." (R. 957). The 911 phone call occurred at 9:13, ten minutes after the incident began. (R. 635, 956).

## SUMMARY OF THE ARGUMENT

Appellant has been chronically mentally ill his entire life. He is the only death row inmate in Florida in whose case all three[11] statutory mental health related mitigating circumstances were found. He is only one of two defendants with this mitigating profile ever to have received the death penalty in Florida, and the penalty was reversed in the other case. Because, under all the circumstances of this case, the sentence is disproportionate, this Court should reverse and impose a life sentence.

Appellant's death sentence resulted from a process of finding and weighing aggravating circumstances that was seriously flawed. Four of the aggravating circumstances found by the trial

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[11] It was appellant's young emotional and psychological age, as well as his 20 year chronological age, that established the third, youthful age mitigating circumstance.

court lack a sufficient factual foundation, particularly the findings that appellant knowingly created a "great risk of death to many persons" and committed the capital felony for "pecuniary gain." Remarkably, the kidnapping aspect of the case was used, in whole or significant part, to establish (1) the felony underlying the capital felony; (2) prior conviction of a violent felony; (3) great risk of death to many persons; (4) the commission of another enumerated felony (i.e., kidnapping); and (5) appellant's pecuniary motive. This impermissible multiplication of one aggravating aspect resulted in the arbitrary imposition of the death sentence.

The proceeding below also was fundamentally flawed because, in direct defiance of this Court's explicit prior holding, the State was permitted to reintroduce appellant's juvenile history below, even though appellant again waived reliance on the "no prior criminal activity" mitigating circumstance. Intentionally mischaracterizing the record as a "criminal record", the State again erroneously portrayed appellant as an experienced criminal.

The error in Fitzpatrick II was built into the resentencing proceeding in a second, highly prejudicial way. The State was erroneously permitted to read into the record appellant's testimony from the first sentencing hearing, even though appellant elected not to testify at the resentencing hearing and appellant's prior testimony was adduced in direct response to the

illegally admitted juvenile evidence. The State's use of this "poisonous fruit" evidence was clear error.[12]

The prosecution also used at least two of its peremptory challenges in a racially biased manner, explaining that it left two other blacks on the jury because they were acceptable, "as far as blacks go." Although the judge apparently found that the prosecutor acted in a racially biased manner, he erroneously believed that he had no power to grant appellant a remedy.

In addition, the sentencing Court refused to strike juror Majors for cause, even though she is "very closest friends" with Mr. Parks, a victim and the State's crucial fact witness. Mrs. Majors candidly stated that she would have difficulty being fair and impartial.

The jury also was improperly led to believe that if appellant did not establish that his mental illness was "extreme" or that his capacity was "substantially" impaired, his emotional and mental problems could not be considered mitigating. This constitutional error was compounded by the failure of the Court to stop the prosecutor from improperly asserting throughout the sentencing hearing that the standards for legal competency and responsibility were the appropriate measures of mitigating mental illness evidence.

The Court also failed to find certain uncontradicted non-statutory mitigating circumstances and erroneously prohibited

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[12] This evidence was evidently critical to the jury's recommendation because the jury interrupted its deliberations to ask for a copy of it, but was told that it could not have one. Thereafter, it returned its seven (7) to five (5) recommendation for death.

appellant from even arguing in his summation that the jury could consider as mitigating the fact the homicide was neither "heinous" nor "cold and calculated."

The proceeding below was replete with prosecutorial misconduct, some of which was sanctioned by the Court. Initially, the prosecutor improperly delegated his decision to seek the death penalty to the widow of the victim and the victim's family, expressly acknowledging that the decision was their's. During the hearing, he introduced gruesome photographs of the partially undressed dead officer when there was no issue to which the photographs were even arguably relevant. He consistently and intentionally placed before the jury inadmissible evidence, including the pre-sentence investigation prepared after the first sentencing hearing and alleged fragments of inadmissible psychiatric, psychological, prison and other records, including records he conceded were inadmissible. He commented on appellant's constitutionally protected decision not to testify, and, in his final words to the jury, improperly exhorted it to "stand with me in this case to seek justice."

Finally, the Court erred by refusing to give an instruction on lingering doubt. It was not appellant's bullet, but the bullet of the other officer at the scene that killed Deputy Heist. While it is inappropriate in this proceeding to challenge the first degree murder conviction, this evidence demonstrates extraordinary doubt about appellant's guilt.

In sum, appellant was denied a fair resentencing hearing as the result of highly prejudicial errors that pervaded the resen-

tencing hearing from the initial decision to seek the death penalty through the Court's imposition of the death penalty.

## ARGUMENT

### I. APPELLANT'S DEATH SENTENCE IS INAPPROPRIATE, EXCESSIVE AND DISPROPORTIONATE IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

In reviewing a death sentence, a fundamental role of this Court is to "[g]uarantee that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case." State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). This comparative analysis, which considers the "circumstances" of the case on appeal together with those of "other [capital] decisions," determines if the death penalty is "appropriate." Proffitt v. State, 12 F.L.W. 373 (Fla. 1987), citing Menendez v. State, 419 So.2d 312 (Fla. 1982). Appellant submits that the death penalty is plainly inappropriate in his case.

A. Appellant's Life-Long History of Mental Illness

The legal standards embodied in the statutory mitigating circumstances that the lower Court found are very demanding. Mental or emotional disturbance must be "extreme." The capacity to appreciate criminality and conform conduct must be "substantially impaired." The mitigating maturity level is that of a "child" or "juvenile." This is an aggregate standard of legally sanctioned non-responsibility that, as a matter of law, falls just short of a successful insanity defense.

To satisfy all three mitigators, a defendant must be an extremely mentally ill and emotionally disturbed psychological child. Appellant is. He has been brain damaged for a lifetime, lives in a fantasy world, and was described by crime scene eye-witnesses as "psychotic", "crazy", "spacey," and oblivious to his surroundings. The State did not adduce any expert testimony to rebut appellant's overwhelming psychological ("in lay terms" he is "crazy as a loon", R.908, a "textbook" case of a psychotic child" (R. 914); neurological (he is "severely and diffusely impaired," R. 976, with "the mind of a child", R. 964-65), psychiatric (appellant is a "seriously mentally ill" "pre-teenager", R. 684-85), and lay (his inventions included "bionic men" with "bionic arms", R. 881, he lived padlocked in a room, and he consistently talked to people who were not there) testimony.

It is, undoubtedly, because the death penalty is patently inappropriate under such circumstances that appellant is the only person with this mitigating profile under sentence of death in Florida. (R. 1734-36). Of 490 death penalties imposed in Florida since 1972 (as of July 10, 1987), appellant is only one of two defendants with this mitigating profile ever to have received the death penalty, and that penalty was reversed in the other case. Id.[13]

Moreover, although the sentencing Court did not so find, there were compelling non-statutory mitigating circumstances

[13] Indeed, of the 490 defendants sentenced to death since 1972, only nine established both mitigating circumstances (b) and (f), which are present in the instant case. (R. 1734). Only three of these nine death sentences were affirmed; two of which involved one defendant who later was found to be incompetent for execution. (R. 1734).

present in appellant's case, see Argument VIII, infra, including the brevity (10 minutes) of the whole episode; the reflexive nature of the shooting (if appellant shot the victim); the unsophisticated, indeed fantastical nature of the crime (he took a bus to rob a bank); appellant's lack of a criminal record; his borderline intelligence; his spontaneous plea "please don't die"; his trouble-free years when he was cared for by Ernest Bugg and Charles Stevens; and his impoverished upbringing (thirteen children lived in three bedrooms).

The absence of the two most serious aggravating circumstances -- a "cold and calculated" or "heinous, atrocious, or cruel" capital homicide -- further distinguishes appellant's case from the overwhelming majority of Florida cases in which the sentence of death has been imposed. Over 95% of death-sentenced defendants in Florida were found to have committed homicides marked by at least one of these two aggravators (R. 1732). These data reflect the Legislature's intent that the death penalty is to be imposed "for only the most aggravated, the most indefensible of crimes." State v. Dixon, 283 So.2d 1, 8 (Fla. 1973).

In comparing the circumstances underlying death sentences in other cases, this Court has given great weight to evidence that establishes mental and emotional illness. Thus, in Huckaby v. State, 343 So.2d 29 (Fla. 1977), this Court vacated the death sentence and imposed life imprisonment even though Huckaby had raped and assaulted his children for 14 years. This Court recognized that "[a]lthough the defense was unable to prove legal insanity, it amply showed that Huckaby's mental illness was a

motivating factor in the commission of the crimes for which he was convicted." Id. at 33.

In a similar case, Mines v. State, 390 So.2d 332, 334 (Fla. 1980), this Court found the defendant's conduct to be heinous, atrocious and cruel, as it had in Huckaby. However, this Court was swayed by the "unrefuted medical testimony" which established that Mines suffered from "schizophrenia, paranoid type." Id. at 337. Accordingly, this Court vacated the death sentence and imposed a life term.

In Jones v. State, 332 So.2d 615 (Fla. 1976), Jones had raped and stabbed his neighbor to death (36 wounds). Despite several serious aggravating circumstances, this Court reversed the death sentence, holding that "the principle determinative fact directing the judgment of this Court is that the appellant had a paranoid psychosis which was undenied and unrefuted, the degree of which no one can fully know." Id. at 619.

This Court reemphasized the importance of mental illness evidence in Miller v. State, 373 So.2d 882 (Fla. 1979), when it reversed the death penalty, although it affirmed three aggravators, including that the crime was especially heinous, atrocious and cruel. The only mitigating circumstance found was that "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance."[14]

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[14] Accord, Burch v. State, 343 So.2d 831, 834 (Fla. 1977) (reversing death sentence because the evidence "establish[es] that at the time of the offenses the defendant was mentally disturbed, and his capacity to conform his conduct to the requirements of law was substantially impaired"); Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985) (reversing death sentence when murder occurred during "an angry domestic dispute in which the (continued...)

More recently, in Ferry v. State, 507 So.2d 1373 (Fla. 1987), this Court vacated the death sentence of a man convicted of burning to death five people. Ferry was "an acute, chronic, paranoid schizophrenic." Id. at 1374. See also Edwards v. State, 441 So.2d 84 (Miss. 1983); State v. Hill, 319 S.E. 2d 163 (N.C. 1984).

Even without the unrebutted evidence of chronic mental illness, it is doubtful that this case would appropriately be a death penalty case in light of the compelling nonstatutory mitigating circumstances. In Proffitt v. State, 12 F.L.W. 373 (Fla. 1987), this Court accepted Proffitt's contention that a murder committed during the commission of a felony did not warrant the death penalty where there was no abuse or torture of the victim and the defendant had no past criminal or violent history. Appellant's crime was certainly no worse than Proffitt's and the mitigating circumstances in the instant case are several-fold more substantial than those in Proffitt.

Proportionality review is the indispensable means of assuring the equal and just administration of the death penalty. Death is a disproportionate penalty for appellant.

## II. FOUR AGGRAVATING CIRCUMSTANCES FOUND BY THE TRIAL COURT LACK A SUFFICIENT FACTUAL FOUNDATION

### A. The Finding of Great Risk of Death to Many Persons is not Supported by the Evidence

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[14](...continued)
victim realized the appellant was having difficulty controlling his emotions."); Thompson v. State, 456 So.2d 444 (Fla. 1984) (justifying reversal of a death penalty, in part, on appellant's history of mild mental retardation and his family's history of mental illness).

In its Findings and Sentence (R. 1720-22), the Court emphasized the marked difference in the evidence it heard at the first and second sentencing hearings. This was true not only of the expert testimony, but also of the factual testimony. Thus, in considering whether adequate evidence supports the aggravating circumstances, this Court is not bound by its prior opinion in Fitzpatrick I. See King v. State, 12 F.L.W. 502 (Fla. 1987) (following resentencing, this Court makes a fresh determination on whether evidence establishes aggravators).

The resentencing Court found that appellant had been convicted of attempting to kill two men, had "held a gun on two others who were present and in substantial danger of being shot," and that "many more deputies were arriving and exposing themselves to a great risk of death." (R. 1720-22). This finding is not supported, beyond a reasonable doubt, by the facts.

Mr. Parks testified that, as soon as appellant fired at the victim, he "immediately sprang forward and grabbed his arm, the one that was holding the gun, and we started wrestling." (R. 632). Both Parks and Deputy Smith testified that the other two people in the room left after a shot or two was fired, while Parks was wrestling on the floor with appellant. (R. 632; 639; 649-50). (See also testimony of Mrs. Spann, R. 595). Parks added that, while wrestling with appellant, he attempted to get appellant to fire the shots in order to unload the gun. (R. 637-38). Deputy Smith testified that he was "on the [hall] carpet flat on his stomach" (R. 649) "laying on the floor" outside the room while the wrestling and consequential shooting occurred. Smith testified that he had "hit the floor" (R. 649) because the first

bullet (R. 648, 656-57) had come through the wall next to where he was standing in the hallway outside the room (R. 648-49). It is uncontradicted that appellant was subdued and under arrest by the time any other officers arrived at the crime scene. (R. 651).[15]

Appellant was convicted of the attempted murders of Parks and Smith. Assuming arguendo that the facts underlying these convictions can be "counted" to prove aggravating circumstance (b), and then "counted again" to prove (c), but see Argument III, these facts do not establish that appellant "knowingly created a great risk of death to many persons".

This aggravating circumstance refers to more than "a showing of some degree of risk of bodily harm to a few persons." Kampff v. State, 371 So.2d 1007, 1009-10 (Fla. 1979). The Legislature intended that "a great risk of death to a small number of people would not establish this aggravating circumstance." Id.

In Johnson v. State, 393 So.2d 1069 (Fla. 1980), Johnson robbed a pharmacy and shot the pharmacist in a gun battle, while three other people were present. This Court reversed the trial court's finding of a great risk of death, stating that "[t]hree people are not 'many persons' as we have interpreted that term in the context of section 921.141(5)(c)." Id. at 1073. Similarly, in Lucas v. State, 490 So. 2d 943, 946 (Fla. 1986), the Court held that the endangerment of three persons does not satisfy this aggravating circumstance, notwithstanding a "raging gunbattle."

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[15] In his opening, the prosecutor conceded that Mrs. Spann and Eric Shaw were outside the inner office when "Mr. Parks is struggling with [appellant] and the gun is going off." (R. 560).

