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IN THE

SUPREME COURT OF FLORIDA

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DENNIS SOCHOR,	)	
Appellant,	)	
vs.	)	CASE NO. 71,407
THE STATE OF FLORIDA,	)	
Appellee.	)	

Corrected

INITIAL BRIEF OF APPELLANT

(On Appeal from the 17th Judicial Circuit
In and For Broward County, Florida)

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

GARY CALDWELL
Chief, Capital Appeals Division
Florida Bar No. 256919

Counsel for Appellant

12/9/91
Copies

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I STATEMENT OF THE CASE

A Broward County grand jury charged Dennis Sochor by indictment with premeditated first degree murder in the death of Patricia Marie Gifford and with kidnapping of Ms. Gifford. R1143. The case was tried to a jury, which found Mr. Sochor guilty as charged. R1189-1190. The jury entered a death verdict in the sentencing phase of the trial. R1225. The trial court sentenced Mr. Sochor to death for the first degree murder and to 22 years of imprisonment for the kidnapping. R1237-38. Mr. Sochor timely filed his notice of appeal, R1240, and this appeal follows.

STATEMENT OF THE FACTS

A. The State's Evidence

At the close of the state's case, the evidence was as follows: Patricia Gifford and Delta Harville went in Ms. Harville's car to the Banana Boat Lounge in Broward County on the evening of December 31, 1981, to celebrate New Year's Eve. Ms. Gifford was to meet her boyfriend, John Vasel, III, after he got off work around 3:00 a.m. At the bar, Ms. Gifford met appellant, Dennis Sochor, and his brother, Gary. Someone at the bar took a photograph of Dennis and Ms. Gifford. Ms. Harville fell ill; Dennis and Gary helped Ms. Gifford take her to her car, where she went to sleep. Ms. Gifford then agreed to go with Dennis and Gary in Dennis's truck (which belonged to his employer) to get something to eat. Dennis and Ms. Gifford were kissing and she was not forced into the truck.

According to Gary, Dennis drove the truck for about five minutes. Thereafter, Gary heard Ms. Gifford shouting for help. He got out of the truck and saw that Dennis had her pinned down. Gary threw a rock at Dennis, who, with an insane look on his face (he looked as though he were possessed by the devil, with his pupils rolled back and his voice altered), told him to get back in the truck. A few minutes later Dennis returned to the truck and they drove away.

In statements to the police after his arrest in 1986, Dennis said that he did not remember very well what had happened. He related that he and Ms. Gifford were kissing. He wanted to have sex, and an uncontrollable feeling came over him. They argued about having sex, he grabbed her, she hit him, a struggle ensued in which he choked her. He disposed of the body in a rural area.

Persons who saw Dennis within a few days of the incident noticed scratches on his face.

Police investigating Ms. Gifford's disappearance obtained the photograph taken at the bar, which was then published in the news. When he saw the picture, Dennis left the area in his employer's truck, which he abandoned in Tampa. He eventually moved to Georgia. In November 1985, he was using the name Mike Jacobs and living with Paul Jones, whom he told about a killing. Dennis was arrested for a traffic offense in May 1986. Broward County Sheriff's detectives flew up to interrogate him, and he waived extradition. At the Broward County Jail he met Michael Hickey, who was a witness for the state in the murder trial of Michael Keen, a fact commonly known in the jail. Mr. Hickey was

mysteriously placed in a segregation cell near Dennis, and Dennis conveniently confessed to him as Mr. Keen had done before. Dennis said he had killed "a fucking, slut, bitch."

1. The bar. Patricia Borman, the bartender, testified that she told Ms. Gifford that she did not like the way Dennis looked. R39. Patricia Ann Vickers testified that she saw Dennis outside the women's room between 12:30 and 1:00 a.m. and he did not seem intoxicated. R59. Delta Harville testified that Dennis did not seem intoxicated when she was taken to the car where she passed out. R88-89. She woke up around 5:00, saw people in the parking lot lighting up joints, spoke briefly with the bartender, and then returned to the car and lay down. R91-93. She roused herself around 7:00 and telephoned the police. R92-93.

