IN THE

SUPREME COURT OF FLORIDA

MICHAEL SCOTT KEEN, Appellant, vs. STATE OF FLORIDA, Appellee.	)	Case No. 71,358

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Seventeenth Judicial Circuit of Florida, In and For Broward County (Criminal Division)

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

RICHARD B. GREENE
Assistant Public Defender
Florida Bar No. 265446

ERIC M. CUMFER
Assistant Public Defender
Florida Bar No. 764663

JEFFREY L. ANDERSON
Assistant Public Defender
Florida Bar No. 374407

Counsels for Appellant

CONTENTS

AUTHORITIES

CASES **PAGE**

FLORIDA STATUTES

UNITED STATES CONSTITUTIONS

FLORIDA CONSTITUTIONS

FLORIDA RULES OF CRIMINAL PROCEDURES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Michael Keen was the Defendant and the State of Florida was the Prosecution in the Circuit Court of the Seventeenth Judicial Circuit of Florida. The parties will be referred to by name or as Appellant or Appellee.

The following symbols will be used:

"1R"	Record on Appeal of First Trial
"2R"	Record on Appeal of Second Trial
"1SR"	First Supplemental Record of Second Trial
"2SR"	Second Supplemental Record of Second Trial

STATEMENT OF THE CASE

Michael Keen was tried on June 3-10, 1985. 1R 362-1563. He was convicted of first degree murder. 1R 1743. This Court reversed for a new trial. Keen v. State, 504 So.2d 396 (Fla. 1987). His re-trial took place on August 26, 1987 - September 2, 1987. 2R 82-1248. Michael Keen was convicted of First Degree Murder. 2R 1459. The penalty phase was held on September 8, 1987. 2R 1249-1284. The jury recommended death by a vote of seven to five. 2R 1465-1471. He was sentenced to death. 2R 1485.

STATEMENT OF THE FACTS

The state presented two inculpatory versions of the alleged murder of Anita Keen, and versions in which Mr. Keen was not guilty of murder. The first story was told by Shapiro; he was a friend, employee, and roommate of Mr. Keen in November 1981. Mr. Keen hired him as a salesperson in 1978. 2R 483-4, 552, 962. He began to room with Mr. Keen who sometimes covered his share of the rent. 2R 484-9, 967-8. Mr. Keen's brother, Patrick, stayed with them at times. 2R 484-9. Shapiro often skipped work to gamble and drink; Mr. Keen was a better salesperson. 2R 551-554, 974. He rarely dated and depended on Mr. Keen for his social life. 2R 557-558.

Shapiro testified that he and Mr. Keen discussed a plan to marry a woman, insure her, and kill her. 2R 490. He claimed that Michael Keen said he planned on insuring and killing Anita Keen before their marriage. 2R 492. He offered no resistance to these plans. 2R 492. Mr. Keen had met Anita through his brother; she moved into the household, and they married in August, 1981. 2R 491-2, 2SR 71. In late October or early November, 1981, Mr. Keen told Shapiro they would

kill Anita on November 15 if the weather were right. 2R 495. He continued to live with the Keens; but, he admitted Mr. Keen spent less time with him after Keen met Anita. 2R 558, 560.

Shapiro testified that on November 15, 1981, the Keens took their boat to a bar. He pretended to run into the Keens there. 2R 497-498. They sailed into the ocean. 2R 501. Shapiro testified that as darkness fell, Anita went to the rail below; Mr. Keen followed and pushed her overboard. 2R 503-4. Shapiro did not actually see Anita Keen go in the water. 2R 508. He did nothing to stop Mr. Keen. 2R 504. He drove the boat out of Anita's range after which Mr. Keen took control. 2R 505-6, 508. Shapiro stated the pair left her still floating after it was dark. 2R 510-1.

Shapiro called the Coast Guard when they got back to the house. 2R 512. Shapiro testified he lied to the police that night and in a sworn statement a week later. 2R 513. He also lied in a separate, sworn statement to an attorney. 2R 517-518. Shapiro stated then that Anita had gone below during the trip back and was missing when the men got home. 2R 511, 577-8.

Hector Mimoso, formerly of the Sheriff's Office, testified he went to the home of Mr. Keen and Shapiro around 11:00 pm that night. 2R 663. Shapiro appeared excited, and Mr. Keen calm. 2R 667. Shapiro kept interrupting and answering questions directed to Mr. Keen. 2R 667-668. Mimoso testified Mr. Keen told him his wife became tired and went to the cabin for a rest, and she was missing when they docked. 2R 665.

On December 10, 1981, Officer Don Scarborough taped a sworn statement from Mr. Keen. 2R 634-657. Mr. Keen said Shapiro met the Keens at Tugboat Annie's. Anita was four to five months pregnant at the time. 2R 650. After going out to sea and listening to the radio, they sailed home; the men remained on the flybridge, but Anita went below to rest. 2R 641-3. At the house, they discovered Anita was gone. 2R 643-644. They called the Coast Guard and the police. 2R 645. He described the insurance policies on Anita Keen, stating the Life of Virginia policy may have been for $250,000, but he had asked his wife to cancel it. 2R 652-3.

The State's evidence showed Anita named Mr. Keen the beneficiary for two life insurance policies, each for $50,000 with double indemnity for accidental death. 2R 591-3, 625. Don Johnson of Life of Virginia testified that he first contacted Mr. Keen when pre-existing policies were transferred from Orlando to Fort Lauderdale. 2R 589-590. At that meeting on June 9, he took the application for life insurance on Anita, then engaged to Mr. Keen. 2R 590. Mr. Keen testified the agent brought up insuring Anita at the meeting. 2R 980-983. Mattie Genova of Prudential Insurance testified a whole life policy on Anita was taken out on June 19. 2R 623. The Prudential records indicate that the agent approached the insured. 2R 629. Mr. Keen testified a Prudential agent sold Anita the policy at her job. 2R 977-978.

Sometime after Anita disappeared, Shapiro and Mr. Keen traveled to California together in a motor home. 2R 513-4, 1019. Mr. Keen left Shapiro there who returned to Florida a week later, but then left the area, returning in 1983. 2R 515, 1021. For two and a half years, Shapiro said nothing to implicate Mr. Keen. 2R 519. In late August, 1984, the police called Shapiro. 2R 518, 683, 735. They accused Shapiro of involvement in a murder and threatened to prosecute him. 2R 541-2. They indicated they already knew that Mr. Keen had killed Anita for insurance money. 2R 519. Shapiro initially stuck with his first tale; he eventually gave the police a version similar to the story to which he testified. 2R 518-519, 531, 541. Shapiro also told the police he owed Mr. Keen $2,000 - $3,000 and that the debt had been erased by his involvement in the murder. 2R 547-549. At the direction of Scheff, Mr. Shapiro secretly recorded a phone call from Mr. Keen approximately 36 hours after Mr. Keen's arrest. 2R 520. In the tape Mr. Keen consistently stated that the death was an accident. 2R 526-539. Shapiro admitted he later told his family yet another version. 2R 579.

The second inculpatory version of events was presented by Michael Hickey. In 1984, Hickey was jailed with Mr. Keen for about a week in early October along with four other men. 2R 792. He had been moved from an Iowa penitentiary to face 1980 armed robbery and grand theft charges, still pending at retrial. 2R 790. Hickey testified that he approached the Broward State Attorney's office just as

Mr. Keen was being transferred out of the cell. 2R 856, 859. Hickey denied that any deal was made then for his cooperation. 2R 860-1. He admitted his no-bond hold was changed to a $1000 bond after cooperating with the prosecutor. 2R 866. At the retrial, Hickey was again serving an Iowa sentence: he denied any deal was made for his testimony below, although he admitted the prosecutor promised to contact the Iowa parole authority if he cooperated. 2R 865. He hoped to transfer to a Florida prison for cooperating. 2R 876. The prosecutor stipulated, "to reduce the Brady issues," 2R 882, that although there was no promise, he expected a "favorable" disposition of the robbery charges since Hickey "did a bang-up job" testifying. 2R 883, 884.

Hickey testified Mr. Keen confessed to killing his wife for insurance money. 2R 820-821. Hickey claimed Mr. Keen said he and his pregnant wife went boating "three or four miles out". 2R 821. Mr. Keen and Shapiro "kept pushing beer and wine to her to get her loaded." 2R 821. Anita got sick and was vomiting over the rail. 2R 821. Hickey related that Shapiro bumped them overboard and then picked up Mr. Keen. 2R 821-2. Hickey's version has the two men circling Anita and watching her drown before returning to port. 2R 821. Hickey testified that Mr. Keen offered to pay Hickey to kill Shapiro to prevent him from testifying. 2R 798. Hickey admitted he had previously been arrested on a two count murder charge out of Kansas. 2R 796.

Mr. Keen allegedly said Shapiro could be located at Shapiro's grandparents' house, at a "sleazy motel in Miami on the strip", or at his deposition, telling Hickey this deposition would take place on October 26 and its location. 2R 800. Hickey related information about Shapiro's family that Mr. Keen allegedly told him to aid finding Shapiro. 2R 799-800, 804. Hickey identified a number on an envelope as Shapiro's father's phone which Hickey said Mr. Keen had given him. 2R 809. Hickey identified a sheet of paper, State Exhibit 14, containing notations by Hickey of the whereabouts of Shapiro's family which Hickey testified were given to him by Mr. Keen. 2R 800-4, 809-11, 813. The notations included a part of the story Hickey said Mr. Keen told him to use with Shapiro's parents to get Shapiro's address. 2R 819-20. Hickey identified three

lines on the sheet as written by Mr. Keen; Hickey said it was the address of Mr. Keen's brother, Patrick. 2R 811. The state later introduced the testimony of Max Jerrell, a fingerprint examiner, who testified a print on State Exhibit 14 matched Mr. Keen's fingerprints, but no prints matched Hickey. 2R 895-7.

Hickey testified he thought he could get out in early October to catch Shapiro at the deposition. 2R 794-5. In 1984, while under sentence in Iowa, he also had a no-bond hold in Broward. 2R 843-844. Hickey said he thought his Iowa sentence would expire in early October and he could get out. Hickey stated he believed this because the jails were crowded and he had bonded before. 2R 795. After the prosecutor offered Hickey use immunity, he admitted robbing a person at gunpoint in Broward in 1980 he was captured with the victim's credit cards and a gun in 1980. 2R 838-839. He knew this charge carried a three year minimum mandatory sentence. 2R 851. After bonding out in 1980, Hickey failed to appear; a no bond capias issued. 2R 891. He had been arrested in another state for two counts of murder and one count of aggravated battery. 2R 843. He was acquitted of those charges but went to prison in Iowa for theft and escape, which sentence he was serving in 1984. 2R 844. As of 1984, Hickey could not remember his complete record, although he had an "FBI rap sheet" five pages long. 2R 853. Hickey admitted to five felony convictions before 1970 and five more in 1971. 2R 854. In actuality, his Iowa sentence expired in November; he received another bond shortly before Christmas, 1984.[1] 2R 860-1.

Michael Keen denied confessing to or soliciting Hickey and testified the sheet on which the Shapiro family information was written was from a pad used to score a game of Spades. He identified indentations on the sheet as the scores. 2R 925-927. Mr. Keen thinks he wrote his brother's name and address on the papers as a note to himself. 2R 928-930. The Margate address was Shapiro's grandparents' condominium. 2R 929-930. This address was in discovery materials in his cell; Hickey had access to them. 2R 931. They also contained the room number and date of Shapiro's deposition. 2R 932. Mr. Keen denied writing the other references to Shapiro's family; he compiled much of this information

[1] Only to be arrested again in another state within a matter of weeks.

around this time at the request of his attorney. 2R 934-935. He stated that State's Exhibit 16 is an envelope commonly purchased in the jail. 2R 936-937.

Another inmate witness, Waddle, testified Mr. Keen had a lot of paperwork about his case in his cell which Keen sometimes left unattended. 2R 911. Waddle claimed to share the cell with Mr. Keen and Hickey, although his memory of the dates did not match those of Hickey. 2R 901, 905-6. Waddle claimed Mr. Keen confessed to him while in the jail. In 1984, Mike Waddle was charged with capital sexual battery on his stepson; he faced life with no parole for twenty-five years. Waddle pled nolo contendere to attempted sexual battery and received probation.[2] 2R 903, 908-9. He denied this bargain motivated him: Waddle said he helped the prosecution because marriage means so much to him. 2R 904. Waddle claimed the Keen brothers had planned the killing, but offered no details. 2R 903. Mr. Keen testified Waddle's story was a complete fabrication. 2R 922.

Mr. Keen was born in Virginia and is thirty-nine years old. 2R 920. His father abandoned his family when he was young. 2R 920. He grew up primarily in Jacksonville and Winter Haven, attending Florida Presbyterian College where he earned a bachelor's degree. 2R 920-922. He asked Shapiro to move out to make room for the baby after Anita became pregnant. 2R 986-987. He was looking forward to being a father. 2R 984-985. Shapiro became more reclusive and had more financial problems; there was tension between Shapiro and Anita. 2R 985-8.

On November 15, the Keens went boating. 2R 988-989. They stopped to gas up and had some drinks at Tugboat Annies. 2R 989-990. Shapiro showed up and asked to join in. 2R 989-990. They sailed out and listened to the radio. 2R 992-993. Anita was queasy and went below. 2R 998. Later she walked toward the upper deck, but stopped by an opening in the railing. 2R 999. She appeared to be ill, and Mr. Keen went to her. 2R 1006. Mr. Keen then felt a blow on his back and he and his wife went overboard. 2R 1006. He started screaming and looking for his wife without success. 2R 1006-1007. He could see the boat and yelled for Shapiro. 2R 1007. Eventually Shapiro steered the boat towards Mr. Keen who was able to get back on. 2R 1008-11. He was cold and shaking; after he calmed down,

[2] He later violated his probation and was sentenced to prison. 2R 903-904.

Mr. Keen took control of the boat to look for Anita. 2R 1011. He searched for three or four hours without success; he was hysterical while searching, but numbed when they returned. 2R 1011, 1074. They took about two hours to return, arriving near 10:00 p.m. 2R 1011-1012.

Shapiro drove the boat home; he kept saying "I'm sorry Michael. It was an accident." 2R 1013. Mr. Keen suggested they stop at the Coast Guard Station but Shapiro promised to handle it. 2R 1014. Shapiro called the Broward Sheriff's Office and gave Mr. Keen muscle relaxants to calm him down. 2R 1015. Shapiro did all the talking with the officer. 2R 1015-1016. Shapiro created the story told to the police. 2R 1016. Mr. Keen went along because Shapiro convinced him it was an accident. 2R 1017-1018.

The state presented testimony of detectives Scheff and Amabile who interviewed Shapiro and Mr. Keen. Both officers helped arrest Mr. Keen on August 23, 1984 in Casselberry, Florida. 2R 686, 737. He stuck by his November 1981 statement. 2R 687-688. Officer Scheff told Mr. Keen a summary of Shapiro's new story and that Mr. Keen faced death. 2R 739-40. Mr. Keen denied killing Anita. 2R 741. Scheff testified that they told Mr. Keen that if he gave a statement it would be less likely that Shapiro would be given immunity. 2R 743. They drove Mr. Keen to Fort Lauderdale on August 24; further interrogation took place on the trip. 2R 690-692, 742. The detectives again interrogated Mr. Keen in Broward County. 2R 694. Mr. Keen refused to speak to a recorder, so Amabile and Scheff wrote a longhand 'transcript' of it. 2R 701, 2SR 136-43. Amabile began writing at 5:39 p.m. on August 24, 1984; it ended two hours later and was but eight pages long. 2R 703, 713-4. Amabile admitted the 'transcript' was not verbatim and contained deliberate misstatements. 2R 699-700, 719, 723. Amabile testified Mr. Keen corrected all the deliberate errors they made in the purported transcript. 2R 724. The police version of Mr. Keen's statements differed in some respects with Mr. Keen's trial testimony. Mr. Keen testified the police transcript did not accurately reflected his statements to them. He testified he was arrested the morning of August 23 and was unable to sleep that night or the next day. 2R 938-940. The police were trying to put words in his mouth during

the interrogation. 2R 947. The police talked about the electric chair and that it would go easier on him if he made a statement. 2R 948. The police kept suggesting he could only "get" Shapiro if he confessed. 2R 949. He had not slept and was overwhelmed when he began to give the police a statement. 2R 959. He refused to sign the police 'transcript', because it was inaccurate. 2R 957-958.

After over twelve hours of deliberation over two days, the jury found Mr. Keen guilty of first degree murder. During the deliberations, at least two jurors read and discussed in relation to the guilt of Mr. Keen a magazine article attacking the ethics of defense lawyers and invoking sympathy for crime victims. 2R 1309-16, 1324-32, 1344-54, 1478.

In the penalty phase, the state put on evidence of a prior conviction for arson, explicitly stating it was to disprove the mitigating circumstance of no significant prior criminal history. 2R 1255-1256. The defense entered into evidence a stipulation that Mr. Keen had a perfect disciplinary record during more than three years of incarceration. 2R 1256. The court sentenced Mr. Keen to death in accord with the seven to five vote of the jury. 2R 1280.

SUMMARY OF THE ARGUMENT

A. Guilt Phase Claims

Two members of Michael Keen's jury discussed a highly inflammatory magazine article during deliberations. It attacked the criminal defense bar, created great sympathy for young female homicide victims, and stated defense attacks on state witnesses are false. This misconduct occurred after two indications of jury deadlock and affected the verdict: one juror relied on the article to convince another to resolve his doubt.

The trial court erroneously refused to release or conduct in camera review of the grand jury testimony of Ken Shapiro even though Shapiro's versions of events were completely contradictory. Recent cases require reversal.

The trial court erred in admitting a purported handwritten transcript including statements claimed to be Mr. Keen's, which he refused to sign or adopt. The admission of all of Mr. Keen's statements were improper as he invoked his right to remain silent, and right to counsel, he was not brought before a

judicial officer in a timely manner, and his statements were involuntary.

The wiretap in this case should have been suppressed on several grounds. It did not come within the exception outlined in Florida Statute 934.03(2)(c) (1983) as the purpose of this interception was not "to obtain evidence of a criminal act" but to prosecute a person previously arrested. Shapiro's consent to the wiretap was not knowingly and intelligently given. This warrantless wiretap was unreasonable; use of a planted informer violated Mr. Keen's rights to remain silent and to counsel under the Federal and Florida Constitutions.

Mr. Keen was tried by a judge whose comment indicated she had decided the facts contrary to Mr. Keen before trial. The judge also noted the political danger to her position which overriding a death recommendation would cause, especially when the victims object. Such a sentencer cannot impartially decide the issues or sentence on the law and evidence.

Mr. Keen was prevented from cross-examining the interrogation officers concerning their improper interrogation techniques in other homicides. Their conduct was a key issue in the case.

The prosecutor intentionally provoked a mistrial by violating a prior court ruling to gain a tactical advantage. Discharge is required.

This alleged homicide occurred well beyond the three mile limit. Florida had no jurisdiction and venue did not lie in Broward County. Moreover, there was extensive, inflammatory publicity which required a change of venue.

The evidence was very close in this case. The trial court failed to consider this in denying the motion for new trial as required by Jordan v. State, 470 So.2d 801 (Fla. 4th DCA 1985).

The court allowed the bailiff to deal with a substantive jury request without anyone else being present.

The trial court improperly admitted testimony concerning an alleged attempt to kill Shapiro. The prejudice outweighed any probative value. Mr. Keen was denied due process of law by the introduction of evidence concerning numerous alleged threats to kill Shapiro in violation of the mandatory notice provisions of Florida Statute 90.404(2)(b)(1). This was irrelevant and its

prejudice outweighed any probative value. There was direct evidence concerning Patrick Keen's alleged attempt to kill his wife and at least an implication of Michael Keen's involvement. This was the precise collateral bad act that caused the prior reversal of this case.

The police testified to a damaging hearsay statement of Patrick Keen. Shapiro's version of events was improperly bolstered by the introduction of the substance of a prior consistent statement. Mr. Keen's use of an alias was repeatedly brought out. This evidence was irrelevant and prejudicial.

The police improperly opined Shapiro was truthful and Mr. Keen was not. This was compounded by further police testimony that Mr. Keen had been dishonest. The prosecutor told the jury that Mr. Keen was arrested pursuant to a warrant and immediately juxtaposed this with the failure to arrest Shapiro, improperly putting a stamp of guilt on Michael Keen and innocence on Shapiro.

The deceased's pregnant status was improperly highlighted. This evidence elicited sympathy for the deceased in violation of the Eighth Amendment and Florida law.

The prosecution was allowed to bring out Mr. Keen's exercise of his right to counsel, improperly penalizing him for the exercise of this right.

A policeman related hearsay about the accuracy of a phone number used to corroborate another state witness.

The prosecution's own evidence created reasonable doubt as a matter of law which requires a judgment of acquittal to be granted.

The trial court failed to instruct on attempted first degree murder, accessory after the fact, and other lesser offenses. Instructions on lesser offenses must be given in a homicide case, if there is any evidence to support them. In a capital case, lessers must be personally waived by the defendant. Anita Keen was last seen alive, raising a jury question as to her death. Mr. Keen testified Shapiro pushed Anita into the water, perhaps deliberately, raising the possibility that Mr. Keen was an accessory after the fact. The Court also gave an incorrect instruction on excusable homicide, despite the possibility Shapiro had accidentally killed Anita.

The errors, cumulatively and separately require reversal.

B. **PENALTY PHASE**

Death is disproportionate because Shapiro who helped plan, commit, and coverup the crime for $3000 got no punishment. The victim and defendant were married which almost always makes death disproportionate. Only one valid aggravating circumstance should have been found, which, with powerful mitigation, does not constitute the most aggravated and least mitigated of crimes for which the penalty is reserved.

The trial court below failed to exercise reasoned judgment in considering mitigating evidence and failed to find mitigating evidence which must be found as a matter of law. The court made a conclusory statement that no mitigating circumstances exist. This failure to exercise reasoned judgment requires this Court to impose a life sentence. Also, this Court must find the uncontradicted evidence establishes that Mr. Keen had a flawless disciplinary record during incarceration; that an equally culpable participant got no punishment; and that Mr. Keen succeeded as a businessman despite a harsh upbringing.

The trial court misapprehended the mitigating value of the disparate treatment of a co-participant.

The court improperly required Mr. Keen prove mitigating circumstances are 'necessarily shown,' an overly stringent burden of proof.

The trial court found the aggravating circumstances established only by competent evidence, not beyond a reasonable doubt, as required by this Court. Mr. Keen was harmed since the evidence of the aggravators was hotly disputed.

The court's finding the crime was especially heinous, atrocious, or cruel showed on its face that it was based on speculation and improper considerations. The trial court doubled the same aspect of the offense.

The court refused a requested instruction guiding the jury by telling them to consider the disparate treatment of an equally culpable participant. The instruction was required to insure consideration of the evidence.

The court did not indicate to the jury what conduct is covered by the heinous, atrocious, or cruel (HAC) circumstance. The instruction invited the

jury to recommend a death sentence based on inflammatory subjective judgments. The jury was misled into believing the responsibility for the death sentence rested elsewhere. The jury was improperly told that six votes could be either a death or a life recommendation.

Victim impact evidence, hearsay, and improper opinion testimony calling for the death penalty was considered by the trial court in sentencing. This violates the prohibition against cruel and unusual punishment. The partiality of the judge below requires a new judge for resentencing; many errors require a jury resentencing.

The statute is unconstitutional for a number of reasons. The aggravating circumstances have not been constitutionally narrowed. The jury instructions have not provided guidance. The statute allows the jury to recommend death by a simple majority. Since aggravating circumstances are an element of the offense of capital murder, Florida errs by allowing a simple majority to decide if they exist. Florida fails to provide meaningful appellate review of death sentences. Florida places procedural obstacles in the way of defendants, insuring arbitrariness only a capital defendant cannot mitigate his sentence after it is imposed. Florida creates a presumption for death. Florida places an unconstitutional burden of proof on defendants. Florida improperly eliminates any consideration of sympathy in deciding penalty which again restricts full consideration of mitigating circumstances. Florida imposes death in a cruel and unusual manner, risking the burning of inmates. Mr. Keen was sentenced to death by a judge selected by a racially discriminatory system which results in racially disparate death sentences.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FAILING TO DECLARE A MISTRIAL AFTER THE MEMBERS OF THE JURY READ A HIGHLY INFLAMMATORY MAGAZINE ARTICLE IN THE JURY ROOM, DURING DELIBERATIONS

During deliberations, after the jury had twice indicated deadlock, two jurors discussed a Time Magazine article, "Whose Trial Is It Anyway?: Defense Lawyers Raise Hackles by Attacking Victims and Prosecutors." Portions of the article were underlined by juror Fischetti which "were some of the points that

interested me the most." 2R 1312. One highlighted portion criticizes defense counsel in the nationally publicized murder of Jennifer Levin for seeking, unsuccessfully, to obtain the victim's diary to show her aberrant sex life.

> By that time, however, Levin's character had been impugned and the anguish of her father amply replenished. Her grief-stricken father has appeared in court wearing a JUSTICE FOR JENNIFER button.

In the next highlighted section, the article tells the same defense attorney had won a "lesser charge of manslaughter" in a case involving a man killing his girlfriend with a hammer.

> It was suggested" said her (victim's) father Paul bitterly, "that she was a manipulative, rich, spoiled person who didn't treat this lovely man who murdered her nicely.

He now works for victim's rights legislation. The final underlined portion emotionally pleas for victim sympathy, especially for female homicide victims killed by their lovers. It states the justice system is biased towards the defense, denies "victim's rights," and permits "morally wrong" criminal defense tactics. 2R 1478.

The non-highlighted portions of the article are equally inflammatory. They describe public revulsion over defense tactics in the highly publicized razor blade slashing of Marla Hanson, another young female victim, noting the spate of victim's rights editorials inspired by that case. Former New York Mayor Edward Koch is quoted: "How many times must a victim be victimized?" Time finds a virulence lately in defense attacks on prosecutors.

> During the recent federal racketeering trial that ended in the acquittal of alleged Mob Boss John Gotti, defense lawyers launched savage personal attacks against Prosecutor Diane Giacalone; they even made wild charges that Giacalone had given her underwear to a prospective witness to testify.

2R 1478. A New York University professor says: this "represents a break down in the last thread of civility." 2R 1478. The article asserts defense attacks on victims and witnesses in the Bernard Goetz case were improper. It states Goetz's "attorney has relentlessly highlighted the criminal intentions of the four (who were both victims and state witnesses)." 2R 1478. Time opines the American Bar Association and individual judges are powerless to stop these abuses.

After trial, this article was found in the jury room and the Court

examined the jury individually. Juror Fischetti stated he saw the magazine in the jury room; he bracketed and underlined the article on the second day of deliberations. 2R 1311. He found the parts dealing with the tactics of criminal defense attorneys to be 'interesting'. 2R 1312. He said the article did not affect him; he had settled on guilt the first day. 2R 1316. He initially maintained he had not shown the article to anyone, claiming concern over exposing other jurors to it. 2R 1312-4.

However, Juror Rodriguez then said he also saw the article during guilt deliberations; the underlining was already present. 2R 1324. He resisted saying who had given him the magazine, but finally admitted Fischetti gave it to him. 2R 1326. They "debated back and forth on the points in the article," in the presence of the other jurors on the second day of deliberations before a verdict was reached. 2R 1327, 1330. Rodriguez had not reached a final decision, 2R 1328, 1330, but claimed it did not influence his vote. 2R 1332. Rodriguez stated Fischetti used the article to convince him the case "doesn't have to be proved to all conclusiveness". 2R 1329.

The court recalled Mr. Fischetti to explain the contradiction between his testimony and Rodriguez's. 2R 1344-1347. He then admitted he showed Rodriguez the article, but still claimed no discussion took place. 2R 1349. This was the only article in any magazine that he marked. 2R 1351-1352. He stated:

> I assume you have the books back there for us to read. If it was that big of a deal, I don't understand why the book was there.

2R 1354. Thus, he thought the court approved reading the magazine.[3]

This inflammatory article infected the jury deliberations and denied Mr. Keen due process of law.[4] Florida and Federal courts have zealously guarded the purity of jury deliberations. The right to have the jury deliberate free from distraction and outside influence is a paramount right, to be closely guarded.

---

[3] The trial court denied the motion for new trial without analyzing the article's content, apparently relying on the jurors' statements the article did not affect them. 2R 1370-1372.

[4] These rights are guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 12, 16 and 17 of the Florida Constitution.

Livingston v. State, 458 So.2d 235, 237 (Fla. 1989).

> One of the most sacred and carefully protected elements of our system of criminal - or civil, for that matter -justice is the sanctity of an impartial jury that has not been infected by unlawful or improper influences. This is absolutely vital to the guarantee of a fair trial to an accused. The safeguarding of that ideal must be zealously guarded.

Meixelsperger v. State, 458 So.2d 416, 417 (Fla. 2d DCA 1962). If a single juror is improperly influenced, the verdict is as unfair as if all were." United States v. Delaney, 732 F.2d 639, 643 (8th Cir. 1989) quoting Stone v. United States, 113 F.2d 70, 77 (6th Cir. 1940); see also Cappadona v. State, 495 So.2d 1207 (Fla. 4th DCA 1986)(three jurors exposed to improper material: mistrial required).

This Court's opinion in State v. Hamilton, ___ So.2d ___ (Fla. January 17, 1991) outlines many of the general principles surrounding this issue. This Court stated:

> The introduction of unauthorized materials conceivably could have a powerful and often unascertainable impact on a verdict or jury recommendation, potentially violating the right to a fair trial guaranteed by the state and federal constitutions. U.S. Const. amend. VI; art. I, §16, Fla. Const. Recognizing this fact, both the courts of this state and the courts of other jurisdictions have applied a somewhat more refined standard to motions for new trial that are based on the presence of unauthorized materials in the jury room.

Slip Opinion at p.6. This Court in Hamilton specifically prohibited any inquiry into the mental processes of jurors but held that the inquiry must be limited to the nature of the materials and how the jurors used the materials. Slip opinion at 11-12. Hamilton also holds that a new trial is required if there is any "reasonable possibility of prejudice". Slip opinion at 14-15.

Courts around the country have granted new trials when the jury was exposed to materials that relate to the criminal justice system or an issue in the case. In Jones v. Kemp, 706 F. Supp. 1534 (N.D. Ga. 1989) the Court held that giving a Bible to the jurors during the penalty phase of a capital case was fundamental error requiring the grant of writ of habeas corpus. 706 F.Sup. at 1558. The Court so ruled despite the lack of objection and failure to show how the jury used the Bible. Id. at 1559.

How the jurors used the Bible whether as a silent monitor witnessing

> that the jurors approached their solemn task in the proper attitude or for guidance as to their specific task, the Court cannot ascertain. A search for the command of extra-judicial law from any source other than the trial judge, no matter how well intentioned, is not permitted.

Id. at 1559. See State v. Harrington, 627 S.W.2d 345, 350 (Tenn. 1981), overruled on other grounds, State v. Alley, 776 S.W.2d 506 (Tenn. 1989) (reversible error for the jury to refer to Bible during penalty phase deliberations).

In Ex Parte Lasley, 505 So.2d 1263 (Ala. 1987), the defendant was charged with scalding a child with hot water. His defense was accident. The jurors ran home experiments with bath water and one juror consulted a law book to understand certain legal terms. The Alabama Supreme Court unanimously ordered a new trial, holding juror misconduct requires a new trial if a juror "might" have been unlawfully influenced. Id. at 1264. The Court further stated:

> Appreciation of the rule cannot in all cases depend entirely upon the juror's statements that the extraneous information did not affect their verdict.
>
> The integrity of the fact-finding proces is the heart and soul of our judicial system. Judicial control of the jury's knowledge of the case is fundamental. Our rules of evidence are designed, so far as humanly possible, to produce the truth and to exclude from the jury those facts and objects which tend to prejudice and confuse. Evidence presented must be subject to cross-examination and rebuttal. The defendant's constitutional rights of confrontation, of cross-examination, and of counsel are at stake. ... Considering three separate home experiments and the consultation of law books by one juror, we conclude that the jury might have been influenced, notwithstanding the jurors' statements to the contrary. The jurors cannot in every case determine the question of whether they were, or might have been, improperly influenced.

Id. at 1264. See also State v. Mapel, 636 P.2d 445 (Or. App. 1981) (during trial three jurors attended drug seminar by the district attorney and one brought literature on marijuana to the jury room: marijuana conviction reversed).

These principles apply when literature, attacking a group of which the defendant is a member, infects deliberations. In People v. Jones, 475 N.E.2d 832 (Ill. 1985) a juror brought a "joke" in the jury room derogatory to Blacks; the defendant was Black. 475 N.E.2d at 836-837. The trial court excused the juror who brought the book; three other jurors who had seen it testified "it would have no prejudicial effect on their deliberations." The Illinois Supreme Court presumed prejudice and unanimously reversed. Id. at 836-837. In United States

v. Heller, 785 Fla.2d 1524 (11th Cir. 1986), jurors made anti-Semitic jokes during the trial of a Jewish defendant. 785 F.2d at 1525-1527. All the jurors assured the judge they render a verdict strictly "on the law and the evidence without bias or prejudice," but the court reversed despite these assurances. Id. at 1526. see Sanchez v. International Park Condominium Association, 563 So.2d 197 (Fla. 3d DCA 1990).

The courts have followed the same rule in a variety of civil cases. See Simmons v. State, 2122 A.2d 366 (Me. 1966) (new trial required when jurors consulted a real estate book in a land damage case); Frede v. Downs, 428 N.E.2d 1035, 1038 (Ill. App. 1981) (new trial when the jurors consulted a book on boating during a boating accident case even though no prejudice was shown); Kirby v. Rosell, 133 Az. 42, 648 P.2d 1048 (App. 1982) (new trial granted when juror read notes from a business law textbook to the jury in a fraud case). Stiles v. Lawrie, 211 F.2d 188 (6th Cir. 1954) (new trial when jurors consulted highway department manual during auto accident case).

The inflammatory article prejudices Mr. Keen's guilt-innocence and penalty case. It creates sympathy for female victims of homicide cases, the type of victim herein. Evidence or argument designed to create sympathy for the deceased in a homicide case is irrelevant and improper. Rowe v. State, 120 Fla. 649, 163 So. 22 (1935); Melbourne v. State, 51 Fla. 69, 40 So. 189 (1906); Garron v. State, 528 So.2d 353, 358-359 (Fla. 1988). It constitutes an Eighth Amendment violation. Booth v. Maryland, 107 S.Ct. 2529 (1987); Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989). The logic of these cases applies to sympathy for victims as a class, creating the same sort of "constitutionally unacceptable risk" of "arbitrary and capricious" action by a jury. Booth, 107 S.Ct. at 2533. The article encouraged the jury to use Michael Keen to avenge all victims, especially female homicide victims.

The article stated many defense accusations against victims and prosecution witness are false and morally wrong. Time excoriated charges victims or witnesses are "manipulative, rich, and spoiled," have criminal activities to cover up, or have unusual personal or sexual lives as false and immoral. This

directly undercut Mr. Keen's defense, which depended on attacking the credibility and motives of the state's witnesses. Shapiro was cross-examined concerning lying to the police, involvement in this homicide, and complete failure in his business and social life. 2R 513, 517-519, 551-554, 557-558. Michael Hickey was questioned about numerous criminal activities in various states. 2R 796, 838-839, 843-844. Mike Waddle was attacked concerning his criminal activity, especially the odious and sexually unusual nature of his offense, sexual battery on his stepson. 2R 901, 903-904, 908-909. Defense counsel's closing argument begins with an attack on the credibility of Hickey and Waddle. 2R 1123-1134. Counsel then described Shapiro's credibility as "the real crux of this case," 2R 1138, and spent most of his argument attacking that credibility. 2R 1438-1144. Defense counsel begins rebuttal with an attack on Mr. Hickey. 2R 1192. The article also prejudiced Mr. Keen's case for a life sentence in which counsel castigated the State's efforts to convict Mr. Keen by cutting deals with dangerous felons.

The article harmed Mr. Keen's case by attacking criminal defense attorneys and their defenses generally. 2R 1478. Prosecution attacks on defense counsel or defenses are improper and require reversal. Ryan v. State, 457 So.2d 1084, 1089 (Fla. 4th DCA 1984); Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979); Waters v. State, 486 So.2d 614, 616 (Fla. 5th DCA 1986). Here, the error is more serious: two jurors were actually reviewing the materials during deliberation. There was no opportunity for correction or limiting instruction. The information was from a seemingly neutral source, making it more damaging than argument from an obviously partisan prosecutor.