See also Mason v. State, 438 So. 2d 374 (Fla. 1983) (3 persons not "many"), Lewis v. State, 398 So. 2d 432 (Fla. 1981); Odom v. State, 403 So. 2d 936 (Fla. 1981). This Court also has held that this circumstance was not established when eight persons in one house were shot in succession. Ferguson v. State, 417 So.2d 639 (Fla. 1982); White v. State, 403 So.2d 331 (Fla. 1981).

In the instant case, the number of persons in the room when the shooting occurred who were at "great risk of death" simply does not meet this Court's interpretation of "many." While four persons faced various degrees of risk, only one (Parks) can be said to have been at great risk of death, with a second (Smith) in some risk. This simply does not meet the "many" standard.

The finding that "arriving deputies" were also knowingly placed at great risk of death cannot be supported at all. In King v. State, 12 F.L.W. 502 (Fla. 1987), the defendant set fire to a house. On his initial appeal, this Court held that his conduct satisfied the "great risk of death" aggravator. However, on his appeal from his resentencing, the Court recognized that the law had evolved, stating:

> Upon reconsideration we find that this aggravating factor should be invalidated. In Kampff v. State, 371 So.2d 1007, 1009 (Fla. 1979), we stated: "'Great risk' means not a mere possibility, but a likelihood or high probability." Furthermore, we have also said that "a person may not be condemned for what might have occurred." White v. State, 403 So.2d 331, 337 (Fla. 1981).

Slip Opinion at 9-10 (emphasis added); see also White v. State, 403 So.2d 331 (Fla. 1981); Lusk v. State, 446 So. 2d 1038 (Fla. 1984).

In the instant case, the capital crime may not be aggravated based upon speculation about what danger arriving deputies might have faced if appellant had not been apprehended by the time they arrived. (R. 754, 757).[16]

B. Pecuniary Gain Purpose

In finding circumstance (f), the resentencing Court found that appellant had

> planned a bank robbery which involved taking a hostage as a shield to facilitate the robbery. . . . He never got to the bank, but the entire incident was motivated by a desire for pecuniary gain, and the capital felony was committed in the attempted robbery."[17]

(R. 1221-22). This aggravating circumstance focuses on the purpose behind the capital felony itself, not the purpose behind the entire criminal episode. Thus, in Peek v. State, 395 So. 2d 492, 499 (Fla. 1981), the defendant had "ransacked the purse belonging to the victim and made off with her automobile." However, the "pecuniary gain" aggravator was reversed because "[t]he record does not support the conclusion that [the victim] was murdered to facilitate the theft. [T]he evidence linking the

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[16] The many facts and opinions that indicate appellant was mentally disordered at the time of the crime also undermine the conclusion that he "knowingly" caused the "great risk" required by Section (f), especially when Mr. Parks testified that he was forcing appellant to discharge his gun. (R. 637-38).

[17] The resentencing Court's interpretation of this circumstance is too broad to pass constitutional muster as a "genuine narrower." The "pecuniary gain" aggravating circumstance "was not designed for application to the armed robbery capital murder. Rather, this language contemplates the hired killing or, as it is sometimes called, the contract murder." Wiley v. State, 484 So.2d 339, 358 (Miss. 1986) (Robertson, J., concurring opinion).

murder to a motive for pecuniary gain is insufficient to establish this aggravating factor." Id. (emphasis supplied).

As in Peek, there is no evidence to suggest, and the State did not contend, that appellant shot the victim "to facilitate the robbery" or that there was an "attempted robbery". Indeed, appellant abandoned within two minutes whatever pecuniary purpose he may have initially had; he refused offers from Parks and Shaw to take their cars or be driven by them to the bank, as well as Parks' offers of money and to act as a shield. Instead, appellant confined himself in a room within an office over 500-900 feet from the bank, and waited for the police to arrive. Cf. Mikenas v. State, 367 So. 2d 606 (Fla. 1978).

C. Preventing a Lawful Arrest

The resentencing Court found that appellant shot and killed Deputy Heist "for the purpose of avoiding or preventing a lawful arrest." (R. 1721). To support this "purpose," appellant must have intended to avoid arrest and known that the victim was a police officer. The facts in the instant case demonstrate that appellant lacked both the requisite intent and awareness.

First, if appellant intended to avoid arrest he would have left the realty office when he had many unobstructed opportunities to do so. Second, appellant was not aware that two officers were present before the shooting.[18] Indeed, witnesses questioned appellant's capacity to see people around him or hear noises.

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[18] While some witnesses testified that they heard a deputy identify himself one or more times through the inner office door, Mr. Parks, who was sitting closest to the door, did not (R. 631-32, 636).

(R. 590, 606-08, 619, 631). He did not see the victim until after he reflexively fired a shot (R. 602, 631).

D. Previous Conviction of a Violent Felony

The sentencing Court found aggravating circumstance (b) by virtue of appellant's contemporaneous convictions for attempted murder and kidnapping.[19] In Wasko v. State, 505 So. 2d 1314, 1317-18 (Fla. 1987), the defendant, like appellant, had never been convicted of a violent crime prior to the capital felony. Contemporaneously with his first degree murder conviction, Wasko was found guilty of burglary with a firearm and attempted sexual battery, both arising out of the murder of a teenage girl. This Court recognized that contemporaneous convictions may satisfy aggravating circumstance (b), but that this rule did not apply to Wasko because the victim of the murder and contemporaneous crimes was the same person.

There is no relevant distinction between Wasko's attempted sexual battery conviction and appellant's contemporaneous convictions of attempted murder and kidnapping. In neither case do the factors demonstrate a "propensity to commit violent crimes." Ruffin v. State, 397 So.2d 277 (Fla. 1981). Rather, like Wasko, appellant was involved in one short criminal episode in which several crimes were proven.[20]

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[19] The finding of aggravating circumstance (b) based on contemporaneous convictions violates the constitutional requirement that aggravating circumstances "genuinely narrow" the class of criminals eligible for the death penalty. See Collins v Lockhart, 754 F.2d 258 (8th Cir. 1985). This is an independent, constitutional basis for reversal in the instant case.

[20] Appellant's case, like Wasko's, is distinguishable from Johnson v. State, 438 So. 2d 774 (Fla. 1983) and King v. State, (continued...)

## III. SEVERAL AGGRAVATING CIRCUMSTANCES WERE BASED ON THE SAME ASPECT OF THE CRIME

This Court repeatedly has held that it is reversible error to base two or more statutory aggravating circumstances on the "same aspect of the defendant's crime." Provence v. State, 337 So.2d 783, 786 (Fla. 1976). Accord, Maggard v. State, 399 So.2d 973, 977 (Fla. 1981); Francois v. State, 407 So.2d 885, 891 (Fla. 1981) ("[s]eparate consideration of factors that are essentially based on the same aspect of the crimes is error."); Mills v. State, 476 So.2d 172 (Fla. 1985).[21] In the instant case, the sentencing Court found five aggravating circumstances. Several of them were based on the same aspect of the crime in contravention of the Provence principle.

### A. Aggravating Circumstances (b) ("Violent Felony"), (c) ("Great Risk of Death"), (d) ("Enumerated

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[20](...continued)
390 So. 2d 315 (Fla. 1980). Those cases involve separate criminal incidents combined in a single trial; Johnson (attempted murder of deputy while fleeing from scene of robbery/murder); King (attempted murder during escape several hours after robbery/murder). See also Ruffin v. State, 397 So. 2d 277 (Fla. 1981) (killing of deputy several hours after killing of victim). Those cases genuinely involve facts indicating the defendant had a propensity to commit violent crimes. But see Lucas v. State, 376 So. 2d 1149 (Fla. 1979).

[21] The prohibition of doubling has a constitutional, as well as state law basis. The constitutionally necessary function that statutory aggravating circumstances perform is to "circumscribe the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 878 (1983). Aggravating circumstances "must genuinely narrow" this class. Id. at 877. See Gregg v. Georgia; 428 U.S. 153, 188 (1976); Proffitt v. Florida; 428 U.S. 242 (1976); Collins v. Lockhart, 754 F.2d 258, 264 (8th Cir. 1985) (the doubling of aggravators violates the Eighth Amendment because "an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing function.")

Felony"), and (f) ("Pecuniary Gain") All Were Based on the Kidnapping Aspect of the Case

Appellant was found guilty of kidnapping "under that portion of the statute that defines kidnapping as the unlawful confining of another person against his will with the intent of holding him as a shield or hostage." Fitzpatrick I, at 1076. Two essential elements of appellant's kidnapping convictions were: 1) the use of force; and 2) the specific intent to hold another as a "shield or hostage." This required specific intent is a specific purpose other than the intent to do the act of confining another itself. Skinner v. State, 468 So.2d 271 (Fla. 2nd DCA 1985).

Having used the kidnappings to establish the underlying capital felony, the sentencing Court then used this aspect of the case to establish, in whole or significant part, four aggravating circumstances: (b) (another violent felony) ("the defendant [was] adjudged guilty of two counts of attempted first degree murder and three counts of kidnapping"); (c) (great risk of death) (the three persons were in the small room where the shooting occurred because they had been kidnapped); (d) (enumerated felony) ("Defendant was found guilty of committing the capital felony while he was engaged in the commission of kidnapping"); and (f) (pecuniary gain). ("For several months, defendant planned a bank robbery which involved taking a hostage as a shield to facilitate the robbery. Defendant got as far as the hostage stage when he was interrupted by the law officers"). (R. 1720-22) (emphasis added).

Thus, the underlying capital felony, which itself was based on kidnapping, preliminarily was "doubled" (indeed "tripled") to

establish both aggravating circumstances (d) (enumerated felony) and (b) (violent felony). This violates Griffin v. State, 474 So.2d 777, 781 (Fla. 1985) ("murder during commission of a robbery cannot also be doubled to support . . . aggravating circumstance [d]"); Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985).

The kidnapping aspect was then used a fourth time to establish aggravating circumstance (f) ("pecuniary gain"). The single motive for taking the hostages was pecuniary gain; to rob a bank. There was no act other than the kidnappings that had a pecuniary purpose.[22] Indeed, an essential element of appellant's kidnapping convictions was a pecuniary motive: the specific intent to take a shield. See Mills v. State, 476 So. 2d 172 (Fla. 1985); Trawick v. State, 473 So. 2d 1235 (Fla. 1985); Oats v. State, 446 So.2d 90, 95 (Fla. 1984) ("[t]hese two circumstances [d and f] must be considered cumulative and may not be considered individually when the only evidence that the crime was committed for pecuniary gain was the same evidence of the robbery underlying the capital crime.")

Finally, the kidnapping aspect was used a fifth time, at least in part, to support aggravating circumstance, (c) ("great risk of death"). Specifically, two subaspects of the kidnappings, which are essential elements of the crime, were used: 1) "forcibly" confining another person, 2) "against his will."

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[22] Despite the sentencing Court's statement that there was an "attempted robbery," (R. 1721), appellant was never indicted for attempted robbery and could not have been because, as the Court correctly found, appellant never got beyond "the hostage stage," (R 1721), or near the bank. Id.

Admittedly, the attempted murders also were essential components of this aggravator. However, the attempted murders, themselves, were doubled to establish aggravator (b) ("violent felony"), and if neither the attempted murder aspect nor kidnapping aspect can be used without doubling to establish aggravator (c), as appellant contends, the remaining undoubled acts cannot establish that aggravator.

B. Aggravating Circumstances (b) ("Another Violent Felony") and (c) ("Great Risk of Death") Were Based on the Same Aspect of the Case

These two aggravating circumstances clearly are based on the same aspect of the case. Appellant's convictions on two counts of attempted murder, which satisfied the "another violent felony" aggravating circumstance (b), are based on the fact that appellant shot, or shot at, both Mr. Parks and Deputy Smith. These same facts are the predicates for the sentencing Court's finding that Parks and Smith were placed in "great risk of death". Without the shots fired at Parks and Smith, aggravator (c) could not have been found. Thus, impermissible doubling occurred when the resentencing Court found that the shots fired at Parks and Smith satisfied both aggravators (b) and (c).

C. The Doubling Was Prejudicial, Requiring the Imposition of a Life Sentence, or at the Least, a New Sentencing Hearing Before a Jury

When the five aggravating circumstances are merged, as they should be, it becomes clear that the weight a single juror, the difference between a life and death recommendation in this case, reasonably may have attached to them is significantly diminished. In light of the other extraordinary circumstances in this case,

see Argument I, supra, the appropriate remedy for the improper doubling should be imposition of a life sentence by this Court.

Alternatively, because the doubling must be deemed to have affected the one vote jury recommendation, a new sentencing hearing is required. Appellant objected, on "doubling" grounds, to allowing the jury to consider all five aggravating circumstances. (R. 1076). It is inherently prejudicial to allow the jury to consider a larger number of aggravating circumstances than is proper.[23] See State v. Quesinberry, 354 S.E.2d 446, 453 (N.C. 1987) ("[I]t is neither appropriate nor equitable to submit [to a jury] a statutorily-enumerated aggravating factor that overlaps with another.")

## IV. THE STATE INTENTIONALLY PLACED BEFORE THE JURY APPELLANT'S JUVENILE HISTORY EVEN THOUGH THIS COURT REVERSED THE PREVIOUS SENTENCE BECAUSE THIS SAME EVIDENCE WAS IMPROPERLY ADMITTED

In direct defiance of this Court's holding in Fitzpatrick II, the prosecutor placed before the resentencing jury the same evidence of appellant's juvenile history this Court held was erroneously admitted at the first sentencing hearing, even though appellant again waived reliance on the "no criminal activity" mitigator. (R. 1265, 1389, 692-694). The prosecutor's alleged basis for doing so was pure pretext;[24] his real basis, emphasized

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[23] "True, the balancing process is not to be performed mathematically. . . . Still no one doubts that the side with the largest number of 'circumstances' has a practical advantage before the sentencing jury." Wiley v. State, 484 So.2d 339, 357 (Miss. 1986) (Robertson, J., concurring opinion.)

[24] As is set out more fully herein, the prosecutor allegedly sought to use this evidence to cross-examine the experts. However, if this Court had thought that the juvenile history was admissible to cross-examine mental health experts, the use of the (continued...)

by his intentional mischaracterizations of the evidence, see below, was to inflame the jury.