Gary Sochor testified that he spent the evening in the "inner bar" while Dennis was talking with Ms. Harville and Ms. Gifford in the "outer bar." R310. He helped Dennis and Ms. Gifford helping Ms. Harville, who seemed pretty drunk, out to her car. R311. Back inside, Gary returned to the inner bar, leaving Dennis and Ms. Gifford at a table. R313. Eventually, Gary said it was time to leave, and Dennis told him to get the truck. R313. When Gary brought the truck around, Denny and Patty were kissing in the parking lot. R314. The kissing continued for 10 or 15 minutes while Gary impatiently waited. R315. Gary suggested that they go get something to eat for breakfast and they all left together in the truck. R315-16.

2. The truck. Gary testified as follows about the trip in the truck:

A It seemed about approximately five minutes.

Q You were still in Broward County, Florida though; is that correct?

A Five minutes. I am not sure what, you know, where the countyline [sic] is.

Q What happened then?

A Everything.

Q Let me ask you this, before I ask that. Who was driving?

A Denny was driving.

Q And where were you?

A I was in the passenger's seat.

Q Did there come a time when the vehicle stopped?

A I remember the vehicle coming to a stop, and Denny got out of the truck and ---

Q Now, do you remember a time when Patty said something to you?

A Patty was hollaring [sic] for help, asking what was going on.

Q Who was she yelling to help her?

A Myself. I got out of the passenger's side, ran around the vehicle, and Denny had her on the ground, had her hands pinned down. I hollared [sic] at him, and ---

Q What was she doing at that time, Patty?

A Just laying [sic] there, and I couldn't understand what was happening, and I just hollared [sic] at Denny to leave her alone. I went and picked up a stone, looking for a rock or stone or something, and I remember throwing -- not to hit him. I threw the stone just above his head to scare him, and he turned and looked at me and told me to get back in the truck, which I did.

Q And why did you get back in the truck?

A Well, in our past, Denny would -- we would get in brotherly arguments and fights, and sometimes Denny would get real furious and ---

Q Let me ask you this: How did he look when you saw him out there? Describe him, if you would, to the ladies and gentlemen of the jury.

A I wouldn't know what came over him at times, but a couple of times in our past and at that particular time ---

Q Do you need a drink of water, Gary?

A Some air.

MR. HANCOCK: Can we get a drink of water for him?

Q (By Mr. Hancock) Just relax.

A The pupil would roll back, and all I'd see is white in his eyes, and he'd be very -- real furious, and in a voice that wasn't his. It would be deep, and would scare you.

Q And can you describe this look?

A He looked to be possessed.

Q What do you mean by "he looked to be possessed?"

A Well, I don't know. It wasn't him. He was possessed by something, you know. I always looked at it as the devil.

Q Now, you indicated you had seen this look before; correct?

A Yes.

Q Now, after that, you indicated you got back in the truck; correct?

A Yes.

Q And after getting back in the truck, can you tell the ladies and gentlemen of the jury what you did?

A I put my face in my hands, in my lap, and just sat there.

Q And how long was it before Dennis came back into the truck?

A It seemed to be around five minutes, a couple of minutes, not very long.

Q Did you ever see Patty again?

A No.

Q And what happened after he got back in the truck?

A As we started down the road -- and it's not hard to remember, but it's just I can remember him starting to talk to me, and I started screaming because I didn't want to hear anything he had to say. I didn't look at him. I didn't sit up. I was just screaming.

Q And why didn't you make any effort to help Patty?

A I was scared of him. We got in some fights in our past, and I usually ended up on the short end of the deal.

Q And after you got back in, did he say anything to you about telling anyone?

A All I remember is the screaming, just screaming, not saying anything, just screaming, and all I remember him saying was that if I didn't shut up, I'd never see my family again.

Q When he gave that threat to you, what did you say or do?

A The next thing I remember, I stopped screaming, and I sat straight up in the truck, and I seen the stoplight, and it was like I didn't remember a thing. I mean I asked him to take me to the beach.

Q And did there come a time when he went back to his place?

A All I remember now is arguing with him about taking me to the beach.

Q Did you get back to the apartment, to where he was living?

> A Yeah, he wouldn't take me to the beach, and we got back to the apartment, and I remember getting out and still arguing about I wanted to go down to the beach, and I can remember somebody at the other apartment hollaring [sic] at us to quiet down.

R316-20.