The timing of the misconduct and Rodriguez's and Fischetti's testimony demonstrate prejudice. The jurors deliberated for eight hours the first day and twice indicated deadlock. 2R 1220-1225. The two jurors discussed the article the second day, after which a verdict was reached. 2R 1311, 1328. This is strong evidence the article influenced the jury. Fischetti took an admitted interest in the portions of the article dealing with the tactics of criminal defense attorneys; he bracketed and underlined them during deliberations. 2R 1311-2. He

thought the court had approved the article. 2R 1354. Rodriguez's comments prove the influence the article had. He read it before reaching his final verdict. 2R 1328, 1330. Fischetti used it to convince him the case "doesn't have to be proved to all conclusiveness," an admission the article was used to overcome his doubts. 2R 1329. The article was far more prejudicial than the materials held to require a new trial in the cases previously discussed. It directly affected the issues of this case. It came at a crucial time in the deliberations, after two indications of deadlock. This Court has previously recognized the closeness of the evidence in this case. Reversal is required.

The trial court's denial of the motion for new trial is contrary to several aspects of Hamilton, supra. The Court specifically relied on the jurors' statements that the article did not affect their verdict. 2R 1370-1372. This is precisely the sort of inquiry into the mental processes of the jurors that this Court condemned in Hamilton, supra. Indeed, this is the precise error which led the First District astray in Doutre v. State, 545 So.2d 1366 (Fla. 1st DCA 1989). See Hamilton, slip opinion at p. 9 n.6. The trial court made no analysis of the content of the material and how it was used which this Court required in Hamilton. Slip opinion at p. 14-15.

Hamilton demonstrates that a new trial is required because the article affected the jury's evaluation of several jury instructions. In Hamilton, this Court approved several cases in which the court had reversed because the materials could have affected interpretation of the jury instructions. Slip Opinion at p. 6-9. The Court approved decisions finding harmful error in Smith v. State, 95 So.2d 525 (Fla. 1957); Yanes v. State, 418 So.2d 1247 (Fla. 4th DCA 1982); and Grissinger v. Griffin, 186 So.2d 58 (Fla. 4th DCA 1966) and disapproved Doutre v. State, 545 So.2d 1366 (Fla. 1st DCA 1989) finding harmless error when the material affected jury instructions. The erroneous material here impacted several jury instructions. Juror Rodriguez testified Fischetti used it to argue that the case "doesn't have to be proved to all conclusiveness." 2R 1329. i.e. Fischetti used the article to influence Rodriguez' interpretation of the reasonable doubt instruction, the same error that Hamilton held should have

have required reversal in Doutre. Slip opinion at p. 9 n.6. The improper material also affected the jury's interpretation of the instruction on weighing the evidence. 2R 1446. The prosecution witnesses in this case were impeached concerning their inconsistent statements, their criminal records, and benefits received for their testimony. The jury instructions recognized these as legitimate methods of impeachment, 2R 1446, but, the unauthorized article ridicules such defense attacks on witnesses in the Goetz case and other cases. The material could also affect the instruction on rules for deliberation. 2R 1453. This instruction tells the jury to ignore their feeling about the lawyers. The thrust of the improper materials was an attack on defense lawyers, directly undercutting this instruction. Reversal is required.

Assuming arguendo, that this Honorable Court feels a new trial is not required the misconduct was independently prejudicial in the penalty phase and a new penalty phase is required. The jury recommended death by the narrowest of margins, seven to five. 2R 1280. Any error would have tipped the balance to death. Booth error mandates at least a resentencing. Jackson v. Dugger, supra. The same reasoning applies to this inflammatory article creating sympathy for victims which was timely brought to the trial court's attention. The article also harmed the penalty phase defense attacking the credibility, criminal activity and disparate treatment of Shapiro, Hickey, and Waddle. 2R 1265-1270. The improper material also impacted the penalty phase instructions. The penalty instructions tell the jury to limit themselves to the statutory aggravating circumstances. 2R 1467. The articles's injection of victim sympathy constitutes a non-statutory aggravating circumstance in violation of the instruction. At the very least, resentencing is required.

POINT II

THE TRIAL COURT ERRED IN REFUSING TO RELEASE OR INSPECT IN CAMERA THE GRAND JURY TESTIMONY OF KEN SHAPIRO.

This Court has recognized that the "evidence against Keen ... was primarily based on the testimony of Ken Shapiro". Keen v. State, 504 So.2d 396, 397 (Fla. 1987).

> It would be legerdemain to characterize the evidence as overwhelming; the real jury issue presented in this trial centered on the

credibility of Shapiro versus the credibility of Keen. Id. at 401. In light of Shapiro's importance, the refusal to release or inspect in camera Shapiro's grand jury testimony violated due process.[5]

Mr. Keen filed a motion for disclosure of the grand jury testimony of Ken Shapiro. 1R 1651-1652. It pointed out Shapiro is the only eyewitness to the events in question and noted Shapiro had previously given a sworn statement to the police exculpating Mr. Keen, inconsistent with statements made in 1984. 1R 1651-1652. He requested the transcript pursuant to Brady v. Maryland, 373 U.S. 83 (1963), alleging the testimony is material and favorable to the defense. 1R 1652. At a hearing on October 19, 1984, the prosecutor argued: (1) a "veil of secrecy" surrounds the grand jury, (2) Brady, is not applicable to grand jury proceedings, and (3) the establishment of a material inconsistency is an insufficient predicate for release under Jent v. State, 408 So.2d 1024 (Fla. 1981). The trial court denied the motion. 1R 8.

The hypocrisy of the prosecution's rhetoric about "the sanctity of the grand jury veil of secrecy" is shown by the method it obtained Patrick Keen's grand jury testimony. On June 3, 1984 the prosecution moved for disclosure of Patrick's grand jury testimony. 1R 1719. The basis was that Patrick Keen would testify contrary to his grand jury testimony. 1R 1759. This motion reflects service by mail on June 3, 1985; Judge Garrett granted disclosure (apparently without a hearing) on the same day. 1R 1719-21. The basis asserted by the prosecution for disclosing Patrick Keen's grand jury testimony is less than that made for release of Shapiro's. Yet, the defense could not even obtain in camera review of Shapiro's grand jury testimony although the prosecution actually obtained Patrick's.[6] Apparently, the "veil of grand jury secrecy" is a doctrine solely benefitting the prosecution. If it was correct to deny release or in

---

[5] The First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 2, 9, 16, and 17 of the Florida Constitution, and Rule 3.220, Florida Rules of Criminal Procedure and Florida Statutes 905.27 (1987).

[6] Appellant previously requested this Court grant a remand to clarify this unusual procedure. Mr. Keen continues to maintain that such a remand is necessary.

camera review of Shapiro's grand jury testimony then surely it was error to disclose the grand jury testimony of Patrick Keen (especially when done by a judge without jurisdiction over this case). The contrast between the treatment of these two motions could not be more striking.[7]

This Court has recognized that Shapiro gave inconsistent statements prior to his trial version. Keen, supra at 398. These included a sworn police statement. Id. Shapiro was the only eye witness at retrial and his credibility was key. He gave inconsistent statements on the night of the incident, and under oath to the police a week later. 2R 512-514. He lied in a sworn statement to a civil attorney. 2R 517-518. He told his current tale only three years later. 2R 518-519. There is an emerging trend to allow release or in camera review of grand jury testimony. The United States Supreme Court outlined the general principles governing this issue in a case in which it reversed a conviction for failure to disclose grand jury testimony:

> Disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice.

Dennis v. United States, 384 U.S. 855, 870, 86 S.Ct. 1840 (1966). In Miller v. Wainwright, 798 F.2d 426 (11th Cir. 1986), two defendants argued they were entitled to in camera review of grand jury testimony as key prosecution witnesses had given inconsistent statements. The Eleventh Circuit agreed the defendants had met the threshold for in camera review:

> To obtain grand jury testimony, a defendant must show a particularized need, sufficient to justify the revelation of generally secret grand jury proceedings. See Dennis v. United States, 384 U.S. 855, 870, 86 S.Ct. 1840, 1849, 16 L.Ed.2d 973 (1966); United States v. Proctor & Gamble Co., 356 U.S. 677, 683, 78 S.Ct. 983, 986, 1 L.Ed.2d 1077 (1958). The district court held that the standard had not been met in this case because the witnesses were thoroughly cross-examined with prior deposition testimony contrary to their trial testimony. It is precisely because of this contradiction in the testimony that someone should look at the grand jury testimony to determine its usefulness to the defendants. Dennis, 384 U.S. at 872-73, 86 S.C. at 1850-51 ... Sometimes an in camera inspection of material is necessary to determine if a party has shown sufficient particularized need. The threshold showing for an in camera review is not as high as that needed to obtain the evidence.

---

[7] Mr. Keen specifically readopted his motion, prior to his re-trial, with the consent of all parties. 2R 4-7. The motion to disclose the grand jury testimony of Ken Shapiro was denied orally and in a written order. 2R 4-7, 2R 1415A.

789 F.2d at 426.

The right to in camera review of otherwise confidential materials in a criminal prosecution was extended by the United States Supreme Court in Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989 (1987). In Ritchie, the defendant, charged with sexual assault on his daughter, moved to have her Children and Youth Services file produced as it "might contain the names of favorable witnesses as well as other, unspecified exculpatory evidence." Id. at 995. The Supreme Court held the defendant was entitled to in camera review despite public policy reasons and specific statutes making the material confidential. 107 S.Ct. at 1001-1002.

The Eleventh Circuit reconsidered Miller in light of Ritchie:

> The Supreme Court's reasoning and decision in Ritchie is an endorsement of the procedures the Court recommended and the holding we reached in Miller. Both Courts, based on facts presented, determined that due process required some court to review the confidential material to determine if the appropriate file "contains information that may have changed the outcome of his trial had it been disclosed." Ritchie, ____ U.S. ____, 107 S.Ct. at 1004, 94 L.Ed.2d at 60. Indeed, the Miller sworn testimony, which contains different versions of the facts, shows recantations of testimony, and other questionable circumstances, presents a compelling need for in camera inspection.

Miller v. Dugger, 820 F.2d 1135, 1136 (11th Cir. 1987). Similarly, Hopkinson v. Shillinger, 866 F.2d 1185 (10th Cir. 1989), modified 888 F.2d 1286 (10th Cir. 1989) (en banc) applies the principles of Ritchie to grand jury testimony.

> Hopkinson asserts that evidence tending to exculpate him may have been presented to this grand jury, but he cannot point to any specific exculpatory evidence because he has never seen the grand jury transcripts.

866 F.2d at 1220. The Tenth Circuit held he was entitled to in camera review because "exculpatory evidence could have been presented" and in camera review preserves state confidentiality interests. See also Butterworth v. Smith, 110 S.Ct. 1376 (1990)(news reporter who testified before grand jury could write about his experience when investigation complete). In Smith, the Court also noted that policy interests in favor of secrecy are greatly lessened once the investigation has ended. Id. at 1381-1382. Smith continues the trend of disclosing grand jury testimony to protect constitutional rights.

Mr. Keen made a more than adequate showing for release or in camera review

of the grand jury testimony of Shapiro. In Ritchie, the United States Supreme Court held a criminal defendant is entitled to review a child witness' confidential file by merely alleging it "might contain favorable witnesses or other unspecified, exculpatory evidence." 107 S.Ct. at 995. In Miller the Eleventh Circuit held that showing a prosecution witness had given materially inconsistent statements suffices to require release or in camera review of grand jury testimony. 798 F.2d at 426. The key prosecution witness below repeatedly gave inconsistent, exculpatory statements. Later, he stated he killed the deceased with Mr. Keen. There could hardly be a more compelling need for in camera review or release of the testimony. Appellant's conviction must be reversed and remanded for a new trial due to the trial court's failure to release grand jury testimony or at least review it in camera.

POINT III

THE TRIAL COURT ERRED IN PERMITTING VARIOUS STATEMENTS OF APPELLANT TO BE INTRODUCED INTO EVIDENCE.

Mr. Keen moved to suppress his statements. 1R 1665-1671.[8] The trial court denied Mr. Keen's motions. 1R 1676. This violated several provisions of law, as shown in sections A through D below.

A. Article I, Section 9 and the Fifth Amendment

Mr. Keen's statements were inadmissible as they were made after an equivocal request to stop questioning. Officer Amabile testified that while Mr. Keen was being transported to Broward County he stated he did not physically kill his wife and "that he did not see any strategical benefit for himself if he told us anything else." 1R 26. Officer Scheff quoted Mr. Keen as saying something "to the effect that he could see know [sic] strategic reasons to give a statement to us." 1R 193.

In Christopher v. Florida, 824 F.2d 836 (11th Cir. 1987), in response to being told that he was charged with two murders, the defendant told police that he had no reason to make a statement:

CHRISTOPHER: Okay then. What's the need of me saying anything then.

---

[8] Appellant renewed his motions, which were originally made during the first trial, at his second trial. 2R 4-7. The trial court denied the motions. 2R 1415A.

824 F.2d at 840. The Court noted that this constituted, at the very least, an equivocal request to stop questioning:

> Moreover, immediately after this second request to stop, and second unlawful continuation of the interrogation. Christopher made a third, albeit somewhat equivocal, request to stop ("Okay then. What's the need of me saying anything then."). Once again the officers improperly failed to terminate the interrogation. Instead, Mills asked Christopher: "What are you upset about? Given the previous requests to stop, at this point there certainly was no need for clarification. Moreover, Mills' question was not a "clarification." Rather, it was interrogation because it invited a response from Christopher that was not restricted to the issue of whether Christopher wished to terminate the interrogation. Mills' response thus constituted yet another violation of Christopher's Miranda rights.

824 F.2d 843, n. 19. Mr. Keen's comment that there was no strategic reason to say anything is equivalent to Christopher's statement "what's the need of me saying anything then". Both comments request, equivocally, the questioning stop.

A suspect's equivocal assertion of the right to silence terminates any further questioning except that designed to clarify his wishes. Owen v. State, 560 So.2d 207 (Fla. 1990); Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985), modified, 781 F.2d 185 (11th Cir. 1985); Christopher, supra, 824 F.2d at 841. The police made no attempt to clarify Mr. Keen's wishes.[9] The resulting statements must be suppressed.

B. Fourth Amendment and due process.

Rule 3.130(a) of the Florida Rules of Criminal Procedure provides every arrested person shall be taken before a judicial officer, within twenty-four hours of arrest unless released on bail. Failure to take a suspect before a judicial officer as required constitutes an illegal seizure.[10] When an arrest

---

[9] This questioning was not initiated by Appellant. Appellant made the equivocal request while being transported to Broward County. 1R 26, 192-193. Immediately upon arriving Appellant was "taken immediately" to the interview room for interrogation. 1R 131.

[10] Appellant was arrested on August 23, 1984, in Seminole County, where he was kept overnight before being transported to Broward County, with resultant booking occurring at approximately 9:00 p.m. on the 24th of August. 1R 171. At the Motion to Suppress hearing on December 21, 1984, both Detective Amabile and Detective Scheff admitted that Appellant was not taken before a magistrate in Seminole County, and, in fact, was not taken before a magistrate until almost forty-eight (48) hours after his arrest. 1R 168-169, 215. Amabile admitted that he knew he was supposed to take Appellant before a magistrate within a twenty-

becomes illegal because no magistrate has reviewed it, resulting statements must be suppressed. See Watts v. Indiana, 338 U.S. 49, 69 S.Ct. 1347 (1949). Here the statements were made after the failure to take Mr. Keen before a judicial officer as required by the rule. There was not a break in the chain to dissipate the illegality.

C. Article I, Section 16, and the Sixth Amendment

The Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 16 of the Florida Constitution guarantee the right to counsel. Under Rule 3.111(a), Florida Rules of Criminal Procedure, and the Florida Constitution, this right attaches when one is formally charged with an offense, or as soon as feasible after custodial restraint, or upon first appearance before a committing magistrate, whichever occurs first. Sobczak v. State, 462 So.2d 1172 (Fla. 4th DCA 1984). Mr. Keen was not brought to first appearance within twenty-four hours as required. Because the right to counsel attaches at first appearance, and because the police avoided the inconvenience by not bringing Appellant to first appearance as required by the rule, Appellant's statements should be suppressed.

Appellant is aware this Court said in Keen:

> Keen's Sixth Amendment claim fails because at the time the statement was made formal charges had not yet been filed against him and, therefore, adversary proceedings had not yet commenced. Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

Id. at 400. This Court rejected only a Sixth Amendment claim on this issue without addressing Rule 3.111 or Article I, section 16. It does not appear that this Court intended to overrule Sobczak, or nullify Rule 3.111.

If Keen stands for the proposition that the Sixth Amendment right to counsel does not attach at the time of the first appearance hearing, and therefore overrules Sobczak, it is incorrect. First appearance is a forum for advising the defendant of the reason for his arrest, appointing counsel, and taking evidence on an adversarial proceeding for bond. Hence, adversarial proceedings have commenced at the time of the first appearance hearing so that

---

four hour period. 1R 1090.

the Sixth Amendment right to counsel attaches. See Coleman v. Alabama, 388 U.S. 1, 7-10, 90 S.Ct. 1999, 26 L.Ed.2d (1970) (right to counsel attaches at preliminary hearing, which involved determining whether evidence justified submitting case to grand jury, and setting bail; counsel can "be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for ... bail"). By ignoring the requirement that Appellant be brought to a first appearance hearing within twenty-four hours, the police induced Appellant to give a statement.[11]

An additional Sixth Amendment ground for suppressing the statements is the continuing interrogation of Appellant despite his request for counsel.[12] Once an accused has expressed his desire for an attorney, police must not subject him to further interrogation until counsel is made available to him, unless he initiates the communication. See Minnick v. Mississippi, 59 USLW 4037, 4039 (U.S. December 3, 1990); Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 1885 (1980). Appellant did not initiate conversations with police after his request for counsel. His statements must be suppressed.

D. Due Process - the statements were not free and voluntary.

The State failed to show that the statements involved were made freely and voluntarily. DeConingh v. State, 433 So.2d 501 (Fla. 1983); Blackburn v. Alabama, 80 S.Ct. 274 (1960). Every indication showed that he did not want to

---

[11] Again, this was after Appellant indicated that he saw no strategic benefit in giving a statement. 1R 26.

[12] Upon his arrest in Seminole County at approximately 10:00 a.m., Appellant, 1R 160, immediately told his employee, Sam Sparks, to get him an attorney, 1R 162, and both detectives involved were aware of this effort, although they weren't aware if an attorney had been contacted or not. 1R 178. When the Appellant and the detectives arrived at the Seminole County Jail about fifteen minutes later, 1R 126-127, Appellant again stated that he wanted an attorney for bail. 1R 163-164. The response of the detective was that there was no bail on this offense. 1R 164. After Appellant was moved from the jail to the headquarters of Seminole County, he again referred to his desire for an attorney, saying that his attorney would ask for discovery. 1R 165-166. It was also admitted at the Motion to Suppress that Appellant requested to make a phone call and the request was refused until he was moved to yet another location, 1R 185, where Appellant finally did make a phone call from Seminole County. 1R 189. Appellant then testified that he told the detectives before the car ride that he had talked to his friend Carol and that an attorney would be waiting for him. 1R 232. Despite Appellant's request for an attorney, interrogation continued.

cooperate. He asked for an attorney on several occasions, he refused to allow any statements he made to be tape recorded, 1R 140, 150, and later refused to sign the handwritten 'transcript' which was written by the officers. 1R 152, 227.[13] His physical and emotional state prevented him from giving a free and voluntary statement.[14] Mental and emotional distress may prevent a person from effectively waiving their rights thereby making a statement inadmissible. DeConingh, supra at 503; see also Breedlove v. State, 364 So.2d 495, 497 (Fla. 4th DCA 1978).

E. §934.03(2), Florida Statutes, and the Federal and Florida Constitutions were violated by admitting the tape made from a phone tap.

Shapiro, acting as a police agent, secretly taped Mr. Keen more than twenty-four hours after Mr. Keen's arrest, while Mr. Keen was in police custody. Mr. Keen filed a pre-trial motion to suppress the wiretap. 2R 1415-1416. Shapiro testified he had admitted his culpability to the police in the death of Ms. Keen. 2R 91. He was concerned whether he would be prosecuted. 2R 91-2. The police asked him to tape any calls from Michael Keen and he agreed. 2R 92-93. He did not sign a written consent. 2R 93-94. He had no recollection of the police explaining the legal requirements of consent. 2R 94. Officer Scheff testified that he gave Shapiro the taping device. 2R 101. He only asked Shapiro if he was willing to tape Michael Keen. 2R 104. He did not explain the requirements of consent laid out in the statute. 2R 104. He testified that the equipment was placed on Shapiro's phone between 10:00 p.m. and 11:00 p.m. on August 25, 1984. 2R 109. The call from Mr. Keen came in after this. 2R 111.[15]

---

[13] These indications of a desire to remain silent must be viewed in conjunction with the repeated promises and inducements for possible leniency if Appellant cooperated against Shapiro. Amabile stated that if he got a statement from Appellant it would make the State Attorney's Office less likely to offer Shapiro immunity, 1R 198, with these statements being repeated on several occasions throughout the course of the trip and the interview. 1R 209-211.

[14] He was shocked and amazed at the arrest, confused, had the chills, and was not coherent when he gave his statement, 1R 233, 270, and, in fact, gave his statement only so he could rest and think and call an attorney, 1R 236, and because of the emotional state that he was in. 1R 242.

[15] The trial court denied the motion to suppress, 2R 115, and the renewed motion to suppress at trial. 2R 523.

The evidence should have been suppressed on several grounds. First, the wiretap did not come within the exception outlined in Florida Statute 934.03(2)-(c) (1983), because its purpose was not "to obtain evidence of a criminal act" but to prosecute a person previously arrested pursuant to a warrant. A criminal statute must be strictly construed in favor of the citizen and against the state. State v. Wershow, 343 So.2d 605, 608 (Fla. 1977). Virtually all the litigation surrounding this statute has involved pre-arrest police investigations. See Morningstar v. State, 428 So.2d 220 (Fla. 1982). The purpose of this statute is to aid police investigations. The nature of the case changes from investigation to prosecution at arrest; this section is limited to the pre-arrest situation.

The construction of the statute to include the post-arrest situation would endanger a defendant's right to counsel and right to remain silent. This construction would allow the planting of police informers (albeit by telephone) in perpetuity. This would violate the Fifth and Sixth Amendment. Maine v. Moulton, 106 S.Ct. 477 (1985). It is undisputed that Mr. Keen had been arrested pursuant to an arrest warrant, interrogated, and booked in the Broward County Jail at the time of the wiretap. 1R 1635, 2R 101. The exception in Section 934.03(2)(c) does not apply.

Second, Ken Shapiro's consent to this wiretap was not knowingly, intelligently, freely, and voluntarily given. The burden is on the prosecution to show by clear and convincing evidence that consent is freely and voluntarily given. Bumper v. North Carolina, 88 S.Ct. 1788 (1968); Norman v. State, 379 So.2d 643, 646 (Fla. 1980). An acquiescence to apparent authority does not constitute consent. Bumper, supra, 88 S.Ct. at 1792.

The prosecution failed to meet its burden. Shapiro had just admitted participation in a murder and was concerned about being charged. 2R 91. He felt it was in his best interest to cooperate with the police. R 91-92. The legal requirements of consent were not explained to him. 2R 94, 104. This falls far short of a knowing, intelligent, free, and voluntary consent. The tape should be suppressed.

Third, this warrantless wiretap was unreasonable under the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 9, 12, 16, 17 and 23 of the Florida Constitution. Warrantless searches are per se unreasonable under the Fourth Amendment subject only to a few specific exceptions. Katz v. United States, 389 U.S. 347, 357 (1987). The burden is on the state to show that the procurement of a warrant was not feasible. McDonald v. United States, 335 U.S. 451 (1948). Article I, Section 23 of the Florida Constitution provides stronger protection of the right to privacy than the United States Constitution. Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 546 (Fla. 1985). Here, there was no showing that a warrant could not be obtained, making it unreasonable under the Federal and Florida Constitutions.

Fourth, the use of a planted informer violated Mr. Keen's right to remain silent and right to counsel as explained above in Section A-D.[16]

F. The admission of an improper "transcript" was error.

After his arrest, Mr. Keen was interrogated by the police. Officer Amabile testified he attempted to take down the interview verbatim but that it was not completely verbatim. 2R 719-720, 723. He intentionally put in inaccuracies, as a test. 2R 723. Mr. Keen refused to sign the purported transcript. 2R 731. The trial court erroneously admitted it,[17] denying Mr. Keen due process of law.[18] This evidence had no proper predicate and was hearsay violating the confrontation clauses of the Federal and Florida Constitutions.

The statement was not what it purported to be, a transcript of the

---

[16] These rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 2, 9, 12, 16, 17, and 23 of the Florida Constitution.

[17] Mr. Keen challenged the fact that the document was not a true and accurate summary and that he never signed nor acknowledged his statement. 1R 165. He renewed his pre-trial objections at the time of the admission of this evidence. 2R 701-702. The xeroxes of seven of the eight pages of the statement were given to the jury, over objection, 2R 702-703, 714-715.

[18] As guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, 17, 21, and 22 of the Florida Constitution.

interview. It contained prior consistent statements of the police officers which are inadmissible hearsay. See Jackson v. State, 498 So.2d 906, 909 (Fla. 1986); Jenkins v. State, 547 So.2d 1017, 1020 (Fla. 1st DCA 1989). Further, recordings of defendants' statements written by another must be signed or adopted by the defendant. Marshall v. State, 339 So.2d 723 (Fla. 1st DCA 1976); Williams v. State, 185 So.2d 718 (Fla. 3d DCA 1966). Mr. Keen refused to sign this purported transcript because there were many inaccuracies in it. 2R 731, 957-958. As in Williams and Jackson, reversal is required. This violated Florida law and the Florida and Federal Constitutions.

POINT IV

MR. KEEN WAS TRIED BY A JUDGE WHO PREJUDGED GUILT AND COULD NOT BE IMPARTIAL ON THE SENTENCE.

The trial court prejudged Mr. Keen guilty before retrial. In 1984, the court heard Mr. Keen testify the death of Anita Keen was caused by Shapiro and may have been an accident. In a hearing before retrial, the judge responded to concern over Shapiro's safety, saying:

> Killing is a crime, and we've had enough killing already in this case, and I don't want anymore in this case.

1SR 28. Given the context, the judge had decided that Mr. Keen's defense was not worthy of belief, and that he had committed a crime. The trial court also stated her position on the bench would be threatened by overruling a jury's death recommendation.

> THE COURT: I would take your argument one step further, Mr. Williams. It is not only difficult for a judge to override a jury's recommendation of life, but it is no easier for a Judge to override a jury's recommendation of death, as one of the judges down in Dade County is living daily even as we speak.
> MR. WILLIAMS: That's more public pressure than legal standard that he's living with.
> THE COURT: Well, the law is not even in by case authority, though it might even be close, that you are virtually bound by a jury's verdict and recommendation.

2R 291. Judge Henning referred to a political threat to defeat a circuit judge in Dade County for overriding a death recommendation and pressure from the victims family. See Appendix A. The court's sentencing order, oral and written, also shows the court prejudged the issues because she considered the original trial verdict and sentencing recommendation in sentencing Mr. Keen to death.

2R 1486, 1386. These recitations show that the trial court was influenced by the earlier proceedings.

> Trial by a judge who prejudges the issues violates due process.
>
> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases.

In re Murchison, 349 U.S. 133, 136 75 S.Ct. 623 (1955); see State ex rel. Mickle v. Rowe, 100 Fla. 1382, 131 So. 331 (Fla. 1930)(defendant "entitled to nothing less than the cold neutrality of an impartial judge); Peek v. State, 488 So.2d 52, 56 (Fla. 1986) (trial judge must be impartial in own mind and convey image of impartiality).

A number of federal cases with facts similar to those herein show the judge's frame of mind below violates this right. In United States v. Holland, 655 F.2d 44 (5th Cir., Unit B 1981), the defendant was retried. The Fifth Circuit held the trial judge's comments to the defendant after the jury retired showed he was biased and required disqualification. The court said the defendant had broken faith with the court in its earlier proceedings. See Nicodemus v. Chrysler Corporation, 596 F.2d 152, 156-7 (6th Cir. 1979) (ordering trial judge off case even though issue not raised or briefed: court stated party had intentionally harassed plaintiff with no proof). Due process requires such a result when the court prejudges the case. See United States v. Sciuto, 531 F.2d 842 (7th Cir. 1976). Sciuto's trial judge refused to recuse himself despite an allegation he had prejudged the probation violation on the basis of the probation officer's report. The Seventh Circuit refused to address an alleged procedural bar, holding the judge violated due process by prejudging the case. Id. at 845; see Walker v. Lockhart, 763 F.2d 942, 960-1 (8th Cir. 1985) (en banc); see also Gardiner v. A.H. Robins Company, 747 F.2d 1180 (8th Cir. 1984) (due process violated when judge shed judicial role and became advocate); Lopez v Vanderwater, 620 F.2d 1229, 1235 (7th Cir. 1980) (judge acting as prosecutor violated due process). Such a due process violation infects the result even when the jury decides the case and is unaware of the judge's position. See Walberg v. Israel, 766 F.2d 1071, 1076-7 (7th Cir. 1985). The court below declared a

crime had occurred. Since the judge knew the defendant had testified to facts suggesting accidental death, prejudgment was revealed. Cf. Carr v. State, 136 So.2d 28, 29 (Fla. 3d DCA 1962).

When a trial court uses evidence from a prior proceeding reversed on appeal to find an aggravating circumstance, it errs. See Huff v. State, 495 So.2d 145, 152 (Fla. 1986); see also King v. Dugger, 555 So.2d 355, 358 (Fla. 1990) (resentencing is "completely new proceeding, separate and distinct" from first sentencing). Prior proceedings must not play a role in a resentencing. Teffeteller v. State, 495 So.2d 744, 745 (Fla. 1986)("resentencing should proceed de novo on all issues ... A prior sentence, vacated on appeal, is a nullity.") The Court held in Teffeteller that the prior death sentence did not mandate reversal because it played no role in the resentencing. Unlike the judge in Rutherford v. State, 545 So.2d 853, 857 (Fla. 1989), the court below commented elsewhere a crime had occurred, showing she had actively considered the information from the prior proceeding. The judge recited the prior sentencing and guilt verdict in the sentencing order itself. She specifically noted the first jury, had recommended a death sentence. Use of this information violates the teachings of King, Huff, and Teffeteller.

The use of this information also violates due process and the right to trial.[19]

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may constitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge... .
>
> The existence of a retaliatory motivation would, of course, be extremely difficult to prove in any individual case... .

North Carolina v. Pearce, 395 U.S. 711, 725 (1969). Here, the judge explicitly relied on the first trial in sentencing Mr. Keen. This is direct evidence of retaliatory motive. A death sentence resting in any way on the fact that a man

---

[19] These rights are guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the Federal Constitution and Article I, sections 9, 16, 21, and 22 of the Florida Constitution.

exercised his right to appeal violates due process and denies him access to the courts. The relief granted in the Pearce line of cases is to reimpose the original sentence; given direct evidence of retaliatory motive, the relief must be to grant a resentencing before a new judge.

Considering prior proceedings also constitutes cruel and unusual punishment. The death penalty requires a heightened degree of reliability in its imposition. See Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Any consideration of a non-statutory aggravating circumstance, violates the carefully channelled decision making required to impose the death penalty. See Elledge v. State, 346 So.2d 998 (Fla. 1977) (court must guard against nonstatutory aggravating factors); Zant v. Stephens, 462 U.S. 862, 885 (1983) (aggravating sentence on basis of constitutionally protected act, such as request for jury trial, impermissible). The sentence, resting in part on his prior proceedings, violates this principle.

The court's concern with the political consequences of overriding a death recommendation also violates the constitution. When circumstances "might lead [the judge] not to hold the balance nice, clear, and true between the state and the accused," Tumey v. Ohio, 273 U.S. 510, 532 (1927), due process is violated. The judge in Tumey was also the mayor of the village whose ordinances he enforced. His town received the fines paid as penalties; the Supreme Court held the judge could not be considered fair and impartial. Likewise, if the judge rubberstamps a jury recommendation of death to retain her office and its salary and prestige, then that judge has an interest in the result. The judge stated just such an awareness. The awareness of victim pressure also violates the Eighth Amendment. See Booth v. Maryland, 107 S.Ct. 2529 (1987). The trial court's indication she had prejudged the facts before hearing the evidence together with the need for heightened reliability in death penalty proceedings requires this Court at least to vacate the sentence.

POINT V

THE TRIAL COURT ERRED IN PROHIBITTING CROSS-EXAMINATION OF OFFICERS AMABILE AND SCHEFF REGARDING THEIR IMPROPER INTERROGATION TECHNIQUES IN OTHER CASES.

The court improperly precluded Mr. Keen from effectively cross-examining

Officers Amabile and Scheff. The prosecution moved to preclude the defense from asking the officers about discipline they received for improper interrogation techniques in another homicide case. 2R 433-434. Defense counsel objected, pointing out the unusual interrogation procedure here, but the court granted the motion, preventing effective cross-examination on a key issue. 2R 436-7.

In Mendez v. State, 412 So.2d 965 (Fla. 2nd DCA 1982), the court said:

> Whenever a witness takes the stand, he ipso facto places his credibility in issue. Baxter v. State, 294 So.2d 392 (Fla. 4th DCA), cert. denied, 303 So.2d 26 (Fla. 1974), cert. denied, 420 U.S. 981, 95 S.Ct. 1412, 43 L.Ed.2d 664 (1975). Cross-examination of such a witness in matters relevant to credibility ought to be given a wide scope in order to delve into a witness's story, to test a witness's perceptions and memory, and to impeach that witness. United States v. Williams, 592 F.2d 1277 (5th Cir. 1979). Limiting the scope of cross-examination in a manner which keeps from the jury relevant and important facts bearing on trustworthiness of crucial prosecution testimony is improper, especially where the cross-examination is directed at a key prosecution witness. Truman v. Wainwright, 514 F.2d 150 (5th Cir. 1975); Stripling v. State, 349 So.2d 187 (Fla. 3d DCA 1977), cert. denied, 359 So.2d 1220 (Fla. 1978). The right of full cross-examination is absolute, and the denial of that right may easily constitute reversible error. Coxwell v. State, 361 So.2d 148 (Fla. 1978). Most important, a defendant should be afforded wide latitude to demonstrate bias or a possible motive of the witness to testify as he has. Blair v. State, 371 So.2d 224 (Fla. 2d DCA 1979).

412 So.2d 996. The Court in Mendez reversed for failure to allow cross-examination about the officer's discipline for excessive force, holding it related to the officer's motive to testify concerning his use of force in that case. 412 So.2d at 966.

The issue of the police conduct in the interrogation process was a key issue. Mr. Keen moved to suppress his statements as involuntary and claiming the officer's handwritten statement was inaccurate. 1R 165. Mr. Keen attempted to challenge these issues through his cross-examination of the officers and his own testimony. 2R 717-731, 756-767, 920-960. The police admitted they intentionally made mistakes in their handwritten statement to see if Mr. Keen noted them, stating this was "highly irregular." 2R 724. The defense theory that Mr. Keen's statement was involuntary and inaccurately recorded would be aided if the jury knew these officers had been disciplined for misconduct in other interrogations. As in Mendez, supra the police discipline showed the officers' motives to avoid discipline by hiding the truth. This exclusion denied Mr. Keen due process of

law and the effective assistance of counsel.[20] Mr. Keen's conviction must be reversed for a new trial.

POINT VI

MR. KEEN MUST BE DISCHARGED AS HIS RETRIAL WAS CAUSED BY INTENTIONAL PROSECUTORIAL MISCONDUCT.

The trial below constituted double jeopardy since the first trial's reversal was caused by intentional prosecutorial misconduct.[21] The trial judge denied a motion to dismiss on this basis without an evidentiary hearing, stating:

> The Florida Supreme Court having already passed upon this issue and ruling that the Defendant's retrial is not barred, the Court hereupon denies the motion.

2R 1418. The trial judge also said:

> I agree that, number one, I, having participated and observed it and being aware of what had occurred, as a matter of fact do not find that it was the egregious prosecutorial misconduct that would be necessary to bar prosecution; that the Supreme Court obviously also was concerned with that issue and indeed has already ruled on it as it stated in the footnote, so that motion will be denied.