The State began its cross-examination of appellant's first witness by asserting that appellant had a "criminal history" (R. 694) and "previous criminal record" (R.703). In fact, appellant has no adult criminal record (either arrests or convictions).[25]

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[24](...continued)
juvenile history by the State during the first sentencing hearing surely would have been harmless error since, as this Court knew, appellant called several mental health experts who were fully aware of appellant's juvenile history at the first sentencing hearing.

[25] The record contains the following description of Appellant's juvenile history:

> Defendant's contacts with the Florida juvenile justice system occurred about six years prior to his trial, almost 13 years ago. A juvenile petition charging him with delinquency for attempted armed robbery referred to conduct occurring on August 11, 1973. There was no adjudication of, or disposition on the attempt charge. . . . Defendant was . . . without formal adjudication, remitted to the supervision of the Division of Youth Services as a result of the consensual entry of a "Treatment and Conduct Plan." This plan provided for a stay of an indefinite adjudicatory hearing, and stated expressly:
>
> > That the submission of this plan and its acceptance by the Court is not an admission of guilt. (emphasis added). Appendix 1.
>
> In fact, this case was never adjudicated.
>
> * * *
>
> The adjudicated delinquencies all resulted from one bizarre incident that occurred on November 15, 1974. The juvenile petition relevant to this incident charged Defendant with delinquency for aggravated assault and possession of a homemade bomb. He "admitted" some of these charges, was adjudicated delinquent on them and was committed to the jurisdiction of the State Department of Health and Rehabilitative Services for placement in a juvenile facility.
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> * * *

(continued...)

Thereafter, the State continuously attempted to reintroduce this consistently mischaracterized evidence through appellant's expert and lay witnesses (e.g. R. 874, 917 (Dr. Dorsey); 925 (Ernest

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[25](...continued)

The initial "Detention Order" of the juvenile court recited that "this child appears to be extremely emotionally upset and unstable," and referred him for evaluation. A subsequent psychological evaluation was conducted by Dr. Lawrence Gilgun, a clinical psychologist. Dr. Gilgun described Defendant's mentally disordered behavior [as follows]:

> He . . . planned to hold the principal and several other school officials as hostages until "the police or someone would bring me a million dollars so that I could give the money to the poor." Ernest reported to me that he had been working on this plan for months and that the initial impetus for his plan occurred when he was watching a news program where he saw many starving children. From his report, it appears that the children were the subject of a documentary on Bangladesh and also possibly children of some nations in Africa who were experiencing very hard times due to the drought there. However, Ernest did not understand the geographical location of these children and thought that he would be able to distribute the money to them and to their families. . . [H]e went on to describe that he planned to hide under some boarded-up steps near Beggs School, planned to bury the money in a hole, wait "until the heat was off" and then begin to distribute the money. . . [L]ater in his life he planned to build a very big house "where all the poor children could come, where I could feed them and carry them to the hospital when they needed it." Ernest also stated that he would keep part of the money to experiment with the building of airliners. He felt quite confident that he could build an airliner and went on to explain that he had built several cardboard plans which appeared to work and he did not see any reason why he could not apply these same principles on a larger scale.

(R. 1215-18).

Bugg); 957-58, 985). In his closing argument, the prosecutor stressed that "all his [appellant's] life he's been in different kinds of trouble." (R. 1096).[26]

The prosecutor claimed he was inquiring about the juvenile record because the experts had "considered" it, i.e., they knew about it. The prosecutor denied that, in order to be even arguably admissible, the juvenile history must have been a basis of, or inconsistent with the expert's opinions (R. 692-94, 875, 984). Appellant proffered below, and asked for the chance to show in limine, that the juvenile history played absolutely no role in the opinions offered by the witnesses at the resentencing hearing, (R. 8, 692-94); that, in any event, the history was entirely consistent with their opinions; and that the attempted armed robbery charge had no factual or legal foundation. (R. 702).[27]

During cross-examination of appellant's first witness, Dr. Barnard, the State focused on the alleged armed robbery even though there is no evidence appellant had counsel for that charge, that charge had never been adjudicated, the informal resolution of the charge stated it was "not an admission of guilt" (R 1216), and it allegedly occurred over fourteen years ago (R. 1215). The prosecutor picked highly prejudicial and misleading fragments of information from records whose originals, at the time of resentencing, had been destroyed. (R. 739). The

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[26] Prior to, and at the resentencing appellant repeatedly sought to prevent the State from again using the inadmissible and prejudicial juvenile history evidence. (R. 1215, 1268, 1389, 692-94).

[27] The sentencing court declined to take evidence on these matters outside the presence of the jury. (R. 693, 1225-26). A requested limiting instruction also was denied. (R. 702).

prosecutor asserted that appellant had said that he "planned to rob the store," but "changed his mind before he arrived at the store" (R. 743), "would have shot the policeman [who arrested him] if the gun would have been loaded," and would have "shot the clerk as she ran from the store." (R. 706).[28] The prosecutor then asked about what he intentionally mischaracterized as a prior "bombing incident." (R. 716).[29] At no time did the State ask a single question asserting an inconsistency between Dr. Barnard's opinion, or that of any other expert witness, and the juvenile history.

A. Admission of the Juvenile History Evidence Violated Fitzpatrick II: The Law of the Case

In Fitzpatrick II, this Court held that the juvenile history evidence was both inadmissible and sufficiently prejudicial "to

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[28] In fact, the "gun" was a starter pistol that could not have fired live ammunition. (R. 734). In his request for the in limine hearing, appellant made an offer of proof that:

> although he knew his father had a fully loaded "real gun" in the house, he took his blank pistol into the store not to rob the store (and that he made no attempt to do so), but to "get into trouble" so he "could get sent away from home." He had had a series of arguments with his mother and wanted to leave his home. Additional evidence, if allowed, would indicate that Defendant also was mentally ill at the time. This evidence would be adduced through the testimony of Defendant's psychiatric, psychological, and other experts who have been identified to the State.

(R. 1216).

[29] There was never an explosion and no evidence was introduced that the alleged homemade "bomb" was real. Dr. Barnard testified that a contemporaneous psychological report indicated that this delinquent act was provoked by appellant's desire to "get a million dollars" to give to the poor, particularly "the children of Bangladesh." (R. 735).

undermine confidence in the outcome of the sentencing hearing." (R. 1252-1255).

1. The Evidence was Highly Prejudicial. This Court emphasized the prejudicial nature of the juvenile history evidence:

> It undermined the defendant's main theory and strategy of defense at sentencing; i.e., the attempt to show that the defendant was suffering extreme mental and emotional disturbance and had impaired capacity. The error enabled the state to undercut that defense by depicting the defendant as an experienced criminal in a way not sanctioned by our capital felony sentencing law.

The prejudicial impact of the juvenile history evidence was greater, and even more certain at the resentencing hearing. Appellant's evidence of mitigation, once again, was mental illness. The death penalty was predicated on the slimmest of margins.[30] The prosecutor's intentional mischaracterization of the juvenile history left the jury with the misimpression that appellant had been found guilty of crimes, and that there was only a hypertechnical difference between an unadjudicated charge of delinquency and the most serious adjudicated adult criminal conduct. (R. 703-04; 743-44). Finally, because of the destruction of the original records,[31] effective cross-examination was impossible, which the sentencing Court recognized, stating: "The

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[30] This Court has indicated an unwillingness to consider error harmless when there is but a one vote margin to support a death recommendation. Morgan v. State, 12 F.L.W. 433 (Fla. 1987).

[31] The only original juvenile record that remains is the single 5x7 note card that says simply: "schizophrenic and suicidal." (R. 740). While copies of some other juvenile records were made available to some resentencing witnesses, because of the destruction of the originals there was no way to confirm whether they were accurate or complete.

defense can't cross-examine a report from HRS." (R. 206).[32] However, the court refused to curtail the prejudicial cross-examination.[33]

2. The Evidence was Inadmissible. This Court made it clear in Fitzpatrick II that, given the appropriate waiver of the "no criminal activity" mitigator, the juvenile history evidence is inadmissible. In so holding, this Court was fully aware of the fact that appellant's expert witnesses knew about the juvenile history and had testified at the original sentencing hearing that appellant was mentally ill, disordered, and bizarre. Indeed, this Court recited this extensive history of mental illness in both Fitzpatrick I and II. Thus, the State's rationalization for its use of the juvenile history at resentencing -- that it was admissible to cross-examine appellant's experts -- is inconsistent with the law of this case.

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[32] Because he asserted his constitutional privilege against self-incrimination, appellant could not rebut the juvenile history evidence, especially the unadjudicated armed robbery charge to which appellant had valid defenses fourteen years ago. (R. 15, 1216). Under these circumstances, it is fundamentally unfair, and violative of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, to put such evidence before a death penalty sentencing jury (which first meets appellant as a convicted murderer) and ask it to fairly reconstruct and consider that evidence.

[33] There was an additional hidden prejudice to appellant's case resulting from the State's improper cross-examination. There were two additional psychologists appellant had intended to call as witnesses at the resentencing, Dr. Lawrence Gilgun and Dr. Brad Fisher. Their report and deposition are part of the instant record as proffers of what they would have testified to. These witnesses were not called because, given the improper scope of the preceding cross-examinations, appellant believed that the State would have been allowed, again improperly, to cross-examine them about the juvenile history, and other similarly inadmissible evidence.

B. Admission of the Juvenile History Evidence Violated Other Well-Established Statutory and Constitutionally Imposed Rules of Evidence

1. The Juvenile History Was Too Remote.

At the time of the resentencing, the events underlying the history had occurred almost thirteen years before. Florida case law and the Sentencing Guidelines would prohibit the use of such a history either to impeach a defendant, see Section 90.610, Florida Statutes (1987); Braswell v. State, 306 So.2d 609 (Fla. 1st DCA 1975), or as a basis for even the mildest criminal sentence.[34] These authorities indicate strong legislative and judicial judgments that the juvenile history in the instant case should have been found inadmissable because of its remoteness, as well as its irrelevance to the experts' opinions.

2. The Admission of the Juvenile History Violated Florida Statutes, Section 90.403.

Even if evidence is relevant, which is not true of the juvenile history, its relevance must be balanced against its likely prejudicial impact before it becomes admissible. Section 90.403, Florida Statutes (1987).[35]

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[34] Appellant's juvenile history would not be considered at the sentencing hearing of one charged with the most trivial crime, for two reasons: 1) the record would be too "old"; and 2) the record includes unadjudicated charges. Fla.R.Crim.P 3.701(d).

[35] McCormick on Evidence (3rd ed. 1984), at 545-46, applies this universally accepted evidentiary principle to facts like those in the instant case:

> Prejudice can arise, however, from facts that arouse the jury's hostility or sympathy for one side without regard to the probative value of the evidence. Thus, evidence of convictions for prior, unrelated crimes may lead a juror to think that since the defendant already has a criminal record, an er-

(continued...)

The cases relied upon by the State at the resentencing hearing, Muehleman v. State, 503 So.2d 310 (Fla. 1987), and Parker v. State, 476 So.2d 134 (Fla. 1985), instead support appellant's position. Muehleman sets forth the same basic balancing test for the admissibility of evidence that is codified in Section 90.403:

> [W]e must consider the evidence admitted, any prejudice accruing to the defendant therefrom, and the purpose for its admission.

Id. at 316 (emphasis supplied). Unlike the instant case, it is clear that the defense "opened the door" in Muehleman to the criminal history (including an assault on the defendant's mother) by introducing evidence "focusing on the mother/son relationship and implying that [defendant's mother] had indirectly caused the murder through lapses in Muehleman's upbringing." Id.

Parker v. State, 476 So.2d 134 (Fla. 1985) was decided before this Court decided Fitzpatrick II, indicating that this Court found it distinguishable; as in Muehleman, the Parker criminal history was first placed in issue by the defense, which contended that the defendant not dangerous, a potential mitigating circumstance appellant specifically waived. (R. 1491).

In sum, the same "improper considerations" held to be inadmissable and prejudicial by this Court in Fitzpatrick II en-

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[35](...continued)
roneous conviction would not be quite as serious as would otherwise be the case.

McCormick adds that such evidence also may "mislead the trier of fact if he is not properly equipped to judge the probative worth of the evidence" and "unduly distract the jury from the main issues." Id. 546 In the instant case, the juvenile history had precisely this intended effect.

tered "into the weighing process" at resentencing, Dragovich v. State, 492 So.2d 350, 355 (Fla. 1986), violating this Court's Dragovich mandate that the State "may not do indirectly that which we have held they may not do directly." Id.

3. The Admission of the Juvenile History Was Fundamentally Unfair Because the Original Records That Were the Basis of Examination were Destroyed

To allow the State to use copies of records that can not be verified as complete or accurate is fundamentally unfair, depriving the evidence upon which the instant death penalty rests of its constitutionally required enhanced reliability. Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

4. The Admission of the Juvenile History Violated Florida Statutes, Section 39.10(4) and 39.12(6).

The use of appellant's juvenile history, particulary when intentionally mischaracterized as a "criminal record", violated the unambiguous mandate of both Section 39.10(4), Florida Statutes ("an adjudication by a court that a child is has committed a delinquent act . . . shall not be deemed a conviction; nor shall the child be deemed to have been found guilty or to be a criminal by reason of that adjudication") and Section 39.12(7) ("No court record. . . under this chapter shall be admissible in evidence in any other. . .criminal proceeding [with certain irrelevant limited exceptions]) (emphasis added). The expressly prohibited use of records of juvenile adjudications in a "criminal proceeding" is unambiguous. There can be no doubt that a capital sentencing proceeding is a "criminal proceeding" as that phrase is used in Section 39.12(7), Florida Statutes. Gardner v. Florida, 430 U.S. 349, 358 (1977).

5. The Admission of the Juvenile History Violated the Eighth and Fourteenth Amendments to the U. S. Constitution.

The constitutional "quid pro quo" for the refusal to provide juveniles with either the full due process protections that are afforded adults, In re Gault, 387 U.S. 1 (1966), or the enhanced procedural guarantees of reliability required in death penalty cases, Woodson v. North Carolina, 428 U.S. 280, 305 (1976), is that the consequence of a juvenile adjudication will be the "concern," "sympathy," and "paternal attention" that "the juvenile court system contemplates." McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971). This "paternal" promise, which is the constitutionally requisite cornerstone of the informal juvenile system, would be broken if appellant's juvenile history, particularly an unadjudicated charge, is allowed to support not just punishment, but the ultimate punishment.