In his taped statements, Dennis said that he kissed Ms. Gifford a few times and felt like having sex. R499. There was an argument, she said no, and he grabbed her. Id. She hit him; he grabbed her and she was hitting him and screaming; he panicked, became angry, and began choking her; she was fighting and then she did not move and he became afraid. R500. He did not have sex with her because he thought he had just killed her. R502. When a girl says no, "an inner charge builds up and builds up, up to a point of I have say no -- no control. No mental control of anything, of anything." R474. "It's a great energy, energy feeling, just like if you ever been a fright [sic] or terrified or something, just a big build up." R475. Dennis said he had left Gary at the A1A strip on the beach before going back to the Banana Boat and picking up Ms. Gifford. R516-17.

3. The Flight. Around 6:00 a.m., Gary woke up in the apartment Dennis shared with Barry and Randy Eckman.[1] He looked out the window, saw that Dennis's truck was not in its parking place, and went back to sleep. R322. He later went outside and saw the truck in its parking place. R322. There was a dark line in the truck bed, the doors were open and a woman's

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[1] A resident of Michigan, Gary was visiting Dennis for the holidays. The Eckmans were members of Dennis's Bible study group.

shoe, a set of keys, and an off white sweater were inside. R323-24. Gary hid the keys and went to sleep in the truck; when he woke up the doors were shut and the truck had been cleaned. R325. He went into the apartment, and when Dennis came in, Gary saw gouges on his cheek.[2] R325-26. Dennis said he had been scratched by a woman when Dennis got into a fight with her companion. R326. The couple had been "monkeying around the truck." R327. Dennis said the keys and other items in the truck belonged to the couple with whom he had been fighting. Id. When Gary expressed doubt about this story and refused to hand over the keys, Dennis "was on the verge" of having the look of being possessed. Id. Two days later, Dennis drove Gary back to the airport for his flight back to Michigan. R329. The next Friday, Detectives from Broward County came to Gary's workplace in Michigan to ask about Dennis's whereabouts. R330. Gary testified that as soon as the officers identified themselves he said, "Now what did he do?" R339.[3] Gary initially said that Ms. Gifford remained in the parking lot when the men left. R346. He came to Florida to try to locate the body. R347-48.

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2 Randy Eckman noticed a scratch on Dennis's forehead. R259. Barry Eckman saw a scratch on the right side of his face. R269. A few days later, Susan Campbell saw Dennis at a church volleyball game, and noticed scratches on his neck and face. R300. It looked as though he had been scratched by a cat or struck by a bush. R301. He said he had cut himself shaving. Id. He wanted her to go for a ride with him and was so insistent that she became nervous. R302-303.

3 Detectives Lauria and Schlein testified that when the officers identified themselves Gary said, "Dennis didn't do it. I know he didn't do it." R388, 548-49. Gary denied saying this. R340.

Meanwhile, Mr. Vasel, Ms. Harville, and Barbara Ryan, Ms. Gifford's mother, had been urging the police to locate Ms. Gifford. Mr. Vasel and Ms. Ryan testified at some length before the jury about Ms. Gifford's good character. Mr. Vasel testified that Ms. Gifford was very loyal and would not go to bars and pick up guys. R106. He testified that she had a very good, excellent relationship with her family, which came down to help look for her. R109. Ms. Ryan testified that her daughter lived with her "high school sweetheart," Mr. Vasel. R623. Ms. Ryan spoke and corresponded with her daughter frequently. R625. Ms. Gifford was very loyal to her family and friends. R626. Ms. Gifford was very healthy and happy, and was starting to meet friends, having just started her job as an aerobics instructor. R627. Ms. Ryan had an emotional meeting with Gary Sochor. R626-27. He told her that his brother had looked like he had the devil in his eyes at the time of the struggle. R632.[4]

The police published photographs of Dennis taken in the bar, and when he saw them, he drove to Tampa in his boss's truck. R478-79. He abandoned the truck there,[5] and was apparently

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4 Ms. Ryan was the state's final witness in its case-in-chief. Both in his opening statement and in his final argument, the prosecutor emphasized Ms. Gifford's good character. He said that her family told the police "what a sweet, loving girl and caring girl she was, that she would never, never just disappear. She was liked by everyone, and that wasn't her style, just to leave and not tell anyone." R25. He emphasized that Ms. Gifford and Mr. Vasel were sweethearts, R834,839, and that it was very difficult for Mr. Vasel and Ms. Ryan to testify. R839-40.

5 Crime scene technicians examined the truck in Tampa on January 22, 1982. On the passenger door were "several spots" and a test on one of these spots "gave us a positive indication of blood." R131. The test did not indicate whether it

later seen hitchhiking near Tallahassee. R236-38. He moved to New Orleans and then to Georgia, R468, where he assumed the name of Mike Jacobs and lived with Paul Jones in November 1985.