2R 25-26. The trial court took no testimony, deferring its function to this Court. This Court stated that this conduct was not intentional without briefing or argument from Mr. Keen and without an evidentiary hearing. No court has fully considered Mr. Keen's arguments on this issue.

The prosecutor intentionally provoked a mistrial in 1984. He filed a pretrial motion to admit collateral crimes evidence. 1R 1683. There was an evidentiary hearing on this issue. 1R 303-354. He asked the judge to reserve ruling, stating:

> What I have told Mr. Gulkin (defense counsel) from the very outset, I will not make reference to this in my opening statement at all. If I am going to offer it ... I will give him ample advance warning to approach the bench and ample advance warning for a ruling from the Court prior to any evidence being offered in front of the jury.
>
> The Court, at that point, may be in a better position, having heard

---

[20] Guaranteed by Article I, Sections 2, 9, 16, 17, 21, and 22 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

[21] Double jeopardy is prohibited by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution.

> the testimony during the course of the trial, of making a determination of yes, it is admissible or no, it is not admissible.

1R 349. The Court reserved ruling, but said:

> I want it understood that there be no mention whatsoever until there is a ruling by the court.

1R 350, 354. The prosecutor promised:

> I will approach side bar if I am going to offer it into evidence at all. I will approach side bar before we tell any witnesses relative to that point and I will let the Court and the Defense know I am attempting to offer it, "This is my next witness I will call to offer it," and the Court then can make a ruling either yes or no.

1R 354. At the conclusion of Shapiro's testimony, the prosecutor proffered testimony concerning the alleged collateral offense. 1R 877-885. The prosecutor stated:

> The State is in a position where we simply are not in a posture where we can effectively prosecute the case at this point without providing that particular information (the alleged prior violence) to the jury.

1R 885. The prosecutor was desperate, but the judge excluded it. 1R 885.

Despite his promise and the Court's orders, the prosecutor asked Keen:

> Q: Didn't you describe to Ken Shapiro how you and Patrick Keen had tried to beat Patrick Keen's wife to death with a rock in 1972?

1R 1258-1259. This intentionally violated the court's order. The prosecutor argued Mr. Keen opened the door by testifying he had never threatened Shapiro. This theory was ludicrous, as recognized by the State on appeal when it confessed error.

Mr. Keen respectfully disagrees with this Court's characterization, in dicta and without briefing, of this action as done "in the heat of trial" and not to intentionally goad the defense into requesting a mistrial. There had been a motion hearing on this issue. The prosecutor asked the court to reserve ruling. He promised to proffer the evidence before he introduced it. He proffered it and had it excluded. The only possible reason to bring this up again, without proffering, was to force a mistrial. He said he could not prosecute the case without the information.

In Oregon v. Kennedy, 456 U.S. 667 (1982), the Court held Double Jeopardy bars retrial if the prosecutor's conduct is designed to provoke a mistrial. 456 U.S. at 679; see Duncan v. State, 525 So.2d 938, 941-942 (Fla. 3d DCA 1988). In

Duncan, the court found the prosecutor intentionally provoked a mistrial because his action was contrary to the court's order and he gained an advantage from the mistrial. The prosecutor's action was deliberate. There was a pre-trial motion, a promise to proffer, a proffer, an adverse ruling, and then it was brought out anyway. The prosecutor gained a tactical advantage from the second trial. He was able to produce a jailhouse informer, Michael Hickey, who did not testify at the first trial, assumably skipping bond. The state knew what Hickey would say and used him at retrial. Hickey testified to an alleged scheme to kill Ken Shapiro, as well as to alleged admissions of guilt of Mr. Keen. 2R 794-822. Even with this new inflammatory evidence the second jury had great trouble with guilt and only recommended a death sentence by a seven to five margin. This shows how weak the prosecution case was in the original trial, absent the inflammatory evidence. The prosecutorial misconduct was egregious. Discharge is required.

POINT VII

THE STATE OF FLORIDA HAD NO JURISDICTION TO PROSECUTE THIS HOMICIDE.

This homicide occurred many miles off the coast of Florida. Florida had no jurisdiction to try Mr. Keen.[22] Mr. Keen recognizes that this Court previously rejected this issue. Appellant urges this Court to reconsider.

This Court held that Florida has jurisdiction when the element of premeditation occurred in Florida, but § 910.005(2) explicitly requires an essntial element with conduct occur in Florida.

> An offense is committed partly within this state if either the conduct that is an element of the offense or the result that is an element, occurs within the state. In homicide, the "result" is either the physical contact that causes death, or the death itself; and if the body of a homicide victim is found within the state, the death is presumed to have occurred within the state.

§ 910.005(2), Fla. Stat. (1987). This Court only required premeditation, an operation of thought, not conduct, occur in Florida. This interpretation

---

[22] Mr. Keen filed a pre-trial motion to dismiss for lack of jurisdiction. 1R 1659-1663. The State conceded the death occurred beyond the three mile limit. 1R 109. The court denied the motion. 1R 1677. A supplemental motion to dismiss was filed. 1R 1704-1706. This was denied. 1R 1712. Prior to his second trial, Mr. Keen filed an unopposed motion to adopt his previous pre-trial motions. 2R 1-21. The trial court granted the motion to adopt the pre-trial motions and entered a written order denying these motions. 2R 1415A. Mr. Keen also moved for a judgment of acquittal on jurisdiction. 2R 914. Florida's territory extends three miles to sea. Article II, section 1, Fla. Const.

substantially broadened the jurisdictional statute and ignored its plain wording, contrary to the principle of strict construction. State v. Wershow, 343 So.2d 605, 608 (Fla. 1977). In People v. Holt, 440 N.E. 2d 102 (Ill. 1982) the Illinois Supreme Court interpreted Section 1-5 of the Illinois Criminal Code, an identically worded statute to § 910.005(2). 440 N.E.2d at 103. Holt was charged with felony-murder with the underlying felony beginning in Illinois but the killing occurring in Wisconsin. The Court in Holt described the importance of the conduct requirement in determining jurisdiction.

> Section 1-5 does not declare that any element of the offense will support jurisdiction. The language is "the conduct which is an element of the offense, or the result which is such an element." (Emphasis added.) (Ill.Rev.Stat. 1979, ch. 38, par, 1-5.) The "element" phrases do not expand jurisdiction but limit it. The proper meaning is that "the conduct" is enough only if it is an element of the offense ... What the draftsmen had in mind was something like mailing a letter bomb from one State to another, or firing a weapon across a State line.

440 N.E. 2d 105. The same reasoning applies to Florida's statute. See also State v. Harvey, 730 S.W. 2d 271, 277-8 (Mo. App. 1987) (jurisdiction proper at common law only in the State where the killing occurred; premeditation alone would not support jurisdiction). This Court's reliance on Lane, is misplaced. In Lane the victim was beaten and robbed in Florida before being driven to Alabama to be beaten further. 388 So.2d at 1023. Thus, in Lane, unlike in Keen, there was unlawful conduct in Florida.

The Keen analysis conflicts with the definition of premeditated murder. Premeditation alone is not an element of first degree premeditated murder. The Standard Jury Instructions, promulgated by this Court, state:

> Before you can find the defendant guilty of First Degree Premeditated Murder the State must prove the following three elements beyond a reasonable doubt.
>
> 1. Victim is dead.
> 2. The death was caused by the criminal act or agency of the defendant.
> 3. This was a premeditated killing of the victim.

The element involved is "premeditated killing", not mere premeditation. An interpretation requiring premeditated killing would be consistent with the conduct requirement of the statute.

The reasoning of Keen leads to absurd results. A person could form the

intent to kill in one state, drive across country, kill someone, and then be prosecuted in every state that he drives through. Such a broad view of jurisdiction is untenable. A literal reading of the statute would minimize these problems.

The Court's opinion in Keen also incorrectly rejected the argument the Federal Government has exclusive jurisdiction over crimes committed on the high seas. Several provisions of the United States Constitution indicate the Federal Government's intent to take jurisdiction over crimes on the high seas. Article I, Section 8 of the Constitution which explicitly gives the Federal Government the power to punish crimes on the high seas also lists a series of powers exclusive to the Federal Government, e.g. declaring war and printing money. Article III, Section 2 specifically gives the Federal Courts jurisdiction in "all cases of admiralty and maritime jurisdiction". The Federal Courts have consistently held that this gives the Federal Courts exclusive jurisdiction, in the civil context. Trans-Asiatic Oil Ltd S.A. v. Apex Oil Co., 743 F.2d 956, 959 (1st Cir. 1984). (Admiralty jurisdiction an exclusive province of the Federal Courts). The same rule should apply in the criminal context.

This case falls within the special maritime and territorial jurisdiction of the United States defined in 18 United States Code § 7. In United States v. Tanner, 571 F.2d 334 (5th Cir. 1978), the Fifth Circuit interprets Subsection 3 of this section to give the Federal Courts "exclusive jurisdiction". 571 F.2d at 335. The same rule of exclusivity should apply to the first clause (The high seas provision). Only the Federal Courts had jurisdiction of this case as it occurred on the high seas; homicide is a federal crime. United States v. Leight, 818 F.2d 1297 (7th Cir. 1987).[23]

POINT VIII

THE PROSECUTION FAILED TO PROVE VENUE.

The homicide occurred in the ocean outside the territory of Broward

---

[23] This Court's reliance on Leonard v. United States, 500 F.2d 673, 674 (5th Cir. 1974); Hoopengarner v. United States, 270 F.2d 465, 471 (6th Cir. 1959); Murray v. Hildreth, 61 F.2d 483, 485 (5th Cir. 1932) is misplaced. Hoopengarner and Murray both involved cases within three mile limit, while this case is outside. Leonard does not involve the high seas provision.

County. The State failed to prove that the venue of the crime occurred in Broward. Article I, Section 16 of the Florida Constitution guarantees to the accused the right to be tried in the County where the crime was committed. The Sixth Amendment to the United States Constitution also guarantees this right. State v. Valentine, 506 S.W. 2d 406, 410 (Mo. 1974). Where the state fails to meet a state law burden to prove venue, a resulting conviction violates due process. Jones v. Russell, 299 F. Supp. 970 (E.D. Tenn. 1969). Where the evidence does not contain proof of venue, the defendant must be discharged. See Pennick v. State, 453 So.2d 542 (Fla. 3d DCA 1984).

POINT IX

THE TRIAL COURT ERRED IN DENYING MR. KEEN'S MOTION FOR A CHANGE OF VENUE.

The trial court erroneously denied Mr. Keen's motion for a change of venue, denying his Sixth and Fourteenth Amendment rights to be tried by "a panel of impartial, indifferent jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961).[24] The publicity concerning this case was inflammatory and concerned prejudicial matters not in evidence. The Fort Lauderdale News carried front page headlines "Mom To Be Drowned For Profit." 1R 1690. The police are quoted as saying the crime is the most cold-blooded killing they have ever encountered. 1R 1690. The prior records of Mr. Keen and his brother are highlighted. 1R 1690-1691. Ms. Keen's pregnancy is highlighted. 1R 1690. Similar articles also appeared in the Miami Herald. 1R 1692. The articles constantly stated this was worst of all murders. 1R 1693. The Fort Lauderdale News ran an article falsely claiming Mr. Keen had admitted involvement in his wife's death. 1R 1694. The Fort Lauderdale Sun-Sentinel also ran extensive inflammatory articles about this case. 1R 1695-1696. The denial of bond in Mr. Keen's case inspired a new round of adverse publicity. 1R 1699-1700. The motion hearing on the jurisdictional issue led to additional publicity. 1R 1701-1702. Michael Hickey's allegations of a death threat against Shapiro were also publicized. 1R 1702.

---

[24] Mr. Keen filed a pre-trial motion for change of venue with numerous articles attached. 1R 1684-1703. This motion was specifically readopted prior to his second trial. 2R 1-21. The trial court entered a written order of denial prior to the second trial. 2R 1415A.

Several of the members of the jury panel were aware of the publicity. 2R 121-122, 150-151. The members of jury were discussing the fact that the deceased was pregnant. 2R 151-152. One member said she had gleaned from the newspaper that "he's the one that threw his wife overboard who was pregnant." 2R 153. She had also read recent publicity which included details of the alleged offense. 2R 155-156. Another person mentioned a particular concern for "the unborn child." 2R 159-160. Another had read "he" pushed a pregnant lady overboard and "left her to 'flounder and die.'" 2R 163. Another thought the case "was over" and "had been tried." 2R 170. Miss Defazio, had been exposed to the publicity. 2R 409-410. Mr. Silver said he had read the media and it "would be hard" so ignore. 2R 413. Mr. Rataiczak had read about it also. 2R 414-415.

Failing to change venue denied Mr. Keen's right to due process of law, a fair trial, and the effective assistance of counsel.[25] Manning v. State, 378 So.2d 274 (Fla. 1980); Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985). Wherefore, Mr. Keen's conviction must be reversed and remanded for a new trial.

POINT X

THE TRIAL COURT ERRED IN FAILING TO CONSIDER THE WEIGHT OF THE EVIDENCE IN DENYING MR. KEEN'S MOTION FOR NEW TRIAL.

This Court recognized the close nature of the evidence in this case. Keen, supra at 401. Mr. Keen filed a Motion for New Trial specifically stating that the verdict was contrary to the weight of the evidence. 2R 1473. The trial court never passed on this aspect of Mr. Keen's motion. 2R 1363-1373, 1484. Mr. Keen was denied judicial review of this issue.

Only a trial judge has the power to pass on the weight of the evidence. Tibbs v. State, 397 So.2d 1120 (Fla. 1981). If this issue is raised in a motion for new trial it is a judge's duty to rule on it. Tibbs, supra; Jordan v. State, 470 So.2d 801 (Fla. 4th DCA 1985). Florida Rule of Criminal Procedure 3.600(a)(2) requires the trial court to consider weight of the evidence in ruling on a motion for new trial. This is especially true in a capital case with its unique finality and attendant heightened standards of reliability required

[25] These rights are guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments and Article I, Sections 2, 16, 17, 19, 21 and 22 of the Florida Constitution.

by Article I, Section 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

The close nature of the evidence caused lengthy jury deliberations. The jury deliberated for eight hours the first day and sent back two indications of jury deadlock. 2R 1220-1225. They deliberated a portion of a second day before reaching their verdict. The prosecution's case depended on an admitted participant who was never charged, and gave a totally different version earlier, and two jailhouse informers who had serious criminal records. It cries out for judicial evaluation of the weight of the evidence. The trial judge only discussed the jury misconduct issue in her oral ruling. 2R 1363-1373. In her written order she merely said that the motion for new trial was denied. 2R 1484. This case should be remanded to the trial court as in Jordan, supra to consider the weight of the evidence.

POINT XI

THE TRIAL COURT ERRED IN ALLOWING THE BAILIFF TO RESPOND TO A SUBSTANTIVE JURY REQUEST WITHOUT THE PRESENCE OF THE JUDGE, DEFENDANT, OR DEFENSE COUNSEL.

This issue involves allowing the bailiff to respond to a substantive jury request without the judge, Mr. Keen, or defense counsel being present, or without Mr. Keen personally waiving his presence, his attorney's presence, or the judge's presence.

The following colloquy took place at the beginning of deliberation:

> THE COURT: Any objection if they ask for the evidence and this going back without us reconvening?
> MR. WILLIAMS: No.
> MR. DIMITROULEAS: No objection. Your Honor.

2R 1222-1223. Subsequently the jury did request the evidence be sent back. 2R 1458. This denied Mr. Keen the right to his presence, his attorney's presence, and a judge's presence. It violated Mr. Keen's right to due process of law and effective assistance of counsel.[26]

This Court discussed the issue of a judge's absence in Brown v. State, 538

---

[26] These rights are guaranteed by Article I, Sections 2, 9, 16, 17, 21 and 22 of the Florida Constitution, the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Rules 3.180, 3.400, and 3.410, of the Florida Rules of Criminal Procedure.

So.2d 533 (Fla. 1989). In Brown, the prosecutor, defense counsel, and the judge agreed how to answer a jury question concerning transcripts. Id. at 834. Defense counsel waived the judge's presence at the actual answering of the questions. This Court held that a judge's presence can not be waived when there are communications with the jury:

> The possibility of prejudice is so great in this situation that it cannot be tolerated. We hold, therefore, that communications from the jury must be received by the trial judge in person and that the absence of the judge when a communication is received and answered is reversible error. We disagree with the state that Brown's failure to object precludes our consideration of the judge's absence. (Footnotes omitted)

538 So.2d at 836. Here, there was no judge present when the bailiff presumably gave the jury evidence. As in Brown, the judge's presence was necessary and non-waivable. Assuming the judge's presence could have been waived, it could only have been by Mr. Keen personally.

This procedure was also improper in that Mr. Keen was not present when the bailiff presumably responded to the request. A defendant has a right to be present at all proceedings pursuant to the United States and Florida Constitutions and Fla.R.Crim.P. 3.180. In a capital case a defendant's right to be present is not waivable. Diaz v. United States, 223 U.S. 442, 455 (1912); Hopt v. Utah, 110 U.S. 574, 579 (1884); Near v. Cunningham, 313 F.2d 929, 931 (3d Cir. 1963); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982). Assuming that presence can be waived, it must be knowingly and intelligently waived by the defendant. Here, the lawyer merely agreed.

The third error here was the absence of defense counsel when the bailiff answered this request. The procedure violated Rule 3.410 which requires the judge give the jury additional materials after deliberation. A direct violation of this rule constitutes per se reversible error. Bradley v. State, 513 So.2d 112 (Fla. 1987); Williams v. State, 488 So.2d 62 (Fla. 1986); Curtis v. State, 480 So.2d 1277 (Fla. 1985); Ivory v. State, 351 So.2d 26 (Fla. 1977).

If a prejudice test applies, the errors here involve a great possibility of prejudice, as demonstrated by Ivory v. State, 351 So.2d 26 (Fla. 1977). In Ivory, the judge had the bailiff deliver the documentary evidence. Id. at 27.

This is exactly what was done in this case. The bailiff erroneously gave the jury a report that had not been introduced in the case. Id. This may well have happened here. Excluded evidence could have been sent back, or proper evidence withheld. This procedure is fraught with prejudice and requires reversal, as in Ivory.

POINT XII

THE TRIAL COURT ERRED IN ADMITTING COLLATERAL OFFENSE EVIDENCE.

The admission of the collateral crime evidence of an alleged attempt to solicit Hickey to kill Ken Shapiro constituted error, as it was irrelevant, unduly prejudicial, and became a feature of the case. Hickey testified he and Mr. Keen met while they were both in the Broward County Jail, and that Mr. Keen solicited him to kill Shapiro. 2R 798-820.[27] This evidence was irrelevant and solely designed to attack Mr. Keen's character. Appellant is aware of the general rule that a threat to intimidate a state witness is admissible. However, in this case it is not relevant as it is not probative of guilt or innocence. Michael Keen's police statement and his trial testimony both state that Shapiro pushed him and his wife off the boat and that she ultimately disappeared. 2R 695, 708-709, 746, 1006. His testimony was that Shapiro had killed his wife, attempted to kill him and was now falsely accusing him of first degree murder. Under these facts, an attempt to kill Shapiro is equally consistent with an innocent grieving widower, angry over his wife's death, the attempted murder of himself, and a false accusation, as it is a guilty person's attempt to silence a witness.

Assuming arguendo, this evidence is relevant, the prejudice from it outweighs any possible probative value. Florida Statute 904.403. The courts have noted that alleged death threats to witnesses are extremely prejudicial and must be strictly scrutinized under the prejudice -probative value test before their admission. United States v. Gonzalez, 703 F.2d 1222, 1223 (11th Cir. 1983); United States v. Check, 582 F.2d 668, 685 (2d Cir. 1978). This evidence does not clearly point to a guilty conscience. The prejudice from the testimony was

[27] Mr. Keen objected to the testimony and documents. 2R 779, 784, 786.

extreme and the evidence close.

Assuming arguendo, that this evidence was admissible it was error to allow it to become a feature of the case. Hickey was allowed to testify at length concerning this issue. 2R 798-820. This issue served as the basis to admit various documents. 2R 781-786. The prosecutor cross-examined Mr. Keen about this. 2R 1043-1046. He argued it at length and concluded his argument with it. 2R 1183-1190. This evidence became a feature of the case. It denied Mr. Keen his right to due process. It was independently prejudicial as to sentencing.[28] Mr. Keen's conviction must be reversed and remanded for a new trial.

POINT XIII

THE TRIAL COURT ERRED IN ALLOWING IRRELEVANT COLLATERAL OFFENSE EVIDENCE.

The prosecutor brought out a prejudicial collateral crime without following the mandatory notice requirements of Florida Statute 904.094(2)(b)(1). This was done during the examination of Ken Shapiro and involved alleged death threats by against Shapiro. This denied Mr. Keen a fair trial and due process of law pursuant to the United States and Florida Constitutions and §90.404, Florida Statutes.

Shapiro testified to alleged repeated threats to kill him if he spoke to anyone and at least implied threats to kill his grandparents. 2R 519, 549. This evidence violated the mandatory notice provision of §90.404(2)(b). The evidence alleged a criminal offense, at least witness tampering. §914.22, Fla. Stat. (1987). The prosecution gave no notice whatsoever of its intention to introduce this evidence. It was error to allow this testimony without the statutorily required notice. Freeman v. State, 538 So.2d 936, 937 (Fla. 2d DCA 1989); Simpson v. State, 555 So.2d 956 (Fla. 4th DCA 1990).

Any possible relevance of this evidence is outweighed by its prejudice. § 90.403, Fla. Stat. (1987). Shapiro's testimony was that Mr. Keen threatened to kill him once or twice a month for a period of time and also implied that Mr.

---

[28] Capital sentencings require heightened reliability. Eighth Amendment to the Federal Constitution; Article I, section 17, Fla. Const. Due process is ensured by the Sixth, Eighth, and Fourteenth Amendments and Article I, sections 9, 16, 21 and 22.

Keen had threatened to kill Shapiro's grandparents. This evidence was devastating as it involved repeated alleged criminal acts. Its probative value was weak.

The admission of this denied Mr. Keen due process of law and the effective assistance of counsel pursuant to Article I, Sections 2, 9, 16, 17, 21, and 22 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Mr. Keen's conviction must be reversed.

POINT XIV

THE TRIAL COURT ERRED IN ALLOWING DIRECT TESTIMONY CONCERNING COLLATERAL BAD ACTS OF PATRICK KEEN AND IMPLYING A COLLATERAL BAD ACT OF MICHAEL KEEN.

The trial court erred in allowing irrelevant testimony concerning Patrick Keen's involvement in a collateral bad act. The collateral bad act inquired into was Patrick Keen's alleged attempt to kill his wife, the same matter that caused this Court to reverse previously. Keen, supra. This evidence denied Mr. Keen a fair trial and due process of law pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, 17, 21 and 22 of the Florida Constitution.

The prosecution introduced the following evidence during its redirect examination of Michael Hickey:

> Q. And why did Shapiro come into the picture?
> A. Because his brother was already involved in a similar sort of thing, that he wasn't credible, like he just thought there would be too much heat on him.

2R 874-876

This evidence was prejudicial in two respects. (1) It directly brought out a collateral bad act of Michael's brother. (2) It implied Michael Keen's involvement in this collateral bad act.

In Fulton v. State, 335 So.2d 280 (Fla. 1976), improper misconduct evidence was introduced against a defense witness. This Court reversed and stated:

> The jury's perception of the defendant might have been colored by the knowledge of a friend's involvement in a collateral matter. The danger of "guilt by association" is a real one, which ought to be minimized whenever possible.

335 So.2d at 285. Here, it was brought out that Mr. Keen's brother, had been involved in a "similar sort of thing". This was extremely prejudicial to Michael Keen. The jury could easily infer guilt of this offense from the brother's similar bad act.

This evidence was also damaging as it would allow the jury to infer that Michael Keen was involved in the prior bad act. Hickey first testifies that Michael Keen and Patrick Keen had originally planned this offense together. He then immediately testified that Patrick Keen had been involved in a similar incident. The jury could easily believe that Michael had been involved in this prior incident. This is the issue that caused the prior reversal. Reversal is required.

POINT XV

THE TRIAL COURT ERRED BY ALLOWING HEARSAY TESTIMONY OF PATRICK KEEN.

The trial court erred in allowing the hearsay testimony of Patrick Keen. Its use violated the due process and confrontation clauses of the United States and Florida Constitutions as well as Florida's statutory prohibition against hearsay.[29]

The prosecution first brought out the alleged role of Patrick Keen in this case in its direct examination of Officer Amabile:

> Q. In August of 1984, did you come into contact with Patrick Keen?
> A. Yes, I did.
> Q. What address did you contact him at?
> A. An address in Orlando, Florida.
> Q. Do you have that address with you here today?
> A. Yes, I do.
> Q. And would your refresh your recollection from your reports as to what address you came into contact with him at?
> A. 907 South Crystal Lake Drive, Orlando, Florida.
> Q. In August of 1984, did the sheriff's department have an occasion to reopen what had previously been a missing person's case involving Lucia Anita Lopez Keen?
> A. Yes.

2R 681-682. This left the impression that Patrick Keen implicated Michael Keen.

The prosecution brought out further hearsay from Patrick Keen in direct examination of Mike Waddle. The prosecutor was examining Waddle concerning what

---

[29] See Article I, Sections 2, 9, 16, 17, 21 and 22 of the Florida Constitution; Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; Fla. Stat. §§ 90.801-90.806.

Michael Keen supposedly told Waddle in the jail:

> Q. Did he elaborate on what he meant by his brother was the reason he was arrested?
> A. He said his brother had talked to an insurance investigator and he was arrested.
> Q. Okay. What if anything else did he tell you about him and his brother?
> A. His brother was supposed to be in it with him and they were supposed to split the money. I don't know how much.
> Q. Did he explain to you what he meant by the fact that him and his brother were supposed to be in it together?
> A. Yeah, they had -- whatever it was, they had planned it together and his brother wanted his money and it was being delayed, so his brother went to the insurance company and talked to the investigator and Mike ended up in jail.

2R 902-903.

The testimony in this case was still hearsay despite the fact that the exact words of Patrick Keen were not brought out. This principle was explained in the well reasoned case of Postell v. State, 398 So.2d 851 (Fla. 3d DCA 1981). In Postell, a police officer testified that after speaking to a witness he arrested the defendant. 398 So.2d at 852-854. The trial court found that this was not hearsay as the actual words were not repeated. The Third District rejected this argument:

> We reject the trial court's wooden application of the hearsay rule and the confrontation clause of the Sixth Amendment. We hold that where ... the inescapable inference from the testimony is that a non-testifying witness has furnished the police with evidence of the defendant's guilt, the testimony is hearsay, and the defendant's right of confrontation is defeated, notwithstanding that the actual statements made by the non-testifying witness are not repeated. (footnotes omitted)

398 So.2d at 854. The Court then described the harm from the testimony:

> Our system demands that the finder of fact determine the believability of any witness and the weight to be given that witness's testimony. That simply cannot be done when the jury is deprived of all opportunity to consider the demeanor of the witness; when the memory, intelligence, and candor of the witness is free from testing; when the bias or interest of the witness cannot be proved; when the witness's opportunity and ability to observe is insulated from questioning ... In short, the insidious diminution of the precious rights of confrontation and cross-examination, through some literal application of the rule against hearsay, cannot be tolerated.

398 So.2d at 856. The inescapable inference was that Patrick Keen gave inculpatory statements to police and to an insurance investigator. The evidence in this case was very close. A statement that Mr. Keen's own brother had

inculpated him was devastating and reversal is required.

POINT XVI

THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF THE ESSENCE OF A PRIOR CONSISTENT STATEMENT OF KEN SHAPIRO.

Officer Amabile was allowed to repeat the essence of Shapiro's prior consistent statement. This improperly bolstered Shapiro and violated the Confrontation Clause of the Florida and United States and Florida's statutory prohibition against the admission of hearsay. Florida Statutes 90.801-90.806. This was damaging as Shapiro's credibility was a key issue.

The following colloquy took place during the direct examination of Officer Amabile.

> A. The Defendant was curious as to why he was under arrest for the murder of his wife some three years earlier.
> Q. What did you tell him?
> A. I told him we had evidence, we had statements that had been given to us that stated that it was not an accidental death, that it was not an accidental disappearance, that it was a planned murder.
> Q. Did you mention the name Ken Shapiro to him?
> A. Yes, I did.

2R 686. This was an improper hearsay recitation of the substance of Ken Shapiro's prior consistent statement.

A witness' prior consistent statement is generally not admissible. Jackson v. State, 498 So.2d 906 (Fla. 1986); Kellam v. Thomas, 287 So.2d 733 (Fla. 4th DCA 1974); Parker v. State, 476 So.2d 134 (Fla. 1985); Van Gallon v. State, 50 So.2d 882 (Fla. 1951); McRae v. State, 383 So.2d 289 (Fla. 2d DCA 1980). This evidence denied Mr. Keen a fair trial and due process of law pursuant to Article I, Sections 2, 9, 16, 17, 21 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Mr. Keen's conviction must be reversed for a new trial.

POINT XVII

THE TRIAL COURT ERRED IN ALLOWING IRRELEVANT EVIDENCE CONCERNING MICHAEL KEEN'S USE OF AN ALIAS.

The prosecution brought out that at the time Michael Keen was arrested, he was going by the name of Michael Kingston. This was irrelevant. Mr. Keen's use of a different name took place years after this offense and had no relationship to this offense. This was introduced solely to attack the character of Mr. Keen, contrary to the Fifth, Sixth, Eighth, and Fourteenth Amendments to

the United States Constitution and Article I, Sections 2, 9, 16, 17, 21 and 22 of the Florida Constitution.

The prosecution first brought out that Mr. Keen used Kingston through Officer Amabile. 2R 684-685. The State again brought this up through Officer Scheff. 2R 737. The prosecutor cross-examined Michael Keen extensively about this.

> Q. And Michael Kingston, that's you?
> A. Yes.
> Q. And after Anita died, you changed your name to Michael Kingston?
> A. Yes.
> Q. And your brother changed his name to Patrick Jameson Knight?
> A. Yes.
> Q. And your testimony is that you changed your name because of credit problems?
> A. Yes.

2R 1041-1042. This irrelevant evidence smeared Mr. Keen's character. It improperly suggested that both Keens changed their names to hide a role in Anita Keen's death. There was no evidence of this.

The prejudice from alias testimony is clear. In Lee v. State, 410 So.2d 182 (Fla. 2d DCA 1982) the Court reversed for the admission of alias evidence.

> It is generally known that some criminals assume another name for the purpose of avoiding apprehension, and the word "alias" has come to connote in the public mind some previous criminal activity. State v. Harvey, 26 N.C. App 716, 217 S.E.2d 88 (1975). There may be instances where proof or reference to aliases is relevant and material to prove or disprove an issue. However, their admission at trial should be strictly scrutinized as they convey the impression that a defendant belongs to a "criminal class." See D'Allesandro v. United States, 90 F.2d 640 (3d Cir. 1937).

410 So.2d at 183 (Footnote deleted). Reversal is required.

POINT XVIII

THE TRIAL COURT ERRED IN ALLOWING HEARSAY POLICE OPINION EVIDENCE.

Shapiro testified to hearsay and police opinion evidence that his version of events was true and Mr. Keen's version false. This denied Mr. Keen a fair trial and due process of law.

In answering the prosecutor Shapiro said:

> A. I was home ill on August 21, and they [Amabile and Scheff] knocked at the door, explained who they were and why they wanted to see me, so I let them in.
>
> And they explained that they needed to question me down at their office with regard to the incident, that they knew the truth, and they didn't arrest me. They simply told me that they knew what the

truth was and they just wanted to hear it from me and that it -I was to accompany them downtown.
Q. And did you eventually tell them the truth?
A. After several hours, yes.
Q. Now, why did you tell them the truth on August 20, 1984 and not before?
A. Well, conversations didn't occur often but while I was in New York, maybe once a month, twice a month, Mike would call me and just tell me - you know, he was calling to make sure that I wasn't saying anything, which I didn't; just kept making the basic threat to me that if he had heard that I was to have gone to anyone, that he would kill me and he knew where my grandparents lived.

But it seemed evident in August of '84, that the detectives really knew what happened and the only way they could proceed from there is if I told them what really happened, so I did.

2R 518-519.

During the direct examination of Officer Amabile:

Q. After that conversation, what was discussed next?
A. We then discussed -- I then discussed with the Defendant the contradictory statement that Kenneth Shapiro had given me earlier.
Q. What did he have to say about that?
A. He just hung his head down, looked like he was thinking for sometime. He stated he could not understand why Kenneth Shapiro would lie.

It was then pointed out to him that we did not believe the original story.

2R 694. The prosecutor brought out similar testimony from Officer Scheff:

Q. Basically, what did he tell you?
A. Well, initially we went over the same grounds that we had gone over before. He indicated to us that he did not physically kill his wife. He again recounted the story and provided us with the account that would have been consistent with the original statements that he provided to the sheriff's office back I guess it was 1981.

We continued to talk to him about it and indicated to him that we did not believe that he was being truthful with us.

2R 744. This was improper hearsay and inadmissible police opinion concerning Mr. Keen's truthfulness.

A witness may not testify to another witness' credibility. Tingle v. State, 536 So.2d 202 (Fla. 1988). Police opinion evidence is particularly damaging as it puts an official government stamp on a person's credibility or lack of it. Comments which "impermissibly suggest that the State of Florida feels that appellant was guilty ..." are fundamental error. Ryan v. State, 457 So.2d at 1090 (among others). See also Buckhann v. State, 356 So.2d 1327, 1328 (Fla. 4th DCA 1978); United States v. Phillips, 664 F.2d 971 (5th Cir. 1981).

This evidence denied Mr. Keen a fair trial and due process of law pursuant to Article I, Sections 2, 9, 16, 17, 21, and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments as well as Florida's statutory prohibition against hearsay evidence. Fla. Stat. §§ 90.801-90.806. Mr. Keen's conviction must be reversed for a new trial.

POINT XIX

THE TRIAL COURT ERRED IN ALLOWING TESTIMONY MR. KEEN WAS ARRESTED PURSUANT TO A WARRANT.

The prosecutor twice brought out that Mr. Keen was arrested pursuant to an arrest warrant which improperly told the jury a judge had given his stamp of approval to guilt. It eroded Mr. Keen's presumption of innocence and his right to a fair trial and due process under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, 17, 21 and 22 of the Florida Constitution.

Officer Amabile testified Mr. Keen was arrested pursuant to a warrant. 2R 685. The prosecution again brought out the warrant through Officer Scheff and contrasted it with the failure to ever arrest Ken Shapiro.

> Q. Was he (Shapiro) ever arrested?
> A. No, he was not.
> Q. Subsequent to that, did you have an occasion to obtain an arrest warrant for anyone?
> A. Yes, we did.
> Q. And who did you obtain an arrest warrant for?
> A. Michael Keen.
> Q. Thank you. After obtaining an arrest warrant for Mr. Keen, did you proceed to try to locate him?
> A. Yes, we did.
> Q. Okay. And what name was he using when you came into contact with him August 23, 1984, if you recall?
> A. Yes, I do. It was Michael Kingston.
> Q. Was he placed under arrest?
> A. Yes, he was.

2R 735-737. This testimony contrasting Shapiro's treatment with Mr. Keen put a judicial stamp of approval on Shapiro's version of events and a judicial stamp of guilt on Michael Keen.

Testimony or argument which "impermissibly suggests that the State of Florida feels that Appellant was guilty" is fundamental error. Ryan v. State, 457 So.2d at 1090. See also, Buckhann, 356 So.2d at 1328; Phillips, 664 F.2d at 971. The fact of a person's arrest is normally irrelevant and objectionable

testimony. Postell v. State, 398 So.2d 851, 855 n.7 (Fla. 3d DCA 1981). Here, the testimony specifically brought out an arrest warrant, which involves an act by a judge. This deprived Mr. Keen of the presumption of innocence, which is "the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895).

POINT XX

THE TRIAL COURT ERRED IN ALLOWING REPEATED REFERENCES TO THE DECEASED'S PREGNANT STATUS.

There were repeated references to the deceased's pregnant status.[30] This evidence was used in a manner designed solely to elicit sympathy for the deceased. It denied Mr. Keen due process of law and the effective assistance of counsel pursuant to Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, 17, 21, and 22 of the Florida Constitution.