For all these reasons, the admission of appellant's juvenile history was reversible error.

## V. THE INTRODUCTION INTO EVIDENCE OF APPELLANT'S PRIOR TESTIMONY, GIVEN UNDER COMPULSION AT HIS FIRST SENTENCING HEARING, VIOLATED HIS PRIVILEGE AGAINST SELF-INCRIMINATION

Because the State, during its sentencing case-in-chief at the initial sentencing hearing, was allowed to portray appellant as an experienced criminal through the impermissible use of his juvenile history, original defense counsel was forced to call appellant as a defense witness, primarily to present his demeanor to the first sentencing jury. (R. 1341-42). By personally presenting appellant to the jury, defense counsel hoped the jury would conclude he was incapable of forming and carrying out a rational and coherent plan.

Thus, appellant's prior testimony was involuntary; the product of illegally admitted evidence. He did not choose to testify, but rather was compelled to do so to rebut the illegally admitted evidence. (R. 1341-42). His prior testimony was the "tainted fruit of the poisonous tree," Wong Sun v. United States, 371 U.S. 471 (1963), the "poisonous tree" being the illegally admitted juvenile history. Admitting his prior testimony at resentencing violated both the Fifth Amendment's privilege against self-incrimination and Article One, Section Nine of the Florida Constitution. In short, the State was allowed to profit at the resentencing hearing by its improper introduction of inadmissible evidence at the first sentencing hearing.

In Harrison v. United States, 392 U.S. 219 (1968), the Court held that prior testimony "induced" by an illegally admitted confession was tainted by the illegally admitted evidence, and thus was inadmissible at the subsequent trial. The Court stated that whether the defendant had made a "conscious tactical decision to seek acquittal by taking the stand" was "beside the point. The question is not whether the petitioner made a knowing decision to testify, but why." Id. at 223 (emphasis in the original). If the defendant testified "in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible." Id.[36]

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[36] See, e.g., Pillsbury Co. v. Conboy, 459 U.S. 248, 280 n. 6 (1983) (Blackmun, J., concurring) ("[T]he state of mind of the witness is relevant to a 'fruits' inquiry, because a witness' statements are 'fruits' only if they do not result from an independent act of free will.").

Florida courts consistently have applied the "fruit of the poisonous tree" doctrine. See, e.g., Gustafson v. State, 273 So.2d 86, 88 (Fla. 4th DCA 1973), and a series of Florida decisions in Hawthorne v. State, 377 So.2d 780 (Fla. 1st DCA 1979) (Hawthorne I); 408 So.2d 780 (1st DCA 1982) (Hawthorne II); 470 So.2d 770 (1st DCA 1985) (Hawthorne III).

In Hawthorne I, the Court reversed a murder conviction finding, in part, that the defendant's confession had been illegally obtained. In Hawthorne II, the Court reviewed a second murder conviction of Defendant Hawthorne; she had taken the stand and testified at the second trial, as she did in the first. The Court held that the defendant's prior testimony could not be used even to impeach her testimony on retrial because: "the State failed to show that the prior testimony used for impeachment purposes" was "not the product of the illegally obtained and unreliable statement." Id. at 803. The Court emphasized that the State's burden is a heavy one, since it not only must show that the improperly admitted evidence in the original trial did not encourage the defendant to take the stand, but also that all the defendant's testimony was unrelated to the illegally admitted evidence.

In Hawthorne III, the Court reviewed Hawthorne's third conviction. During the third trial, the State cross-examined defendant using facts obtained from the confession and prior testimony, without mentioning either. The Hawthorne III Court reversed again because "the impeachment effort had at its source the illegally obtained statement." Id. at 772-73. Accord, Zeigler v. State, 471 So.2d 172 (Fla. 1st DCA 1985).

Thus, in this case, the burden was on the State to show not only that appellant would have testified if the highly prejudicial juvenile history had not been admitted, but that no part of his prior testimony was provoked by the illegally admitted evidence.[37]

> [H]aving illegally placed his confessions before the jury, the Government can hardly demand a demonstration by the petitioner that he would have testified as he did if his inadmissible confessions had not been used.

Harrison v. United States, 392 U.S. 219, 224 (1968).

There can be little doubt that the State's use at resentencing of appellant's prior testimony was extraordinarily prejudicial. The prosecutor used the prior testimony extensively (R.848, 1082, 1087, 1088, 1089, 1093, 1094, 1096, 1099, 1102, 1104, 1107, 1109), and with obvious effect. The resentencing jury requested a copy of this prior testimony, along with that of one other witness, after it had begun deliberations. (R. 1870).

As importantly, as noted earlier, the purpose of putting appellant on the stand at the original sentencing was to rebut, primarily by demeanor evidence, the illegally admitted juvenile history. Thus, the prejudice to appellant of admitting this compelled testimony at the second sentencing hearing was com-

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[37] If this Court has any question about whether appellant would have testified but for the illegally admitted evidence or about what he might have said if he had, that question is evidence of a failure of proof by the State. Appellant notes that, even though it was not his burden to do so, in addition to submitting the original defense counsel's affidavit establishing the nexus between the illegally admitted evidence and the prior testimony (R. 1341-42), appellant asked the sentencing Court for, but was denied an in limine hearing to provide additional proof that appellant's prior testimony was a direct consequence of the illegally admitted juvenile history. (R. 535).

pounded by reading it into the record. The jury was able to consider only the words appellant used, transmitted to them in a flat, emotionless tone, and was not able to evaluate him and his state of mind by personally observing him.[38] As the Court in Washington v. Watkins, 655 F.2d 1346, 1376 n.57 (5th Cir. 1981) noted: "equally as important" as mitigating evidence in a death penalty proceeding "may be the jury's subjective, unarticulable perceptions of [the defendant] . . . The exercise of mercy, of course, can never be a wholly rational, calculated, and logical process."

Thus, under the special circumstances of the instant case, the introduction of the prior testimony was error, severely prejudicing appellant.

## VI. THE STATE'S USE OF PEREMPTORY CHALLENGES WAS RACIALLY BIASED

The sentencing Court erred, in violation of State v. Neil, 457 So.2d 481 (Fla. 1984), and Batson v. Kentucky, 106 S.Ct. 1712 (1986), by allowing the State to peremptorily strike venire jurors Dale Anita Jackson and Frances McCarty.

1) Miss Jackson

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[38] The personal observations of a mentally ill person play a large role in psychiatric diagnosis. See Diagnostic and Statistical Manual III (1980), the source of diagnostic criteria for the American Psychiatric Association. Specifically, expert witnesses in this case placed great reliance upon appellant's "affect," facial gestures, body movements, mood swings, loss of conversational focus, and abrupt changes in personality, phenomena that are not reflected in the transcribed and literal meaning of words. (See, e.g., R. at 966-68, 910, 689). The resentencing jury was unable to appreciate these subtleties, which in their aggregate are a witness' demeanor, by having appellant's prior testimony read.

With the strike of Jackson, the State had struck for cause (three) and peremptorily (three) six of eight non-white jurors: Hobart Williams (R. 193), Efigenia Schwerr (R. 216), Frances McCarty (R. 217-18), Annie Johnson (R. 319), and Jennifer McCaskill (R. 339).[39] Appellant objected to every strike.

Miss Jackson stated that she believed in the death penalty, depending upon the circumstances. "In some cases I can see [imposing the death penalty]; in some cases I can't." (R. 281). She also stated that she would listen to, and apply the law, that she could vote for the death penalty, and that such a decision would be her own. (R. 281-285). She initially categorically stated that "murder" would be a "serious crime" that would justify the death penalty, qualifying it only later by noting that it would depend on "what exactly happened and why it happened." (R. 283). She said that she could recommend the death penalty even if the defendant had mental disorders, depending on the "kind of emotional problems he had." (R. 284). She answered in the negative to the State's question: "Do you believe that blacks are more likely to receive the death penalty than whites"? (R. 284).

When the State exercised a peremptory challenge against Ms. Jackson, appellant objected on the basis of Neil, and the Court required the State to justify its challenge. During argument, appellant pointed out that the State already had challenged six of eight non-white jurors, that Miss Jackson's voir dire answers contained no hint of partiality or bias, and that the State had

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[39] The State later struck another black juror, Ms. Nettles. (R. 471).

not exercised strikes against numerous white venire jurors who gave virtually identical answers about their views on the death penalty.[40]

In addition, the Court knew that appellant is black and the victim was white (as well as all the prosecution witnesses), and that the State had engaged in "disparate examination" of the venire jurors, e.g., asking only black, not white venire members whether they thought the administration of the death penalty was racially biased. (R. 77 (McCorvey), 284 (Jackson), 369 (Reese)).

The State replied that it had not yet exercised strikes against two blacks, and then added at R. 376 (emphasis added):

> I think the other two blacks that are on here are better than she is, **as far as black people go**.

The State added that Miss Jackson's answers about the death penalty were "uncertain", which is simply not supported by the record. Nor is it the "clear and reasonably specific" prosecutorial explanation that Neil requires. See, e.g., Slappy v. State, 503 So.2d 350, 355 (Fla. 3d DCA 1987); Floyd v. State, 12 F.L.W. 2105 (Fla. 3d DCA 1987). The following colloquy then occurred:

> Mr. Millemann: . . . The only reason that she's being stricken as a jury [sic] is because she's

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[40] Whether to recommend the death penalty would depend on all the circumstances; whether to recommend the death penalty for someone with a mental illness, likewise, would depend upon the degree of illness; and the fact the victim was a law enforcement officer would not make the crime significantly more serious. R. 94-95, 100 (Emmanuel), 108-09, 113 (Robert Williams), 129, 130-32 (Langdon), 220-24, 229 (Little), 308-09 (McDonald), 153-57 (Muller)).

Ms. Dena Lynn Tyree was a white petit juror who was seated after Miss Jackson was struck. Ms. Tyree stated she did not personally believe in the death penalty; yet the State did not exercise a strike against her. (R. 342).

> black, and I think this case falls squarely within Neil and squarely within the Supreme Court ruling.
> Mr. Rimmer: That, of course, is nonsense.
> The Court: **Well, I don't think it's nonsense.**

(R. 374) (emphasis supplied).

However, the Court then expressed its belief that it could impose no remedy for what it thought to be a Neil-Batson violation. The Court first said at R.375:

> The Court: At this point I don't think I have any responsibility except to make you state the reason in the record and then hope the appellate court doesn't find some.
> Mr. Carr: Judge, I would ask the Court to consider in exercising your discretion.
> The Court: I don't have any discretion. I think the matter ends there. I just make them state their reason in the record and hope that they don't make us try the case again.
> * * *
> I'm not striking her. The State struck her.

After further argument by appellant "that it is serious error to allow Jackson to be removed from this jury" (R. 376), the Court said again at R. 376:

> That's the argument you make to the appellate court. I don't think I have any choice [but to strike her].

Appellant responded by asking the Court to strike the venire panel, which request was denied. (R. 376-77).

2) Miss McCarty

Miss McCarty, another black venire juror, stated that she did not have feelings on the death penalty "one way or the other" and would "try to keep an open mind." (R. 171). The imposition of death should "all depend on the situation." (R. 173).

Despite these answers, the prosecutor struck Ms. McCarty,

over defense objection. (R 217-18). The Court inquired why the prosecutor struck Ms. McCarty, and the prosecutor responded:

> Frances McCarty because she said she didn't know if she could vote for the death penalty, and during general voir dire this morning, she said she did not want to sit in judgment against another person.

(R. 218). The Court took no further action.

It is, of course, simply not true that Ms. McCarty expressed any inability to vote for the death penalty. She did, during the general voir dire, say that she "prefers not to sit in judgment against another person" (R. 34-35), but so did several other persons, and she did not say that she could not sit in judgment. The prosecutor made no further inquiry of her on this point, evidently content to have a seeming excuse to strike another black juror.

3) Argument

The Court required the State to justify both the Jackson and McCarty strikes. Having heard the voir dire of twenty-nine prior venire jurors when the State struck Jackson, the sentencing Court was "best able to evaluate whether there [was] a need for the explanation of challenges on the basis that they are racially motivated." Thomas v. State, 502 So.2d 994, 996 (Fla. 4th DCA 1987). "[E]xperienced in supervising voir dire," the Court decide[d] "the circumstances concerning the prosecutor's use of peremptory challenges create[d] a prima facie case of discrimination against black jurors." U.S. v. David, 803 F.2d 1567, 1570 (11th Cir. 1986); see also Pearson v. State, 12 F.L.W. 2147 (Fla. 2d DCA 1987). In neither instance, did the State meet its burden of rebutting the presumption "that the questioned chal-

lenges were not exercised solely because of the prospective juror's race" Hale v. State, 480 So.2d 115, 116 (Fla. 2d DCA 1985), quoting Neil v. State, supra at 486-87.

The sentencing Court clearly erred when it failed to provide a remedy for what it apparently found to be a racially motivated strike against Miss Jackson. This finding is entitled to deference.[41] See Thomas v. State, 502 So. 2d 994 (Fla 4th DCA 1987). There are at least two remedies for a Neil-Batson violation: either dismiss the entire venire pool and begin with a new panel, or reinstate the improperly challenged juror on the venire. Batson v. Kentucky, 106 S.Ct 1712, 1724, n.24 (1986). Accord, State v. Neil, 457 So.2d 481, 486-87 (Fla. 1984), quoted in Hale v. State, 480 So.2d 115, 116 (Fla. 2nd DCA 1985); Cotton v. State, 468 So.2d 1047 (Fla. 4th DCA 1985).

In short, as in Slappy v. State, 503 So. 2d 350, 355-56 (Fla. 3d DCA 1987), the error in the instant case "is that the trial court apparently considered itself bound to accept all of the prosecutor's explanations at face value." See also Keeton v. State, 724 S.W.2d 58, 66 (Tex. App. 1987).