Mr. Jones testified that Dennis told him that he had choked someone and put the body in a drainage pipe in the countryside while living in Ft. Lauderdale. R564. He said it did not bother him if he had to do it again. Id. He had used a vehicle to dispose of the body, and then wiped it of every trace of evidence. R565. Over defense counsel's objection, Mr. Jones testified that Dennis said it did not bother him at all, that death was death, life is life, when you are gone you are gone. R565-66. Dennis would do the same thing to Mr. Jones if he told anyone about this. R566. Shortly afterward, Dennis put on the stereo and danced and sang as though nothing had happened. Id. Asked about Dennis's thoughts on women, Mr. Jones replied: "To him, women were more or less a sexual tool, nothing more." R566.[6]

In May 1986, Dennis was arrested on a minor traffic offense in Georgia. Detective Schlein and Sergeant Lauria of the Broward County Sheriff's Office flew up to interrogate him. At first, he denied that his name was Sochor and denied having been in Ft.

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was human blood. R143. There were scratch marks on the door. R135-36. There was "an area which had appeared to be wiped clean." R136.

6 The trial court had previously sustained an objection when the prosecutor asked Randy Eckman about his attitude toward women, and had cautioned that the area should be avoided. R261-64.

Lauderdale. R457. He eventually admitted that he was Dennis Sochor and that he had lived in Ft. Lauderdale. He made several taped statements to the police.

In his first taped statement, he said that he had spoken with a woman at the bar in the photograph, and discussed having sex with her. R472-73. He was drunk and did not remember much about the conversation. Id. He and his brother left the bar, but he may have returned to it. R474. Asked what would happen when a girl said no, he replied: "It's hard to describe. It's like an inner charge builds up, up to a point I have say no -- no control. No mental control of anything, of anything." R474. "It's a great energy, energy feeling, just like if you ever been a fright or terrified of something, just a big build up." R475. Asked whether it was released when he forced himself on a girl, he replied: "It's -- you know, in the past, when it's happened, I guess I can't say it's satisfying or there is complete release. It's just charged up, and at the onslaught of the ones I do remember, it was a very guilt, very terrible feeling." Id. The next morning, when his brother mentioned the items in the truck, he became afraid. R476. He feared that he had again done something that he had done "previously other times," that he might have forced himself on "another woman." Id. He thought that he "had committed another rape possibly, probably." Id. He "raped her, another girl." R477. Terrified at the thought that he had committed "another rape," he left town in his boss's truck.

R479. When he does this with women, he is not aware of what he is doing during it, but afterward he is aware of it. R485-86. He was deeply sorry about what had happened. R487.

The detectives took Mr. Sochor back to Ft. Lauderdale, where he made additional statements and tried to assist the search for the body. These statements were essentially similar to the first taped statement, but gave some sketchy details about his life after he left Florida. When taken to the Banana Boat Lounge, he said he killed the woman. This statement was not taped.

In addition to playing Mr. Sochor's taped statements for the jury, Detective Schlein gave the jury his own theory of the case: "In this particular case, as I sit here, I believe the girl was abducted, raped, and murdered out in a remote area. To admit to a rape and murder is much more vial [sic] than simply admitting that she was choked while resisting his advances, almost accidentally, and I think in Dennis' case since he is so emotional, to admit a version that he can live with, and that's exactly the way I see it. There is no doubt in our mind that both he and Gary were present, that she was raped and murdered." R560-61.

While in jail awaiting trial, Mr. Sochor met Michael Hickey under somewhat mysterious circumstances. An Iowa prison inmate, Mr. Hickey had been brought to Ft. Lauderdale to testify about a jailhouse confession to murder made to him by Michael Keen. R583,586. His role in the Keen case was well known around the jail. R592. For unknown reasons, Mr. Hickey was transferred for a few hours to a discipline cell in an area where Mr. Sochor was

a trustee. R589-90.[7] Striking up an acquaintance with Mr. Sochor, Mr. Hickey had him speak to a guard about transferring him out of the discipline cell, and the guard transferred him to Mr. Sochor's cell. R594-95. Mr. Hickey held himself out as a jailhouse lawyer, and Mr. Sochor consulted with him about his case. R577-78. "Just out of the blue" Mr. Sochor said that he had "killed a fucking, slut, bitch." R579. He said that his brother was with him. R580. A few days later, Mr. Hickey told Mr. Sochor that he did not seem like a killer, and Mr. Sochor reiterated that he had "strangled the fucking, slut, bitch." R579. His brother had been hitting him when he killed the woman. R580.