The prosecution emphasized the pregnancy in closing argument. 2R 1159-1163. Evidence or argument designed to create sympathy for the deceased is irrelevant and improper. Jones v. State, 15 F.L.W. S469 (Fla. Sept. 13, 1990); Rowe v. State, 120 Fla. 649, 163 So. 22 (1935); Melbourne v. State, 51 Fla. 69, 40 S. 189 (1906); Garron v. State, 528 So.2d 353, 358-359 (Fla. 1988). Such evidence violates the Eighth Amendment. Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529 (1987); Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989). A new trial is required.

Assuming arguendo that this Court does not feel that this evidence requires a new trial, it was independently prejudicial in the penalty phase. The prosecutor stressed this again in his penalty phase closing. 2R 1261-1262. The jury's vote was only seven to five. This improper evidence may well have tipped the balance.

POINT XXI

THE TRIAL COURT ERRED IN ALLOWING EVIDENCE CONCERNING MR. KEEN'S EXERCISE OF HIS RIGHT TO COUNSEL.

Officer Scarborough testified he took a statement from Mr. Keen, at his attorney's office and with his attorney present. 2R 631-658. This was an

---

[30] 2R 494, 505-506, 644, 650-651, 653, 665.

improper reference to the exercise of his right to counsel. It is improper to comment on a person's exercise of his Sixth Amendment right. See State v. Burwick, 442 So.2d 944 (Fla. 1983); Jackson v. State, 359 So.2d 1190, 1193-1194 (Fla. 1978); Reed v. State, 333 So.2d 524 (Fla. 1st DCA 1976). This led the jury to believe that Mr. Keen's statement was somehow concocted by his attorney to set up a defense. It denied him due process of law and the effective assistance of counsel pursuant to Article I, sections 2, 9, 16, 17, and 21 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendment to the United States Constitution.

POINT XXII

THE TRIAL COURT ERRED IN ALLOWING HEARSAY TESTIMONY REGARDING THE ACCURACY OF A TELEPHONE NUMBER.

State Attorney investigator, Dale Nelson, was improperly allowed to testify to a telephone number written on an envelope. This testimony was hearsay and violated Florida's statutory prohibition against hearsay as well as the Confrontation Clause of the Florida and United States Constitution.

The prosecution brought out the following during the direct examination of Dale Nelson:

> Q. On the back of the envelope it says, "Store, 516-766-5789."
> A. Yes, sir.
> Q. Have you checked to see what phone number that is for?
> A. Yes, we have.
> Q. And what phone number is that?
>
> MR. WILLIAM: Objection, hearsay, unless he's from the telephone company.
>
> THE COURT: Overruled.
>
> A. It was Oceanside Liquors.

2R 785-786. This evidence was clearly hearsay as there was no showing that Mr. Nelson had any personal knowledge of what the number was. Florida Statutes 90.801-90.806.

This testimony was prejudicial as it tended to corroborate Michael Hickey, when he stated that Mr. Keen had allegedly told him the address and phone number of Mr. Shapiro's grandparents liquor store in New York. Hickey's credibility was an essential issue in the case. A new trial is required.

POINT XXIII

THE TRIAL COURT ERRED IN FAILING TO GRANT MR. KEEN'S MOTION FOR JUDGMENT OF ACQUITTAL AS THE PROSECUTION'S OWN EVIDENCE CREATED REASONABLE DOUBT AS A MATTER OF LAW.

The State is bound by its own evidence; if that evidence creates reasonable doubt, a judgment of acquittal must be granted. D.J.S. v. State, 524 So.2d 1024 (Fla. 1st DCA 1987); Hodge v. State, 315 So.2d 507 (Fla. 1st DCA 1975); Weinstein v. State, 269 So.2d 70 (Fla. 1st DCA 1972). The conviction also violated the due process requirements of the Eighth and Fourteenth Amendments. Jackson v. Virginia, 443 U.S. 307 (1979).

The State introduced Mr. Keen's police statement; in it he stated that he did not kill his wife, but that Ken Shapiro pushed him and his wife off the boat. 2R 706-707. The prosecution introduced this evidence and is bound by it. The prosecution's own evidence created reasonable doubt as a matter of law. D.J.S., supra; Hodge, supra; Weinstein, supra. Mr. Keen must be discharged.

POINT XXIV

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT ON ANY NON-DEATH LESSERS.

The jury was given no instruction on attempted first degree murder, aggravated battery, battery, or accessory after the fact. This constitutes fundamental error in a capital case since evidence supported these lessers. Instructions must be given on lessers, if there is any evidence to support them. Drotar v. State, 433 So.2d 1005 (Fla. 3d DCA 1983). In a capital case, lessers must be personally waived by the defendant. Harris v. State, 438 So.2d 787 (Fla. 1983); Mack v. State, 537 So.2d 109 (Fla. 1989).

The jury was only instructed on the lesser included offenses of second degree murder and manslaughter. 2R 1206. Ms. Keen was last seen alive and no one testified to her death. This raises a question as to the fact of her death. Assuming arguendo, that she died, it raises a question as to the cause of her death. Thus, attempted first degree murder would be required. Aggravated battery and simple battery would also be required as it is unknown whether or not she suffered great bodily injury.

The evidence also supported accessory after the fact as a lesser included offense. The prosecution introduced Mr. Keen's police statement in which he

stated that Ken Shapiro pushed his wife overboard but that he helped cover it up. 2R 694-711, 744-747. Mr. Keen also testified to these events. 2R 1006-1018. Thus, there was direct evidence to support accessory after the fact as a lesser included offense.

The failure to instruct on these lessers was harmful. The jury was given no verdict which would effectuate possible doubts about death or the cause of death. A verdict of second degree murder or manslaughter would not serve such a purpose. The failure to instruct on these one-step removed offenses constitutes reversible error. It was harmful to fail to instruct on accessory after the fact as the jury could believe Mr. Keen's testimony and believe he was guilty of this offense. See, e.g., Harrington v. State, 538 So.2d 850 (Fla. 1989). Failure to instruct on non-death lessers violates the United States and Florida Constitution. See Vujosevic v. Rafferty, 844 F.2d 1023 (3rd Cir. 1988). This also violates the Eighth Amendment to the United States Constitution and Article I, Section 17 of the Florida Constitution in a capital case. Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382 (1980).

POINT XXV

THE TRIAL COURT ERRED IN ITS INACCURATE JURY INSTRUCTION ON EXCUSABLE HOMICIDE.

The trial court gave the following inaccurate instruction on excusable homicide.

> Excusable homicide. The killing of a human being is excusable and therefore lawful when committed by accident or misfortune, in doing any lawful act by lawful means with usual, ordinary caution and without any unlawful intent, or by accident or misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat without any dangerous weapon being used, and not done in a cruel or unusual manner.

2R 1207.

The phrase "without any dangerous weapon and not done in a cruel or unusual manner" is misleading and leads a jury to believe that excusable homicide cannot exist when the killing is done in a cruel or unusual manner. State v. Smith, ____ So.2d ____, 15 FLW S659 (Fla. December 20, 1990). This restriction only applies to the sudden combat prong and not to the other prongs. Id.

The prosecution introduced Mr. Keen's 1981 police statements. 2R 636-653, 662-666. This evidence raised the theory of excusable homicide due to an accident. The prosecution also introduced Mr. Keen's subsequent police statement. 2R 694-714, 744-747. In this prosecution evidence, Mr. Keen states that although Ken Shapiro pushed him and his wife in the water, Michael believed it was an accident. 2R 706-711. Mr. Keen's trial testimony was of a similar nature. 2R 994, 1017-1018. The misleading "cruel or unusual manner" modifier could have led the jury to reject accidental death as a theory of defense. This jury instruction denied Mr. Keen due process of law and the effective assistance of counsel pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, 17, 21 and 22 of the Florida Constitution.

POINT XXVI

MR. KEEN'S CONVICTION MUST BE REVERSED DUE TO CUMULATIVE ERROR.

Although an error may not merit reversal by itself, several errors in combination may require reversal. Barnes v. State, 348 So.2d 599 (Fla. 4th DCA 1977); Varnum v. State, 188 So. 346 (Fla. 1939); Perkins v. State, 349 So.2d 776 (Fla. 2d DCA 1977); Douglas v. State, 135 Fla. 199, 184 So. 756 (1938). Unpreserved error otherwise barred can be considered in judging the harm from other errors. Gibbs v. State, 193 So.2d 460 (Fla. 2d DCA 1967); Pollard v. State, 444 So.2d 561 (Fla. 2d DCA 1984); Gordon v. State, 449 So.2d 1302 (Fla. 4th DCA 1984). In Gibbs, supra, Justice Adkins wrote on this issue while sitting as an associate on the Second District Court of Appeal.

> Objections were not made in the lower court, and the making of these comments was not such fundamental error of law as to constitute the sole cause of reversal. However, this error may be considered with other assignments of error in determining whether the substantial rights of the defendant have been injuriously affected.

193 So.2d at 463.

Mr. Keen received an unfair trial due to the injection of numerous improper influences into the case. There was jury discussion of inflammatory articles after two indications of deadlock and lengthy deliberation, improper hearsay testimony of Patrick Keen, the introduction of prior consistent

statements of Ken Shapiro, numerous character assaults on Michael and Patrick Keen, improper victim sympathy evidence, and improper police and judicial opinion testimony. These combined to create an unfair trial in violation of the Florida and Federal Constitutions. The jury in this case was obviously troubled by their decision in both phases. In the guilt phase there were two indications of deadlock over a day and one half of deliberations. The jury's penalty recommendation was seven to five. Virtually any error in this case could have tipped the balance to conviction and/or death. Mr. Keen's conviction and sentence must be reversed and remanded for a new trial.

POINT XXVII

THE SENTENCE OF DEATH IS DISPROPORTIONATE.

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1989). The purpose of proportionality review is "to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The Supreme Court of Florida reviews each sentence to ensure that similar results are reached in similar cases." Proffitt v. Florida, 428 U.S. 250, 258 (1976) (opinion by Powell, J.); see Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981). Proportionality review compares the death sentence "to the cases in which we have approved or disapproved a sentence of death." Garcia v. State, 492 So.2d 360, 368 (Fla. 1986). The scope of comparison includes reductions to life when a judge ignores a reasonably based jury recommendation of life. See Brown, 392 So.2d at 1331 ("we compare the case under review with all past capital cases," citing three life recommendation cases as examples of proportionality reductions). Mr. Keen's case falls into three categories in which this Court reduces the sentence to life.

The trial court found three aggravators: (1) the crime was especially heinous, atrocious, or cruel (HAC), and (2) the defendant committed it in a cold, calculated, and premeditated manner and (3) for pecuniary gain. 2R 1486-1489. The court found no mitigating circumstances. 2R 1489. The jury's view of the facts must have differed: it voted for death by a single vote, 7-5.

The trial court erred in its sentencing order; when this occurs, this

Court looks beyond the order and decides proportionality claims on record facts. See Nibert v. State, 16 FLW S3, 4 (Fla. December 13, 1990). Three mitigating circumstances should have been found: Mr. Keen succeeded in business despite a disadvantageous upbringing, he adjusted well to prison, and an equally culpable co-participant received no punishment.[31] HAC was improperly found.[32] The cold and calculated and pecuniary gain aggravators should be considered together.[33]

The treatment of Kenneth Shapiro, unpunished despite his equal culpability for murder, compels a reduction to life. According to Shapiro, sometime in 1980, he and Mr. Keen conversed about finding an unsuspecting woman, marrying her, insuring her, and then killing her. 2R 490. Planning continued from before the Keen's marriage to the day of Anita's death. 2R 492-5. Shapiro faked accidentally meeting the Keens at a restaurant that day. 2R 497. He says he watched Mr. Keen push Anita into the water sometime near sunset; then Shapiro started and maneuvered the boat away from Anita; then Mr. Keen took control. 2R 502-4, 506, 571. Shapiro's own testimony establishes his guilt of murder, but the State also presented the testimony of Michael Hickey who related the alleged story Mr. Keen told Hickey in jail. In this account, Shapiro pushed both Keens overboard and then picked up Mr. Keen. 2R 821.

Shapiro repeatedly told the police, once while under oath, that Anita had simply disappeared. 2R 513-4. Later, the pair travelled to California in a motor home. Mr. Keen left Shapiro there; Shapiro reunited with Mr. Keen in Florida a week later, but then left the area. 2R 515. For two and a half years, Shapiro said nothing to implicate Mr. Keen; then the police called. After six hours of questioning, Shapiro broke down and told the police "the truth" - the version the police indicated they already knew. 2R 518-9, 531. Shapiro told police his

---

[31] See Point XXVIII.

[32] See Point XXXII.

[33] See Point XXXIII. Mr. Keen argues elsewhere that the sentencing order suffers from other errors; he accepts this aggravation as found for argument's sake only.

role in the crime extinguished a $3000 debt he owed Mr. Keen.[34] 2R 548-9.

In numerous cases, this Court reduced a death sentence due in part to disparate treatment which was shown or could be found.[35] These cases show Mr. Keen's offense does not demand the ultimate penalty. Some involve codefendants less culpable than Shapiro and a more aggravated crime, yet this Court reduced the sentence to life. In McCampbell v. State, 421 So.2d 1072 (Fla. 1982), this Court held the jury could reasonably base a life recommendation in part on the treatment of codefendants. McCampbell had executed a security guard during the robbery of a grocer. Three codefendants who testified against him participated in the robbery but not the killing; all pled to lesser charges. The trial court properly found three aggravators: defendant was under sentence of imprisonment (parole), had been previously convicted of violent felonies (assault with intent to murder and assault with intent to rob), and killed during the commission of a robbery. In Thompson v. State, 456 So.2d 444 (Fla. 1984), this Court reduced the sentence to life, in part on the disparate treatment of participants who were not even accomplices. Thompson shot a gas station clerk during an attempted robbery; two aggravators were valid: the defendant was guilty of prior violent felonies and killed during the commission of a felony. The jury could have reasonably based their life recommendation on disparate treatment of the six state witnesses who testified and helped plan or carry out the robbery; the court noted the witnesses were not all accomplices and some had pled to reduced charges. Thompson also had mental problems and good family life. Unlike Thompson

---

[34] Shapiro denied he killed anyone, saying his "being there" extinguished the debt. 2R 549. He also minimized his involvement when he told his family what happened. 2R 579-81. Shapiro admits he then varied his story by what he wanted his listeners to hear, but "Only in that particular instance." 2R 580.

[35] See Slater v. State, 316 So.2d 539 (Fla. 1975); Halliwell v. State, 323 So.2d 557 (Fla. 1975); Malloy v. State, 382 So.2d 1190 (Fla. 1979); Neary v. State, 384 So.2d 881 (Fla. 1980); Barfield v. State, 402 So.2d 377 (Fla. 1981); Smith v. State, 403 So.2d 933 (Fla. 1981); Stokes v. State, 403 So.2d 377 (Fla. 1981); McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Hawkins v. State, 436 So.2d 44 (Fla. 1983); Herzog v. State, 439 So.2d 1372 (Fla. 1983); Thompson v. State, 456 So.2d 444 (Fla. 1984); Brookings v. State, 495 So.2d 135 (Fla. 1986); DuBoise v. State, 520 So.2d 260 (Fla. 1988); Callier v. State, 523 So.2d 158 (Fla. 1988); Harmon v. State, 527 So.2d 182 (Fla. 1988); Spivey v. State, 529 So.2d 1088 (Fla. 1988); Pentecost v. State, 545 So.2d 861 (Fla. 1989); Fuente v. State, 549 So.2d 652 (Fla. 1989).

and McCampbell, Mr. Keen lacks the powerful aggravator of prior violent felony convictions, McCampbell previously assaulting with the intent to kill. In Thompson and McCampbell, the codefendants were not equally culpable; Shapiro was equally culpable for Anita's death. To approve Mr. Keen's death sentence sends a man to his death although his equally culpable helper got no punishment, while in other cases men with more aggravators were spared because their helpers, less culpable, received less punishment. Death is not proportionate for Mr. Keen.

This Court has given life sentences in cases in which the defendant's and co-participant's culpability were equal and the crime equally or more aggravated than below. In Brookings v. State, 495 So.2d 135 (Fla. 1986), Brookings committed a contract murder with four aggravators: he previously was convicted of violent felonies (two armed robberies and a shooting with intent to kill a police officer); murdered for pecuniary gain (a contract killing for $5000); committed the crime to disrupt or hinder governmental functions (the deceased was a witness against a relative of the homicide's contractor); and killed in a cold and calculated manner. Id. at 142 n.3. The trial court found disparate treatment of the codefendants and another mitigator. This Court reasoned:

> In short, although appellant pulled the trigger, Murray and Lowery were also principals in this contract murder, helping to plan and carry out this crime. That Murray would escape any chance of the death penalty and that Lowery could walk away totally free while the ultimate penalty was sought against appellant, are facts that could reasonably be considered by the jury.

Id. at 143; see Fuente v. State, 549 So.2d 652, 659 (Fla. 1989)(Contract killing with three aggravators: prior violent felony, crime committed to avoid arrest and in a cold and calculated manner; reduced to life because the codefendants would not likely be prosecuted); see also Callier v. State, 523 So.2d 158 (Fla. 1988)(life sentence for crime similar to state's claim below).

The crimes in Fuente and Brookings were both highly premeditated and committed for money. Both had additional aggravators not found below, including prior violent felony convictions. Neither showed they had adjusted well to prison, unlike Mr. Keen. Yet, this Court vacated their death sentences and imposed life, emphasizing the equally culpable codefendants were walking away free. Shapiro has walked away a free man. Death for Mr. Keen would be dispro-

portionate in light of these reductions to life sentences.

Mr. Keen anticipates the State will argue these cases should be distinguished because their juries recommended life, but these cases show when a crime is not severely aggravated and another equally culpable receives no or little punishment, death is disproportionate. Distinguishing these cases based on the recommendation of their juries ignores the reason for substantive proportionality review as explained in Proffitt and Brown: to ensure similar cases are not capriciously given vastly differing punishments. A jury's recommendation is not a factual difference in the nature of the crime or characteristics of the offender, but rather an evaluation of those facts by the defendant's peers. Consistent life recommendations for a class of cases shows death for defendants in that class is capricious. This case shows the need for substantive review to ensure consistency; juries cannot be completely consistent: had any of the seven jurors voting for Mr. Keen's death switched their vote, he would have received a life recommendation. Accepting the life recommendation cases for comparison here does not mean every life recommendation case will be imported into proportionality analysis and require life sentences for large numbers of other cases. What requires this Court to enforce consistency of results based on the treatment of another equally culpable is the consistency of juries through time and a large number of cases in basing their decision on this factor. This consistency establishes the standard which this Court should recognize. Also, precedent exists to reduce death sentences on disparate treatment grounds even with jury death recommendations. See Halliwell, 323 So.2d at 561.

This Court has also held that domestic killings are almost always not appropriate for the death penalty. See Blakely v. State, 561 So.2d 560, 561 (Fla. 1990) (citing cases); Blair v. State, 406 So.2d 1103 (Fla. 1981). In Blair, the defendant killed his wife after she threatened to report him to the police for spending too much time with the wife's daughter. The trial court found no significant criminal history in mitigation. After holding some of the aggravating circumstances invalid, this Court reduced the sentence to life, citing Halliwell v. State, 323 So.2d 527 (Fla. 1975) in which the court reduced

the sentence in an angry domestic killing. In Blair, by contrast, the defendant carefully plotted the killing, yet the Court still reduced the sentence. In Blakely, the jury recommended death unanimously and the crime was both cold, calculated and premeditated and heinous, atrocious, or cruel. Yet, because it was a domestic killing, this Court reduced the sentence to life. Because it was a domestic killing, like Blair and Blakely, this court should impose a life sentence.

Finally, a proper consideration of the aggravating and mitigating circumstances shows this offense was simply not the most aggravated and least mitigated of cases for which death is reserved. See Dixon, 283 So.2d 1. In Songer v. State, 544 So.2d 1010 (Fla. 1989), this Court said:

> We have in the past affirmed death sentences that were supported by only one aggravating factor, ... but those cases involved either nothing or very little in mitigation.

Id. at 1011; see Smalley v. State, 546 So.2d 720 (Fla. 1989); Nibert v. State, 16 FLW S3 (Fla. December 13, 1990). Since Songer had significant mitigating evidence in his record and only one aggravating circumstance, this Court reduced his sentence to life. Mr. Keen has only one valid aggravating circumstance in his offense. The mitigating evidence demands that a life sentence be imposed. Mr. Keen's equally culpable codefendant got no punishment, a factor requiring a life sentence even with no other mitigation. He shows a good work record and ability to succeed in prison. He has done well in prison; such evidence is a "significant factor in mitigation" because it shows prospects "for rehabilitation and productivity within the prison system if sentenced to life in prison." Cooper v. State, 526 So.2d 900, 902 (Fla. 1988). Because Mr. Keen can succeed in jail, has not had a violent criminal past, has a codefendant who got no punishment, and committed a crime with a single aggravator, this Court should reduce his sentence to life.

POINT XXVIII

THE TRIAL COURT FAILED TO CONSIDER AND FIND PROPOSED MITIGATING CIRCUMSTANCES SUPPORTED BY UNCONTRADICTED EVIDENCE.

A. MR. KEEN PRESENTED UNCONTRADICTED EVIDENCE PROVING RECOGNIZED MITIGATING CIRCUMSTANCES.

Despite uncontradicted evidence proving recognized mitigating factors, the

trial court found no mitigating circumstances.[36] 2R 1489. Defense counsel proposed and argued two mitigating circumstances: Mr. Keen had adjusted well to prison; and Shapiro, equally culpable, got no punishment for his crime. 2R 1268, 1378. Counsel requested two special jury instructions on these.[37] 2SR 64, 65.

Disparate treatment of equally culpable participants can negate a death sentence. See Slater v. State, 316 So.2d 539 (Fla. 1975); Halliwell v. State, 323 So.2d 557 (Fla. 1975). Disparate treatment of equally culpable participants is a well-defined mitigating circumstance. See Campbell v. State, 16 FLW S1, 2 n.4 (Fla. December 13, 1990). 'Equally culpable' - in the sense that disparate treatment mitigates sentencing - means the participant either: was a principal in the first degree, was the actual triggerman, could reasonably have been found to have actually killed the victim, or was the controlling force in the killing. See Eutzy v. State, 458 So.2d 755, 759 (Fla. 1984) (harmonizing cases); McCampbell v. State, 421 So.2d 1072, 1076 (Fla. 1982). The rule that a sentencer cannot be precluded from considering any circumstances of the offense requires considering all evidence about disparate treatment of codefendants which has mitigating value. See O'Callaghan v. State, 542 So.2d 1324 (Fla. 1989)(jury should have been instructed to consider disparate treatment of, among others, codefendant same jury convicted of second degree murder); Herring v. State, 446 So.2d 1049 (Fla. 1984); see also Lockett v. Ohio, 438 U.S. 586 (1978). Jurors and courts may look at all the evidence, unconstrained by the formal charges and convictions, in deciding if a codefendant has equal culpability. See Brookings v. State, 495 So.2d 135, 143 (Fla. 1986); Fuente v. State, 549 So.2d 652, 658 (Fla. 1989). The extreme disparity of no punishment versus death adds force to the mitigating circumstance. See Brookings, 495 So.2d at 143; Fuente, 549 So.2d

---

[36] The trial court did claim to consider the lack of disciplinary problems of Mr. Keen in prison, but did not find the circumstance, stating: "After due deliberation the Court determined that there are no mitigating circumstances in this case." 2R 1489.

[37] The court instructed on Mr. Keen's adjustment to prison, but not on the treatment of Shapiro. This was also error. See Point XXXIV. These requested jury instructions and argument sufficiently identified the nonstatutory mitigating circumstances counsel intended to establish. See Lucas v. State, 15 F.L.W. S473, S475 (Fla. September 20, 1990).

at 659 (life override improper when codefendants "would likely not be prosecuted").

The evidence shows Shapiro was equally culpable, yet got no punishment. He helped plan, execute, and commit the crime. He testified he first pulled the boat away from Anita Keen; he might have actually pushed her in the water. Although he denied he did so for money, it was the only reasonable explanation for his behavior. A principal in the first degree, he was equally culpable. McCampbell, supra. Shapiro's treatment for murder is undisputed: he was charged with nothing and received no punishment. 2R 545. The disparity could not be greater: death versus no punishment. Such disparity makes the mitigator even stronger. Brookings, supra; Fuente, supra.

The state stipulated Mr. Keen had no disciplinary problems while incarcerated for over three years. 2R 1464. Those choosing between a life sentence and death must consider evidence of good adjustment to prison. See Skipper v. South Carolina, 476 U.S. 1 (1986); Valle v. State, 502 So.2d 1225 (Fla. 1987); Campbell, 15 F.L.W. at S344 n.6. Additional uncontested facts buttress the finding of good adjustment to prison. Mr. Keen testified that his father abandoned the family when he was young. 2R 920. Mr. Keen overcame this adversity and graduated from college. 2R 922. He tried to become a teacher, but was unable to find work in the field. 2R 922. He held a responsible sales position supervising others. 2R 484, 961. He started his own company. 2R 944. An impressive work record together with adjustment to incarceration mitigates criminal acts because it shows a potential for rehabilitation and usefulness inside prison. See e.g Cooper v. State, 526 So.2d 900, 902 (Fla. 1988) (citing cases). Mr. Keen's counsel stated, "It's obvious that he had potential," and argued life in prison was the appropriate sentence. 2R 1266.

B. THIS COURT MUST IMPOSE A LIFE SENTENCE WHEN THE TRIAL COURT FAILS TO EXERCISE REASONED JUDGMENT IN DETERMINING MITIGATING CIRCUMSTANCES.

The sentencing order, 2R 1489, 1391-2, fails to consider the mitigating evidence. The court did not consider the extreme disparity in punishment between Mr. Keen and Shapiro. Although the State stipulated Mr. Keen served over three

years without a disciplinary report, the court failed to find successful prison adjustment, saying only such evidence would not mitigate the crime. The order's silent about unrefuted testimony Mr. Keen overcame disadvantages and succeeded in business.

Failure to exercise reasoned judgment in finding and weighing aggravators and mitigators is error.[38] The court "must expressly evaluate in its written order" whether each proposed mitigating circumstance is supported by the evidence and, when a nonstatutory mitigator, truly mitigates the sentence. Campbell, 16 FLW at S2; see Bouie v. State, 559 So.2d 1113, 1116 (Fla. 1990); Lamb v. State, 532 So.2d 1051, 1054 (Fla. 1988); Rogers v. State, 511 So.2d 526 (Fla. 1987); see also Van Royal v. State, 497 So.2d 625, 628 (Fla. 1986). The order must explicitly weigh each mitigator found. Campbell 16 FLW at S2.

Failure to make any findings at all is a failure to exercise reasoned judgment and requires this Court impose a life sentence.[39] §921.141(3); see Bouie, supra; Lucas v. State, 417 So.2d 250 (Fla. 1982).

> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment....

§ 921.141(3), Fla. Stat. (1989) (e.a.). In Bouie, the trial court submitted a written order substantially the same as its oral pronouncement, which stated:

> The court has considered the aggravating and mitigating circumstances presented in evidence in this cause and determines that sufficient aggravating circumstances exist, and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Bouie, 559 So.2d at 1116. This Court described the findings as deficient, conclusory statements:

> which fail to show the independent weighing and reasoned judgment

---

[38] The trial court also abused her discretion by not finding the mitigating circumstances established as a matter of law, as argued below.

[39] This reasoned judgment is also required by the guarantees of due process and freedom from cruel and unusual punishment contained in the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution and Article I, sections 2, 9, 16, 17, and 21 of the Florida Constitution.

> required by the statute and caselaw and do not meet our requirements. Because of the absence of requisite findings, we therefore follow the statutory mandate and reduce Bouie's sentence to life imprisonment with no possibility of parole for twenty-five years.

Id(e.a.). This order makes a conclusory statement, just as in Bouie, that no mitigating circumstances exist; lacking the requisite findings, it shows there was no reasoned judgment required by statute.

In Van Royal, the judge overrode a life recommendation six months after it was made and orally sentenced Van Royal to die. Six months later, after the record had been certified on appeal, the trial court entered a written sentencing order. This Court held (1) the failure to make contemporaneous findings, oral or written, and (2) the trial court's failure to enter a timely written order showed the court had not, exercised the reasoned judgment in finding and weighing mitigating and aggravating circumstances as required by statute. Van Royal, 497 So.2d at 628. In this case, the trial court's order, written and oral, show no reasoned judgment occurred.

The State may attempt to argue the holding in Grossman v. State, 525 So.2d 833 (Fla. 1988) requires a remand for a judge resentencing. In Grossman, this Court said it would remand for judge resentencings those cases occuring before Grossman's effective date[40] in which the court failed to enter a written order concurrent with oral death sentencing. See Stewart v. State, 549 So.2d 171, 176 (Fla. 1989). Grossman's prospectivity rule must not apply to facts like those in Bouie who had trial and sentencing before Grossman became effective. See Bouie, 559 So.2d at 1114. In Bouie, the findings, oral and written, were defective and showed on their face the court did not exercise reasoned judgment; this required a life sentence be imposed. Grossman's ruling that written findings be contemporaneous with sentencing differs because it is a prophylactic rule of procedure, insuring trial courts do seriously consider the aggravating and mitigating factors. See Holton, 15 F.L.W. at S502. Bouie shows that Grossman

---

[40] This Court held this rule takes force 30 days from when the decision would be final, either July 25, 1988, assuming finality counts from this Court's denial of rehearing, or April 5, 1989 assuming finality counts from the denial of a petition for writ of certiorari by the Supreme Court. The trial court sentenced Mr. Keen on October 15, 1987. 2R 1490.

did not overrule Van Royal's holding that when the trial court errs by not exercising reasoned judgment at all, life must be imposed. The order below shows just such a failing. The failure to consider seriously the mitigating evidence, orally or in writing, requires this Court impose a sentence of life.

C. THE MITIGATING CIRCUMSTANCES, SUPPORTED BY UNCONTRADICTED EVIDENCE, MUST BE FOUND AS A MATTER OF LAW.

In Campbell v. State, 16 FLW S1 (Fla. December 13, 1990) and Nibert v. State, 16 FLW S3 (Fla. December 13, 1990) this Court held where an uncontroverted "reasonable quantum of competent proof," of a mitigating circumstance exists, the court must find the circumstance has reasonably been established, and will be found as a matter of law on appeal. Campbell, 16 FLW at S2 n.5. In Campbell, the trial court erred by not finding the defendant suffered from impaired capacity to appreciate the consequences of his acts and an abused and deprived childhood. Campbell, 16 FLW at S2. In Nibert, 16 FLW S3 (Fla. December 13, 1990), the record showed "a large quantum of uncontroverted mitigating evidence," and the court erred in not finding the mitigators. 15 FLW at S4. In Huckaby v. State, 343 So.2d 29 (Fla. 1977), the court improperly ignored the mental illness of the defendant on which "[t]here was almost total agreement;" this Court found the mitigating factors as a matter of law and imposed life on proportionality grounds. 343 So.2d at 33.

The evidence supporting mitigating circumstances below is unrefuted; these circumstances must be found as a matter of law. Good adjustment to prison must be found. The State stipulated Mr. Keen to this. No evidence contradicted Mr. Keen's testimony about his background; Shapiro confirmed Mr. Keen was a good salesman and supervised numerous other salespeople, 2R 483-4, and the police confirmed they arrested Mr. Keen at his workplace. 2R 684-5. Disparate treatment must be found. Nothing contradicted evidence of Shapiro's treatment: he got no punishment. Shapiro's role was more culpable than Shapiro states since Shapiro may have actually pushed the Keens off the boat, was motivated to extinguish his debt, but even his own testimony makes him a principal who helped plan and

commit the crime.[41]. The failure to find these mitigating circumstances violates Florida law and the Eighth Amendment. Campbell, supra; Parker v. Dugger, ___ U.S. ___, (January 22, 1991).

POINT XXIX

THE TRIAL COURT MISAPPREHENDED THE MITIGATING EFFECT OF DISPARATE TREATMENT.

In the penalty phase charge conference, defense counsel proposed two special jury instructions defining mitigating circumstances, one of which was granted.[42] However, the court refused to instruct the jury:

> In determining whether or not to impose the death penalty, you shall consider as a mitigating circumstance the treatment accorded to Kenneth Shapiro, a person under the law as equally culpable of the murder.

1SR 65, 2SR 13. Defense objected to the denial. 2SR 11. Counsel told the judge decisions required considering treatment of other participants, but the judge cut him off, saying:

> Regarding that instruction on Ken Shapiro, I don't believe it's (sic) a legal statement of the law or the situation in this case necessarily shown to them, so that will be denied.

2SR 13. This statement shows the court misapprehended the mitigating nature of Shapiro's treatment (and burden of proof in finding mitigators, as argued in the following point).

This statement and the court's failure to either find or consider the disparate treatment mitigator in her sentencing order, 2R 1489, 1391-2, shows she misapprehended the law on disparate treatment and it affected her sentence. This directly restricted consideration of mitigating evidence. See Eddings v. Oklahoma, 455 U.S. 104, 112-3 (1982); Thomas v. State, 546 So.2d 716, 717 (Fla. 1989) (Hitchcock error shown in part by trial court's comments). The record

---

[41] This Court has previously granted only a judge resentencing when mitigators established as a matter of law were not found below. For the instant error and as an alternate to the error in Section B, it must order a jury resentencing and a new judge hear it, as argued in Point XXXIX.

[42] The court instructed the jury to consider Mr. Keen's adjustment to incarceration and nondangerousness if incarcerated. 1SR 64, 2R 1273.

requires this Court find this circumstance as a matter of law.[43] This misapprehension at least requires resentencing before the judge.[44]

POINT XXX

THE TRIAL COURT USED THE WRONG STANDARD OF PROOF IN REJECTING PROPOSED MITIGATING CIRCUMSTANCES.

The trial court held that mitigating circumstances must be "necessarily shown." 2SR 13. However mitigating circumstances need only be "reasonably established by the greater weight of the evidence." Nibert v. State, 16 FLW S3, 4 (Fla. December 13, 1990). The standard employed by the trial court in this case imposes a much heavier burden on defendants.

A sentencing order revealing the court used an incorrect standard of proof for aggravators is "fatal error," see Carter v. State, 560 So.2d 1166, 1169 n. (Fla. 1990); likewise, using an incorrect standard of proof in finding mitigators is fatal error. A 'necessary' showing is too high a standard to find facts supporting mitigators.[45]

The most onerous burden on mitigation constitutionally allowed is the 'reasonable likelihood' standard, a level of certainty less than more-likely-than-not, but more than a mere possibility. See Boyd v. California, 110 S.Ct. 1190, 1198 (1990). The jury must be told to accept evidence proven in reasonable likelihood as defined in Boyd, otherwise the instruction violates the Lockett rule and due process. Ibid; see also Mills v. Maryland, 486 U.S. 367, 374-5 (1988).

Use of this improper and unconstitutional burden harmed Mr. Keen since the

---

[43] Mr. Keen explains the law and why the record compels finding this mitigating circumstance at Point XXVIII.

[44] The appropriate relief for sentencing errors is discussed separately in Point XXXIX.

[45] Defendant argues in Point XL(I) that any burden of proof for mitigating evidence unconstitutionally restricts its consideration; however, a plurality of the Supreme Court recently said a state may require defendants to show mitigating circumstances are proven by a preponderance of the evidence. See Walton v. Arizona, 110 S.Ct. 3047, 3055 (1990) (opinion by White, J.). This point assumes without conceding that some burden for mitigators is permissible.

evidence of mitigation was strong.[46] Its use requires at least a judge resentencing.[47]

POINT XXXI

THE TRIAL COURT USED THE WRONG STANDARD OF PROOF IN FINDING THE AGGRAVATING CIRCUMSTANCES.

A sentencing order which reveals the trial court employed the wrong standard is "fatally defective." Carter, 560 So.2d at 1169 (noting the court found the aggravators by clear and convincing evidence). Florida law requires the state to prove aggravators established beyond a reasonable doubt.[48] See State v. Dixon, 283 So.2d 1 (Fla. 1973).

In her oral and written findings of the aggravating circumstances, the trial court variously said she used either a "substantial evidence" standard, 2R 1486, a "competent evidence" standard, 2R 1486, 1387, 1487, 1388, 1389, or an "only evidence" standard.[49] 2R 1489, 1391. The order is fatally flawed.