The record in the instant case amply supports the conclusion that the Jackson and McCarty strikes were racially motivated. As noted above, the State conducted disparate examinations of the black and white venire jurors; gave disparate treatment to simi-

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41 The finding is entitled to weight whether viewed as express -- "I don't think [appellant's racial challenge is] nonsense" (R. 374) -- or as implicit. See Rijo v. State, 721 S.W.2d 562, 565 (Tex. Ct. App. 1986) ("the trial court was justified in impliedly finding from the facts and relevant circumstances" that no inference of racial bias was raised) (emphasis added).

lar responses from white and black venire jurors (striking the black jurors); offered asserted reasons for disqualifying Ms. Jackson and Ms. McCarty that were neither true, nor "clear and reasonably specific"; conducted two of the briefest of all voir dire examinations of Miss Jackson and Ms. McCarty;[42] and attempted to justify its strikes with a racial slur: two other black venire jurors were "better" "as far as blacks go." See Floyd v. State, 12 F.L.W. 2105, 2106 (Fla. 3d DCA 1987); Peek v. State, 488 So. 2d 52, 56 (Fla. 1986) (a judge should not "convey an image of prejudice or bias to any person or any segment of the community.").

The Batson-Neil error was surely prejudicial. The striking of a single black juror is inherently prejudicial. Fleming v. Kemp, 794 F.2d 1478, 1483 (11th Cir. 1986). Accord, Floyd v. State, supra ("The striking of a single black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when there are valid reasons for the striking of some black jurors"); Hale v. State, 480 So.2d 115 (Fla. 2d DCA 1985); U. S. v. Gordon, 817 F.2d 1538 (11th Cir. 1987); U. S. v. David, 803 F.2d 1567 (11th Cir. 1986); Powell v. State, 355 S.E.2d 72 (Ga. Ct. App. 1987); Rodgers v. State, 725 S.W.2d 477 (Tex. Ct. App. 1987).

## VII. THE COURT ERRED IN FAILING TO STRIKE FOR CAUSE MRS. HARRIET MAJORS, A VENIRE JUROR

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[42] Each examination covered about one page (Jackson, 33 lines; McCarty, 9 lines (excluding objections)) of transcript. Very few of the State's other voir dires were as brief or briefer.

Article I, Section 16 of the Florida Constitution, the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Section 913.03, Florida Statutes (1987), all guarantee a defendant in a capital sentencing proceeding the right to an impartial jury. In failing to strike for cause Mrs. Majors, the sentencing court denied appellant this fundamental right.

During Mrs. Majors' voir dire examination, she testified that Paul Parks was one of her "very closest friends," and that she and her husband had known the Parks' for approximately twenty-five (25) years. (R. 458-59). "[Parks] and his wife have just been among our very closest friends. We take vacations with them. We do all sorts of things together." (R. 459) (emphasis added). Mrs. Majors readily acknowledged that she discussed the Fitzpatrick case with Parks. (R. 459). "We were **extremely** interested in it at the time but, yes, we heard a great deal of it from Paul, Mr. Parks." (R. 461, 462) (emphasis supplied). Parks relayed to her what happened on the day appellant took him as a hostage. (R. 462).

Mrs. Majors was asked about her ability to be an impartial juror, given her long personal friendship with Mr. Parks:

> I would try to be, but I could not honestly say. I'm sure that the fact that you know someone very much and you would certainly put a great deal of credibility to what he had to say. **It would be hard, I think, to be totally impartial.** I dont't know. I don't know how I would react to that. I'm sorry.

(R. 460) (emphasis supplied). She continued:

> There again, when you know someone very well, it's hard to completely untangle your feelings, but I would do the best that I could.

(R. 465-66).

The Court said in Leon v. State, 396 So.2d 203, 205 (Fla. 3d DCA 1981):

> Although a trial court has broad discretion in its conduct of voir dire, . . . its exercise of that discretion is "subject to the essential demands of fairness."

Based upon the above facts, the Court below clearly abused its discretion by failing to strike Ms. Majors for cause. (R. 523-24).[43]

It is plain that Mrs. Majors' close association with Parks "substantially impair[ed]" her ability to be an impartial juror. Wainwright v. Witt, ___ U.S. ___, 105 S. Ct. 844 (1985); Lara v. State, 464 So.2d 1173 (Fla. 1985); Herring v. State, 446 So.2d 1049 (Fla. 1984).[44] Mr. Parks was the critical State's witness at the resentencing. He was one of appellant's crime victims, and the "victim" of four of the five aggravating circumstances

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[43] At the time appellant challenged for cause Mrs. Majors, he had one remaining peremptory challenge, which he used against another prospective juror. Thus, appellant was unable to use that challenge to "backstrike" Mrs. Majors. As this Court stated in Hill v. State, 477 So.2d 553, 556 (Fla. 1985):

> [I]t is reversible error for a court to force a party to use peremptory challenges on persons who should hve been excused for cause, provided the party subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied.

Appellant exhausted all of his peremptory challenges and the Court denied his request for additional challenges. (R. 530).

[44] These cases note that the prospective juror need not be unequivocal about his ability to be impartial; rather, a juror should be struck for cause where the juror's ability to be impartial is "substantially impaired."

found by the sentencing Court.[45] Mrs. Majors' understandable pre-hearing commitment to give his testimony "a great deal of credibility" therefore was extraordinarily prejudicial. Given the long-term and deep friendship between Mr. Parks and Mrs. Majors, it is inevitable that she also gave enhanced weight to, found more aggravating, acts aimed at Park's life. It is to avoid arbitrary prejudice, flowing from sympathy, that the Supreme Court precluded the use of victim impact statements in death penalty cases. See Booth v. Maryland, 107 S. Ct. 2529 (1987). That prejudice is far greater where the juror is "very closest friends" with a victim.

In Singer v. State, 109 So.2d 7 (Fla. 1959), the defendant was sentenced to death for the murder of a relative of a prominent local family. This Court held it was reversible error not to dismiss for cause a venire juror who testified that he was uncertain he could render an impartial verdict because he knew the victim's family and might be biased "subconsciously", id. at 20, and because he knew about the case. This Court found "reasonable doubt" that the juror could be impartial.

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[45] Indeed, his testimony provided the bases for all of the aggravating circumstances found: he testified that appellant threatened to shoot the hostages (R. 629-30); appellant shot the victim (R. 631); Mr. Parks "wrestled" with appellant on the floor over control of his gun (R. 632); appellant shot him (R. 632); and perhaps most damaging:

> Finally, he (appellant) got his foot in my chest and pushed me away. And then as I raised up again to go back again, he had the gun in both hands this time and it went click . . . Yes, it [the gun] was right at my chest.

(R. 633).

The Court also held that a juror's statement that he will consientiously find the facts and apply the law does not, ipso facto, establish his competence:

> if it appears from other statements made by him or from other evidence that he is not possessed of a state of mind which will enable him to do so.

Id. at 24. See also, Lusk v. State, 446 So.2d 1038 (Fla. 1984); Lambrix v. State, 494 So.2d 1143 (Fla. 1986) (it was proper to exclude a juror who gave inconsistent answers about her capacity to recommend the death penalty). In Hill v. State, 477 So.2d 553 (Fla. 1985), this Court reiterated the "reasonable doubt" rule:

> If there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial, he sould be excused. . .

Id., quoting Singer v. State, supra at 23-24.[46]

District courts of appeal have carefully applied the "reasonable doubt" rule to jurors like Mr. Majors. In Jefferson v. State, 489 So.2d 211 (Fla. 3rd DCA 1986), the Court found reasonable doubt about a venire juror's impartiality because she gave equivocal answers about whether her husband's job in the clerk's office might possibly affect her objectivity and the weight she would give police testimony. In Auriemme v. State, 501 So. 2d 41 (Fla. 5th DCA 1986), the Court reversed a conviction because a

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[46] In Hill, a death penalty case, this Court held that the trial court erred in failing to strike venire juror Johnson for cause. During his voir dire examination, Johnson admitted pro-death penalty feelings as a result of media coverage. Despite his contention that he could disregard his feelings and listen to the evidence, this Court found that he "did not possess the requisite impartial state of mind." Hill at 556.

juror stated that, while she "would try" to be fair, she was not sure she could be, because she had two young nieces. See Sikes v. Seaboard Coast Lines Railroad Co., 487 So. 2d 1118, 1121 (Fla. 1st DCA 1986) (a "juror's testimony that she would 'try to be fair'" does not assure impartiality).

Like the jurors in Jefferson, Lambrix, Auriemme, and Sikes, Mrs. Majors conceded she might not be impartial (R. 460) and, at best, gave inconsistent and ambiguous answers on this point (compare R. 463 with R. 465) these statements do not even suggest that she could overcome an objective source of inevitable partiality - a close and long friendship. See also Lara v. State, 464 So.2d 1173 (Fla. 1985); Smith v. State, 463 So.2d 542 (Fla. 5th DCA 1985).[47]

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[47] Courts often have found to be disqualifying social relationships betwen venire jurors and non-party witnesses. For example, in State v. Joiner, 112 So. 503 (La. 1927), a prospective juror testified during voir dire that he was a close personal friend of the main witness for the state (as well as the victim). The Court held that it was reversible error to allow the juror to sit, stating:

> It is the natural impulse of all men, with rare exceptions, when the direct question is put to them, especially by one in authority, such as a district attorney or a trial judge, to declare that they believe they can disregard a preconceived opinion and render a fair and impartial verdict upon the evidence submitted to them. In general, they are sincere in their statement and belief. The declaration, however, should not only proceed from the mouth of the venireman, but it should be made in connection with a state of facts showing that it is probably true.

See also State v. Jackson, 203 A.2d 1, 7-8 (N.J. 1964) (holding that, while the juror's statement that the friendship would have no bearing on the issue of credibility was sincere, it was "difficult to accept for it runs counter to human nature"); Wilburn v. U.S., 340 A.2d 810 (D. Col. 1975); State v. Domino, 444 So.2d 268 (La. App. 1983).

## VIII. THE COURT ERRED BY FAILING TO FIND AND WEIGH SEVERAL NON-STATUTORY MITIGATING CIRCUMSTANCES

Appellant clearly established several non-statutory mitigating circumstances; indeed, most were uncontradicted. However, the Court declined to find any of them. (R. 1722). These circumstances were based on appellant's "character or record" and the circumstances of the crime. See Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982).

First, the brevity of the crime is mitigating. If appellant killed the victim, it was done virtually instantaneously and reflexively. This Court has previously given substantial weight to the fact that a defendant's "commission of the death act was probably upon reflection of not long duration." Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985).

Second, the homicide was not a cold and calculated or heinous, atrocious, or cruel killing. See, Argument IX, infra. This uncontradicted fact should have been accorded substantial weight.

Third, as in Ross v. State, supra, appellant had no adult criminal history, and his juvenile history is comprised of two bizarre acts that demonstrate mental and emotional disorder, not conscious, criminal design. These facts alone warrant the imposition of a life sentence. Blair v. State, 406 So. 2d 1103 (Fla. 1981).

Fourth, the patent lack of criminal design and sophistication demonstrated not only by appellant's unreal and fantasy-based "plan", but also by appellant's spontaneous crime scene plea: "please don't die", are mitigating. See Washington v. State, 362 So.2d 658 (Fla. 1978).

Fifth, during the years that appellant was cared for (e.g., by Ernest Bugg and Charles Stevens), he remained trouble-free. (R. 918-924, 932-939). Such evidence is important mitigation. See Skipper v. South Carolina, 106 S.Ct. 1669 (1986).

Sixth, appellant was raised in poverty as one of 13 children who shared three bedrooms. This is also entitled to consideration as a mitigating circumstance. See Fead v. State, 12 F.L.W. 451 (Fla. 1987); Scott v. State, 411 So.2d 866 (Fla. 1982); Shue v. State, 366 So.2d 387 (Fla. 1978).

Seventh, appellant's borderline intelligence, although mentioned by the Court, (R. 1722), should have been given independent non-statutory weight since it was related to every aspect of the capital felony.

Eighth, extraordinary doubt about whether appellant shot the victim, see Argument XIX, infra, also is mitigating.

When one or more of these circumstances are added to the life-death equation, a life sentence should be imposed. See Issue I, supra.

## IX. APPELLANT WAS DENIED A FAIR SENTENCING HEARING WHEN THE TRIAL JUDGE PROHIBITED HIM FROM ARGUING IN HIS SUMMATION THAT THE JURY SHOULD CONSIDER AND WEIGH CERTAIN NONSTATUTORY MITIGATING EVIDENCE

In his closing argument, appellant attempted to argue that death was not an appropriate penalty because, among other reasons, the killing was not especially cruel, and was not cold-blooded or calculated. (R. 1126). However, the prosecutor's objection to this argument was sustained. Id. Through this ruling, the jury was effectively told that it is improper to argue, and therefore it could not consider as mitigating, that the killing in this case was not cruel or calculated. Patently,

this is appropriate, non-statutory mitigating evidence that a jury must be allowed to consider pursuant to Lockett v. Ohio, 438 U.S. 586 (1978). Accord, Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 106 S. Ct. 1669 (1986).

There is persuasive evidence in this case that the absence of these two most serious aggravators is not only relevant, but compelling mitigating evidence. Only a handful of Florida death-sentenced inmates, fewer than 5%, were found to have committed capital felonies that lacked both of these aggravating circumstances (R. 1732). The significance of the absence of these two serious aggravators is confirmed by the virtually unanimous view of the venire jurors in appellant's case. When asked on voir dire what murders should be punished by the death penalty, the jurors consistently identified cruel or calculated homicides. (E.g., R.94, 132, 153, 207, 241, 298, 392, 405, 414, 432). Thus, the sentencing Court's ruling created the clearest "risk" that the death penalty was imposed "in spite of factors which may call for a less severe penalty." Lockett, 438 U.S.at 605.

Assuming arguendo that the jury ignored the sentencing Court's implicit ruling that it could not consider the absence of the two serious aggravating circmstances, the arbitrary restriction on appellant's closing argument still violated appellant's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Section 11 of the Florida Constitution, since appellant was denied the vital opportunity to persuade the jury on this point:

> There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial. . .

> In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.

Herring v. New York, 422 U.S. 853, 862 (1975).

An important component of appellant's "advocacy", indeed a major component of his basic "theory of the case", was the absence of cruelty and calculation.