B. The Defense Evidence.

There were four defense witnesses. The principle effect of their testimony was to denigrate Mr. Sochor's character.

The first defense witness was Arnold Zager, a psychiatrist. This defense witness testified that Mr. Sochor could be "extremely dangerous to the public" and was legally sane at the time of the offense. R657-58. He reached this conclusion after seeing Mr. Sochor twice at the jail, for a total of two hours. R651. This constituted a "comprehensive examination." R675. His notes

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7 Mr. Hickey did not know why he was placed in the punishment cell. R591. The record does not show how Mr. Sochor became a trustee while awaiting trial for first degree murder. Although it was not revealed to the jury (nor, apparently, to the mental experts who testified at trial), the jail guards reported that Mr. Sochor was crazy. S18 ("THE BAILIFF: The jail told me he's a psycho and they want him back as soon as possible.") He told a psychiatrist, Dr. Zager, that he was being treated with Lithium and Sinequan in the jail. R654.

from this comprehensive examination covered slightly more than two pages. R665-66. Dr. Zager did not read or review the statements made by any witness in the case. R666. He did not listen to Mr. Sochor's taped statements. R687.[8] Asked about his general lack of knowledge about the facts of the case, he replied that he was "not the detective," R673-74, and that trying to ascertain the facts "would be beyond what I am asked to do." R682. Investigating witnesses who knew Mr. Sochor at the time of the offense would be beyond his range. Id. The prosecutor questioned Dr. Zager about his knowledge of the facts of the case as follows:

> Q Without looking at your notes, and if you need to look at your notes, feel free, but explain what you can, without your notes, what you understand the facts to be.
>
> A I understand the victim -- and I think her name was a Patricia Gifford.
>
> Q Correct.
>
> A Was at the Banana Boat Lounge on January 1st of 1982, apparently celebrating the new year, and apparently, she left that Banana Boat Lounge with some other individual and was subsequently found murdered, and there was a picture taken of several individuals there at the Banana Boat Lounge, and among the pictures -- or among the people present was Dennis Sochor, hence he was at least not a suspect, but certainly the police wanted him for questioning, and apparently, they could not find him for a lengthy period of time, and that subsequently he was arrested on a traffic related offense in, I think Roswell, Georgia, and as part of the evaluation, after he was arrested, and as I say prior to his being arrested, he used IV

8 In the prosecutor's view, Mr. Sochor's voice on the tape was the voice of a madman. R854.

> cocaine. He was then apparently discovered to be at least a suspect in this possible case and was returned to Fort Lauderdale.
>
> Q Did you know any other facts of this case?
>
> A I know other facts with regard to other legal history of this gentleman.

R662-63.[9]

The testimony of Patsy Ceros-Livingston, the second defense witness began as follows:

> Q (By Mr. Rich) Doctor, would you please give us the benefit of your past medical education and training, so that the jury will know just exactly what you do?
>
> A I have no medical training.

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9 These "other facts" were referred to several times in the prosecutor's examination of Dr. Zager. R665 (the probable cause affidavit mentioned "other legal issues that this gentleman was involved in at that time.... Q: What do you mean by legal history? A: In terms of whether there were any other legal difficulties, criminal or civil."); R675 ("he confided in me other personal issues with regard to aberrant behaviors being before, that I have not certainly brought up today. Q: Other things that he has done that you have not brought up today; correct? A: Yes."); R680 ("Q: So, even before he had any use of alcohol, he was violent [when he was a teenager]; is that correct, or continued antisocial behavior? A: I didn't say he was violent then, but that he was committing various acts against society, such as stealing, etcetera [sic]."); R687 ("I do know about his past history in regard to women, which you know, I have been advised not to discuss in my testimony today."), ("I am aware of difficulties that he has had with women prior to this present charge.") In Mr. Sochor's first taped statement, played by the prosecution in its case-in-chief, the jury also heard about these "other facts." R475 ("at the onslaught of the ones I do remember, it was a very guilt [sic], very terrible feeling."); R476 (he feared that there had been a recurrence of what had happened "previously other times") (he may have forced himself on "another woman") (he may have committed "another rape"); R477 (he "raped her, another girl"); R479 (same), R480-81 (he does not know why he attacks "girls"); R481-83 (he has felt the same "urges" again).