This prejudiced Mr. Keen. The evidence of an insurance killings, depended entirely on the testimony of two convicted felons who cut very favorable deals for their testimony, and a co-participant.[50] Waddle's story that Mr. Keen confessed to him contained virtually no detail. 2R 903. Hickey's story was more detailed, but Hickey had access to Mr. Keen's paperwork about his case, including police reports and press accounts. 2R 911, 923. The details of what Hickey claims Mr. Keen related to him differed from the story told by Shapiro.

---

[46] The mitigators established and the evidence supporting them is discussed above in Point XXVIII.

[47] Mr. Keen argues the appropriate relief for this error in Point XXXIX

[48] This burden is also mandated by due process and the heightened reliability of the prohibition against Cruel and Unusual Punishment guaranteed by the Eighth and Fourteenth Amendments to the Federal Constitution.

[49] The court's statement that the only evidence in the record showed Mr. Keen had planned a murder for insurance money for a year simply misstates what occurred. witnesses who testified to that were all impeached and had motives to lie. Mr. Keen testified that Ken Shapiro pushed him and Anita overboard.

[50] Although the jury found Mr. Keen guilty of murder, such finding does not relieve the state of its burden to prove the aggravating factors beyond a reasonable doubt. See Downs v. State, 15 F.L.W. S478, S479 (Fla. September 20, 1990).

Hickey's version has the boat 3-4 miles out, Anita drinking too much and getting sick over the rail, Shapiro pushing both Keens into the water, and the pair actually seeing Anita drown. 2R 821-2. Shapiro testified the boat was much further out, said nothing about Anita becoming drunk or sick, stated Mr. Keen pushed Anita overboard without leaving the boat, and said the boat came while Anita still tread water. 2R 501-4, 510. Mr. Keen's testimony sharply differed: actually, Shapiro pushed Mr. Keen and Anita overboard, perhaps by accident, and the two men could not find her. 2R 1006-1011. Also, Mr. Keen called neither insurance salesman to get policies on his fiance. 2R 589, 629.

Assuming arguendo, Mr. Keen killed his wife for insurance money, evidence the death was especially heinous was weaker yet. As shown in the next point, the court's findings are suspect; the incorrect standard harmed Mr. Keen since reasonable doubt exists. Moreover, the judge accepted Shapiro's testimony on what occurred, 2R 1487, 509, without discussing Hickey's story who claimed that Anita was drunk to the point of vomiting when Shapiro pushed both Keens in the water. 2R 821. If true, the chance Anita would not realize what was happening because she was so sick would be greater. See Rhodes v. State, 547 So.2d 1201 (Fla. 1989); Herzog v. State, 439 So.2d 1372, 1379 (Fla. 1983)(events occurring after victim loses consciousness cannot be used to establish heinous aggravator). The court states that she does not know how long Anita lived, finding "competent testimony" showed she splashed about in the water. 2R 1489. This resort to pure speculation to make findings requires at least a judge resentencing.[51]

POINT XXXII

THE TRIAL COURT RELIED ON IMPROPER CONSIDERATIONS AND SPECULATION IN FINDING THE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE WHICH WAS NOT PROVEN BEYOND A REASONABLE DOUBT.

In her findings of fact, the court apparently accepted Shapiro's testimony that Ms. Keen was pushed off the boat as darkness fell without discussing the the version of events described by Hickey. 2R 1487, 509. Even accepting this was a proper exercise of discretion, although argued previously that it was not,

[51] The appropriate relief for this error is argued in Point XXXIX.

Shapiro's testimony does not establish the crime was especially heinous, atrocious, or cruel (HAC).[52] The court states that she does not know how long Anita lived, finding "competent testimony" showed she splashed about in the water. 2R 1489. The court went on to suppose:

> If only alive for a brief period of time surely she was alive long enough to see her newly wed husband watching and realize with horror that he was not helping and was the cause of her death. Surely she was alive long enough to know the horror that she would never make it to the safety of a shore she could not even see. Surely she was alive long enough to know the horror that her unborn child would also go to a watery grave. Surely she was alive long enough for the total inky black of night to surround he (sic) in the ocean filled with unknown, filled with horror.

2R 1487-8.

The court improperly relied on the deceased's pregnancy to show the victim was weak and felt anguish at the death of the fetus. Any reliance on the death of the fetus apart from the victim would be non-statutory aggravation. See Riley v. State, 366 So.2d 19, 21 (Fla. 1979)(relying on mental anguish caused to victim's son who saw victim executed improper). The weakness of the mother due to pregnancy does not establish HAC: HAC cannot be shown by mere incapacity. See Clark v. State, 443 So.2d 973, 977 (Fla. 1983) (murder of defenseless elderly woman despicable, but not HAC). The mental anguish, assuming that such anguish was established by the evidence, of knowing the fetus would die does not establish HAC. See James v. State, 453 So.2d 786 (Fla. 1984). In James, two men shot the incapacitated victim to death after first shooting and wounding her husband in a robbery. Id. at 789. This Court held the trial court invalidly found HAC; the mental anguish of knowing her husband was wounded and in the hands of her killers did not establish HAC in James; such mental anguish does not prove HAC here either. Id. at 792. This reliance inflamed the passions of the court, as is apparent in the language of the sentencing order. It prejudiced Mr. Keen. Cf. Brown v. State, 526 So.2d 903, 907 (Fla. 1988) (trial court improperly relied on status as police officer to find HAC; language showed court not dispassionate).

The order speculates about the facts underlying HAC because the record

---

[52] §921.141(5)(h), Fla.Stat. (1987).

shows unrebutted reasonable hypotheses of innocence to the circumstance. Aggravating circumstances must be proven beyond a reasonable doubt. See Dixon, 283 So.2d at 9; Clark, 443 So.2d 973. If there are reasonable unrebutted hypotheses of innocence in the record, then the circumstance is not established as a matter of law. See Eutzy, 458 So.2d at 757-8. "Not even 'logical inferences' drawn by the trial court will suffice to support a finding of a particular aggravating circumstance when the states's burden has not been met." Clark, 443 So.2d at 976. HAC is a torturous killing in which one intentionally causes suffering beyond that necessary to kill. See Chesire v. State, 15 F.L.W. S504, S505 (Fla. September 27, 1990); Porter v. State, 564 So.2d 1060 (Fla. 1990); Brown, 526 So.2d at 907. In Brown, the victim was wounded by gunshot and begged for his life before being shot to death, but this Court held HAC was not applicable because there was no showing the defendant intended the death to be painful.

No evidence shows drowning is a particularly painful way to die; no evidence established how long Anita Keen lived or was conscious after hitting the water. Her ability to know what was happening even if conscious was limited. Shapiro testified it was "just barely light enough to see and understand what's happening, but you knew that darkness was soon coming." 2R 509. The boat was about 100 yards from her; Shapiro testified he never heard Anita yell or say anything and did not see her signal the boat. 2R 573-4. There was no showing that Anita could distinguish one figure from another in the near darkness. Anita reasonably could have believed her husband was not responsible for her plight and the boat was still searching for her. Even if conscious until the boat left the area, she reasonably could have died soon after; her pregnancy may have hastened her death and reduced her suffering. HAC was not proven absent a purpose to cause extreme mental or physical anguish, not shown when such anguish was not shown.[53]

[53] Mr. Keen argues the appropriate relief at Point XXXIX.

POINT XXXIII

THE TRIAL COURT IMPROPERLY DOUBLED ITS CONSIDERATION OF THE COLD, CALCULATED, PREMEDITATED AGGRAVATOR AND PECUNIARY GAIN AGGRAVATOR.

In Provence v. State, 337 So.2d 783, 786 (Fla. 1976), this Court found error in considering the aggravators that the defendant committed the killing during the course of a robbery and for pecuniary gain as separate circumstances. Both refer to the same aspect of the crime. Also, if the defendant commits a burglary with an underlying felony of robbery, the felony aggravator merges with pecuniary gain. See Campbell v. State, 15 F.L.W. S 342, S343 (Fla. June 14, 1990)(citing cases). A murder with the purpose to avoid arrest and committed to disrupt or hinder law enforcement also improperly doubles the same aspect of the offense. See Bello v. State, 547 So.2d 914, 917 (Fla. 1989); Thomas v. State, 456 So.2d 454 (Fla. 1984). The purpose of the doubling rule is to protect against giving undue weight to the same aspect of the offense.[54] See Provence, 337 So.2d at 786 (virtually every defendant who committed robbery murder would have two aggravating circumstances automatically). In Bello, the defendant's firing on police officers who were attempting to aid another victim, even though it had an additional disruptive effect on the officers' duties, was found merged with the avoid arrest. 547 So.2d at 917.

The trial court improperly doubled consideration of the same aggravating aspect of the offense, finding Mr. Keen committed the crime for pecuniary gain and in a cold, calculated, and premeditated manner (CCP). 2R 1486, 1488. See Downs v. State, 15 F.L.W. S478 (Fla. September 20, 1990). In Downs, because the trial court merged the pecuniary gain and CCP aggravators, this Court refused to decide if CCP had been improperly applied retroactively. Id. at S480 n.6. There was actually one circumstance doubled below: that Mr. Keen allegedly plotted a killing for insurance money and carried out that plan. In Scull v. State, 533 So.2d 1137, 1142 (Fla. 1988), the fact that Scull stole the car did not show he had committed the murder in order to steal; he could have taken the

---

[54] Unreasonable weighing of the same aspect of the offense also violates due process and the heightened reliability required in death sentencings by the Cruel and Unusual Punishment prohibition. These rights are guaranteed by the Eighth and Fourteenth Amendment to the Federal Constitution.

car to get away. In Hardwick v. State, 521 So.2d 1071 (Fla. 1988), evidence suggested the defendant killed for drugs; this Court struck pecuniary gain, holding it applied only when "the murder is an integral step in obtaining some sought-after specific gain." Id. at 1076; see Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). This definition of the pecuniary gain circumstance - a killing planned for financial gain - means it entails the heightened degree of premeditation which makes a homicide a cold, calculated, and premeditated one.[55] See Rogers, 511 So.2d at 533-4; Reed v. State, 560 So.2d 203, 207 (Fla. 1990). Virtually every defendant who kills for pecuniary gain starts out with two aggravating circumstances weighed against him; as this Court found in Provence, this unfairly doubles the same aspect of the offense.[56]

POINT XXXIV

THE TRIAL COURT ERRED IN NOT INSTRUCTING ON DISPARATE TREATMENT.

The jury instructions failed to provide for consideration of the disparate treatment of Shapiro, although the Court did instruct the jury to consider other aspects "of the Defendant's character or record and any other circumstance of the offense." 2R 1274. Defense counsel requested the jury be told:

> In determining whether or not to impose the death penalty, you shall consider as a mitigating circumstance the treatment accorded to Kenneth Shapiro, a person under the law as equally culpable of the murder.

1SR 65, 2SR 13. The court denied the request; counsel objected, saying decisions showed the proposed instruction was a correct statement of the law. 2SR 11-13. However, the trial court ruled:

> Regarding that instruction on Ken Shapiro, I don't believe it's (sic) a legal statement of the law or the situation in this case necessarily shown to them, so that will be denied.

2SR 13.

Trial courts err by refusing to instruct on statutory mitigating circumstances even if the 'catch-all instruction is given. See Stewart v. State, 558 So.2d 416, 420 (Fla. 1990); Robinson v. State, 487 So.2d 1040, 1043 (Fla. 1986).

---

[55] This Court's decision in Echols v. State, 484 So.2d 568 (Fla. 1986) is prior to this limitation of pecuniary gain thus it does not control.

[56] Mr. Keen argues the appropriate relief at Point XXXIX.

> The jury must be allowed to consider any evidence presented in mitigation, and the statutory mitigating factors help guide the jury in its consideration of a defendant's character and conduct. We therefore find that the trial court erred in not instructing on these two statutory circumstances.

Robinson, 487 So.2d at 1043. However, this Court has also held telling the jury to consider all circumstances of the offense and characteristics of the offender with mitigating value means no further instructions need be given on non-statutory mitigators. See Stewart, 558 So.2d at 420; Randolph v. State, 562 So.2d 331, 339 (Fla. 1990); Stewart, and Randolph, did not consider the specific kind of mitigating instruction requested here. In Mendyk v. State, 545 So.2d 846 (Fla. 1990), this Court did consider a similar instruction,[57] and held:

> [T]he standard jury instructions on mitigation tell the jury that they may consider any significant aspect of the defendant's life and character urged by the defense. Moreover, it is clear in this instance that appellant's codefendant was not equally culpable with appellant and did not actually participate in the murder itself. Thus, the trial court did not abuse its discretion in refusing to give this instruction.

Mendyk, 545 So.2d at 850.

In contrast, the court below did not exercise its discretion because the court misunderstood the level of evidence required to instruct on mitigators and mistook the mitigating nature of the evidence.[58] When any evidence supports a theory of defense, the court errs by not instructing on that theory. See Gardner v. State, 480 So.2d 91 (Fla. 1985); Parker v. State, 458 So.2d 750 (Fla. 1984). In Robinson, this Court said:

> The degree of Robinson's participation is subject to some debate, but there is at least enough evidence to warrant the giving of this mitigating charge to the jury. [footnote omitted] Robinson also put on some evidence of impaired capacity. The trial judge may not have believed it, but others might have, and it, too, was adequate at least to instruct the jury on.

Robinson, 487 So.2d at 1043. The court below stated the mitigator was not 'necessarily' shown to the jury and so refused to instruct on it. Mendyk is

---

[57] Mendyk requested his jury be told:
In determining the appropriate sentence for the defendant, you are instructed to consider the sentence of the codefendant.
Mendyk, 545 So.2d at 849, n.3.

[58] See Point XXIX.

distinguishable because this record supports the claim Shapiro was equally culpable of the crime, yet received disparate treatment.[59] Mr. Keen stressed this mitigating circumstance in his penalty argument. 2R 1268-70. As the court did not exercise its discretion using legally correct standards and so prejudiced a key defense argument, the court erred.

The state may argue Mendyk means a jury need never be told disparate treatment mitigates a crime if the 'catch-all' instruction is given. While the 'catch-all' instruction provides adequate consideration for most types of non-statutory mitigating evidence seen in Florida, it does not plainly suggest disparate treatment of codefendants can be considered. Cf. Penry v. Lynaugh, 109 S.Ct. 2934 (1990)(failure to instruct on Penry's retardation violated Lockett, distinguishing other cases in which same instructions permitted consideration of different mitigating evidence). Although the 'catch-all' instruction restates the words of Lockett, a jury, in reasonable likelihood, would not read it to include others' sentences as mitigation.[60] Neither a 'circumstance of the offense' nor 'character of the defendant' naturally encompasses the resulting sentences of other participants in the crime. The only mitigating instruction the jury heard about codefendants directed attention to the actions of the participants during the offense.[61] The best evidence the jurors misinterpreted the

---

[59] This evidence is set out in detail in Point XXVII.

[60] Although the 'catch-all' instruction correctly states the law of relevancy under Lockett, a jury may be misled even with a legally correct statement of the law if it does not impart the appropriate meaning to lay jurors. See Wilhelm v. State, 15 F.L.W. S431, S432 (Fla. September 6, 1990) In Wilhelm, the jury was told proof Wilhelm had a .10 or higher blood alcohol level when driving is a "prima facie case" Wilhelm was impaired, an element of the crime with which Wilhelm was charged. Wilhelm, 15 F.L.W. at S432. Instructing jurors the showing was a "prima facie case" - the statute's constititutional words, see State v. Rolle, 560 So.2d 1154, 1157 (Fla. 1990) - would force jurors to guess what the words meant, and, in reasonable likelihood, read into them a presumption of guilt. Wilhelm 15 F.L.W. at S 432. Similarly, it is error to instruct jurors using the 'catch-all' mitigator, although a legally correct statement, because, in reasonable likelihood, it restricts mitigation.

[61] The judge instructed the jury to consider if:
Three, the defendant was an accomplice in the offense for which he is to be sentenced, but the offense was committed by another person, and the Defendant's participation was relatively minor.
2R 1273; This instruction is based on §921.141(6)(d), Florida Statutes.

instructions is that the trial court made that very error.[62]

Because jurors would misinterpret the 'catch-all' instruction to exclude relevant mitigating evidence, the refusal to grant the special instruction violates the cruel and unusual punishment clause. See Boyde, 110 S.Ct. at 1198; see also Hitchcock v. Dugger, 481 U.S. 393 (1987). In Boyd, the Court held if instructions, in reasonable likelihood, restrict consideration of mitigating evidence, they violate the Constitution. Id. at 1198. Reasonable likelihood means the level of certainty the jury erred is more than a mere possibility, but less than the more-likely-than-not standard. Ibid. Boyde's jury - after hearing four days of testimony relating to the defendant's background and character and the prosecutor argue such evidence did not outweigh the aggravators - was instructed to consider, inter alia:

> Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

Boyde, 110 S.Ct. at 1194. Since extenuate is a synonym for mitigate, the Court held the instruction did not, in reasonable likelihood, restrict the jury's consideration, especially given the evidence and argument.

Mr. Keen's jury heard testimony about this circumstance in the guilt phase, not the penalty phase as in Boyd. Mr. Keen's prosecutor never explicitly acknowledged that this evidence was relevant, unlike Boyd's prosecutor, instead inviting the jury:

> to listen to the other possible mitigating circumstances and weigh them in your mind whether or not they are valid, and if you find a mitigating circumstance, weigh it against these aggravating circumstances as the law requires.

2R 1264. Jurors taking the instructions not to include disparate treatment as a mitigator would be reinforced by this argument. The failure to give the requested instruction meant the jurors did not consider the disparate treatment of Shapiro, a valid mitigating circumstance.[63] The instructions render the death

---

[62] The court misunderstood the relevance of treatment of Shapiro. See Point XXIX.

[63] Such a misinstruction requires a jury resentencing.

sentence unreliable.[64]

POINT XXXV

THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON THE ESSENTIAL ELEMENTS OF THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE.

The trial court below instructed the jury that it could find the crime was especially heinous, atrocious, or cruel (HAC) if it found the evidence established:

> Two, the crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious, or cruel.

2R 1272. This instruction denied Mr. Keen his right to a properly guided jury. See Shell v. Mississippi, 111 S.Ct. 313 (1990); Walton v. Arizona, 110 S.Ct. 3047, 3057 (1990); Maynard v. Cartwright, 486 U.S. 356 (1988). An aggravating circumstance, vague on its face and left undefined allows use of improper and prejudicial factors in imposing a death sentence. See Jones v. State, 15 FLW S469 (Fla. September 13, 1990). This is especially true when the jury's passions are inflamed by words like 'evil' or 'wicked'.

In Cartwright, the jury considered an aggravating circumstance identical to HAC. The failure to offer adequate guidance on the circumstance's meaning caused the Supreme Court to vacate the sentence:

> First, the language ... at issue -- "especially heinous, atrocious, or cruel" -- gave no more guidance than the "outrageously or wantonly vile, horrible, or inhuman" language that the jury returned in its verdict in Godfrey.

Cartwright, 108 S.Ct. at 1859. In Walton, the Supreme Court explained its decisions as meaning "It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face." Walton, 110 S.Ct. at 3057. The Court holds even fuller instructions than that given below fails to pass constitutional muster. See Shell, 111 S.Ct. at 313.

No guidance was provided here. The evidence of HAC was speculative at

---

[64] This unreliable result violates not only the cruel and unusual punishment prohibitions, but also due process and the right to a jury trial, contrary to the Fifth, Sixth and Fourteenth Amendments to the Federal Constitution and Article I, sections 9 and 22 of the Florida Constitution.

best, not even capable of being proven as a matter of law.[65] In this instance, it was error to instruct on HAC at all. See Jones, 15 FLW at S471. Allowing the jury to find an aggravating circumstance without adequate instruction leads to an unreliable result.[66]

POINT XXXVI

MR. KEEN'S JURY WAS IMPROPERLY LED TO BELIEVE THAT THEY HAD NO RESPONSIBILITY FOR THE DEATH SENTENCE IN THIS CASE.

The judge improperly denigrated the jury's recommendation, stating:

> The other thing I want you all to know is that there is only one person who makes an ultimate decision in this case as to what sentence the Defendant will receive and that is me.

2R 142. The trial judge later said:

> THE COURT: Something else again that I wanted to discuss. Miss Graham had mentioned her concern about thinking a week or two weeks or a year down the road as to what she sentenced him to . . .
>
> Regarding sentencing in any case, that sentencing is always up to the Judge. As I stated before, in a death penalty proceeding, we do go through an advisory recommendation. But let me remind you all again since it has once again been voiced since I have told you that the first time, that while your recommendation is given great weight by the Court, there is only one name that is put on any sentencing papers on the Defendant in this case.
>
> There is only one individual who is responsible for the sentence that the Defendant does or does not receive in this case, and that sentence may or may not agree with your jury recommendation. And that is me and that is a job that I have elected and selected to do. Yours is a recommendation to me. Yours is not a sentence.

2R 288-289.[67]

The judge's comments were improper and required a mistrial. A juror expressed concerns about the seriousness of the life and death decision, but the judge attempted to satisfy the concerns by telling the entire panel the judge alone took responsibility for the sentence. This error caused the United

---

[65] See Point XXXII.

[66] This unreliable result contravenes both due process and the prohibition against cruel and unusual punishment guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the Federal Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

[67] Counsel immediately moved for mistrial, arguing these comments denigrated the jury's sense of responsibility. 2R 289-290. The trial court denied the motion. 2R 291-292. The prosecution also repeatedly described the jury's role as advisory or as a recommendation without any explanation of its significance. 2R 190, 214, 228, 229, 232, 236.

States Supreme Court to reverse in Caldwell v. Mississippi, 472 U.S. 320, (1985). Misleading the jury into minimizing their sense of responsibility for the death sentence makes the sentence unreliable. See Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988). It is improper to misinform the jury as to its role. Pait v. State, 112 So.2d 380, 383-84 (Fla. 1959); Blackwell v. State, 76 Fla. 124, 79 So. 731, 735-6 (Fla. 1918). The jury had been hopelessly misinformed at this point, and a mistrial was required.[68]

The trial court compounded the error in its 'curative' instruction.

> THE COURT: However, I want you to understand what your recommendation means to the Court. If you recommend death, the Court itself reviews the facts, the aggravating and mitigating factors and other information that is legally before the Court, and the Court then determines what sentence it will impose, which may be a death recommendation, it may be overriding the recommendation in sentencing him to life.
>
> If you recommend a sentence of life imprisonment, then I may also override your recommendation but I can only do so if the facts suggesting a death sentence are so clear and convincing that virtually no reasonable person could differ, and I must find that the record is devoid of any mitigating circumstances.e0

2R 310-311. This told the jury a death recommendation is virtually meaningless, requiring de novo sentencing by the court, whereas a life verdict is virtually binding. It completely relieved the jury of responsibility for a death sentence. The 'correction' made matters worse by affirmatively encouraging a death sentence. It told the jury a vote for death is a vote to pass the buck. It constitutes error. See Pait, 112 So.2d at 385.

No other instructions corrected these errors. The court consistently told the jury that their penalty verdict was advisory. 2R 1255, 1271, 1272, 1274, 1275, 1276. The court emphasized the judge's final decision making power. 2R 1271. These instructions misled the jury and relieved them of their responsibility for a death sentence. See Mann, supra. Individually and cumulatively, they require a jury resentencing.

---

[68] The error denied Mr. Keen due process of law and subjected him to cruel and unusual punishment contrary to the Fifth, Sixth, Eighth, and Fourteenth Amendments of the Federal Constitution and Article I, Section 2, 9, 16, 17, 21, and 22 of the Florida Constitution.

POINT XXXVII

THE COURT DENIED THE APPELLANT DUE PROCESS BY TELLING THE JURY, THAT SIX VOTES WOULD BE EITHER A DEATH OR A LIFE RECOMMENDATION.

The trial court instructed the jury:

> The fact that the determination of whether six or more of you recommend a sentence of death or six or more recommend a sentence of life imprisonment in this case can be reached by a single ballot should not influence you.

2R 1275. This instruction is incorrect and misleading as to the number of jurors required to recommend death. It constituted reversible error.

In Harich v. State, 437 So.2d 1082 (Fla. 1983), the court told the jury:

> You will now retire to consider your recommendation. When seven or more of you are in agreement as to what sentence should be recommended to the court, that form of recommendation should be signed by your foreman and returned to the court.

437 So.2d at 1086. This Court recognized this instruction infringed on the defendant's right to have a six-to-six vote, a life recommendation. The misleading instruction was harmless in Harich since nine jurors voted for death.

Here by instructing the jury that six or more votes is a recommendation of death and that six or more votes is a recommendation of life, the jury is being instructed that a six-to-six vote is inconclusive, allowing either recommendation. Any instruction which dissuades the jury that six votes is a life recommendation is improper. See Rose v. State, 425 So.2d 521, 525 (Fla. 1982). Here, there is a seven-to-five vote. The instruction is not harmless. Appellant was denied due process by the misleading jury instruction,[69] requiring a jury resentencing.

POINT XXXVIII

THE TRIAL COURT ERRED BY CONSIDERING A REPORT CONTAINING VICTIM IMPACT EVIDENCE, OPINION EVIDENCE THAT THE DEFENDANT SHOULD BE EXECUTED, HEARSAY, AND UNPROVEN ALLEGATIONS OF CRIMINAL ACTIVITY.

At the direction of the court, a Pre-Sentence Investigation report (PSI) was written, a portion of which the court considered. 1SR 70-90, 2R 1377, 1385. The PSI told - through the hearsay of one family member - how Anita's family suffered. 1SR. It also includes statements from representatives of two other victims: the two insurance companies which insured Ms. Keen. John Minor of

---

[69] Fifth, Eighth and Fourteenth Amendments, United States Constitution; Article I, Section 9 and 17 Florida Constitution.

Prudential Insurance Company of America decried the abuse of his company for private gain, darkening the good will of the insurance business, particularly since it involved the loss of life. He called the act agredious (sic) and recommended the most severe punishment. 1SR 80. Frank Sutherland of Life of Virginia Insurance Company repeated these sentiments, saying there was no redeeming feature in the case and it was a "particularly gruesome" method. Id. The report contains the opinion testimony of two officers, Amabile and Scheff, who call for the death penalty and refer to the offense as heinous. 1SR 81-2. The PSI continues with an evaluation of the facts and recommend death. 1SR 87-8. It contains a list of Mr. Keen's alleged criminal record including offenses for which he was not convicted and narrative descriptions of some of the supposed offenses. 1SR 75-6.

Florida statute specifies the aggravating circumstances which may be considered and the procedure to determine them:

> Any such evidence which the court deems to have probative value may be received regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida.

§921.141, Fla.Stat. (1987). Use of testimony when the defendant has not cross examined the witness cannot be introduced under this statute because both the Florida and Federal Constitutions guarantee the right to confront witnesses. See Rhodes v. State, 547 So.2d 1201, 1204 (Fla. 1989). The rule of procedure mandates that, "Each side will be permitted to cross-examine the witnesses presented by the other side." Rule 3.780, Fla.R.Crim.P. The use of hearsay testimony violated Mr. Keen's constitutional right, explicitly protected in the Rule governing the proceedings below. Especially damaging were the statements of Elizabeth Lopez which constituted double hearsay, since she supposedly relayed the statements of family members to the official who then put them in his report.

The risk of arbitrary, and hence cruel and unusual, punishment becomes too great when the passions of the sentencer are inflamed by victim sympathy. See

Booth v. Maryland, 482 U.S. 496 (1987); Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989). The opinion of a victim's relative on the sentence is not relevant. See Floyd v. State, 15 F.L.W. S465 (Fla. September 13, 1990). The PSI contained inflammatory statements by and about the victims and opinions by them that Mr. Keen should die. The Court considered the PSI in determining sentence. 2R 1384-5. The consideration of this inflammatory evidence violated Florida law and due process and constituted cruel and unusual punishment.

The PSI also contained unsupported allegations that Mr. Keen had been accused of crimes for which he was not convicted and convicted of crimes not proven.[70] This Court has long held that aggravating a capital offense with arrests, vacated convictions, or charges on which acquittal was obtained cannot be permitted. See Provence v. State, 337 So.2d 783, 786 (Fla. 1976); Odum v. State, 403 So.2d 936, 942 (Fla. 1981). Improper evidence of prior crimes, even when introduced to rebut the mitigating circumstance of no significant history of criminal conduct, compels a new sentencing, especially when coupled with victim opinion evidence that the defendant deserves death. See Dragovich v. State, 492 So.2d 350, 354-5 (Fla. 1986). The improper allegations of prior criminal activity contained in the PSI, especially when connected with the inflammatory calls for death by victims, render this sentencing unreliable.[71]

POINT XXXIX

THE ERRORS ABOVE REQUIRE A JURY RESENTENCING BEFORE A NEW JUDGE.

Mr. Keen argues in Point XXVIII that his sentence should be reduced to life; the argument below is the alternate relief to which he is entitled. The relief argued in this section is also required for the errors argued in Points XXIX, XXX, XXXI, XXXII, XXXIII, and XXXVIII all of which involve errors in the sentencing order or affecting the judge only. The errors argued in Points XXXIV, XXXV, XXXVI and XXXVII all involve erroneous jury instructions and so require

---

[70] Mr. Keen testified at his guilt phase he had one prior felony conviction and some misdemeanors a long time before. 2R 1040. At sentencing, the state, in rebuttal to the statutory mitigating circumstance of no significant prior criminal history, introduced one conviction. 2R 1255-6.

[71] Mr. Keen argues the appropriate relief below in Point XXXIX.

full jury resentencings. Point IV's error also requires a jury resentencing.

All of the points above require a post-hearing determination of facts underlying mitigating and aggravating circumstances. In like circumstances, this Court requires full rehearings rather than post-hearing findings of particular facts. When a trial court fails to make an explicit finding that a defendant's out of court statement was freely and voluntarily made, an appellate court cannot remand for a post-trial determination of voluntariness. See Greene v. State, 351 So.2d 941 (Fla. 1977); Smothers v. State, 513 So.2d 776, 778 (Fla. 1st DCA 1987). In Greene, the court noted a judge "is not a computer which can consistently make objective determinations" about voluntariness. Greene, 351 So.2d at 942. The Court cannot presume the judge to be uninfluenced by the verdict. When a trial court fails to determine whether a discovery violation was intentional, causes prejudice, and can be remedied, this Court will not ask the trial court for a post-trial determination, but instead grants a new trial. See Smith v. State, 372 So.2d 86, 88 (Fla. 1979). In Smith, the fear that a post-trial court would be influenced by the verdict and desire not to rehear the case informed the decision. Smith, 372 So.2d at 88. Also, the Court in Smith found such determinations about discovery violations likely to rely on "hearsay, conflicting recollections and summarized and paraphrased information." Id.

The import of these decisions is that a trial court cannot give fair consideration, to post hoc fact findings. This concern weighs more in death sentencing proceedings, where the prohibition against cruel and unusual punishment requires heightened reliability. See Beck v. Alabama, 447 U.S. 625 (1980). The difficulty of the court below in judging the facts when fresh in her mind is apparent from the error. To ask her to revisit the question now, without a full sentencing hearing and jury recommendation, would likely not produce a more reliable result, given the institutional push to ratify a decision already made in the judge's mind. Especially in light of the 7-5 vote of the jury, this Court should grant a new, full sentencing hearing.

At the least, this Court should order that the sentencing hearing be had before a new judge. When an appellate court remands for resentencing, it will

order a new judge decide the sentence based upon these factors:

> "(1) whether the original judge would reasonably be expected on remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness."

Spivey v. State, 512 So.2d 322, 324 (Fla. 3d DCA 1987), quoting United States v. Robin, 553 F.2d 8, 10 (2d Cir. 1977); see United States v. White, 846 F.2d 678, 696 (11th Cir. 1985)(citing cases).

Here, the judge has already demonstrated the difficulty she has putting the previously overturned decision out of her mind. Her sentencing order explicitly based itself, in part, on the prior trial and sentencing recommendation. 2R 1486. Judge Henning responded to the prosecutor's concern over Shapiro's safety by saying "Killing is a crime, and we've had enough killing already in this case, and I don't want anymore in this case." 1SR 28. Apparently the judge had already decided to credit the trial testimony of Shapiro and Hickey rather than Mr. Keen.

The judge made errors of fact in finding the aggravating and mitigating circumstances and considered inadmissible evidence in the PSI. The order shows the judge's strong feelings about the crime, concluding "the facts of this case cry out for the death penalty". 2R 1489. Strong personal feelings weigh heavily in deciding whether to order a new judge decide a sentence. See Heath v. State, 450 So.2d 588, 590 (Fla. 3d DCA 1984); see also Suarez v. Dugger, 527 So.2d 190, 192 (Fla. 1988) (judge's comments that post-conviction unmerited after warrant signed but before judge heard post-conviction motion required recusal). She also stated her awareness that her position on the bench could be threatened by overruling a jury's death recommendation. 2R 291-2. The heightened reliability demanded in death sentencings requires a new judge. See Beck, 447 U.S. 625.

POINT XI

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

A. THE AGGRAVATING CIRCUMSTANCES USED IN THIS CAPITAL SENTENCING ARE UNCONSTITUTIONAL.

The Supreme Court has held that the lack of a consistently applied

narrowing definition of a facially vague capital aggravating circumstance violates the Eighth Amendment because it fails to narrow the class of death eligible,[72] guide the discretion of the sentencer,[73] and allow meaningful appellate review.[74] The inability to consistently narrow an aggravating circumstance also violates the rule of lenity which requires construction of criminal statutes in favor of the accused.[75] This rule is rooted in due process. See Dunn v. United States, 442 U.S. 100, 112 (1979). Due process requires legislatures give guides to the law's meaning lest arbitrary enforcement occur. See Papachristou v. City of Jacksonville, 405 U.S. 156, 168-9 (1972). The constitutional principles of substantive due process and equal protection require that a provision of law be rationally related to its purpose. Reed v. Reed, 404 U.S. 71 (1971). This principle applies to criminal enactments. See State v. Walker, 461 So.2d 108 (Fla. 1984). A criminal statute "must bear a reasonable relationship to the legislative objective and must not be arbitrary." Potts v. State, 526 So.2d 104 (Fla. 4th DCA 1987), aff'd., State v. Potts, 526 So.2d 63 (Fla. 1988). Florida's aggravating circumstances, as construed, violate these requirements.[76]

Florida's aggravating circumstance that the crime was especially heinous, atrocious or cruel (HAC) provides no limits or guides to imposing a death sentence. Its words are identical to Oklahoma's aggravator held facially vague in Maynard v. Cartwright, 108 S.Ct. 1853 (1988); see Shell v. Mississippi, 111 S.Ct. 313 (1990).

---

[72] See Godfrey v. Georgia, 446 U.S. 420, 422 (1980).

[73] Maynard v. Cartwright, 108 S.Ct. 1853 (1988).

[74] Godfrey, 446 U.S. at 432-3.

[75] This rule of construction applies to statutes touching on sentences. See Bifulco v. United States, 447 U.S. 381 (1980).

[76] Due process is guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the Federal Constitution and Article I, sections 9 and 16 of the Florida Constitution. Cruel and unusual punishment is prohibited by the Eighth and Fourteenth Amendments to the Federal Constitution and Article I, section 17 of the Florida Constitution.

The Court has held the defendant's mental state to be one factor to consider. See Card v. State, 453 So.2d 17 (Fla. 1984) (fact that defendant enjoyed killing one consideration). In Mills v. State, 476 So.2d 172 (Fla. 1985), the Court held a lingering death from a gunshot wound did not establish HAC because "The intent and method employed by the wrongdoers is what needs to be examined." Id. at 178. However, in Pope v. State, 441 So.2d 1073 (Fla. 1984), this Court stated "No further definitions of the terms are offered, nor is the defendant's mindset ever at issue." Id. at 1078. Thus, this Court sometimes declares the defendant's mindset irrelevant, and sometimes finds it important.

Victim suffering, including foreknowledge of death,[77] has been used to find HAC, but not to limit it. Te Court has not limited HAC by specifying what kind of victim suffering, is required to find HAC. In Grossman v. State, 525 So.2d 833 (Fla. 1988), an officer stopped Grossman and another; Grossman attacked her and shot her to death during the struggle. This Court upheld HAC because the officer was beaten and knew she was struggling for her life. Grossman, 525 So.2d at 840-1. In Brown v. State, 526 So.2d 903 (Fla. 1988), the defendant also struggled with a police officer trying to arrest him and another; he then shot and wounded the officer. The officer begged Brown not to kill him, but Brown did so. Brown, 526 So.2d at 906-7, n.11. The Court struck HAC because it found the defendant did not intend to cause victim unnecessary suffering although the facts were nearly identical to Grossman. When the victim attempts to flee, sometimes the Court upholds the aggravator on this basis[78] and sometimes not.[79] In Jennings v. State, 453 So.2d 1109 (Fla. 1984), vacated 470 U.S. 1002, reversed on other grounds, 473 So.2d 204 (1985) this Court accepted that the victim had been unconscious during the incident. Compare Herzog v. State, 439 So.2d 1372 (Fla. 1983) (requires consciousness).