## X. THE PROSECUTOR IMPERMISSIBLY COMMENTED ON APPELLANT'S RIGHT TO REMAIN SILENT

During the testimony of appellant's psychiatrist, Dr. Barnard, the prosecutor asked the witness whether he had discussed the capital offense with appellant. The witness responded that he had. (R. 709). The following colloquy then occurred:

> Q. (By prosecutor): Now, he [appellant] told you how things happened, how he [appellant] recalled things happening that day?
> Mr. Millemann: Objection to that. There is law in Florida that says -- specifically holds that those conversations are not admissible.
> (Prosecutor): Why not put him [appellant] on the stand? To evaluate him [appellant] he's [the witness] testified that he considered the things that the defendant told him.

(R. 709).

A prosecutor's comment on the failure of a defendant to testify has long been held to constitute per se reversible error. Gordon v. State, 104 So.2d 524 (Fla. 1958); Rowe v. State, 98 So. 613 (1924). "The price society must pay for violation of this constitutional right is reversal." Smith v. State, 492 So.2d 1063, 1066 (Fla. 1986). Indeed, any comment which is fairly susceptible of being interpreted as a comment on silence is

error. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Molina v. State, 447 So.2d 253, 256 (Fla. 3rd DCA 1983). This rule clearly applies in a sentencing proceeding. Bertolotti v. State, 476 So.2d 130 (Fla. 1985).

In State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), this Court, for the first time, adopted a harmless error rule for cases in which a prosecutor comments on a defendant's silence. But pursuant to DiGuilio, the State has the burden of demonstrating "beyond a reasonable doubt" that the error did not affect the outcome of the case. Id. at 1139. The State can't carry that burden in this case. The jury was extraordinarily interested in appellant's testimony, which it interrupted its deliberations to request, and, by inference, in what appellant chose not to say at the resentencing hearing. And in assessing whether error is harmless, it "is significant that the difference of one vote rendered the jury recommendation one of death rather than mercy." Morgan v. State, 12 F.L.W. 433, 434 (Fla. 1987).

**XI. THE STATE'S MISREPRESENTATIONS THROUGHOUT THE SENTENCING HEARING THAT MENTAL ILLNESS THAT IS NOT "EXTREME" OR "SUBSTANTIALLY" IMPAIRING IS NOT MITIGATING, AND THE RESENTENCING COURT'S FAILURE TO SPECIFICALLY INSTRUCT THE JURY TO THE CONTRARY, DENIED APPELLANT A FAIR SENTENCING HEARING AND VIOLATED LOCKETT V. OHIO, 438 U.S. 586 (1978).**

**XII. THE KNOWINGLY IMPROPER USE BY THE STATE THROUGHOUT THE RESENTENCING HEARING OF THE LEGAL STANDARDS FOR COMPETENCY AND RESPONSIBILITY RATHER THAN THE APPROPRIATE MITIGATION STANDARDS, AND THE RESENTENCING COURT'S FAILURE TO LIMIT THE STATES'S MISUSE OF THE COMPETENCY AND RESPONSIBILITY STANDARDS, DENIED APPELLANT A FAIR RESENTENCING HEARING.**

Because these arguments are related, appellant combines discussion of them.

Throughout the resentencing hearing, the State asserted in its examination of witnesses and in closing argument, over persistent objections,[48] that the standards against which the jury should measure the mitigating evidence were those governing competency and responsibility. (R. 577, 708, 724-25, 1091).[49] Appellant's objections were overruled, and his request for a timely curing instruction was denied, even though defense counsel argued correctly that, if the State "is allowed throughout the course of this case to plant that seed in the jury's minds, there will be no instruction that you can give that will cure that problem." (R. 579).

The State's second alternative line of improper assertions and argument was that evidence of mental illness and emotional disturbance that did not satisfy the enhancing statutory modifiers simply was not mitigating. Indeed, in its closing argument, over objection (R. 1086), the State based its case upon this improper theory:

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[48] Prior to the resentencing hearing, appellant filed motions to preclude the State from misleading the jury about the applicable mitigation standards for emotional disturbance and psychological capacity and to strike the enhancing adjectives "extreme" and "substantially", which modify statutory mitigating circumstances (b) & (h). (R. 1170-72; 1287-1291). In addition, appellant filed an express written waiver of reliance at resentencing upon the argument that appellant satisfies the M'Naghten test. (R. 1491, 1547).

[49] The standards governing mitigating evidence of mental illness and those establishing competency and criminal responsibility are quite different and should not be confused. See, Ferguson v. State, 417 So.2d 631 (Fla. 1982); Mines v. State, 390 So.2d 332, 337 (Fla. 1980); Quince v. State, 441 So.2d 185 (Fla. 1982); State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). Accord, State v. Johnson, 257 S.E. 2d 597 (N.C. 1979).

> Here is the **key** to the whole thing. . . . The **key** word here, ladies and gentlemen, is the word **extreme**. The defendant was under the influence of extreme mental or emotional disturbance. At no time am I going to tell you that he was not mentally or emotionally disturbed. The thing is how mentally or emotionally disturbed was he? Was it extreme? You can have mental or emotional disturbance without it being extreme.
>
> The next statutory mitigating factor is that his capacity to appreciate the criminality of his conduct or to conform this conduct to the requirements of the law was substantially impaired. The **key** word here, ladies and gentlemen, is the word **substantially**. . . . They are going to tell you he had the age of a child and child like and all that, but you consider all the evidence and consider first of all, whether or not any mental or emotional disturbance he had was **extreme** and his capacity being impaired was **substantial**, not was it impaired, not was he mentally or emotionally disturbed, but was it **extreme**. Was it **substantial**. Those are the **key** words.
>
> MR. MILLEMANN: Objection, Your Honor.
>
> THE COURT: Overruled.

(R. 1085-86) (emphasis added).[50]

Indeed, the prosecutor used the words "extreme" and "substantially" twenty-three times. (R. 1085-86, 1091, 1098-99, 1101, 1108). This fundamentally misleading and unfair argument was bolstered by the State's use of a large chart during closing, again over objection (R. 1079-80), which listed only the statutory mitigating circumstances, and omitted any reference to non-statutory mitigating circumstances.

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[50] The prosecutor communicated in the quoted text that the jury should not consider whether appellant was impaired or mentally ill, but whether his impairment and mental illness were "substantially and impairing" and "extreme". The overruling of appellant's objection gave the jury the clearest impression that the prosecutor's statements were correct.

Appellant requested that the Court instruct the jury that:

> Evidence of mental or emotional disturbance can establish a mitigating circumstance, even if it is not "extreme" and does not "substantially" impair one's capacity to appreciate the criminality of his conduct, and does not "substantially" impair one's capacity to conform his conduct to the requirements of law.

(R. 1883). However, the court refused to give this instruction.

The intended and actual prejudicial effect of these misleading assertions, argument and prop, aggravated by the Court's contemporaneous failure to instruct, was to impose upon appellant an unconstitutionally enhanced burden of proving that his mental illness justified a life sentence, in violation of Florida law and the Eighth and Fourteenth Amendments to the United States Constitution. Lockett v. Ohio, 438 U.S. 586 (1978); Hitchcock v. Dugger, 107 S.Ct. 1821, 1824 (1987).

While the jury eventually was instructed that it could consider any mitigating evidence proffered by appellant, even that which did not establish an "insanity defense", under the circumstances of this case, a reasonable juror would likely have believed that, if evidence failed to reach the level explicitly required in the statutory enumerated mitigators, that evidence was not mitigating at all. Indeed, this logic is embodied, as a rule, in the established principle of construction expressio unis est exclusio alterius; e.g., the express mention of "extreme" excludes mental disturbance that is not extreme. See generally 49 Fla. Jur. 2d Statutes, Section 126.

Plaintiff acknowledges that in Johnson v. State, 438 So.2d 774, 779 (Fla. 1983), this Court found that the use of the objec-

tionable adjectives was not inherent error "when coupled with the jury's ability to consider other elements in mitigation. . . . " However, in this case, the jury's "ability" to consider in mitigation evidence of mental illness and disorder short of the statutory standards was impaired. Having heard during the hearing that the appropriate standards were competency and responsibility, having watched the Court overrule repeated defense objections to the prosecutor's misrepresentations, having listened to the prosecution's argument (with the aid of the improper chart) overruled objections, the jury most likely thought either that non-statutory evidence of mental illness was simply irrelevant or, at a minimum, was entitled to virtually no weight. See Floyd v. State, 497 So.2d 1211, 1215 (Fla. 1986) (failure to instruct jurors that they "were permitted to consider nonstatutory mitigating factors" was "compounded by the prosecutor's closing argument to the jury that there were no mitigating factors"). Accord, Downs v. Dugger, 12 F.L.W. 473, 474 (Fla. 1987) ("the mere opportunity to present nonstatutory mitigating evidence does not meet constitutional requirements if the. . . jury is led to believe that some of that evidence may not be weighed during the formulation of an advisory opinion. . ."); Riley v. Wainwright, 12 F.L.W. 457, 458 (Fla. 1987) "the jury's determination of the existence of any mitigating circumstances, statutory or nonstatutory, as well as the weight to be given them are essential components of the sentencing process.") (emphasis added). In Riley, this Court added that not only improper instructions, but "incomplete or confusing instructions relative to the considera-

tion of both statutory and nonstatutory mitigating evidence," that "does violence to the sentencing scheme and the jury's fundamental role in that scheme."[51] Id. at 458 (emphasis added).

Instructions are "incomplete" or "confusing" if "there is a reasonable possibility that the jury understood the instructions in an unconstitutional manner." Peek v. Kemp, 784 F.2d 1479, 1489 (11th Cir. 1986). The ultimate question is what a "reasonable juror" would have understood, California v. Brown, 107 S.Ct. 837 (1987); in this case, what a single juror might reasonably have misunderstood. The only way in which appellant's jury could have understood that it could give appropriate weight to nonstatutory mitigating mental illness evidence was to have been so instructed, as appellant requested. As the Court explained in Washington v. Watkins, 655 F.2d 1346, 1375 (5th Cir. 1981), citing Taylor v. Kentucky, 436 U.S. 478, 488-89 (1978):

> Only an instruction from the trial court can invest a particular concept -- here the jury's ability to consider nonstatutory mitigating factors -- with the authority of the court.[52]

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[51] This Court emphasized that, as in the instant case, one of the ingredients of the reversible error was the fact that "the prosecutor discussed 'the' mitigating circumstances to see if 'they' exist and then checked off the statutory list." Id. at 459. In this case, the prosecutor did precisely the same thing.

[52] For this reason, the fact that counsel was free to argue this point is virtually irrelevant. This is a legal point; not a factual argument. See Goodwin v. Balkcom, 684 F.2d 794, 802-03, n.8 (11th Cir. 1982):

> Any suggestion that counsel's argument can perfect an otherwise faulty jury charge is totally erroneous. Arguments of counsel can never substitute for the instructions given by the court.

(continued...)

## XIII. THE ADMISSION INTO EVIDENCE OF GRUESOME PHOTOGRAPHS OF THE PARTIALLY UNDRESSED DEAD VICTIM VIOLATED APPELLANT'S EIGHTH AMENDMENT AND STATE LAW RIGHTS

Over appellant's objection, the sentencing Court admitted into evidence gruesome photographs of the dead officer laying on the floor with his shirt off, and with a bullet wound in his head, as well as bloody photographs of the kidnapping victim, Mr. Parks. (R. 652). These photographs were not relevant to any issue before the jury. Their inflammatory nature created the risk of an arbitrary and capricious jury response, in violation of the eighth and fourteenth amendments.

Appellant does **not** raise herein the question of whether it would have been appropriate to admit these photographs had this been the guilt phase of the trial. But, the sentencing Court expressly instructed the jury that the issue of appellant's guilt was not an issue in this proceeding. (R. 1128). One must have a vivid imagination to see the logical connection between these gruesome photographs and aggravating circumstance in issue herein. Thus, the photographs were not relevant.

Moreover, alleged relevancy must be weighed against prejudicial value. See Section 90.403, Florida Statutes (1987). In the guilt phase of a trial, the weighing of these two countervailing principles is often difficult, although the courts generally find that the relevancy of photographs slightly outweighs their prejudice. See Straight v. State, 397 So.2d 903 (Fla. 1981); but

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[52](...continued)

Accord, Washington v. Watkins, 655 F.2d 1346, 1374-75 (5th Cir. 1981); Spivey v. Zant, 661 F.2d 464, 470 (5th Cir. 1981); Dix v. Kemp, 763 F.2d 1207, 1209 (11th Cir. 1985).

see Reddish v. State, 167 So.2d 858 (Fla. 1964); Beagles v. State, 273 So.2d 796 (Fla. 1st D.C.A. 1973); Wright v. State, 250 So.2d 333 (Fla. 2nd D.C.A. 1971); see also State v. Patrick, 345 S.E.2d 481 (S.C. 1986).

But where, as here, the issue is only the appropriate penalty, prejudice outweighs alleged relevance. The photos, especially the bloody photograph of Mr. Parks shown to juror Majors, improperly aroused fear and appealed purely to the jurors' emotions. It would be difficult, if not impossible, for a juror to make a reasoned judgment about the death penalty when faced with such a photograph of one of her "very closest friends".[53] The one vote margin in the jury's recommendation may well have been attributed to this prejudical error.

The sentencing Court admitted the photographs not because they were relevant to any aggravating circumstance, but solely because "they were admitted in the trial". (R. 758-60). However, this Court has ruled that evidence of guilt is inadmissible in a resentencing procedure unless it is relevant to prove the existence of an aggravating circumstance. King v. State, 12 F.L.W. 502 (Fla. 1987). The State can't have it both ways, admitting evidence relevant only to guilt (e.g., the photographs and evidence of appellant's criminal responsibility), while excluding evidence of "lingering doubt" about appellant's guilt. See, Argument XIX, infra.

The admission of the photographs also is inconsistent with Booth v. Maryland, 107 S.Ct. 2529, 2532 (1987). It is hard to

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[53] See Issue VII, supra.

imagine a more emotionally charged victim impact "statement" than photographs of the dead victim's bloody, partially unclad body. In short, because "a picture is worth a thousand words", the photographs were as inflammatory, and served to inject as much arbitrariness into the sentencing decision as written words.[54]

## XIV. THE DELEGATION OF THE DECISION TO SEEK THE DEATH PENALTY FROM THE PROSECUTOR TO THE WIDOW WAS UNCONSTITUTIONAL

On December 29, 1986, the State requested a continuance of the resentencing hearing. The "more compelling reason" (R. 1206) for this request was the State's suggestion that there was "a very good possiblility we might be able to settle this case without a resentencing hearing." (R. 1267). Defense counsel was going to contact the victim's widow and family and, if they indicated that they did not want to seek the death penalty, the prosecutor would agree not to do so. (R. 1208-09).[55] However, the prosecutor said categorically: "if the family is in a position where they want the ultimate maximum penalty in the case, then we will go forward on that." (R. 1209) (emphasis added).