---

[77] See Harvey v. State, 529 So.2d 1083, 1087 (Fla. 1988) (Killing discussed in front of victims, one of whom tried to escape).

[78] Phillips v. State, 476 So.2d 194 (Fla. 1985).

[79] Amoros v. State, 531 So.2d 1256 (Fla. 1988) (Distinguishing Phillips on the grounds that Phillips reloaded his weapon during the chase).

No case explains what is necessary to find in order for HAC to be established. The refusal to specify any necessary findings by the sentencer, judge and jury, mirrors the flaw in the Oklahoma construction of HAC. This creates unconstitutional vagueness.

> The discretion of a sentencer who can rely upon all the circumstances of a murder is as complete and as unbridled as the discretion afforded the jury in Furman. No objective standards limit that discretion.

Cartwright, 822 F.2d at 1491. A unanimous Supreme Court agreed. Cartwright, 108 S.Ct. 1853, 1857. This circumstance violates due process and constitutes cruel and unusual punishment.

The cold, calculated and premeditated circumstance (CCP) has not been limited to its legislative purpose. It was intended "to include execution-type killings as one of the enumerated aggravating circumstances." Senate Staff Analysis and Economic Impact Statement, SB 523 (May 9, 1979, revised). The standard construction is that it "ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive." E.g. McCray v. State, 416 So.2d 804, 807 (Fla. 1982). The qualifier "ordinarily" eliminates any narrowing the class of death eligible persons. The construction makes the circumstance distant from a legislative objective, the statute, as construed, violates due process.

Attempts at construing the facially vague words of CCP have failed. It does not narrow the class of death eligible persons, or channel the discretion of the sentencer. This failure is shown by comparing Herring v. State, 446 So.2d 1049 (Fla. 1984) (clerk shot twice during robbery after making threatening gesture shows CCP) with Rogers v. State, 511 So.2d 526 (Fla. 1987) (overruling Herring) with Swafford v. State, 533 So.2d 270 (Fla. 1988) (resurrecting Herring), with Schafer v. State, 537 So.2d 988 (Fla. 1989) (reinterring Herring). The courts have not kept the statute rationally related to its purpose.

This failure also renders the statute unconstitutional since it fails to narrow the class of death-eligible. A felony murder is death eligible under Florida Statute 921.141(5)(d). Any premeditated murder is death-eligible as CCP.

The failure to narrow the class of death eligible makes the statute unconstitutional. See Zant v. Stephens, 462 U.S. 862, 877 (1983); Lowenfield v. Phelps, 484 U.S. 231, 244 (1988).

B. THE STANDARD JURY INSTRUCTIONS ARE UNCONSTITUTIONAL.

The penalty jury instructions are such as to assure arbitrariness. The Standard Jury Instruction on HAC informs the jury:

> 8. The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious, or cruel.

Fla.Std.J.Instr.(Crim) - Penalty Proceedings - Capital Cases F.S. 921.141.[80] This instruction insures arbitrary application, in violation of the dictates of Shell, 111 S.Ct. at 313 and Cartwright, 486 U.S. 356 (1988). The vague words of the circumstance, do not guide discretion. See Walton v. Arizona, 110 S.Ct. 3047, 3057 (1990); Cartwright, 486 U.S. 356, 363-4, 108 S.Ct. 1853, 1857. In Shell, the Court held more extensive definition of HAC did not pass constitutional muster. The instruction is unconstitutionally vague.

The standard instruction on the cold, calculated, and premeditated circumstance[81] (CCP) also tracks the statute. This Court has been misled by the vague statutory language into applying this circumstance too broadly. See Rogers, 511 So.2d 526 (condemning prior construction as too broad). Jurors are prone to like errors. The standard instruction invites arbitrary and uneven application. Since the statutory language is subject to a variety of constructions, the standard instruction ensures arbitrary application. This violates the Cruel and Unusual Punishment Clauses of the state and federal constitutions. These clauses require accurate jury instructions during the sentencing phase of a capital case. See Walton, supra; Cartwright, supra.

This Court has defined the pecuniary gain aggravating circumstance to require "the murder is an integral step in obtaining some sought-after specific

---

[80] This instruction and the others discussed in this section are taken from West's Florida Criminal Laws and Rules 1990, at 859.

[81] The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
Fla.Std.J.Instr.(Crim) - Penalty Proceedings - Capital Cases F.S. 921.141.

gain." Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988); see Rogers v. State, 511 So.2d at 533; Hill v. State, 549 So.2d 179 (Fla. 1989). Florida juries are instructed per the standard jury instruction the circumstance is proven when:

> 6. The crime for which the defendant is to be sentenced was committed for financial gain.

Fla.Std.J.Instr.(Crim.) - Penalty Proceedings - Capital Cases F.S. 921.141.

The circumstance is difficult to apply, even for courts with knowledge of the case law. Defendants are sentenced to death for a robbery killing in which the judge improperly finds pecuniary gain in addition to the robbery felony circumstance. See Provence v. State, 337 So.2d 783 (Fla. 1976). Defendants may be sentenced to die for taking which is an afterthought, see Hill, supra, or in the course of an escape from the crime, see Scull v. State, 533 So.2d 1137 (Fla. 1988). The bare words of an aggravating circumstance which courts have difficulty applying does not comply with the requirement of a guided jury.

C. THE USE OF MAJORITY VERDICTS IS UNCONSTITUTIONAL.

A verdict by a bare majority violates due process and the Cruel and Unusual Punishment Clause. This error harmed Mr. Keen since his jury voted for death by a single juror. Assuming arguendo there is no federal constitutional right to a jury in capital sentencing, the Florida right to a jury[82] must be administered in a way that does not violate due process. Cf. Anders v. California, 386 U.S. 736 (1967) (although there is no constitutional right to appeal, state law right to appeal must comply with due process).

A guilty verdict by less than a "substantial majority" of a 12-member jury is so unreliable as to violate due process. See Johnson v. Louisiana, 406 U.S. 356 (1972); Burch v. Louisiana, 441 U.S. 130 (1979). The same unreliability infects capital sentencing decisions made by a majority verdict. In Burch, in deciding that a verdict by a jury of six must be unanimous, the Court looked to the practice in the various states in determining whether the statute was constitutional. Similarly, in deciding Cruel and Unusual Punishment claims, the Court will look to the practice of the various states. See Solem v. Helm, 463

---

[82] The right to a jury in capital sentencing predates the 1968 constitution and is therefore incorporated into article I, section 22, Florida Constitution. Cf. Carter v. State Road Dept., 189 So.2d 793 (Fla. 1966).

U.S. 277 (1983); Thompson v. Oklahoma, 108 S.Ct. 2687 (1988). Among the states employing juries in capital sentencing, only Florida allows a death penalty verdict by a bare majority.

D. FLORIDA ALLOWS AN ELEMENT OF THE CRIME TO BE FOUND BY A MAJORITY OF THE JURY.

Our law makes the aggravating circumstances into elements of the crime so as to make the defendant death eligible. See State v. Dixon, 283 So.2d at 9. The lack of a unanimous jury verdict as to any aggravating circumstance violates Article I, sections 9, 16, and 17 of the state constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal constitution. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc); contra Hildwin v. Florida, 109 S.Ct. 2055 (1989).

E. THE LACK OF MEANINGFUL APPELLATE REVIEW IS UNCONSTITUTIONAL

In Proffitt v. Florida, 428 U.S. 242 (1976), the plurality upheld Florida's capital punishment scheme in part because state law required a heightened level of appellate review. History has shown that intractable ambiguities in our statute have prevented the evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt.See Parker v. Dugger, ____ U.S. ____ (January 22, 1991). This Court has stated Proffitt that it will not reweigh aggravating and mitigating circumstances. See e.g. Hudson v. State, 538 So.2d 829, 831 (Fla. 1989). The Court also truncates its substantive review of death sentences by refusing to examine life cases. This failure means the Court cannot maintain substantive proportionality. The statute is unconstitutional because it injects arbitrariness into the application of the death penalty. The failure of the Florida appellate review process is highlighted by the life override cases. See Cochran v. State, 547 So.2d 928, 933 (Fla. 1989)(inconsistencies abound in judging appropriateness of overriding jury recommendations for life).

F. PROCEDURAL OBSTACLES TO APPELLATE REVIEW RENDER THE STATUTE UNCONSTITUTIONAL.

Florida has institutionalized disparate application of aggravating and mitigating circumstances by erecting the contemporaneous objection rule to bar

valid claims.[83] See, e.g., Rutherford v. State, 545 So.2d 853 (Fla. 1989) (absence of objection barred review of use of improper evidence of aggravating circumstances); Grossman v. State, 525 So.2d 833 (Fla. 1989)(absence of objection allows victim impact information in violation of eighth amendment); Smalley v. State, 546 So.2d 720 (Fla. 1989)(absence of objection allows penalty instruction violating eighth amendment). Use of retroactivity principles works similar mischief. See Myers v. Ylst, 897 F.2d 417 (9th Cir. 1990).

G. FLORIDA DOES NOT ALLOW A CAPITAL DEFENDANT A POST-VERDICT MOTION TO MITIGATE.

Unlike any other case, a condemned inmate cannot ask the trial judge to mitigate his sentence because rule 3.800(b), Florida Rules of Criminal Procedure forbids the mitigation of a death sentence. This violates the constitutional presumption against capital punishment and disfavors mitigation in violation of Article I, Sections 9, 16, 17, and 22 of the state constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the Federal Constitution. It violates equal protection. Cf. Myers, 897 F.2d 417.

H. FLORIDA CREATES A PRESUMPTION OF DEATH.

Florida law creates a death presumption where a single aggravating circumstance appears. This creates a death presumption in every felony murder case (since felony murder is an aggravating circumstance) and every premeditated murder case (depending on which of several definitions of the premeditation aggravating circumstance is applied to the case[84]). In addition, HAC applies to any murder. This imposes a presumption of death.[85] This presumption of death restricts consideration of mitigating evidence, contrary to the guarantee of the Eighth Amendment to the Federal Constitution. See Jackson v. Dugger, 837 F.2d

---

[83] In Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977), this Court held that consideration of evidence of a nonstatutory aggravating circumstance is error subject to appellate review without objection below because of the "special scope of review" in capital cases. Mr. Keen contends that a retreat from the special scope of review violates the eighth amendment under Proffitt.

[84] See Justice Ehrlich's dissent in Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984).

[85] The presumption for death appears in §§921.141(2)(b) and (3)(b) which requires the mitigating circumstances outweigh the aggravating.

1469, 1473 (11th Cir. 1988); Adamson, 865 F.2d at 1043. It also creates an unreliable and arbitrary sentencing result contrary to due process and the Eighth Amendment. The Federal Constitution and Article I, sections 9 and 17 of the Florida Constitution.

I. THE BURDEN OF PROOF FOR MITIGATION IS UNCONSTITUTIONAL.

The trial court below instructed the jury it must find mitigating evidence reaches a 'reasonably convincing' burden of proof before giving any consideration to it. 2R 1255, 1271-4. If not reasonably convinced the evidence establishes the circumstance, then the evidence is ignored.

Ignoring evidence not meeting the reasonably convinced standard is the law in Florida for both juries and judges. See Fla.Std.Jury Instr. (Crim.) Penalty Proceedings -- Capital Cases; Campbell v. State, 16 FLW S1, S2 (Fla. December 13, 1990); Floyd v. State, 497 So.2d 1211, 1216 (Fla. 1986); Lamb v. State, 532 So.2d 1051 (Fla. 1988). In Adamson v. Ricketts, 865 F.2d 1011, 1041 (9th Cir. 1988) (en banc), the court struck down an Arizona statute forbidding consideration of mitigating evidence unless the defendant proved by a preponderance of the evidence the existence of a mitigating factor. But see Walton, 110 S.Ct. at 3055 (plurality opinion said states may impose this burden).

The jury instructions given below violate this principle and constitute error under the Florida andd Federal Constitution as a restriction of mitigating evidence. Florida law unconstitutionally restricts consideration of mitigating evidence.[86]

J. FLORIDA UNCONSTITUTIONALLY INSTRUCTS JURIES NOT TO CONSIDER SYMPATHY.

The court instructed the jury not to consider feelings of sympathy using the standard guilt phase instruction:

> Feelings of prejudice, bias or sympathy are not legally reasonable doubts, and they should not be discussed by any of you in any way. Your verdict must be based on your views of the evidence, and on the law contained in these instructions.

2R 1218. This instruction denied consideration of mitigating evidence. In Parks

---

[86] Mr. Keen argues the appropriate standard, assuming some standard is constitutionally allowed and shows the trial judge actually used an even more stringent standard, contrary to state law at Point XXX.

v. Brown, 860 F.2d 1545 (10th Cir. 1988), reversed on procedural grounds sub nom. Saffle v. Parks, 110 S.Ct. 1257 (1990), the Tenth Circuit held that jury instructions which emphasize that sympathy should play no role violate Lockett. The instruction given above also states that sympathy should play no role in the process. The prosecutor below, like in Parks, argued that the jury should closely follow the law on finding mitigation. 2R 1264. A jury would have reasonably believed that much of the weight of the early life experiences of Mr. Keen should be ignored. This instruction violated Lockett. Inasmuch as it reflects the law in Florida, that law is unconstitutional for restricting consideration of mitigating evidence.

K. ELECTROCUTION IS CRUEL AND UNUSUAL.

Electrocution is cruel and unusual punishment in light of evolving standards of decency and the availability of less cruel alternatives. It violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 17 of the Florida Constitution. Electrocution amounts to excruciating torture. See Gardner, Executions and Indignities -- An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment. 39 OHIO STATE L.J. 96, 125 n.217 (1978) (hereafter cited, "Gardner"). Malfunctions in the electric chair cause unspeakable torture. See Louisiana ex rel. Frances v. Resweber, 329 U.S. 459, 480 n.2 (1947); Buenoano v. State, 565 So.2d 309 (Fla. 1990). It offends human dignity because it mutilates the body. Knowledge that a malfunctioning chair could cause the inmate pain increases the mental anguish.

Death by lethal injection is more humane. The chances of painful error are smaller: a mistake will not cause the painful burning as in electrocution. It does not depend upon complicated machinery. Lethal injection does not mutilate the body and so reduces the emotional anguish of the condemned's family and the condemned himself. Altogether, 18 states now have adopted lethal injection, making it the favored method of execution.

This unnecessary pain and anguish shows that electrocution violates the Eighth Amendment. See Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In re Kemmler, 136 U.S. 436, 447 (1890); Francis, 329 U.S. at 463-64; Coker v. Georgia, 433

U.S. 584, 592-96 (1977). A punishment which was constitutionally permissible in the past becomes unconstitutionally cruel when less painful methods of execution are developed. Furman v. Georgia, 408 U.S. 238, 279 (Brennan, J., concurring), 342 (Marshall, J., concurring), 430 (Powell, J., dissenting). Electrocution violates the Eighth Amendment and the Florida Constitution.

L. RACIAL BIAS RENDERS THE DEATH PENALTY UNCONSTITUTIONAL.

The sentencer was selected by a system designed to exclude Blacks from participation as circuit judges, contrary to the equal protection of the laws, the right to vote, due process of law, the prohibition against slavery, and the heightened reliability and carefully channelled decision making required by the prohibition of cruel and unusual punishment.[87] When the decision maker in a criminal trial is purposefully selected on racial grounds, the right to a fair trial, due process and equal protection require that the conviction be reversed and sentence vacated. See State v. Neil, 457 So.2d 481 (Fla. 1984); Batson v. Kentucky, 476 U.S. 79 (1986). When racial discrimination trenches on the right to vote, it violates the Fifteenth Amendment as well.[88]

The election of circuit judges in circuit-wide races was first instituted in Florida in 1942;[89] before this time, judges were selected by the governor and confirmed by the Senate. 26 Fla. Stat. Ann. 609 (1970), Commentary. At large election districts in Florida and elsewhere historically have been used to dilute the black voter strength. See Rogers v. Lodge, 458 U.S. 613 (1982); White v. Regester, 412 U.S. 755 (1973); McMillan v. Escambia County, Florida, 638 F.2d 1239, 1245-7 (5th Cir. 1981), modified 688 F.2d 960, 969 (5th Cir. 1982),

---

[87] These rights are guaranteed by the Fifth, Sixth, Eighth, Thirteenth, Fourteenth, and Fifteenth Amendments to the Federal Constitution and Article I, sections 1, 2, 9, 16, 17, and 21 of the Florida Constitution.

[88] The Fifteenth Amendment is enforced, in part, through the Voting Rights Act, Chapter 42 U.S.C. §1973 et al..

[89] For a brief period, between 1865 and 1868, the state constitution, inasmuch as it was in effect, did provide for election of circuit judges.

vacated, 466 U.S. 48, 104 S.Ct. 1577, on remand 748 F.2d 1037 (5th Cir. 1984).[90]

The history of elections of black circuit judges in Florida and in Broward County in particular, shows the system has purposefully excluded blacks from the bench. Florida as a whole has eleven black circuit judges, 2.8% of the 394 total circuit judgeships. See Young, Single Member Judicial Districts, Fair or Foul, Fla. Bar News, May 1, 1990 (hereafter Single Member Districts). Florida's population is 14.95% black. County and City Data Book, 1988, United States Department of Commerce. In Broward County, there are 43 Circuit judges, none of whom are black. Single Member Districts, supra. Blacks comprise 13.5% of the people of Broward County.

Florida's history of racially polarized voting, discrimination and disenfranchisement,[91] and use of at-large election systems to minimize the effect of the black vote shows that an invidious purpose stood behind the enactment of elections for circuit judge in Florida. See Rogers, 458 U.S. at 625-8. It also shows that an invidious purpose exists for maintaining this system in Broward County. The results of choosing judges as a whole in Florida, establishes a prima facie case of racial discrimination contrary to equal protection and due process in selection of the decision makers in a criminal trial.[92] These results show discriminatory effect which together with the history of racial bloc voting, segregated housing, and disenfranchisement in Florida violate the right to vote as enforced by Chapter 42, United States Code, Section 1973. See Thornburg, 478 U.S. at 46-52. This discrimination also violates the heightened reliability required by the freedom from cruel and unusual capital punishment. See Turner v. Murray, 476 U.S. 28 (1986); Beck v. Alabama, 447 U.S. 625 (1980). Florida allows this kind of unreliable decision to be made by sentencers chosen

---

[90] The Supreme Court vacated the decision because it appeared that the same result could be reached on non-constitutional grounds which did not require a finding a intentional discrimination; on remand, the Court of Appeals so held.

[91] See Davis v. State ex rel. Cromwell, 156 Fla. 181, 23 So.2d 85 (1945) (en banc) (striking white primaries).

[92] The results of choosing judges in Broward, 0 blacks out of 43 positions is such stark discrimination as to show racist intent. See Yick Wo v. Hopkins, 118 U.S. 356 (1886).

in a racially discriminatory manner and the results show disparate impact on sentences. See Gross and Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan.L.R. 27 (1984); see also, Radelet and Mello, Executing Those Who Kill Blacks: An Unusual Case Study, 37 Mercer L.R. 911, 912 n.4 (1986) (citing studies).

Because the selection of sentencers is racially discriminatory and leads to condemning men and women to die on racial factors, this Court must declare that system violates the Florida and Federal Constitutions. It must reverse the circuit court and remand for a new trial before a judge not so chosen, or impose a life sentence.

CONCLUSION

For the foregoing reasons, Mr. Keen's conviction must be reversed, and his sentence of death vacated or reduced to life.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

Richard B. Greene
RICHARD B. GREENE
Assistant Public Defender
Florida Bar No. 265446

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U. S. Mail, to Ralph Barreira, Assistant Attorney General, 401 N.W. 2d Avenue, Suite 921, Miami, Florida 33128 this 24th day of January, 1991.

Richard B. Greene
Counsel for Appellant

A P P E N D I X

Man convicted in duct-tape murder of contractor's 22-year-old son

By M. DION THOMPSON
Herald Staff Writer

Jesse Ramirez was found guilty of first-degree murder and kidnapping Friday in the 1984 death of a wealthy contractor's son, who suffocated after his head was wrapped in nearly four rolls of duct tape.

The jury deliberated for less than three hours before convicting Ramirez, 33, in the death of 22-year-old Mario Portela. The state is seeking the death penalty on the murder charge and a life sentence on the kidnapping charge.

Dade Circuit Judge Steven D. Robinson scheduled the penalty phase of the trial for April 22.

After hearing the verdict, members of Portela's family began to cry. Outside the courtroom, they hugged each other and shook hands with prosecutors Abe Laeser and Kevin DiGregory.

During his closing argument, Laeser called Ramirez's crime an "unbelievably cruel and merciless act" and urged the jury to convict Ramirez.

"It's a battle between good and evil," he said. "This is the type of crime that transcends any argument that there's a justification for it."

Portela's body was found in a ditch 19 days after the Aug. 7, 1984, abduction. He was stuffed in a sleeping bag and wore only a pair of boxer shorts.

The son of a wealthy South Dade contractor, Portela was abducted in front of his father's office by a woman and two men. On Aug. 12, a man who identified himself as "Juanco" called Jesus Portela and demanded $2 million for his son. During the trial, witnesses identified Ramirez's voice as that of the man who demanded the ransom money.

Ransom negotiations with Jesus Portela were unsuccessful. Laeser contended that Ramirez killed Portela "just so he wouldn't be able to say this man who did this to me has tattoos on his arm."

Ramirez has a panther tattooed on one arm and an eagle on the other.

One of the kidnappers, Hector De Parias, testified during the trial that Ramirez committed the murder. De Parias pleaded guilty in federal court to extortion and received a 20-year sentence. He also pleaded guilty in state court to charges of second-degree murder and kidnapping, for which he received 40-year sentences.

Julita De Parias, described as Ramirez's lover, was convicted in federal court of conspiracy to commit extortion and extortion and received a 40-year sentence.

Ramirez has been convicted of the same charges in federal court and also received a 40-year sentence.

Two charged with putting bomb parts in activist's car

By RICHARD WALLACE
Herald Staff Writer

The FBI Friday arrested one of the two men charged with placing the unassembled parts of a bomb in the car of anti-Castro activist and Spanish-language radio commentator Manuel Espinosa in 1983.

Alberto Kairuz, 36, was arrested at the FBI's Miami office, said spokesman Paul Miller.

"Agents told him to come to the office this morning," Miller said. "He actually came to the office not knowing that there was a warrant for his arrest."

Kairuz and an alleged accomplice, Francisco de la Paz, were indicted Thursday by a federal grand jury in Miami on charges of conspiracy and possession of a destructive device.

De la Paz already is in state custody in an unrelated case, Miller said.

The bomb parts allegedly were put in Espinosa's 1976 Lincoln Continental on Feb. 26, 1983 outside his home at 4621 W. 18th Ct.

The unexploded components — 1½ pounds of C-4 plastic explosive, blasting caps and detonation cord — were discovered the next day.

The indictment also alleges that in March of 1983, De la Paz issued a false "communique" that linked Espinosa to Omega 7, a secretive militant exile organization.

"It appears that Kairuz and de la Paz were attempting to discredit Manuel Espinosa, but the reasons behind that I'm not at liberty to say," Miller said.

Espinosa is a self-described former Cuban intelligence agent who is a fervent advocate of the overthrow of Cuban President Fidel Castro.

During the late 1970s, Espinosa became the focus of a political controversy in the South Florida Cuban exile community as an active figure in the Committee of 75. Committee members visited Cuba and engaged in a dialogue with Castro to gain the release of political prisoners held there.

Espinosa, who previously has been a minister of a Hialeah church, provides brief broadcasts of political commentary on radio station WQBA in Miami.

Escapee placed on wanted list

Michael Thomas Savich, awaiting trial on first-degree murder charges when he escaped from Dade County Jail in February, has been placed on the U.S. Marshal's Service 15 Most Wanted list.

"It may not be tomorrow, but I like to think that somewhere along the line he'll mess up and we'll get him," said Mel Hess, enforcement supervisor with the Marshal's Service. "Either that, or his life is going to be awfully miserable having to constantly look over his shoulder."

The 33-year-old New Yorker had been sentenced to 50 years in a federal penitentiary in Pennsylvania on bank robbery charges.

APR

hat this was
attack on a
bons and slo-
hants, cocaine
street thugs.
and sloganed,
cut back on
about irony.
out by my
So now, with
ed for May 13,
to talk about
e power of

touch of the
d poetry in his

point of what
d.
of the human
ols tug at deep
tional identity.
for love, with
; for spiritual
d the Star of

eople together.
e the public
"

y good?
f people have
heir pessimism
That's a good

me Miami will
. Some 400,000
buted already.
onsortium of 44
s, school pro-

bol now, but it

he deeper chal-

drug crusaders
years.
ciety is collaps-
"Children are
rtial things will
ey don't. There
the distribution
dco, 17 million
hill. It's only a
ils explodes."
timist, but one
elp.
dered the reali-

help a few drug

ding."

A project once opposed by the Environmental Protection Agency, the U.S. Fish

"Yep, that's a lot of sand," Chapman

Please turn to BEACH / 2B

his wife, Barbara, Sylvia Nipon's

Please turn to ARREST / 2B

Fleas infest North Dade school, disrupt classes

By CANDACE M. TURTLE
Herald Staff Writer

Students and staff at Jan Mann Opportunity School North are scratching to distraction — their school is infested with fleas.

Though only the size of a grain of pepper, the fleas have disrupted classes and tests and caused physical education activities to be canceled.

Registrar Vera Mays, one of the first to arrive at school mornings, said that's when the insects are particularly active — and hungry.

"Every morning my legs are just covered with them," Mays said. "I've taken them home; they're in my car. I just sit here and scratch blood." She pointed to her right leg, which was blotchy from flea bites. "They really like this leg."

Nathaniel Green, a seventh-grader, said so many fleas jumped on him after he was on the playing field one day that he had to take a shower. He beat his clothes and took them to the home economics teacher to get them washed.

Last week, as he took his Stanford Achievement Test, he said fleas were "jumping out of the floor."

The fleas are concentrated outside the locker room, in the parking lot, in the nearby main office and on the playing fields.

Classrooms repeatedly have been sprayed, but the fleas keep coming back.

Principal Walter Oden believes they hop rides to school with the stray dogs and cats that roam the neighborhood.

The strays climb under the buildings at night and leave their fleas behind, he said.

The school comprises several connected portable classrooms, and there is a gap about a foot high between the ground and the floors. When the buildings were moved to the site at 16101 NW 44th Ct. several years ago, sandbags were used to fill the gap. Over the years, the bags have deteriorated and left places where the animals can climb through.

Dr. Juan Tomas of Dade County Health Department's office of disease prevention said the way to get rid of the fleas is to get the animals off campus.

"In order to have effective elimination of fleas . . . you have to get rid of the animals," he said. "Fleas on their own don't survive. They feed on dogs, cats and rodents."

Sam Blank, executive superintendent of facilities management, said a fence will be put around the bottom of the classrooms. The district will also spray or fumigate the school.

"This will be taken care of," Blank said. "We'll do it as soon as possible. It's something that doesn't need a lot of study."

Slain man's friends, kin protest sentencing delay

By JAY DUCASSI
Herald Staff Writer

Criticizing a judge for delay in sentencing a killer, 200 protesters picketed outside the Metropolitan Justice Building Friday.

They demanded that Circuit Judge Steven Robinson sentence Jessie Ramirez, 33, for the kidnap-murder of Mario Portela, 22.

The convicted man is in jail. A jury found him guilty April 10. At the request of defense attorneys, the judge told jurors not to return until May 26 — when they will recommend either a life sentence or execution.

The judge acknowledged Friday that the delay is "unusual," explaining he gave extra time to a new defense lawyer just entering the case. Normally a jury makes such a decision immediately after trial.

The victim's father is a wealthy and popular South Dade developer. Friday morning, he placed ads in The Miami Herald, El Miami Herald and Diario las Americas urging sympathizers to join him at the protest. The Herald ads cost him about $4,000; the cost of the Diario ad was not available Friday night.

"Death to the murderer!" said one picket sign. "Judge: Mario's death was not postponed," said another.

Among the picketers were Emilio Millian, a popular radio personality who lost both legs in a car bombing, and state Reps. Luis Morse, Rudy Garcia and Roberto Casas. A veritable Who's Who of Miami's Latin builders also carried placards at the noontime rally.

Judge Robinson, avoiding the demonstrators, had lunch sent up to his chambers. He declined comment on the case.

According to prosecutors, Ramirez kidnapped Portela on Aug. 7, 1984, and demanded $1 million in ransom. When negotiations broke down, Ramirez wrapped four rolls of duct tape around his victim's head, saying his death would be "easy, like killing a chicken." Portela suffocated.

"It was an unbelievably cruel and merciless act," Assistant State Attorney Abe Laeser told the jury.

"What we want is for the sentence to be imposed already," said Jesus Portela, the victim's father. "And yes, I believe he should get death."

ALBERT COYA / Miami Herald Staff

Jesus and Carmen Portela demand fast justice for their slain son Mario.

The victim's father-in-law, Evelio Peña, president of the Latin Builders Association, also protested.

Prosecutor Laeser is worried the seven-week delay may cause jury problems.

"What do I do if all 12 jurors can't come back?" he said Friday as he watched the picketers. "What if somebody dies or leaves the country or gets sick?"

Ramirez's defense lawyer, Bob Martin, said the victim's family was trying to use political clout and publicity to pressure the jury and the judge.

"They may hurt themselves badly," the lawyer said. He said he may demand a new sentencing jury if the publicity taints the first jurors.

"You know what the appellate process in a death case is like. Every single thing is going to be looked at," he said. "The judge has done everything possible to explain to the family that the steps he's taken are to promote justice, not delay it."

mas graduates record 651

mended / 2B

undergraduate and graduate — not the law school. The law school is in another three weeks."

"It's our 25th anniversary year and it's our 22nd annual commencement," O'Neill said of the universi-

INSIDE

Lobby exec quits

Frank Calzon, executive director of the Cuban-American National Foun-

Friends carry carnations to honor Ronnie's courage

By MIKE WILLIAMS
Herald Staff Writer

ny's Catholic School carried a carnation — red, yellow, white and violet reminders of Ronnie's

Ronnie DeSitter's schoolmates

2 1987

Dade County schools will soon start turning away students who haven't had their measles shot, following the announcement Friday of a countywide measles emergency.

Dr. Richard Morgan, director of the Dade County Health Department, said a recent measles alert was upgraded to an emergency after consultation with disease experts, including the Atlanta-based National Centers for Disease Control.

A measles emergency declared Oct. 22 was rescinded at the end of January, after a month without any reported cases. But 12 new cases, primarily among preschoolers, were reported in the past six weeks. Morgan said the majority of the cases were in the Latin community.

The health department is asking that schools stop the 30-day grace period for immunized, and that day-care centers make sure children are immunized.

Children who normally are allowed in school without immunization because of religious or medical reasons won't be allowed during the emergency, said Associate Superintendent Paul Bell.

The health department estimates that 50 to 60 percent of children in the preschool age population have been immunized. The minimum age for measles, mumps and rubella vaccine has been lowered from 15 months to 12 during the emergency status.

In addition, in high-risk populations such as black Americans, Latins and Haitians, it is recommended that the minimum age of vaccination be lowered to six months.

While measles is best known for its skin rash, the disease is most infectious for three days before the rash appears. Its early symptoms include fever, cough and red, watery eyes. The illness usually lasts 10 days to two weeks and can be severe in infants.

Government-funded neighborhood community health centers where parents can take their children for shots include:

Jackson Memorial Hospital complex; Borinquen Health Care Center, 5700 NE Fourth Ct.; Liberty City Health Service Center, 1320 NW 62nd St.; North Dade Health Center, 16555 NW 25th Ave.; Coconut Grove Family Health Center, 3230 Hibiscus St.; Stanley C. Myers Community Health Center, 621 Washington Ave., Miami Beach; Community Health of South Dade, 10300 SW 216th St.; Martin Luther King Clinica Campesina, 810 W. Mowry St., Homestead; and the Dade County Department of Public Health centers.

Death penalty asked in kidnap killing

By JAY DUCASSI
Herald Staff Writer

Mario Portela, the kidnapped son of a Miami real estate developer, died a slow, excruciating death in 1984, suffocating inside yards of duct tape his abductors wrapped tightly around his head.

Ramirez

"It was a cold-blooded and ruthless murder," Assistant State Attorney Kevin DiGregory told a jury Friday. He is asking for the electric chair for Jessie Ramirez.

Ramirez, 33, is on trial for the death of Portela. When he vanished in August 1984, more than 200 FBI agents scoured the nation.

When the kidnappers realized their scheme to get $1 million from Portela's father had failed, DiGregory told the jury, Ramirez decided Portela was too big a risk alive.

While Portela, 22, was chained to a bed in a Southwest Dade apartment, Ramirez began wrapping duct tape around his head, the prosecutor said.

Ramirez told a fellow kidnapper who was watching that the death would be "easy, like killing a chicken," DiGregory said. While Portela pleaded for his life, Ramirez kept wrapping.

"His head and neck were wrapped tightly and completely with duct tape, all air passages completely blocked," DiGregory told the jury. "The medical examiner will tell you Portela was conscious and acutely aware of his fate for several minutes."

According to prosecutors DiGregory and Abe Laeser, four people were involved in the kidnapping of Portela from a trailer at a development in Southwest Dade on the afternoon of Aug. 7, 1984.

Ransom negotiations with Portela's father Jesus, a wealthy developer, were unsuccessful. The kidnappers never picked up the money.

On Aug. 21, two boys playing in a field in Davie found the body of Mario Portela in a ditch, clad only in boxer shorts and stuffed into a sleeping bag.

FBI agents arrested the murder suspects in Los Angeles on Sept. 24.

Prosecutors say one of the kidnappers, Hector De Parias, will testify that Ramirez killed Portela. The state says De Parias, his brother Julio, his sister Julita and her boyfriend Ramirez kidnapped Portela with a double motive: to get the ransom, and to get revenge for what they saw as an insult to their mother.

The mother, Leonor De Parias, had bought a house from the elder Portela two years before the kidnapping, prosecutors said. She became angry at Jesus Portela because she felt the interest rate on her home, 18 percent, was too high. At the time, Jesus Portela told her it was the bank's business, not his.

"You'll be sorry for this," Leonor De Parias said at the time, according to the elder Portela, who testified Friday.

Besides Hector De Parias' testimony, prosecutors say they have fingerprints from Ramirez on the duct tape used in the murder.

Defense lawyer Bob Martin told the jury Friday that the evidence will show that Ramirez, at best, was an accessory after the fact.

Ramirez and his girlfriend are already serving a 40-year sentence in federal prison for the kidnapping. Julita De Parias has not gone to trial in state court. She asked for a trial separate from her boyfriend's.

Attorneys in the case told Circuit Judge Stephen Robinson that the trial will take about three weeks.

Garbage firms sued for overcharging

By ARNOLD MARKOWITZ
Herald Staff Writer

Five garbage hauling companies and one executive have been sued by the state of Florida, which accused them of overcharging public institutions millions of dollars and asked state and federal courts to make them pay back three times as much.

The civil suits, filed Thursday, are an outgrowth of a 1986 federal indictment and criminal trial for price-fixing. The chief operating officer and a former general manager of United Sanitation Services, and a former secretary-treasurer of Industrial Waste Services Inc. were convicted. Those are the two largest private garbage collectors in Dade and Broward counties. Industrial Waste pleaded guilty as a corporation.

They were fined a total of $595,000, but fines assessed as criminal penalties are not used for repayment of victims.

Defendants in the state's federal suit are United Sanitation Inc., its chief operating officer Lewis R. Goodman, Industrial Waste Service Inc. and Waste Management of Florida Inc. The Circuit Court suit accuses Industrial Waste Service, Imperial Sanitation Services Inc. and World Sanitation Inc.

"We're suing for civil remedies, to get the money back for the victims," said Deputy Attorney General Walter Dartland.

"To these companies, a fine and small sentence could be part of the cost of doing business, and they could still retain millions of dollars of profit for their stockholders. We don't think these people should keep those ill-gotten gains."

Dartland said the case was filed separately in Dade Circuit Court and U.S. District Court because in federal jurisdiction the defendants can be made to pay the victims three times actual damages, which were estimated at $1 million in overcharges by each of the accused companies. The state case, filed to enforce Florida's anti-trust law, seeks the maximum million-dollar civil penalty, to be paid to the state government.

Victims listed are Jackson Memorial Hospital, Miami-Dade Community College, Metropolitan Dade County, the Dade School Board, Florida International University, and the state departments of Health and Rehabilitative Services, Natural Resources and General Services, the operator of state office buildings. The garbage companies' commercial customers are not included.

According to the lawsuits, based on testimony and evidence from the 1986 criminal cases, the garbage companies maintained and enforced agreements not to compete for each other's customers — and thus were able to charge unfairly high prices, Dartland said.

"In some cases customers did switch, or a salesman accidentally got an account he shouldn't have gotten. Then the companies would get together, and one would say to another, 'You took one of my customers last month. It was worth so many dollars, and you owe me another account worth so much.' The other guy would call a customer and say he couldn't service the account any more. He would offer to transfer it to the other company at the same price."

The defendants also worked together against smaller garbage haulers who refused to participate in the scheme, Dartland said: by aggressive underpricing they would lure customers away from honest competitors, who would have to cooperate or go out of business.

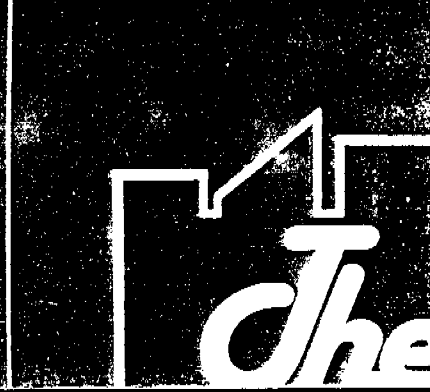
Emile Meyer, played villain in 'Shane'

SLIDELL, La. — (UPI) — Actor Emile Meyer, known for his sympathetic portrayals of villains in such Hollywood classics as *Shane*, died Thursday of Alzheimer's disease at the age of 76.

With diverse parts such as the warden in *Riot in Cell Block 11*, a slaver in *Hurricane Smith*, and a storekeeper in *White Feather*, Mr. Meyer is perhaps best recalled as the white-bearded villain, Ryker, in *Shane* in 1953.

Deaths

Deaths Elsewhere



AL DIAZ / Miami Herald Staff

Blankenship, 19, a prostitute with AIDS, at the Metro Building.

ands have been swollen has had bouts of thrush fungal infection.

knows how many prostih AIDS are on Miami's random street sampling g program of 355 Miami turned up 58, or 16 who tested positive for virus, said Jeanne Eas-AIDS program manager Dade County Health Department. Next to northern New Jersey, Miami had the highest rate of the seven areas tested.

Both Bruce and Perry said legislators should look at Blankenship's case as an example of why the penalty for prostitution charges should be stiffened. The maximum penalty is 60 days in jail.

"This is something we have to deal with because it's symptomatic of things to come, in, unfortunately, greater numbers," Perry said.

Aunt tells of killer's tortured childhood

The aunt of a convicted murderer testified Wednesday that her nephew lived a tortured childhood in his native Colombia, with both parents beating him often and at times dressing him in girl's clothes.

Adalfia Garcia was the first defense witness for Jesse Ramirez, 33, who was convicted last month of the murder of Mario Portela. Portela, 22, kidnapped from his father's contracting office, died in August 1984 after his head was tightly wrapped with duct tape.

Ramirez

Through a translator, Garcia said her nephew, whose real name is Norbey Duque Garcia, was hung from beams and hooks as punishment and was forced to put his hands on a hot stove.

Defense lawyers Palmer Singleton and Robert McGlassen expect to call doctors who will testify that Ramirez's treatment as a child affected his behavior as an adult. The defense lawyers have asked the jury to recommend a life sentence instead of execution for their client.

The victim's parents said Wednesday that Garcia's testimony was rehearsed with defense lawyers. Garcia told prosecutor Abe Laeser during cross-examination that she had gone over her testimony with the defense, but had been told to "tell the truth."

"She is only saying words that have been put in her mouth," said Carmen Portela, the victim's mother.

Defense attorneys have said they have as many as 31 witnesses ready to testify. Circuit Judge Steven Robinson said he expects the case may last until Friday.

DEATH NOTICES

Classified Advertising

AA-01 Death Notices | AA-01 Death Notices | AA-01 Death Notices

CORBETT

ERIKSSON

LUPATKIN

NYIRI

SCHEAFFER

N.Y.S.E./
AMEX/NAS
OTC/OPTIC

8

Busin

Kellogg
Florida

From Herald Staff

Two more
and RJR Nab
would stop buy
to protest the
advertising.

Kellogg, ba
would stop bu
continues to as

RJR Nabisc
said its ad cutb
as well as tele
also said it wo
Florida as long

Clorox Co.
announced sir
Soup Co., Ger
Co., are amo
discussed poss

Said Susan
Bob Martinez
tion in Florida
back. We k
everybody thi

Trends

THE STO
session after
The Dow
dropped 2.1
slightly outn
Stock Excha
unchanged.
million shar
previous ses
slipped .08 t

THE DO
other major

AL DIAZ / Miami Herald Staff

Day off

What better way to spend a day off than to relax under the shade of a tree and fish. Hector H. Palma Jr., 28, does just that Tuesday, fishing from Watson Island while enjoying a beautiful day.

Duct-tape killer pleads for his life

By JAY DUCASSI
Herald Staff Writer

As a young boy, Jessie Ramirez was choked with a broomstick, hung upside down from a meathook and forced to put his hands on a hot skillet, his attorneys told a jury Tuesday.

The lawyers hope the stories of Ramirez's suffering as a youth in Colombia will keep a jury from recommending his execution for the grisly murder of the son of a Southwest Dade developer in 1984.

"This trial, this phase of the trial, is about the home and the life of Jessie Ramirez when he was a little boy," defense lawyer Palmer Singleton told the jury. "Despite the despicable acts he has committed, there are reasons you should sentence Mr. Ramirez to life, not death."

Ramirez, 33, was convicted April 10 of the first-degree murder and kidnapping of Mario Portela, 22. Portela, kidnapped from the office of his father, a wealthy contractor, asphyxiated after his head was wrapped in duct tape.

After a seven-week delay that provoked the victim's family to demonstrate on the courthouse steps, the sentencing phase of the trial began Tuesday.

Defense lawyers Singleton and Robert McGlassen, who did not participate in the trial but who handle death-penalty appeals for the Southern Prisoners Defense Committee in Atlanta, may call as many as 31 witnesses for the second half of the case.

The list includes relatives of Ramirez, who are expected to testify about the abuse he suffered during his early years in Colombia, and doctors who will say the abuse affected his actions two decades later in Miami.

Singleton told the jury that Ramirez's mother once pinned him to the floor, holding a broomstick to his neck, until the boy, then in his early teens, passed out and began spitting blood. Another time, his mother forced him to press his hands against a hot stove, Singleton said.

"Jessie Ramirez endured pain on a daily basis," the lawyer said.

Prosecutor Abe Laeser told the jury Ramirez "was laughing, in a joking manner," when he killed Portela in August 1984 to avoid being identified by police.

"The defendant said it was like killing a chicken," Laeser said. Ramirez ran out of duct tape while binding Portela's ankles, and told an accomplice to buy more tape, Laeser said. Portela waited for 45 minutes before Ramirez finished the job, wrapping his head tightly until he choked to death.

Better that Portela had died from a shotgun blast than endure the "psychic pain" of knowing for 45 minutes that he was going to die, the prosecutor told the jury.

Portela's parents, Jesus and Carmen Portela, complained Tuesday about the seven weeks that Circuit Judge Steven Robinson has allowed the defense to prepare for the sentencing phase.

Three weeks ago, the couple staged a demonstration in front of the courthouse. The protest drew more than 200 picketers, including three state representatives.

"That man has been laughing at us for three years and he will be laughing until he goes to the chair," said Carmen Portela. "He is less than an animal, because an animal has feelings."

Officer, women injured in 2-car crash

By LYNNE DUKE
Herald Staff Writer

A Metro-Dade police officer received severe facial cuts and a Miami woman was critically injured when their cars collided while the officer was racing to a crime scene.

Angelica Olga Castro, 52, of Miami, was in critical condition at Baptist Hospital.

The cuts around Officer Alejandro Victor Ocariz's eyes required between 30 and 40 stitches, police spokesman Jim Hutton said Tuesday. He was treated at South Miami Hospital and released. Ocariz, 23, who has been on the force for two years, will be off duty for a couple days to recover, Hutton said.

With his police unit's siren blaring and its lights flashing, Ocariz was racing along Bird Road at 3:46 a.m. Monday en route to a crime scene. At the intersection with Southwest 114th Avenue, yellow lights were flashing for east-west Bird Road traffic and a red light was flashing for traffic heading south on the avenue.

Castro, headed south on the avenue in a 1972 Ford Mustang, stopped at the red light, then pulled into the intersection, causing Ocariz to broadside her, Hutton said. Ocariz probably was traveling at roughly 50 miles per hour, Hutton said. Both cars were totaled.

Castro was cited for failing to yield the right of way from a stop.

Student stabbed at St. Brendan

A 16-year-old student at St. Brendan High School was stabbed twice as he walked through the school's parking lot Tuesday afternoon, police said.

Miguel Jimenez, a junior, was stabbed once in the back and gashed across the right eye. He was listed in satisfactory condition at Baptist Hospital Tuesday night.

Reinaldo Perez, 21, of 1031 SW 131st Pl., and Isaac Castillo, 18, of 1481 SW 71st Ct., were arrested and charged with aggravated robbery, Metro-Dade police said.

The attack occurred at 2:10 p.m., 10 minutes after school had ended at the private Catholic high school at 2900 SW 87th Ave.

According to police:

Perez and Castillo drove by Jimenez. Without saying a word, Perez, a former gang member who is on probation, ran up to Jimenez and punched him in the face. Castillo then ran up behind Jimenez, stabbed him in the back and cut his face. The suspects fled. They were arrested at their homes.

PASQUALE DIPASQUALE JR.

New St. Thomas president

PROFESSIONAL: President, Loras College in Dubuque, Iowa, 1977-present . . . president, Assumption College in Worcester, Mass., 1972-1977 . . . professor and director of graduate studies in English, Illinois State University, 1969-1972 . . . taught at University of Oregon, 1965-1969 . . . taught at Seton Hill College, 1961-1965 . . . head of English department, St. Mary's Seminary, Mwanza, Tanzania, 1957-1961.

Committee recommends four for No. 2 administrative pos

By TINA MONTALVO
Herald Staff Writer

Four finalists for the No. 2 administrative post at Florida International University have been recommended to President Mitch Maidique by a committee

William Wood academic affairs since College at New Paltz, system in New York. H Pound and helped star

MARICE COHN BAND / Miami Herald Staff

Jurors vote for death in tape murder

iami International Airport.

de

ief

Dade man found in Pembroke canal

DEATH NOTICES

overdose of trichloroethy- Alcaraz

No one knows how widespread a problem

Please turn to FATAL / 5C

In the heat of the moment

HAYWOOD GALBREATH / Miami Herald

Businessman Bob Haughn, right, got angry Thursday when Metro firefighters parked their truck on his property, blocking the entrance and damaging his freshly sealed driveway. So he locked the gate and impounded it, temporarily. Haughn argued with Metro district fire chief Charley Perez, left, for about 10 minutes before reopening the gate. The firefighters parked the truck at Haughn's fork-lift rental business, at Northwest 41st Street and 72nd Avenue, after putting out a minor fire at the Dade County Stockade next door.

Spare me, duct-tape killer asks judge

By JAY DUCASSI
Herald Staff Writer

Convicted murderer Jesse Ramirez told a judge Thursday that he is a converted Christian who reads the Bible daily, collects empty soup cans for orphans and preaches the gospel to fellow convicts.

The judge will decide today if that's enough to keep Ramirez from the electric chair.

The parents of Ramirez's victim don't think so.

"They should put him in the chair so he can meet God right away," said Jesus Portela. Ramirez kidnapped and murdered Portela's 22-year-old son, Mario, in August 1984.

"We're doing him a favor by putting him in the electric chair," said Carmen Portela, the victim's mother. "He won't sin anymore."

Sin, Ramirez told a packed courtroom, is what he's been trying to cut down on lately.

"I'm studying for preacher in the prison and God instructs me through the Bible to instruct others," Ramirez said.

Two months ago, a jury convicted Ramirez, 33, of the Portela murder.

According to prosecutors, Ramirez and three others kidnapped Portela, son of a wealthy Miami developer. When a ransom scheme failed, Ramirez wound 68 feet of duct tape around Portela's head until he suffocated.

Three weeks ago, the jury reconvened and voted 10-2 for the death penalty.

The final decision is up to Circuit Judge Steven Robinson, who held a sentencing hearing Thursday. Ramirez took the stand and testified for two hours about his conversion to fundamental Christianity while serving time for extortion in a federal prison in Oklahoma two years ago.

At the Dade County Jail, he said, he has counseled more than 80 inmates. Once he protected an inmate who was being beaten with broomsticks by cell mates. Ramirez said he threw his body around his friend and took the blows on his back.

"My conversion to Christ does not allow me to attack a person or hit them with my hands," he said.

Prosecutor Abe Laeser, unimpressed, cross-examined Ramirez, using the New Testament for reference, quoting the apostle Paul telling believers to honor man's law as well as God's.

"It doesn't talk about executing people," Ramirez said.

Judge Robinson will hear from more witnesses this morning before sentencing Ramirez.

Miami vows to press claim for sports authority funds

Referendum rejected / 3C

By LISA GETTER
Herald Staff Writer

The Miami City Commission vowed Thursday not to give up its first claim to Miami Sports and Exhibition Authority money pledged to the Miami Heat basketball team.

Commissioners also scheduled a public hearing July 9 to review all the agreements between the sports authority, The Heat, the city and Decoma Venture, developers of the new arena.

Mayor Xavier Suarez said it would be a "full airing and it's going to take some time."

At issue is the so-called "side agreement," a memorandum negotiated last September by then-sports authority chairman Larry Turner and officials with the Heat.

The agreement gave the team the right to collect all or part of its share of excess arena expenses from the sports authority. But the money had also been pledged by the authority to help the city pay back a $10 million loan for the James L. Knight Center and Coconut Grove Exhibition Hall. Some sports authority members say they didn't know of the

Please turn to HEAT / 5C

INSIDE

Absent commissioners force

AL DIAZ / Miami Herald Staff

Cortes, 14, and Juan Olarte display their affection for Madonna at Orange Bowl.

mother Marina Gomez. ...gh enthusiastic, the ...was relatively calm and ... Miami police reported ...blems with drugs, drink... rowdiness and made only ...rrests for ticket scalping. ...concert wasn't so big an ...as the September 1985 ...Springsteen tour, in which

80,000 seats sold out in three hours. Madonna has a different audience and appeal.

"It's the way she dresses, her hairstyle," Juan Olarte, 14, of Miami, tried to explain, mostly by waving his arms.

"She's sexy," said his friend Jimmy Cortes, 14. "That little birth mark above her lip."

"BEAUTY MARK," Juan interjected.

"Her music and her body," said Walter Bolanos, 16, who drove all the way from Orlando with girlfriend Rikki Corbitt, 17.

"I want to be just like her," Corbitt said, and sighed. "I used to like Cyndi Lauper, but after Madonna came out, forget it."

...residences for members and their guests.

"They're buying property on Biscayne, which is not the most desirable property, but perhaps they can enhance it," said Sheldon Greene, a North Dade real estate broker. "They bought an old hotel on 79th Street and the first thing they did was upgrade the building. Hotels and motels are very adaptable to other uses. Perhaps the

Please turn to YAHWEHS / 2B

cayne and on Miami Beach / 2B.

Pioneer radio station moves

Radio station WKAT, a 50-year resident of Miami Beach, held a parade to help celebrate its move across the bay to new digs in North Miami / 4B.

1987

...e friends bid private farewell to Great One

...g, he was a private man. His family ...ose to lay him to rest outside the public ...w, without spectacle.

Auxiliary Bishop Norbert M. Dorsey ...nducted the 70-minute Mass inside the ...anish-style cathedral, which is the ...adquarters for the Archdiocese of ...iami.

Then, on the cathedral steps flanked by ...lm trees, faithful fans and the news ...edia, Dorsey consecrated Gleason's cas... ...t with holy water.

Gleason's wife and two daughters from ...previous marriage stood teary-eyed, arm in arm. Behind them stood Audrey Meadows, who played Gleason's TV wife Alice Kramden in *The Honeymooners*, and June Taylor, Marilyn Gleason's sister and leader of a dance troupe that performed on *The Jackie Gleason Show*. All of them carried a red carnation, symbolic of the boutonniere that Gleason wore on the variety show.

Gleason, who was 71, was buried at Our Lady of Mercy Cemetery in West Dade.

The former bandleader, carnival emcee, Broadway star, dramatic film actor and television legend died of cancer Wednesday night at his Lauderhill home after a month-long hospital stay.

Besides a grieving family, Gleason left behind thousands of fans and fellow entertainers who remember him as a comedian and actor like no other, as Ralph Kramden, the big-mouth bus driver, and Minnesota Fats, the slick gambler in *The Hustler*. Gleason won an Oscar nomination for that performance.

About 40 fans stood outside the cathedral Saturday, many feeling dejected that they were not allowed inside. About 2,000 had attended a public visitation for Gleason the day before in North Miami.

When the funeral ended, some of Gleason's show business friends gathered outside the cathedral and embraced.

"I've worked with a lot of talented people, and he was simply the most talented person I ever worked with," said Rod Parker, a writer for *The Jackie Gleason Show*, which was broadcast from Miami Beach in the 1960s.

Said Walter Stone, a writer for *The Honeymooners* in the 1950s: "I loved the man and I'll miss him."

...p at private colleges for financial aid

...lles are ... applica... Florida ... percent ... ter at ... auder... jumped ... in St. ... over ... Park

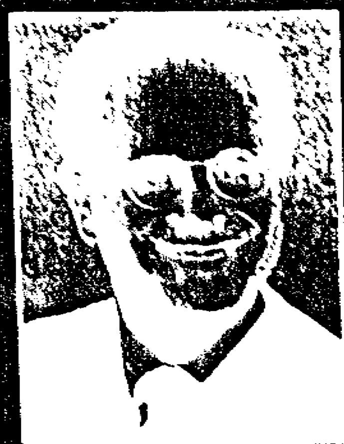
received so many applications so early — 2,508 for a freshman class of 410 — that the school has stopped accepting them.

"As a matter of fact, we're sending applications back," said David Erdmann, dean of admissions. "We've filled our class."

Applications to public institutions are also growing, but in a steady — not spectacular — way. Every year since 1983, applicant pools to all of Florida's nine public universities have grown an average of about 8 percent. On the high end is Florida International University, where freshman applications have increased by 10 percent annually.

Admissions officers at the application-happy

Please turn to COLLEGES / 5B



Judge Steven Robinson: 'Not fundamentally opposed to death penalty.'

Duct-tape ruling may put judge in political danger

By DAVE VON DREHLE
Herald Staff Writer

Is Dade Circuit Judge Steven Robinson — a shy millionaire with a taste for priceless art — willing to send a man to die in the electric chair?

In Saturday's bitter aftermath of Robinson's decision to spare the life of duct-tape murderer Jesse Ramirez, that question was pondered by lawyers, politicians and judges in breakfast nooks, beside swimming pools and over car phones.

Robinson's answer, everyone agreed, could determine the survival of the 11-year veteran judge.

Supporters said Robinson is ready and willing to condemn a murderer — if the case is absolutely clear. "He is not fundamentally opposed to the death penalty," said publicist Gerald Schwartz, Robinson's longtime campaign manager.

Robinson answered critics of the Ramirez sentence.

"My analysis is that the judge was on the edge of his seat

Please turn to ROBINSON / 3B

YAH... tial u... Th... sharp... during... an O... ed a... murd... landl... Pe... have... eigh... St. ... what... week... apart... auth... comi... talk... and ... Yahv... mon... are ... The... their... expa... recr... prop... surre... other... winn... were... or fa... say... door... Opa... Delr...

testimonial about teen-age pregnancy, *Papa Don't Preach*.

Although the concert was delayed almost two hours because of rain, Madonna still managed to change costumes at least four times during the evening as she danced and pranced up a sweat.

Her repertoire couldn't help but

accompaniment.

Basically, Madonna's *Who's That Girl* tour is a succession of skits set to music with little to tie them together. The show lacked warmth and personality, aside from the costumed characterizations.

Between all the posing and

AL DIAZ / Miami

Madonna pranced and danced Saturday night at the Orange Bowl, the first stop in her U.S. tour.

strutting, Madonna had little to say to the audience except some half-kidding complaints about the weather and the bugs.

Level 42, the band that is

opening for Madonna on this did not go on as scheduled of the rain. After the stage dried, Madonna went on p.m. and played until 11:3

Judge's ruling may have political repercussions

ROBINSON / *from 1b*

listening for something to convince him that he could overrule the death sentence," said prosecutor Abe Laeser: "It was his first death penalty case, and if I can help it, it will be his last."

Robinson was unavailable for comment Saturday, gone on a five-week vacation.

Ramirez was convicted April 10 of fiendishly murdering Mario Portela, 22, the son of a wealthy Dade County builder. Ramirez wrapped 23 yards of duct tape around Portela's head, suffocating him, after a bungled attempt to collect a huge ransom.

After an unusual delay to allow a new defense team to prepare for the sentencing hearing, the jury voted 10-2 to recommend the death penalty.

Late Friday, Robinson sentenced Ramirez to two life terms plus another 40 years. The judge chose to spare the killer after hearing testimony that Ramirez was brutally abused as a child.

The judge himself realized the political danger. Portela's family wields influence in the powerful Latin Builders Association, and the victim's cause was championed by state legislators. Portela's aunt, when the sentence was announced, cried: "You will never be elected again in this town."

After leaving the bench Friday night, Robinson phoned political strategist Schwartz, trying to weigh his chances of survival.

"He knew in advance this would have a negative effect. As his political consultant, I didn't welcome his decision," Schwartz said. "But he feels his decision was based on the facts and the evidence."

Veteran trial attorneys said Saturday that Robinson has always run a laid-back courtroom, through his eight years as a county court judge and three years on the circuit court bench. That reflects his personality, they said — the judge even has a painting of himself, wearing a tropical sarong, hanging in his home.

Robinson firmly believes his job is not to exact vengeance, friends say. Instead, Robinson tends to believe that criminals can be reformed through counseling and therapy. He has made a specialty of studying different approaches to sentencing, and he frets over his decisions until he feels they are perfect, they say.

Robinson's approach has backfired at least once. In 1982, he sentenced a convicted child molester to two years' probation and counselling. The defendant's name: Frank Fuster, the Country Walk baby sitter who was convicted

"This will very definitely hurt him."

"I'll certainly remember," said Dick Rundell, another campaign strategist for local judicial candidates. "I clipped the story from this morning's paper and put it in my political file."

Please turn to TEACH / 2B

mentor who taught English at North High.

Judith Weech discuss th

C.W. GRIFFIN / Miami Herald Staff

Relatives and friends of Mario Portela, seated with armbands, refuse to stand Monday morning when Circuit Judge Steven Robinson enters the courtroom.

Victim's family sits in judgment

By JAY DUCASSI
Herald Staff Writer

Circuit Judge Steven Robinson, who went on vacation the same day he refused to send "duct-tape" murderer Jesse Ramirez to the electric chair, returned Monday to find his courtroom packed with the angry family and friends of the killer's victim.

It was the same sight Robinson saw June 26, the day he overrode a jury recommendation for the death penalty and sentenced Ramirez to life in prison for the murder of Mario Portela. That day, angry shouts and curses from the victim's relatives followed Robinson as he left the bench.

The judge now says he was ready to send Ramirez to the electric chair but changed his mind after hearing a doctor testify about the killer's tortured childhood.

Robinson called his morning calendar Monday while 25 friends and relatives of Portela stared at him silently. All wore black armbands depicting the scales of justice broken in half.

"I'm going to be here every day. He's going to dream of me at night, and know that I'll be here the next morning," said Carmen Portela, the murder victim's mother.

Not one person in the group stood up as the judge entered the courtroom at 9:55 a.m. and

Please turn to JUDGE / 2B

'All my life I have lived by the principle of free political expression. I can't change that view if I am the recipient.'

Judge Steven Robinson

Hastings predicts showdown with Co

By R.A. ZALDIVAR
Herald Washington Bureau

WASHINGTON — U.S. District Judge Alcee Hastings of Miami challenged the fairness of his impeachment inquiry Monday, urging a House subcommittee to release records of a previous investigation of him and warning that "a political confrontation" may be in the offing.

"I am troubled," began Hastings' letter to House Judiciary Committee Chairman Peter Rodi-

petition to Congress.

"I am concerned that the staff may be proceeding without the effective and considered direction necessary to assure ... a record that fairly represents the issues," Hastings wrote. "I am concerned that the result may be a political confrontation of a kind that should be unnecessary."

Anticipating a showdown in Congress, Hastings has been traveling and building a political base of support. The letter was the judge's first criticism of the

of the bribery charge in 1983.

Hastings has bitterly criticized the court system's investigation as a rehash of the same charges the jury rejected. As the first black U.S. district judge in Florida, he has charged that his accusers are motivated by racial prejudice. Hastings had urged Congress in January to investigate his accusers, not him.

His letter came as official Washington shut down for the August recess. A spokesman for Rodino said he was out of town

on his case.

"The time for secret proceedings, if they were ever appropriate, has long since ended," Hastings wrote. He asked "that the committee and the subcommittee/open their deliberations and proceedings on all matters that concern me to the public."

William G. McLain, an attorney for Hastings, said the letter was precipitated by the subcommittee's request for secret records of the 1981 grand jury that indicted Hastings. McLain said

ives refreshing pause

Dade County schools, then the student really has to think.

"Then you have to synthesize information from one field to another," said Harrell, who was trying to explain the meaning of critical thinking. "You have to be critical and creative."

Social studies teacher Charlotte Christensen will work with her colleagues on societal factors that affect learning. These include ethnic differences, the influence of television and family issues such as teen-age pregnancy.

"When you assume that all children come to you with the same life experience, you do them a disservice," she said. Some eat with chopsticks. Some are taught not to look adults directly in the eye. "The point is to be aware that there are other ways of doing things."

Genie Dunn will help teachers learn how to use computers in the classroom — for checkbook balancing in arithmetic, for visualizing a triangle as the angles change in geometry, for setting up a data base in social studies.

"In my school, there's a computer on a cart that any teacher can bring to the classroom," she said. "What often happens is that the machines are there, but only a few teachers know how to use them."

Every nine weeks, each of the eight mentors will take on two new teachers on mini-sabbatical, known as externs. The externs will do some reading and come up with a plan for their nine weeks. They'll hear from experts. Some will do research and write papers. Some will visit businesses related to their field. Some will plan lessons, and try them out on students.

"They'll be free from the rigors of teaching assignments," said Elaine Liftin, executive director for staff development, "but not free from the rigors of thinking."

Ex-Miami cop begins chief's job

The West Palm Beach Police Department's newest employee stood in the hallway, fumbling unsuccessfully with the office door's combination lock. Before he could read the right numbers he had written on a scrap of paper, a colleague swung the door open for him.

"I'm so new I just forgot the combination," laughed Billy Riggs, a former Miami officer who began his tenure Monday as West Palm Beach's police chief.

Riggs, 43, spent his first full day as chief meeting the city's leaders, answering phone calls, arranging his office — the easy stuff. The real tests, lowering the city's high crime rate, restoring morale and gaining the confidence of minorities, lie ahead.

Just a few hours into his job, Riggs looked at those problems.

"I got the easy job," Riggs said. "Sometimes I have to make crucial decisions, but most of the time I sit in air conditioning, move paper around and talk on the phone. The officers on the street have the tough job."

Riggs, who served with the Miami Police Department for 17 years, ought to know. But to fight the city's daunting problems, he'll have to be politician, patrolman and a public relations expert.

Riggs enters a city recently named by the FBI as the nation's most crime-ridden municipality of its size. He'll work in a department that is technically unsophisticated. And Riggs must win over minorities in a city that is dominated by them, but which are vastly under-represented in the department.

Victim's kin ridicule judge's decision

JUDGE / *from 1B*

bailiff Arthur Bland called out the customary "All rise."

"He doesn't deserve the respect that a decent human being gets," Carmen Portela said.

The judge, who said he did not notice that the group in the packed courtroom remained seated, said their refusal to stand is not contempt of court. He called it a form of free speech.

"All my life I have lived by the principle of free political expression," the judge said. "Certainly I can't change that view if I am the recipient."

On April 10, a jury convicted Ramirez, 33, of the grisly August 1984 murder of Portela, 22. Ramirez admitted in court that, after kidnapping Portela, he wrapped 68 feet of duct tape around the victim's head, asphyxiating him.

The jury voted 10-2 for the electric chair, rejecting defense pleas that Ramirez was severely abused as a child and had become deeply religious in prison.

Robinson, who in the past has refused to speak about the case, told The Herald on Monday that the day the jury recommended death, he prepared an order sentencing Ramirez to the electric chair.

But he never issued the order. Instead, he granted a defense request to present more testimony after the jury had been disbanded.

"I was kind of angry about that, because it really put me on the spot," Robinson said. Nevertheless, the judge said, the defense had case law on its side.

The judge said he changed his mind, and his sentence, after hearing from a psychologist, Dr. William Samek, who testified that savage childhood beatings had left Ramirez severely traumatized.

"I changed my sentence order only after I heard the link between his treatment as a child and later actions," the judge said.

Robinson, who had never tried a death-penalty case before, refused to say if he believes in the death penalty, saying it would violate the canon of judicial ethics to discuss the subject.

But he said he believes in his oath of office, which requires him to "apply the law" of the state of Florida.

"That means it is my responsibility, being a judge in the state of Florida, to give the death penalty where it is appropriate," Robinson said.

The victim's father, Jesus Portela, said during the trial that he wanted to see Robinson removed from the bench. Portela and Erelio Peña, president of the politically powerful Latin Builders Association and the victim's father-in-law, staged a widely attended rally against Robinson on the courthouse steps before the sentencing.

Portela said his family will stage another demonstration, this time in front of the Dade County Courthouse, next Monday, the anniversary of his son's death. The family will ask Chief Judge Gerald Wetherington to transfer Robinson to civil court.

"We don't think he's capable of working in criminal court," Portela said.

Robinson said he has been in criminal court for 2½ years, even though the normal rotation is two years. He said he asked the chief judge a year ago, before the Portela case, for a transfer to civil court at the end of 1987.

C.W. GRIFFIN / Miami Herald Staff

Erelio Pena, left, father-in-law of Mario Portela, receives an armband with a broken scale of justice from Carmen Portela, the victim's mother.

JON KRAL / Miami Herald Staff

A woman tries to cross the picket line at the Dade County Courthouse

Man's family, friends oppose killer's life prison sentence

By ARNOLD MARKOWITZ
Herald Staff Writer

Mario Portela's family and friends, who wanted his convicted murderer sentenced to death, demonstrated Monday at the Dade County Courthouse against the judge who overrode a jury recommendation and sentenced the killer to life in prison.

Monday was the third anniversary of Portela's death. In broiling noonday heat, 153 supporters gathered in front of the courthouse steps and then followed Jesus and Carmen Portela, the murder victim's parents, on an hour's sidewalk march. Most carried signs, some calling for the impeachment of Circuit Judge Steven Robinson.

The Portelas said the demonstration was meant to persuade Dade Chief Judge Gerald Wetherington to transfer Robinson from the court's criminal division to the civil division. Wetherington did not attend the demonstration; neither did Robinson.

"It is also to tell other judges that we are the people and we will not let this happen any more," said Jesus Portela, a real estate developer. "What I really want is to get Judge Robinson off the bench. He's no good for the bench."

Boxes of armbands, stacks of protest signs and copies of a letter inviting people to demonstrate were distributed. The letter said, in part:

"Perhaps, by a demonstration of our concern, we can mark the beginning of a change in the judicial system and none of you will ever have to suffer the loss of a loved one at the hands of a criminal."

Mario Portela died at the hands of criminals who kidnapped him for ransom and murdered him when a planned ransom payment fell through. Jesse Ramirez, the one who killed Portela by wrapping his head with tape that caused death by suffocation, was

have mobilized relatives, friends and business associates against the judge. They packed his courtroom Aug. 10 wearing black armbands picturing the scales of justice broken in two.

At the courthouse demonstration, they were joined by activist Marvin Weinstein and about a dozen other members of Parents of Murdered Children. A priest, Rev. Jesus Hernandez of St. Jude's Greek Orthodox Church, was another of the marchers.

Police quell teen-age melee

TITUSVILLE, Fla. — (AP) — Police in riot gear quelled a rock- and bottle-throwing melee that broke out when 350 teen-agers gathered at an all-night grocery where a couple of suspected shoplifters had been locked in by a

Metro-Dade Commissioner Jorge Valdes announced Monday that he no longer supports a public vote on repealing Dade's English-only law — but he and 18 Hispanic groups demanded that county commissioners repeal the law themselves.

Valdes said he would ask commissioners to cancel a Sept. 1 public hearing, called at his insistence a few weeks ago, and ignore his previous request for a March 1988 referendum. Flanked by 20 Hispanic community leaders at a midday news conference, Valdes said he had concluded such a referendum would tear Miami apart.

[illegible] referendum on the ordinance because it [illegible] and again create a very negative image of Dade County before the world," the 18 groups said in a statement.

But Valdes said that a few weeks after the Sept. 1 hearing he will reintroduce his first measure on the anti-bilingual law: A proposal for immediate repeal with no public vote. That is within the county commission's power.

The 18 organizations, though offering no detailed plan to push the repeal measure through, indicated strong support Monday for the idea. Pressure from these organizations — none of which sent representatives during earlier commission debates on the issue — would make it far harder for commissioners to dodge the question of repeal, as they tried earlier to do.

The organizations represented Monday included the Latin Chamber of Commerce, the Coalition of Hispanic American Women, the Cuban American Bar Association, the Cuban American CPA Association, the Cuban American National Foundation, Facts About Cuban Exiles, the Latin Builders Association, the Municipalities of Cuba in Exile and the Spanish American League Against Discrimination. These and other groups belong to a loose coalition called *Unidos*, or United.

Monday's news conference marked the first strong public statement by Hispanic leaders on the anti-bilingual battle, begun weeks ago as a lone crusade by Valdes. In early discussions, not one commissioner would agree to repealing the anti-bilingual law outright, forcing Valdes to accept a referendum as a compromise.

But the prospect of a referendum horrified leaders of the 18 groups represented at Monday's news conference. They met with Valdes in secret over the past several weeks to ask him to back away from his compromise. Valdes ultimately agreed — and in the process won new allies for his

Pryor

Former boxing c after alleged rap

By JAY DUCASSI
Herald Staff Writer

Former boxing champion Aaron Pryor, facing a possible life sentence on charges that he kidnapped and raped a woman in his home last February, instead walked out of court Monday with a $5,000 fine and no criminal record.

Assistant State Attorney Howard Pohl said he was forced to drop most of the charges

offense, the prosecution

The judge also grante withhold adjudication in there will be no record o

Pryor, who is attem boxing, said the court w any victory he has had i

"I feel like I'm ch again," he said. "I thi I'm going to wake up today."

police said.

Loeffler said Franco and her son had been living in Plantation in Broward County near Miami with a 30-year-old Colombian identified as Leonel Sarmiento.

Investigators said they don't know Sarmiento's relationship, but said the boy called him "papito," Spanish for father, when shown Sarmiento's picture.

displayed statewide in newspapers and on television.

Gustavo was discovered in Central Florida Wednesday, police said, after a couple left a kilogram of cocaine and the boy at the home of Julio Avendano, 41, and failed to return.

Avendano was charged with drug trafficking. He has been unwilling or unable to identify the

Gustavo's teacher, ped
contacted authorities aft
him, Loeffler said.