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[54] While victim photographs might in some cases be relevant and admissible if, for example, it is alleged that the killing was particularly cruel, heinous, and atrocious, absent such justification victim photographs distract the jury from the required "individualized determination" of whether the capital defendant should be executed based on "the character of the individual and circumstances of the crime." Booth v. Maryland, supra, quoting Zant v. Stephens, 462 U.S. 862, 879 (1983).

[55] The evidence, including the fact the prosecutor requested the continuance, the reasons for that request, the prosecutor's experiences in other cases, and the various statements that he made (set forth herein) demonstrate that if the victim's family had decided not to seek the death penalty, the prosecutor absolutely would have honored that decision.

A confirmation that the victim's family would make the decision was provided by the prosecutor's statement at R.1207:

> I went through this once before in the Amos Cross, police officer murder case. I handled that case also and it came right up to the wire on the day we were getting ready to select a jury, and Officer Cross' widow agreed to a life sentence or two consecutive life sentences, and everybody was happy we worked that out and we didn't have to go to trial.

The prosecutor did not himself inquire about the family's feelings, but delegated that task to defense counsel. (R. 1206). Thus, the prosecutor had no way of knowing on what criteria (as it turned out) the victim's widow and family decided to seek the death penalty. Indeed, the prosecutor pledged himself to seek the death penalty, if that was what the family wanted, before he or defense counsel talked to the victim's widow and family about their wishes.

The assumption that prosecutors will make death penalty charging decisions is a predicate of the constitutionality of Florida's death penalty statute. In Gregg v. Georgia, 428 U.S. 153, 225 (1976), Justice White responded to the argument that the arbitrary administration of the death penalty by prosecutors rendered it unconstitutional:

> Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments, the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. (emphasis added).

Justice White's critical assumption was reiterated in McCleskey v. Kemp, 107 S.Ct. 1756, 1774 (1987), where the Court upheld the death penalty because: 1) a limited number of identified "decisionmakers", including prosecutors, exercise the discretion to impose death; and 2) there are reasonable criteria that "narrow the decisionmaker's judgment". Both constitutional predicates are absent in the instant case.[56]

Appellant's argument is entirely consistent with, indeed dependent upon the widely accepted principle that prosecutors have broad, generally unreviewable prosecutorial discretion. The

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[56] Although appellant's instant argument has the stronger, constitutionally-imposed foundation expressed in Gregg and McCleskey, the policy considerations underlying it are similar to those expressed years ago by this Court in Oglesby v. State, 90 So. 825, 826 (Fla. 1922), when it set limits on the prosecution of crimes by private counsel.

> When such assistants are employed in the case, the state attorney should always remain present at the trial, and see that a public prosecution does not degenerate into a private prosecution, and that the administration of the criminal law is not made a vehicle of oppression for the gratification of private malice, or the accomplishment of private gain or advantage. (emphasis added)

See also Ganger v. Peyton, 379 F.2d 709, 713-14 (4th Cir. 1967) ("At common law, a prosecuting attorney is the representative of the public in whom is lodged a discretion . . . which is not to be controlled by the courts or by an interested individual. . .") (emphasis added); State v. Peterson, 218 N.W. 367, 369 (Wisc. 1928) ("Our scheme contemplates that an impartial man selected by the electors of the county shall prosecute all criminal actions in the county unbiased by desires of complaining witnesses or that of the defendant.") (emphasis added); Polo Fashions, Inc. v. Stock Buyers International, Inc., 760 F.2d 698, 704 (6th Cir. 1985) (a basic "procedural protection" "is the requirement that criminal actions be prosecuted by disinterested, publicly employed attorneys", who represent not "an ordinary party" but a "sovereignty" whose obligation it is "to govern impartially").

predicate of this deferential principle is that the broad discretion will be exercised by public officials.[57]

## XV. THE COURT ERRED BY FAILING TO STRIKE FOR CAUSE JUROR BENTHOWSKI BECAUSE OF HIS VIEWS ON THE DEATH PENALTY

During individual voir dire, juror Benthowski was asked for his views on the death penalty. His response was: "I'm for it." (R. 255). The following colloquy then occurred:

> Mr. Millemann: And under what circumstance?
> Prospective juror: Taking a life.
> Mr. Millemann: So if someone takes a life, you think they should forfeit theirs?
> Prospective juror: If it were done intentionally.
> Mr. Millemann: O.K. Would you need to impose the death penalty if it is was done intentionally?
> Prospective juror: Yes.
> * * *
> Mr. Millemann: If somebody is found guilty of intentional murder, they should forfeit their life?
> Prospective juror: Yes.
> Mr. Millemann: Any exception to that you can think of?
> Prospective juror: I don't know.
> Mr. Millemann: That's a view that you hold strongly?
> Prospective juror: Yes.
> Mr. Millemann: If you were being put in a position where you had that view and you had to apply a different view, somebody else's view, would you feel some tension in that respect?

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[57] See Young v. U.S. ex rel. Vuitton et Fils, S.A., 107 S.Ct. 2124, 2139 (1987). ("It is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion, for liberty itself may be at stake in such matters.")

The American Bar Association Standards of Criminal Justice Relating To Prosecution Function (2nd ed. 1980), adopted in Florida, warn prosecutors that the "prosecution function should be performed by a public prosecutor". Standard 3-2.1. The Commentary explains that "[t]he idea that the criminal law, unlike other branches of law such as contracts and property, is designed to vindicate public rather than private interests is now firmly established."

> Prospective juror: It all depends on what the view was.
> Mr. Millemann: If the view was that -- that the law was that it's not automatic, an eye for an eye, [for] an intentional murder, would you find some tension between the law and your own personal view?
> Prospective juror: Possibly.

(R. 255-57). Mr. Benthowski went on to state that he has held this view since the early 1950's when he was in the military. The juror indicated that the killing of a police officer would add further force to his strong pro-death penalty views. (R. 264).[58]

When the prosecutor questioned Mr. Benthowski, the latter was asked if he would be able to listen to all the evidence, weigh the mitigating factors against the aggravating factors, and, if appropriate, recommend life. The juror responded "I believe so." (R. 268). The following then occurred:

> Mr. Rimmer: In this case?
> Prospective juror: Possibly, yes, sir.
> Mr. Rimmer: Is there any reason why you think you couldn't?
> Prospective juror: I started remembering some of the details of the case and, of course, I don't know all the facts, so I really can't.

(R. 268). Appellant's motion to strike juror Benthowski for cause was denied. (R. 269-70).

The fact that Mr. Parks was a social friend whom the juror trusted (R. 266-67) raises questions about his ability to be an

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[58] Mr. Benthowski further indicated that he knew several of the witnesses. Among the witnesses that he knew were Mr. Fanning, the owner of the real estate office in which the offense occurred, and Mr. Parks. "I did know Mr. Parks socially." (R. 266). He further stated that he knew Mr. Parks to be an honest person and that he would tend to trust what Mr. Parks had to say. (R. 266-67).

impartial juror. Wainwright v. Witt, 105 S.Ct. 844 (1985); Lara v. State, 464 So.2d 1173 (Fla. 1985); see argument VII, supra. However, adding into the equation Mr. Benthowski's views on the death penalty, his ability to be an impartial juror clearly was "substantially impaired".

This Court has held that it is error for a court to fail to excuse for cause a juror who likely would vote automatically for the death penalty. O'Connell v. State, 480 So.2d 1284 (Fla. 1985); Thomas v. State, 403 So.2d 371 (Fla. 1981). Mr. Benthowski admitted that it was only a "possibility" that he would be able to fairly weigh the mitigating circumstances against the aggravating circumstances, given his longstanding and deeply held beliefs on the death penalty. When it is only "possible" that a juror will be able to fairly apply the death penalty, the juror should be excused for cause. See cases cited in Argument VII, supra. See also, Lambrix v. State, 494 So.2d 1143 (Fla. 1986).

Although Mr. Benthowski holds staunch pro-death penalty views, the Constitution mandates that the "substantially impaired" Witt rule be applied symmetrically.[59] Accordingly, the juror should have been struck for cause.

## XVI. THE SENTENCING COURT ERRED BY ALLOWING THE PROSECUTOR TO ADVISE THE JURY ABOUT THE CONFIDENTIAL PRESENTENCE INVESTIGATION PREPARED IN CONNECTION WITH APPELLANT'S VACATED SENTENCE

During the cross-examination of defense witness Dr. Barnard, with the pre-sentence investigation prepared in support of the first death sentence in hand, the prosecutor asked: "Now I be-

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[59] This issue is now before the U.S. Supreme Court in Ross v. Oklahoma, 717 P.2d 117 (Okla. Crim. App. 1986), cert. granted, __ U.S. ___, 41 Crim. L. Rep. (BNA) 4071 (June 15, 1987).

lieve you also, did you not, considered the pre-sentence investigation?" (R. 710). Following strenuous objection and a motion for mistrial, the prosecutor handed the witness that document. (R. 711).[60] The prosecutor then read from the document and questioned the witness about its contents. (R. 711-713). This use of the presentence investigation violates both State law and constitutionally protected rights.

Florida Rule of Criminal Procedure 3.712 provides that "[t]he presentence investigation shall not be a public record and shall be available only to the following persons under the following stated conditions. . ." The enumerated persons to whom the report may be disclosed do not include jurors in a resentencing hearing. Thus, the prosecutor's disclosure of the report and its contents to the jury was a plain violation of the confidentiality provisions of the Florida Rules of Criminal Procedure.

Moreover, the prosecutor's tactic was designed to, and did advise the jury that appellant had been previously sentenced, unconstitutionally diminshing the resentencing jury's sence of responsibility. See Caldwell v. Mississippi, 105 S.Ct. 2633 (1985). This was equally improper since the Court properly had granted appellant's motion to keep that information from the jury. (R. 1371).

## XVII. THE SENTENCE MUST BE VACATED BECAUSE OF PERVASIVE AND HIGHLY PREJUDICIAL PROSECUTORIAL MISCONDUCT THROUGHOUT THE SENTENCING PROCEEDING

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[60] The witness recognized the document because he had seen it in conjunction with opinions he expressed in support of appellant's clemency petition, submitted to the Governor and his Cabinet.

From the beginning to the end of the resentencing hearing, the prosecutor intentionally sought to introduce highly prejudicial evidence that he knew to be inadmissible and persisted in making improper and prejudicial assertions and arguments before the jury. In addition to the repeated incidents of prosecutorial misconduct that are recited in independent arguments herein[61]:

> (1) The prosecutor attempted to cross-examine Dr. Dorsey about appellant's juvenile history even though the prosecutor knew that the opinion of Dr. Dorsey was not based upon the juvenile history (R. 874-75, 917). The Court sustained appellant's objection, as it indicated it would at a prior bench conference (R. 874-75), but not before the prosecutor had improperly placed before the jury his assertion that appellant had caused "uproars" at the Beggs School (R. 917).
>
> (2) The prosecutor consistently cross-examined appellant's experts with inadmissible reports (R. 708, 985-86), including a report of Dr. Marshall (a psychiatrist who examined appellant for competency and responsibility), that the prosecutor knew likely was inadmissible. (R. 1063-64). Indeed, the Court subsequently and properly precluded Dr. Marshall from testifying.
>
> (3) The prosecutor examined appellant's experts about appellant's alleged dangerousness and aggressiveness (R. 718, 940-42), even though appellant had expressly

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[61] The prosecutor intentionally and repeatedly mischaracterized appellant's juvenile history as a "criminal history" and "previous criminal record" (R. 694, 703-04), knowing that appellant had waived the "no criminal activity mitigator." (Argument IV). The prosecutor intentionally mischaracterized the alleged delinquency that was never adjudicated as an "attempted armed robbery" (R. 705), and the adjudicated delinquency as an actual "bombing" (R. 716). (Argument IV). The prosecutor inserted the competency and responsibility issues into the case, even after the judge sustained appellant's objection to them (R. 725), knowing they were irrelevant and that appellant had expressly waived reliance on incompetency and non-responsibility as possible mitigating circumstances (R. 1491). (Arguments XI and XII). The prosecutor improperly commented on appellant's constitutionally protected assertion of the right to remain silent (R. 709). (Argument XV). As discussed immediately above, the prosecutor intentionally disclosed to the jury that there had been a prior "presentence investigation", even though the prosecutor had expressly promised not to "go into that" during the hearing (R. 1371). (Argument XVI).

waived reliance on non-dangerousness as a mitigating circumstance (R. 1491).

(4) The prosecutor argued the dangerousness or aggressiveness issue extensively to the jury (R. 1094-96, 1109), despite appellant's waiver.[62]

(5) The prosecutor asserted on cross-examination, with no factual basis, that appellant's family members may have broken the law and committed murder (R. 749, 887).

(6) The prosecutor intentionally mischaracterized as a "psychologist" (R. 985) a prison counselor whose report he improperly attempted to use to cross-examine appellant's neurologist (R. 985-86).

(7) The prosecutor improperly exhorted the jury, in his closing argument, "to stand by me in this case to seek justice" (R. 1109).

(8) The prosecutor appealed to local bias and parochialism in both his earliest comments to the jury (during general voir dire) (R. 30), and in his final closing argument. He chastised the defense for "bringing in these experts from out of town, from Connecticut, from Gainesville, from Mobile . . ." They "come in from out of town . . ." (R. 1085).

(9) Most outrageously, the prosecutor attempted during the last moments of appellant's sentencing case-in-chief to "dump" as much inadmissible and highly prejudicial evidence as possible before the jury through the alleged cross-examination of appellant's neurologist. The prosecutor did this knowing that he could call none of the "phantom witnesses," who allegedly were the sources of his assertions, because their testimony was irrelevant and otherwise was inadmissible. They were not neurologists, thus, nothing they had to say was relevant to the opinion of appellant's neurologist, as the Court ruled. The highly prejudicial assertions contained in the prosecutors "questions" to the neurologist were made sequentially over **ten** sustained objections.[63]

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62 Points 3 and 4 provide independent bases to reverse appellant's death sentence. Maggard v. State, 399 So.2d 973 (Fla. 1981), cert. den., 454 U.S. 1059 (1981).