He said detectives wil
the man from a Decemb
influence arrest in Plan
Avendano for identificati
Loeffler said authoriti

JON KRAL / Miami Herald Staff

A woman tries to cross the picket line at the Dade County Courthouse

Man's family, friends oppose killer's life prison sentence

By ARNOLD MARKOWITZ
Herald Staff Writer

Mario Portela's family and friends, who wanted his convicted murderer sentenced to death, demonstrated Monday at the Dade

The Portelas said the demonstration was meant to persuade Dade Chief Judge Gerald Wetherington to transfer Robinson from the court's criminal division to the civil division. Wetherington did

have mobilized relatives, friends and business associates against the judge. They packed his courtroom Aug. 10 wearing black armbands picturing the scales of justice broken in two.

Valde

repea

By JUSTIN GILLIS
And LUIS FELDSTEIN SO
Herald Staff Writers

Metro-Dade Commi
Jorge Valdes announced
that he no longer supports
vote on repealing Dade's
only law — but he
Hispanic groups demand
county commissioners re
law themselves.

Valdes said he would a
missioners to cancel a
public hearing, called at h
tence a few weeks ago, an
his previous request for a
1988 referendum. Flanked
Hispanic community lead
midday news conference,
said he had concluded
referendum would tear
apart.

"We oppose the propose
endum on the ordinance be
will be divisive, open old
and again create a very
image of Dade County be
world," the 18 groups s
statement.

But Valdes said that
weeks after the Sept. 1 he
will reintroduce his first
on the anti-bilingual law:
posal for immediate repeal
public vote. That is wit
county commission's powe

The 18 organizations,
offering no detailed plan
the repeal measure throug
cated strong support Mon
the idea. Pressure from
organizations — none of
sent representatives during
commission debates on t
— would make it far har
commissioners to dodge th
tion of repeal, as they tried
to do.

The organizations repr
Monday included the Latin
ber of Commerce, the Coal
Hispanic American Wom
Cuban American Bar Ass
the Cuban American CPA
tion, the Cuban American
Foundation, Facts About
Exiles, the Latin Builders
tion, the Municipalities of
Exile and the Spanish A
League Against Discrim
These and other groups bel
loose coalition called *Uni*
United.

Monday's news con
marked the first strong
statement by Hispanic lea
the anti-bilingual battle,
weeks ago as a lone cru
Valdes. In early discussio
one commissioner would
repealing the anti-bilingu
outright, forcing Valdes to
a referendum as a compron

But the prospect of a

'I sent [the judge] a telegram. I told him that I will never let him forget my son, and I never will. It is the least that I can do.' — Carmen Portela

CAROL GUZY / Miami Herald Staff

Carmen and Jesús Portela will gather today with friends and relatives at the Metro Justice Building to mark the anniversary of their son's death and protest his killer's sentence.

IN MARIO'S MEMORY

His parents want him to be remembered — and his murderer sentenced to death.

By MARGARIA FICHTNER
Herald Staff Writer

On the credenza behind Jesus Portela's office desk is propped a plaque bearing a portrait of Jesus Christ and the familiar Reinhold Niebuhr prayer that begins, "God grant me the serenity to accept the things I cannot change," but these days there is no room for serenity in Portela's shattered heart.

"We cannot bring my son back," he says, "so we do this."

At noon today, Portela, a well-to-do Dade developer, and his wife, Carmen, will lead an hourlong demonstration in front of the Dade County Courthouse in memory of their son Mario, who was murdered on this date three years ago.

The march also will protest the punishment meted the young man's killer, Jesse Ramirez. In June, Circuit Judge Steven Robinson sentenced Ramirez to two life terms plus 40 years. The Portelas — like the majority of the jury that at this time.

"I refuse to be pitted against the Portelas," he says.

Robinson is the judge who put Frank Fuster on probation in a 1981 child molestation case that was to presage the horrors of Country Walk. But four years later, he went far beyond state sentencing guidelines to slap an unusually stiff 30-year term on a man convicted of beating a child to death after the boy had vomited in his Corvette.

Recently, Robinson admitted he had leaned toward the death penalty in the Ramirez case until hearing testimony that the 33-year-old Colombian had been savagely abused in childhood and had become deeply religious since being in prison.

None of that is good enough for the Portelas.

"That he was punished when he was small," says Carmen Portela. "That he was abused. That doesn't give him the right to kill my son or anybody else. We

CAROL GUZY / Miami Herald Staff

Carmen and Jesus Portela will gather today with friends and relatives at the Metro Justice Building to mark the anniversary of their son's death and protest his killer's sentence.

IN MARIO'S MEMORY

His parents want him to be remembered — and his murderer sentenced to death.

Mario Portela: He was killed three years ago today.

By MARGARIA FICHTNER
Herald Staff Writer

On the credenza behind Jesus Portela's office desk is propped a plaque bearing a portrait of Jesus Christ and the familiar Reinhold Niebuhr prayer that begins, "God grant me the serenity to accept the things I cannot change," but these days there is no room for serenity in Portela's shattered heart.

"We cannot bring my son back," he says, "so we do this."

At noon today, Portela, a well-to-do Dade developer, and his wife, Carmen, will lead an hourlong demonstration in front of the Dade County Courthouse in memory of their son Mario, who was murdered on this date three years ago.

The march also will protest the punishment meted the young man's killer, Jesse Ramirez. In June, Circuit Judge Steven Robinson sentenced Ramirez to two life terms plus 40 years. The Portelas — like the majority of the jury that recommended the death penalty by a 10-2 vote — want to see Ramirez in the electric chair.

Barring that, they want Robinson transferred off the criminal bench, and today's demonstration is to drive home that point to Chief Judge Gerald Wetherington, whose chambers are in the Flagler Street courthouse.

"As I see Judge Robinson," says Carmen Portela, "he is against the death penalty deep inside. I respect that, but the thing is this: If he is against the death penalty, he cannot be a judge in a state where the death penalty is allowed."

Robinson, a former county judge who won election to circuit court in 1984, declines to be interviewed about the matter at this time.

"I refuse to be pitted against the Portelas," he says.

Robinson is the judge who put Frank Fuster on probation in a 1981 child molestation case that was to presage the horrors of Country Walk. But four years later, he went far beyond state sentencing guidelines to slap an unusually stiff 30-year term on a man convicted of beating a child to death after the boy had vomited in his Corvette.

Recently, Robinson admitted he had leaned toward the death penalty in the Ramirez case until hearing testimony that the 33-year-old Colombian had been savagely abused in childhood and had become deeply religious since being in prison.

None of that is good enough for the Portelas.

"That he was punished when he was small," says Carmen Portela. "That he was abused. That doesn't give him the right to kill my son or anybody else. We are not giving Mr. Ramirez the death penalty. Ramirez had the choice. He came to this country 15 years ago, like I came 25 years ago. I didn't murder anybody. He had the choice to be a good man, to work and have kids, all a good way of life. Instead, he chose to kill."

On Aug. 7, 1984, Mario "Chichi" Portela was abducted from a family company sales office in Southwest Dade, presumably in revenge for a business deal that involved the elder Portela. The $1 million ransom demanded by the kidnappers was delivered but never retrieved. Portela, stripped to his shorts and stuffed inside a sleeping bag, was found dead in

Please turn to **PORTELAS** */ 3C*

Sky-box chic and champagne by the g

around Portela's head, suffocating him, after a bungled attempt to collect a huge ransom.

After an unusual delay to allow a new defense team to prepare for the sentencing hearing, the jury voted 10-2 to recommend the death penalty.

Late Friday, Robinson sentenced Ramirez to two life terms plus another 40 years. The judge chose to spare the killer after hearing testimony that Ramirez was brutally abused as a child.

The judge himself realized the political danger. Portela's family wields influence in the powerful Latin Builders Association, and the victim's cause was championed by state legislators. Portela's aunt, when the sentence was announced, cried: "You will never be elected again in this town."

After leaving the bench Friday night, Robinson phoned political strategist Schwartz, trying to weigh his chances of survival.

"He knew in advance this would have a negative effect. As his political consultant, I didn't welcome his decision," Schwartz said. "But he feels his decision was based on the facts and the evidence."

Veteran trial attorneys said Saturday that Robinson has always run a laid-back courtroom, through his eight years as a county court judge and three years on the circuit court bench. That reflects his personality, they said — the judge even has a painting of himself, wearing a tropical sarong, hanging in his home.

Robinson firmly believes his job is not to exact vengeance, friends say. Instead, Robinson tends to believe that criminals can be reformed through counseling and therapy. He has made a specialty of studying different approaches to sentencing, and he frets over his decisions until he feels they are perfect, they say.

Robinson's approach has backfired at least once. In 1982, he sentenced a convicted child molester to two years' probation and counseling. The defendant's name: Frank Fuster, the Country Walk baby sitter who was convicted three years later in one of the largest child abuse cases in the country.

On other occasions, however, Robinson has come down harder than expected on criminals. In a 1985 case, for example, he sentenced Norman Eastman to 30 years for beating a 2-year-old child to death, even though the sentencing guidelines recommended a maximum term of seven years.

"The Ramirez sentencing has to be seen in the context of his career on the bench, and I think the public will see it was not part of a pattern," Schwartz said.

Not likely, Robinson's critics answered. They said the decision to spare the Duct Tape Killer will still burn in the memories of some of Dade's most powerful figures three years from now, when the judge will be up for re-election.

"People will be working very hard at election time" to defeat him, said Armando Gutierrez, a political consultant paid to know the pulse of Dade's Cuban voters.

Grief over their son's death spurs parents to activism

PORTELAS/from 1C

a canal. Sixty-eight feet of duct tape had been wrapped around his head, asphyxiating him. He would have been 25 this past June.

To advertise today's march, his parents have printed and distributed thousands of Say-No-to-the-Death-of-Justice flyers, and they expect "no less than 2,000 to 3,000 people" to show up, says the father. "Maybe more. You never know."

Jesus Portela is vice president of the politically heavyweight Latin Builders Association, and his son was married to the daughter of the association's president, Evelio Pena. As the network is powerful and far-flung, today's crowd could be large.

"They know it's not our problem any more," says Carmen Portela. "It's everybody's problem."

"We don't try to deny anybody's rights," adds her husband. "I believe in the law of this country. But this was premeditated. They kidnapped my son. They killed my son. There's no doubt in any mind [Ramirez is] the killer. He should be punished for that. This is what the jury recommended, and the jury is the people, and we are the people. We the people can change laws. We the people can remove the judge."

Circuit Judge Steven Robinson, left, sentenced Jesse Ramirez to two life terms plus 40 years in the murder of Mario Portela.

Since their ordeal began three years ago, Carmen and Jesus Portela have taken an unusually activist posture in their grief.

When Ramirez's sentencing was delayed for seven weeks, they rallied scores of friends to demonstrate in front of the Metro Justice Building, where the trial had been held. When Robinson returned to the bench Aug. 10 after a few weeks of study leave, they filled his third-floor courtroom with supporters wearing brown armbands trimmed with broken scales of justice.

They vow at least one of them will show up in Robinson's courtroom every day until some action is taken on their behalf, even if it takes years. Even if it never happens.

"We'll be there," Carmen Portela says. "I sent [the judge] a telegram. I told him that I will never let him forget my son, and I never will. It is the least that I can do."

The Portelas have been married 27 years. She is 46; he is a year older. They came to the United States from Cuba in 1962, five months before their son's birth, settling in New York, where Jesus Portela started a home repair and remodeling business that eventually grew to 20 employees. Even today, he proudly displays snapshots taken in those days of his three panel trucks parked in a line along a wintry New York street.

In 1971, the family moved to Miami, where Portela began to buy, remodel and then resell houses. Eventually, he began buying land, too, and then building his own new houses and apartments. He now heads Portela Investments Inc., a corporation with about 250 employees. It is a family business. His wife runs the accounting department, and at his death, Mario was being groomed to take over.

"He does everything I do," says Jesus Portela, who sometimes still speaks of his son in the present tense. "He supervises my business like I do. He, at that time, was doing the things that I do now."

To outward appearances, the Portelas are the picture of the fulfilled American dream. They are an attractive couple, dressed well and with apparent expense. Jesus Portela's office near Florida International University is decorated in quiet good taste. A large color photograph of Mario, handsome and grinning, dominates one wall.

For a time, the couple says, they contemplated leaving Miami. "but on[e] come home and tell my wife I don[t] think we should move anywhere," Portela says. "We should stay here, b[e] what other place are we going to have our friends here."

His wife agreed. It is those frie[nds] she says, "who are helping me to [see] that I have something else to live [for]. You know, when something like t[his] happens, you feel like you are alo[ne] the world in a very dark tunnel, a[nd] you're never going to see the light again."

The business, neglected in the h[or]rible aftermath of Mario's death, ha[s] begun to claim their time again.

"We care about our business," [says] Jesus Portela. "We have to stay ho[t] can make dollars — to pay taxes, [to] whatever you have to pay and to t[hink] of the future. We have to think wh[at] we're going to do in the future."

Then, after a pause, a blurted, [un]admission: "There is no future."

"When this happens to you, you [are] marked forever," says Carmen Po[r]. "No matter what you have. No ma[tter] where you go. No matter if you la[ugh]. No matter if you sing. No matter [what] you are doing. You are marked in [the] soul forever."

'I was drifting through life in Kenneth's tow

DOUGLAS/from 1C

thing.

Mr. Douglas and I left at once for the Hotel Belmont in New York. That was the whole wedding trip, and it was great. I discovered sex. I came to the experience not so much with love or even passion, but with a wild, eager curiosity. There must have been a good deal of latent passion in me. At last, I'd found out about men.

left him, he wrote in one of his last letters to me: "I always thought you supported me out of nobility; now I realize you did it because it was an adventure." He was right.

Kenneth's prison term was up in the early months of 1915. As the release date approached, my family begged me to give up my job in Newark and return home. Because of their relentless pressure, I gave in to their wishes.

Back with family

er, Uncle Ned, who'd been lost for years in the schism of the two families. He seemed easy and relaxed as if he had just dropped in for an idle social visit after a decade and a half. "So glad to see you," he said. Actually he was here on a secret diagnostic mission. Any idiot might have realized this, but in my perturbed state I didn't.

Uncle Ned said he'd like to meet my husband and get acquainted with him as well. Kenneth phoned. He'd sent Uncle Ned to investigate.

A 'threshold case'

In a few days, Kenneth arrived, and after having a couple of talks with my husband, Uncle Ned invited me into his office. Uncle Ned said that although Kenneth was a very nice man, he'd now had the chance to study him and could give me a true picture of what my husband was like. He called him a "threshold case" and said that

moved by it, flabbergasted by it, though there was a little twinge, a hint of bitterness that my father had given me up for so long. Most of all I was touched by Uncle Ned's fair and understanding presentation of the whole dilemma. I knew I couldn't go on the way I'd been living.

So I told Uncle Ned that I thought it would be better if I returned to my father, but I'd have to tell my husband. He called Kenneth into the office, went over the

[with, perhaps I'll go to Co]lumbus, Ohio, and get a job on a ne[w]spaper."

I accompanied him to th[e] valley, and we sat on a stone [at] the edge of the line and ta[lked]. When the trolley was rea[dy] to move out, I said goodbye. [It] was the end of it. I went b[ack] to Uncle Ned's house, back t[o] back to listening to his so[ng] Schoenberg on the piano. [The] next few days, I was on m[y] way to Florida, where I could

eir son's death spurs parents to activism

Circuit Judge Steven Robinson, left, sentenced Jesse Ramirez to two life terms plus 40 years in the murder of Mario Portela.

g remove the judge."
e their ordeal began three years
armen and Jesus Portela have tak-
unusually activist posture in their

en Ramirez's sentencing was de-
for seven weeks, they rallied
of friends to demonstrate in front
Metro Justice Building, where the
d been held. When Robinson re-
to the bench Aug. 10 after a few
of study leave, they filled his
loor courtroom with supporters wearing brown armbands trimmed with broken scales of justice.

They vow at least one of them will show up in Robinson's courtroom every day until some action is taken on their behalf, even if it takes years. Even if it never happens.

"We'll be there," Carmen Portela says. "I sent [the judge] a telegram. I told him that I will never let him forget my son, and I never will. It is the least that I can do."

The Portelas have been married 27 years. She is 46; he is a year older. They came to the United States from Cuba in 1962, five months before their son's birth, settling in New York, where Jesus Portela started a home repair and remodeling business that eventually grew to 20 employees. Even today, he proudly displays snapshots taken in those days of his three panel trucks parked in a line along a wintry New York street.

In 1971, the family moved to Miami, where Portela began to buy, remodel and then resell houses. Eventually, he began buying land, too, and then building his own new houses and apartments. He now heads Portela Investments Inc., a corporation with about 250 employees. It is a family business. His wife runs the accounting department, and at his death, Mario was being groomed to take over.

"He does every thing I do," says Jesus Portela, who sometimes still speaks of his son in the present tense. "He supervises my business like I do. He, at that time, was doing the things that I do now."

To outward appearances, the Portelas are the picture of the fulfilled American dream. They are an attractive couple, dressed well and with apparent expense. Jesus Portela's office near Florida International University is decorated in quiet good taste. A large color photograph of Mario, handsome and grinning, dominates one wall.

For a time, the couple says, they contemplated leaving Miami, "but one day I come home and tell my wife I don't think we should move anywhere," Portela says. "We should stay here, because what other place are we going to go? We have our friends here."

His wife agreed. It is those friends, she says, "who are helping me to see that I have something else to live for. You know, when something like this happens, you feel like you are alone in the world in a very dark tunnel, and you're never going to see the light again."

The business neglected in the horrible aftermath of Mario's death, has begun to claim their time again.

"We care about our business," says Jesus Portela. "We have to see how we can make dollars — to pay taxes, to pay whatever you have to pay and to think of the future. We have to think what we're going to do in the future."

Then, after a pause, a blurted, awful admission: "There is no future."

"When this happens to you, you are marked forever," says Carmen Portela. "No matter what you have. No matter where you go. No matter if you laugh. No matter if you sing. No matter what you are doing. You are marked in your soul forever."

ing through life in Kenneth's tow'

e in one of his last always thought e out of nobility, u did it because it e." He was right.

er. Uncle Ned, who'd been lost for years in the schism of the two families. He seemed easy and relaxed as if he had just dropped in for an idle social visit after a de-

He'd sent Uncle Ned to investigate

A 'threshold case'

In a few days, Kenneth arrived.

moved by it, flabbergasted by it, though there was a little twinge, a hint of bitterness that my father had given me up for so long. Most of all I was touched by Uncle

"Oh, perhaps I'll go to Columbus, Ohio, and get a job on a newspaper."

I accompanied him to the trolley, and we sat on a stone wall at

t the crowds.
die and I'm still here?" she
ordinary woman alone. May
piness in this troubled world.
as the best."
, a 32-year-old telephone
youngster he used to sneak
oom to watch *The Jackie*
r his parents put him to bed.
the couch and I'd laugh the
father," Conway said. "He'd
'What are you doing here?'
and join me."
nd, Dave Giordano from
ith him to the funeral home.

surprised by my reaction. It was the first time I'd reacted to a celebrity death. Here was someone who was in my living room every Saturday night.

"I feel it more as a personal loss," said Forrest. "It's like someone from my childhood died."

Julie Valle, a New Yorker visiting Miami, made the trip to the funeral home in a wheelchair. The 46-year-old homemaker said it was something of a hassle, but she had to go see Gleason one last time.

"I was a great fan of his," she said. "He had a big mouth, but he had an even bigger heart."

C.W. GRIFFIN Miami Herald Staff

Marilyn Gleason, Jackie's widow, and her sister June Taylor, at rear, leave funeral home.

Slain man's kin irate at life term for killer

[illegible] Steven Robinson started a [illegible] night when he sentenced a [illegible] for committing one of the most [illegible] in Dade County in 1984.

[illegible] movement of the sentence — [illegible] over [illegible] 10-2 jury recommendation for [illegible] penalty — touched off the emotions of [illegible] family of both the convicted man and his [illegible]

"[illegible] to God," called out friends of the convicted killer, Jose Ramirez.

"Murderer, murderer," yelled family members of the [illegible] man, Mario Portela.

"What you have done here is a shame for the justice system of the United States," said the victim's father-in-law, Pedro Pena.

"You will here from us, Robinson," said Gene McCarthy, the victim's uncle.

"You will never be elected again in this town," said McCarthy's wife, Consuelo.

Ramirez, a native of Colombia, admitted before sentencing that he killed Portela in August 1984.

Portela, 22, the son of a prominent developer, was kidnapped from his father's Southwest Dade office on Aug. 7, 1984. When negotiations for the $1 million ransom broke down, Ramirez tightly wrapped 68 feet of fiber-reinforced duct tape around Portela's head,

Please turn to **RAMIREZ** / 5D

ERICA BESSE Miami Herald Staff

nin were all smiles as they rode on Churchill the elephant.

lked to U.S. get VIP ride

mitation from
new American
rought squeals
m Judyth. Both
gles as Rocky
his repertoire.
phant ride on
that produced
miles that very
he sides of the
daughter.
o life than just
aid Keith Wa-
pment for the
iami. "This is
for them. This

is an opportunity of their lives."

The Fajardos have been staying at the Salvation Army shelter since May 1. Fajardo, a campesino, is seeking refuge in America. He is hoping for political asylum, claiming he was persecuted by the Honduran government for being a member of a farmers' cooperative that was asking for better treatment.

He says the army forced him off the land he was renting. He left behind his wife and a third child.

"He's very industrious and willing to help himself," Waters said. As long as Fajardo's immigration status is unsettled, however, he cannot work.

But none of that mattered Friday. The Fajardos were the guests of Metrozoo and received the full VIP treatment, complete with lunch and golf cart tour.

Lenny and his dad even got picked as special performers in the animal show. They became daredevil animal handlers, helping to carry out a 15-foot, 150-pound Burmese python.

Dwarfed by the beast, Lenny never even flinched.

"Hopefully," Waters said, now the worst is behind them."

rule sank pro-growth bloc

Sweltering 95 sets Dade record

According to the venerated South Florida weather cliche, "It's not the heat, it's the humidity." Friday, it was both — in abundance.

A record high reading of 95 was registered at Miami International at 12:40 p.m.

"If we hadn't gotten the thunderstorms, we certainly would have gone higher -- the upper 90s," said National Weather Service forecaster Ralph Pendleton.

But a pattern of rising heat followed by cooling, afternoon rain really isn't all that unusual, Pendleton said.

"We get our record highs around here with southwest winds," he said. "The air comes across the peninsula, and we also get thunderstorms building up over the peninsula and moving over the Miami area."

Friday's record for a June 26 replaced the

and making people happy," said friend, Margaret Sheffield. "Everybody adored him."

Wearing top hat and tails, using the name Van Houston, Mr. Beck delighted audiences young and old with his card tricks and disappearing acts. No matter what the benefit, he was more than willing to perform.

As a young man, Mr. Beck had been a professional magician and musician. As he aged, his talents were given for free.

A painting contractor for more than four decades, 35 of those years in Coral Gables, he built a successful business without even

Gables Golf Association. Mr. Beck spent a good many hours on the links of the Granada course. He also spent a lot of time with his dogs. Fifteen years ago, that led him to city hall.

Mr. Beck wanted his dog, Rags, to accompany him in his golf cart. The county and city said no. Mr. Beck challenged their decision. Before long, Rags had an official course membership card and was riding merrily in his owner's golf cart whenever Mr. Beck played.

Tiger, his last dog, never played golf, but did ride with Mr. Beck to job sites every day. Mr. Beck also taught the terrier to sing when he

Gladys L. Webb, retired nurse

Gladys L. Webb, a retired registered nurse and a resident of South Florida for more than four decades, died Thursday after a lengthy illness. She was 80.

For the past two decades, Mrs. Webb had lived in Plantation. During the 20 years before that, she had lived in Dade.

Mrs. Webb is survived by her husband, William Webb, a retired insurance executive; three sons, Allan Webb, Ph.D., of the Jet Propulsion Laboratory in Pasadena, Calif.; Glenn Webb, Ph.D., of the math department at Vanderbilt University; Dennis Webb, a Miami lawyer; and six grandchildren.

Services will be at 11 a.m. Monday at the Joseph B. Cofer Miami Shores Funeral Home, 10931 NE Sixth Ave. Friends may call at the funeral home from 7 to 9 p.m. Sunday. Interment will be in Southern Memorial Park.

Victim's kin vows to campaign against judge

RAMIREZ / from 1D

covering up his mouth and nostrils.

Ramirez told a friend, who testified at trial, that it was "easy, like killing a chicken."

Portela's body was found in a ditch in Dania on Aug. 20.

"I only want to tell Judge Robinson to keep this in his conscience forever — to think about my son and then ask his conscience if he did a good job," the victim's mother, Carmen Portela, said outside the courtroom Friday night.

The victim's parents were angry that it took the judge more than two months to sentence Ramirez, who was convicted of first-degree murder on April 10.

The judge, who admitted the delay was "unusual," said he wanted to give the new defense lawyers time to prepare for sentencing.

The Portelas say they have been victims of a justice system in which the accused has more rights than the victim.

The victim's father, Jesus Portela, a prominent member of the politically powerful Latin Builders Association, says he plans to campaign against Robinson at re-election time.

"This man will never be judge again. I don't care what it costs me," Portela said.

On May 2, Portela and Peña, president of the Latin builders' group, staged a protest demonstration against the judge on the courthouse steps that drew more than 200 people, including prominent Latin politicians.

The judge said Friday he did not consider the case worthy of the maximum penalty.

Reading from a five-page sentencing order, the judge said he was impressed by Ramirez's jailhouse conversion to fundamentalist Christianity and his "sincere belief in the Almighty."

Robinson also cited testimony of relatives and psychologists, who said Ramirez had been abused as a child.

"Hung from a meathook, he was beaten with multi-tailed whips; he was choked by his mother's broom handle; his hand was placed in the lit burners of a stove," the judge said.

"What this court has heard yesterday and today is a history of a violent man whose violent nature was developed not from

some inherent evil, but from violence committed by others against him," Robinson said. "To inflict the death penalty in this case would ignore this overriding mitigating causality."

Nevertheless, the judge said, Ramirez the crime called for severe punishment.

"The terror of the defendant in the days and minutes before his death must have too horrible for us to try and imagine," he said.

The judge sentenced Ramirez to life in prison, with a minimum term of 25 years before parole for the murder. The judge added another consecutive life sentence for the kidnapping, and made the sentences consecutive to a 40-year term Ramirez is already serving for a federal extortion conviction.

According to testimony Friday, the Portela killing was not the only murder Ramirez committed in August 1984, Chief Assistant State Attorney Abe Laeser said Ramirez killed another man in Houston over a drug debt on Aug. 25, five days after Portela died.

Laeser said Ramirez also wrapped duct tape around the head of German Tejada and tortured him. Tejada died of a heart attack. Ramirez has not been charged with the Tejada murder.

Laeser told the judge that Ramirez was "a sociopath" who planned Portela's murder for four days while waiting for the ransom to be paid.

"This is as cold and calculated an act as anyone could imagine," he said.

Six injured aboard Delta jet

Four airline employees and two passengers were injured Friday when a Delta Airlines jet from Atlanta hit extreme turbulence as it approached Fort Lauderdale-Hollywood International Airport.

"It was shake, rattle and roll," said Pat Healy of Phoenix, who was flying to Fort Lauderdale for a medical conference.

A spokesman for Delta said Flight 877, carrying 239 passengers, hit the rough air about 6:45 p.m. when the Boeing 767 was about 110 miles north of Fort Lauderdale.

Many of the passengers were eating dinner when the plane began vibrating, Healy said.

One person suffered a neck sprain and another suffered a back injury, while the others suffered minor injuries, a Broward Sheriff's Office spokesman said.

In an unrelated incident Friday night, an Eastern DC-10 jetliner traveling from Los Angeles to Miami experienced a sudden drop in pressure as it approached Miami International Airport at 37,000 feet.

It landed without incident at 9:40 p.m. The plane immediately descended after the unexplainable pressure drop. One passenger fainted and another suffered an eardrum injury that did not require hospitilazation, Eastern spokesman Robin Matell said.

The aircraft, Flight 23, left Los Angeles carrying 198 passengers and 11 crew members.

Driver of stolen car drowns in pond

The driver of a stolen car being chased by Metro-Dade police drowned early Friday when he drove into a pond on a West Dade golf course.

Police said Ramon Hurtado, 28, drove a 1984 black Mercury Cougar into a pond at the Fontainebleau Park Golf Course around 1:15 a.m.

Metro-Dade Fire Rescue divers were called, but they could not find the man because the water was too murky, said Metro-Dade spokesman Juan Murias.

A wrecker pulled the car out of the pond, and Hurtado's body was found inside.

The chase began after police spotted Hurtado speeding through the intersection of Southwest 97th Avenue and West Flagler Street. Hurtado, who has no known address, drove into the Fontainebleau Park area. He drove onto the golf course and straight into a pond.

After removing the car, police learned it had been stolen in Sweetwater.

Shooting charges dropped against 2 officers

COPS / from 1D

the gunmen. Ex-policemen Raul Puig and Pete Gutierrez said they were drinking with Manresa and Lopez when the plot was hatched and later heard the shots, but did not see the incident.

The defense said Quesada and Puig lied in hopes of getting their sentences commuted. Quesada is serving a 25-year term on cocaine charges, while Puig was sentenced to four years for conspiring to help a drug dealer.

Gutierrez, who is two months from finishing medical school in the Dominican Republic,

chores. They still face an internal investigation.

"I'm glad it's over — and I'm upset it ever happened," Lopez said.

"A nightmare," Manresa said.

Both officers say they have lost the appetite, at least temporarily, for undercover work. Also, they said, their cover was blown by the publicity.

Some of the jurors said they thought the case was weak.

"I think something happened with those four policemen, but I don't think there was enough evidence to convict," said Larry Harts,

"I commend you, sir, on what you have brought to my attention," the judge said.

Sharpstein and her husband, Richard Sharpstein, who represented Lopez, and attorney Douglas Hartman, who defended Manresa, also thanked Scruggs for his honesty.

"I respect you," Richard Sharpstein told Scruggs as the two men shook hands.

"Right's right," Scruggs said.

Scruggs said he was disappointed in the ruling because of the seriousness of the allegations. But he would not comment on the effect it might have on the pending federal investigation of police corruption.

Donaldson said that even without the contract, he wants to help Dade solve its trauma problems. "I have a great emotional commitment to trauma," he said. "I'll be here, whether I'm paid or not."

...approval to ... advertising a business in the right-of-way of a public street. When the law takes effect in 10 days, violators can be fined $200.

...later to keep fighting.

"I am familiar with all of those people," Valdes said. "They always take the opportunity to try to push me against the wall."

3 controllers to be asked about crash

By ROBERT L. STEINBACK
Herald Staff Writer

A Washington air traffic control specialist will be in South Florida today to interview three controllers who were on duty Monday morning when a helicopter and a light airplane collided in midair near Opa-locka Airport, killing a 27-year-old student pilot.

The National Transportation Safety Board specialist will also review tapes of the conversations between the pilots and the tower controllers, said Jeff Kennedy, an air safety investigator for the NTSB.

The collision, which occurred about 8:20 a.m. above the intersection of Red Road and Northwest 138th Street, killed Keiji Nakajima, a Tokyo resident living in South Florida while studying for his helicopter operator license. The student pilot of the Cessna 152, Hernando Lozado, and his instructor, Julio Cesar Bedoya, crash-landed at the airport and escaped serious injury.

Cesar was putting Lozado, who was at the controls, through a "throttle-off" emergency drill before the accident, Kennedy said. In such a drill, the student is expected to land the aircraft after the instructor closes its throttle — the equivalent of an automobile driver lifting his foot off the accelerator.

Such a maneuver would have caused the airplane to lose altitude more quickly than usual, Kennedy said, forcing the pilot to make a sharp turn toward the runway rather than a wide, gentle turn. Investigators said the maneuver may have brought the plane into the helicopter's airspace.

Inspection of the two aircraft indicated that the helicopter's main rotor hit and sheared off the airplane's propeller, Kennedy said. The airplane's nose wheel and one of its rear wheels were also sliced off.

Nakajima may have survived the collision, said Dr. Arthur Copeland, Dade County assistant medical examiner. The victim's injuries and clues from the scene suggested Nakajima may have been killed by the fall, Copeland said.

Duct-tape judge won't hear case

Robinson

By JAY DUCASSI
Herald Staff Writer

The judge who refused to send "duct tape" murderer Jesse Ramirez to the electric chair after a jury recommended the death penalty has removed himself from the trial of Ramirez's girlfriend, who also faces execution if convicted.

"I felt uncomfortable hearing the case," Dade Circuit Judge Steven Robinson said Tuesday. "My gut feeling is another judge should hear it."

Robinson's June 21 decision to spare Ramirez's life, after a jury voted 10-2 for the electric chair, angered the family of victim Mario Portela. Ramirez admitted at trial that he wrapped 68 feet of duct tape around Portela's head, choking him to death, after a kidnap-for-ransom went wrong.

Portela's mother, Carmen, has shown up in Robinson's court almost every day since the sentencing in a silent protest to the judge's decision.

Robinson was scheduled to try the case against Ramirez's girlfriend, Julita De Parias, on Oct. 5. Prosecutors Abe Laeser and Kevin DiGregory say De Parias participated in Portela's kidnapping, was in the same room when Portela was murdered and urged her boyfriend to kill.

Ramirez said at his trial that he was under De Parias' influence when he killed Portela. A psychologist testified that Ramirez allowed his girlfriend to control him.

In a one-page order recusing himself from the upcoming trial, the judge said that that testimony, which would not be admissible in the girlfriend's trial, would "unavoidably" prejudice his sentencing if she was convicted.

The judge did not explain how his sentencing would be affected. The victim's parents, who believe he would not have sentenced the girlfriend to death either, were happy with the decision.

"It's what he should have done in the first place, if he didn't believe that he could give the death sentence," Carmen Portela said Tuesday.

Jesus Portela, the victim's father, a wealthy builder with powerful connections in the Latin community, said he will keep trying to have Robinson removed from the bench.

HUD chief to be replaced

HUD / *from 1B*

agement team in. That has been common knowledge," he said. "But the manager has not discussed the terms of it a whole lot."

Moore said Pereira can count on his support in the transition. "I will do whatever the manager asks me in terms of providing assistance."

Under Pereira's proposal, Oasis would reorganize and manage Dade's troubled housing agency. It would also draw up a court-ordered plan for long-range housing repairs that is due in mid-November.

After two years, Dade officials would resume control of Little HUD, while Oasis could switch to a consulting role for one year, Pereira said.

Moore, who has been Little HUD's acting director for 15 months, would become an adviser, Pereira said.

"It is an unprecedented arrangement," Pereira said. "Al would not be the director. We're going to be naming a lead Oasis person to be responsible for the day-to-day operations, reporting to the county manager's office."

In a draft memorandum to the commission, Pereira said Oasis officials would have "many of the management prerogatives we normally reserve for department directors" — including the power to hire personnel, subject to county approval.

Oasis would be paid $325,000 each of the two years; the federal government would cover $300,000 of the cost the first year, Pereira said.

Moore, a veteran bureaucrat with no housing expertise, was appointed to the Little HUD job by Pereira in June 1986, after longtime director Mel Adams resigned under fire. Moore began a reorganization of the agency, focusing on improving management and maintenance operations. But improvements have been small and slow.

Moore's position became especially shaky after State Attorney Janet Reno sued the county over public-housing conditions, and after reports that he was criticized in an unreleased grand jury report for his handling of gas leaks that led to a fatal explosion at a project in February.

Hispanic board members quit

QUIT / *from 1B*

jobs. Penalver hoped to enlist Martinez's help in pressuring the Cabinet to hire more Hispanics.

Penalver also wanted some staff to handle the commission's paperwork. After Gonzalez left, he would stop by the commission office regularly to pick up mail and handle some chores. But he had little time — and showed up last week to find the office in other hands, Penalver said.

"I don't want to make a major case out of the removal of the files from that office," Penalver said Tuesday. "But all these decisions are being taken without even the courtesy of a phone call to inform us beforehand."

Penalver later discovered that the files — stuffed in a five-drawer file cabinet and six small boxes — had been moved to another part of the governor's office, the Office of Citizens Assistance. It's located "right across the hall from where they were," said Alex Steverson, director of administration for the governor's office.

Steverson said he had notified Gonzalez of the move the day before it happened.

"It was a routine move. It was no big deal," Steverson said. "The bosses upstairs, like the governor and those folks, were totally unaware of [the commission] being moved."

The result is that the commission has no director — and no office — three months after the Legislature gave it new life. Steverson conceded that "the ball is in our court" to provide the commission with staff and supplies, but added: "I don't have any orders to do anything."