63 The outrageous colloquy was as follows:

Q. He [appellant] did ask Dr. Marshall if he ought to act crazy did he not?
Mr. Millemann: Objection.

(continued...)

63(...continued)
Court: Sustained.

* * *

Q. When you talked to Fitzpatrick, did he indicate, in any way indicate to you, that he was preoccupied with gaining power?
A. No.
Q. Did he indicate that to Dr. Marshall?
Mr. Millemann: Objection.
Court: Sustained.
Q. Did you ask him how he felt with a gun in his hand?
A. No.
Q. Did Dr. Marshall have an opinion about that?
Mr. Millemann: Objection, Your Honor, continuing objection.
Court: Sustained.
Q. Do you think his intelligence is about average?
A. No, I don't.
Q. Did Dr. Marshall think it was?
Mr. Millemann: Objection.
Court: Sustained.
Q. Do you think he is manipulative?
A. No, I don't.
Q. Didn't Dr. Gilgun think he was manipulative?
Mr. Millemann: Objection.
Court: Sustained.

* * *

Q. Didn't Dr. Gilgun indicate that he was mad and frustrated because everybody was always telling him what to do?
Mr. Millemann: Objection.
Court: Sustained.
Q. Do you think he understood the consequences of his actions?
A. I don't think he did.
Q. Didn't Dr. Gilgun think he did?
Mr. Millemann: Objection.
Court: Sustained.
Q. Was he motivated to act in his own best interests?
A. No, he wasn't.
Q. Did Dr. Gilgun think he was?
Mr. Millemann: Objection.
Court: Sustained.

* * *

Q. Did you find any history of that [Fitzpatrick pretending to act crazy] when you reviewed his history?
A. I did not.

(continued...)

As Judge Pearson wrote in his concurring opinion in Molina v. State, 447 So.2d 253, 256 (Fla. 3rd DCA 1983), reversing a conviction for prosecutorial misconduct:

> [T]his experienced prosecutor fully expected that his question would be objected to, the objection would be sustained, and no answer from the defendant would be forthcoming. . . . Thus, as I see it, the prosecutor consistently tried to get before the jury matters which he knew or should have known they were not entitled to receive.

The prosecutor's pervasive misconduct, measured in its entirety, was inexcusable, unethical[64], and highly prejudicial. See Keen v. State, 504 So.2d 396 (Fla. 1987); Lipman v. State, 428 So.2d 733, 736 (Fla. 1st DCA 1983) (incidents of prosecutorial misconduct must be "considered as a whole").

The Court in Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), announced a heightened standard of review for determining the constitutional effect of improper prosecutorial argument which occurs at capital sentencing hearings. Such argument violates the eighth amendment unless the state can demonstrate that it "had no effect on the sentencing decision." Id. at 2646 (emphasis added). This Court asks a comparable question: whether such misconduct "substantially contribute[s] to the jury's advisory recommendation of death. . . ." Teffeteller v. State, 439

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[63](...continued)
Q. What about Elaine Pittman's report?
Mr. Millemann: Objection, Your Honor.
Court: Sustained.
Mr. Rimmer: No further questions. (R. 987-91).

[64] The special responsibilities of a prosecutor, who is a public official, include the obligation to be "a minister of justice" and "not simply" "an advocate." Rule 4-3.8, Rules Regulating the Florida Bar.

So.2d 840, 845 (Fla. 1983). See Keen v. State, 504 So.2d 396, 401 (Fla. 1987).[65]

No matter what the standard, the intentional and outrageous prosecutorial misconduct in this case, which the State substituted for the testimony of expert rebuttal witnesses it simply did not have, denied appellant a fair sentencing hearing.

## XVIII. BY BOTH REQUIRING APPELLANT TO CARRY THE BURDEN OF PROVING THAT MITIGATING CIRCUMSTANCES OUTWEIGHED AGGRAVATING CIRCUMSTANCES AND AUTHORIZING A JURY SENTENCING RECOMMENDATION BY A ONE VOTE MARGIN, THE FLORIDA STATUTE AND LOWER COURT DENIED APPELLANT RIGHTS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant's sentencing jury was instructed that it was to determine "whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist." (R. 1130). This instruction is unconstitutional because it placed upon appellant the burden of proving that mitigating circumstances outweighed aggravating circumstances, creating a presumption that death was the appropriate recommendation once "sufficient aggravating circumstances" were found. At a minimum,

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[65] The Eleventh Circuit has recognized that a prosecutor who has engaged in such misconduct will be accorded no deference:

> Arguments delivered while wrapped in the cloak of state authority have a heightened impact on the jury. For this reason, misconduct by the prosecutor, normally an elected public official, must be scrutinized carefully.

Drake v. Kemp, 762 F.2d 1449, 1459 (11th Cir. 1985) (en banc).

a reasonable juror could (and should) have so interpreted the instruction.[66] California v. Brown, 107 S.Ct. 837 (1987).

The Eighth and Fourteenth Amendments require the prosecution to bear the ultimate burden of proving death is appropriate. State v. Wood, 648 P.2d 71, 83 (Utah 1982); Comment, Capital Punishment and the Burden of Proof: The Sentencing Decision, 17 Cal. W.L. Rev. 316 (1981). See also Smith v. North Carolina, 459 U.S. 1056 (1982) (opinion of Stevens, J., on denial of certiorari); Lockett v. Ohio, 438 U.S. 586, 609 n.16 (1978) (issue raised but not decided); but see Ford v. Strickland, 696 F.2d 804, 817-819 (11th Cir. 1983).

The Florida death penalty statute also authorizes a jury death recommendation by one vote. In combination, the burden of proof and single vote provision allow (indeed appear to require) a death recommendation where five jurors are convinced life is appropriate and seven are in a state of equipoise, unconvinced that death is the appropriate punishment. This is inconsistent with the Supreme Court's insistence that state death penalty procedures must assure "reliability in the determination that death is the appropriate punishment in a specific case." Zant v. Stephens, 462 U.S. 862, 884-85 (1982).

## XIX. THE COURT'S REFUSAL TO GIVE A "LINGERING" OR "RESIDUAL" DOUBT INSTRUCTION WAS ERROR

Appellant asked for, but the Court refused to give proposed instruction number 8, which read:

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66 This was precisely the interpretation given to the instruction by the prosecutor. (R. 1074). ("The statute very clearly says the mitigating has to outweigh the aggravating".)

> The possible mitigating circumstances are not limited to, but may include, if evidence supports them, that:
>
> a) The Defendant did not shoot the deceased Deputy Sheriff.

(R. 1070-71, 1879).

At resentencing, appellant proved to a moral certainity that the bullet that killed the victim was a bullet fragment that, during the original trial, original sentencing, and its resentencing case-in-chief, the State, by carefully reconstructing the crime scene, had proven came from the other deputy sheriff's gun.

Specifically, appellant established that: 1) what killed the victim were two small fragments of a bullet found in the skull of the victim[67] (R. 794); 2) those two small fragments, in their aggregate, were the base of a bullet (R. 794-95); 3) a large bullet fragment which had a missing base was in the overhang of a cabinet ("overhang") directly under which the victim was standing when he was shot[68] (R. 793-95); 4) the large overhang fragment was "bevelled" and had human bone on it, indicating it had hit a hard bony object, and ricocheted up into the overhang (R. 796-97, 1001, 1017); 5) the two small fragments and the large fragment in the overhang constituted a single bullet (R. 1002);and 6) although ballistics tests could not determine from which of the .38 guns (that of appellant or Deputy Sheriff Smith) the single bullet had come (R. 822-26), the crime scene reconstruction evidence demonstrated that it came from Deputy Smith's

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[67] State's Exhibits No. 71 (original trial exhibit 14A) and 72 (original trial exhibit 14). (R. 779-85).

[68] State's Exhibit 60 (original trial exhibit 6). (R. 997).

gun. See Defense Exhibits 1 and 2 (R. 802-03). Also, "the rifling impressions . . . were consistent with those produced by [a] Smith and Wesson .38" (R. 998), Deputy Smith's gun.

Additional metallurgical and compositional evidence, also adduced for the first time at resentencing, established that the fragment that killed the victim and the large fragment attributed to the other deputy were the same bullet. (R. 1020). There simply was no factual dispute about this; it was established "within very exceptional odds" and "totally and completely" (R. 1020-21).[69]

The original crime scene evidence that identified the bullet that killed the victim as Deputy Smith's was entirely consistent with both Smith's testimony and his location in the room, as well as explicit concessions made by the State at the resentencing hearing.[70] When he shot in appellant's direction, he either was lying on the floor or crouching in the open inner room door (R. 642-69), facing appellant, who was directly in front of both the

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[69] Initially, the State's crime scene witness maintained that no metallurgical examination had been done by the State (R. 798), but neglected to add that one had been requested. (R. 1024). After appellant's examination revealed that the large overhang fragment previously had been "mounted" for a microscopic test (R. 1017), and after appellant submitted a relevant Brady discovery request (R. 1538), the State's witness revealed that a metallurgical examination had been requested in 1980, but, for unexplained reasons, it had not been possible for the FDLE Laboratory to do one. (R. 1024).

[70] For example, the State conceded that the victim's head was inside the inner office window when he was shot. (R. 559, 620, 767-69). The State's exhibits show the flight path of appellant's bullet through the wooden edge of the window. It could not have hit the victim's head if it were inside the window since the bullet would have first traveled by the head before it nicked the window's edge behind the victim.

inner room window and the victim. Id. Deputy Smith also testified the first bullet fired by appellant came through the wall in his direction (R. 648, 636-37), and was not fired towards the victim.

After appellant demonstrated that the bullet attributed to Deputy Smith actually killed the victim, the State's chief crime scene witness "adjust[ed]" the "reconstruction theory so that it fits the evidence" (R. 1025). His "adjusted" testimony (R. 1041) came after seven years of contradictory testimony, flatly contradicting his sworn testimony on several prior occasions.

The sentencing Court, in effect, nullified appellant's compelling mitigating evidence by indicating that appellant's evidence was not relevant (R. 785), instructing the jury that "you will not concern yourself with the question of his guilt" (R. 1128), and refusing to give appellant's requested clarifying instruction (number 8). This judicial nullification of appellant's evidence denied appellant a fair resentencing hearing in violation of the Eighth and Fourteenth Amendments to the United States Constitution. But see King v. State, 12 F.L.W. 502 (Fla. 1987); see Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984); Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981); Lockhart v. McCree, 106 S.Ct 1758, 1769 (1986).

Appellant is fully aware of this Court's recent decision in King v. State, supra. He emphasizes that the instant case should be viewed as an exception to King because the State "opened the door" to appellant's "lingering doubt" evidence by retrying its entire case and admitting evidence that was relevant only to

guilt and innocence, e.g., the victim's photographs and evidence of appellant's responsibility. See, Argument XIII, supra.

## XX. THE EXCUSAL OF JURORS BY THE COURT AND STATE DEPRIVED APPELLANT OF A RACIALLY BALANCED JURY

Thirty-three (33) white and nine (9) non white[71] veniremen were considered as potential jurors. Of those, the Court excused for cause four (4) whites and three (3) blacks. The prosecutor excused, by peremptory challenges, six (6) whites and four (4) blacks. Thus, the combined excusals by the Court and prosecutor were ten (10) whites and seven (7) blacks. The whites were thus reduced by about 31% and the blacks by about 78%. When these numbers are subjected to statistical analysis, the statistical probability that race is not a factor in this process is less than one percent (1%). See Appendix "A".

While the Supreme Court has upheld the right of trial courts to excuse jurors whose views about the death penalty impair their ability to impose the death penalty, Witt v. Wainwright, supra, the Court has not addressed the question of whether such a rule is permissible where the demonstrated result, as here, is gross racial disparity. In this case, the disparity was caused, in part, as the record in this case (R. 1776-77) and relevant social science literature demonstrate, because black Americans are significantly more often opposed to the death penalty than white Americans. Jury Selection as a Biased Social Process, 11 Law & Soc'y Rev. 9 (1976); Due Process versus Crime Control, 8 Law & Hum. Behav. 31 (1984). But the racial discrimination in the

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[71] Eight of these were black and one was Filipino. For purposes of simplicity, these jurors will be referred to as black.

instant case also was caused by the prosecutor's racially discriminatory use of preemptory challenges. See Argument VI, supra.

While the State is surely entitled to a jury that can fairly apply the law, a defendant is entitled to a representative jury that "expresses the conscience of the community on the ultimate question of life or death." When these two rights clash, at least under the circumstances of the instant case, the latter must prevail. As the Supreme Court said in Batson v. Kentucky, 106 S.Ct. 1712, 1717 (1986) (citations omitted):

> The very idea of a jury is a body. . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge. . . . Those on the venire must be "indifferently chosen," to secure the defendant's right under the Fourteenth Amendment to "protection of life and liberty against race or color prejudice."

While it is true that the decisions in Batson and McClesky v. Kemp, 107 S.Ct 1756 (1986), prohibit only "purposeful" discrimination, given the explicit prosecutorial discrimination discussed supra, Argument VI, combined with the overwhelming statistical evidence in the instant case, the discrimination herein was adequately purposeful.

**XXI. APPELLANT IS TOO YOUNG TO BE EXECUTED**

Florida's statute directs that youthful age be considered as a mitigating circumstance, and appellant's emotional and psychological age of 10-12 (R. 909, 936) was so considered. How-

ever, a substantial body of authority suggests that a person of such youthful age who commits a capital offense should never be punished by execution. See Thompson v. Oklahoma, 724 P.2d 780 (Okla. 1986), cert. granted, 40 Crim. L. Rep. (BNA) 4175 (Feb. 25, 1987). It makes little difference whether the defendant's youthful age is chronological or psychological. The reasons that underly the eighth and fourteenth amendments' proscription of executing juveniles apply in both instances.

## CONCLUSION

For the foregoing reasons, appellant respectfully requests that this Court vacate his death sentence and enter a term of life imprisonment.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been served by U.S. Mail to Honorable Robert A. Butterworth, Attorney General, Criminal Appeals Division, The Capitol, Tallahassee, FL 32301 on this 9th day of October, 1987.

Edward S. Stafman