Q You are not a medical doctor?

A No, I am not.

Q What are you?

R693-94. It turned out that Ms. Ceros-Livingston was a psychologist. R694-95. She spent a total of 3 1/2 hours with Mr. Sochor in the jail. R697. Defense counsel elicited from her testimony that Mr. Sochor had previously been arrested on a sexual battery charge, and that he had pled guilty to a charge that he thought was rape. R711. She gave him the Minnesota Multiphasic Inventory Test, and the results showed a "fake-bad profile." R714. A "fake-bad profile" means that "the person is answering the questions in such away [sic] as to make themselves [sic] look psychopathological, very ill, and that's what we found with this profile." Id.[10] She testified that Mr. Sochor was

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[10] In his final argument to the jury in the sentencing phase, defense counsel sought to denigrate the testimony he had elicited from Dr. Ceros-Livingston: "Patsy Ceros-Livingston went through a lot of psychological tests, where you check things out. I have gone through that thing, too. I flunked it, too. According to her, I am a psycho myself. She's probably right." R1100. With respect to Dr. Zager's testimony he said: "I was amazed when I read Zager's report, and you will have it here. 'This man is extremely dangerous, under the influence of an alcoholic beverage. He has drug abuse from the time he was sixteen-and-a-half, but he is not dangerous enough to be involuntarily committed, under the Baker Act.' What kind of stupid law is this? What kind of system do we have in this country? What kind of society do we have in this country that doesn't take care -- we have created a frankenstein monster with this system." R1096. He topped all of this off with the following: "I'm sure if I could have afforded it, I could have gotten another psychiatrist and could have gotten you a different evaluation, but unfortunately, nobody can afford these things." R1102.

legally sane at the time of the offense. R717. Dr. Ceros-Livingston was no better informed about the facts of the case than Dr. Zager was:

> Q Would it be fair to say that you really don't have anything about the facts of this case; is that correct?
>
> A Very little.
>
> Q Can you tell us what you know bout the facts of this case?
>
> A I know that a person is dead.
>
> Q Do you know who that person was?
>
> A Gifford? No, I'm not sure. I don't remember the name. I know it was a woman, and I know -- obviously I know what I read in the newspaper. I didn't read it back then, but obviously now and --

R721. She did testify that Mr. Sochor had told her that while in jail he had been in "quite a few altercations....some fights with other inmates." R726.

The third defense witness was Bernard Baptiste. As the prosecutor was trying to impeach Mr. Baptiste concerning his apparently numerous convictions, defense counsel said of his witness: "I don't pick and choose these witnesses. I mean, you take them as they come." R761. Mr. Baptiste testified that while he was in jail with Mr. Hickey and Mr. Sochor, Mr. Hickey urged him to testify against Mr. Sochor, saying that he could get out of jail on a $500 bond if he did so. R748-49.[11] Mr. Hickey

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11 Apparently Mr. Baptiste was in jail for first-degree murder. R761.

said that he would kill Mr. Sochor if he (Hickey) had to go back to prison for more than two years, but would not kill him if he were set free on probation. R 751-52.

The final defense witness was Genevieve Hardwich, a drug addict who became acquainted with Mr. Sochor while in jail. She asked him whether he killed his girlfriend, and he replied as follows: "Dennis said he didn't kill anybody. He said that they didn't find the body. I didn't pressure him because I didn't want him to quit talking to me. I didn't know if he killed a girl or guy that day, but he just said he didn't kill anybody." R781. After this conversation, an investigator from the State Attorney's Office came to see her and said that Mr. Sochor was "another Ted Bundy." R779,782. Ms. Hardwich had never heard of Ted Bundy, so she was told that he was like another man, Schaefer, who had killed "a whole bunch of girls." R786-87.

C. **Rebuttal**. The state called one rebuttal witness, Ricardo Castillo, a psychiatrist. His testimony affirmed rather than rebutted the denigration of Mr. Sochor's character by the defense witnesses. He testified that Mr. Sochor told him that the first girl with whom he had sex was "a bitch, a dog" and gave him a venereal disease. R794-95. As with Dr. Ceros-Livingston, Dr. Castillo's knowledge of the case was based on newspaper accounts. R797. Mr. Sochor told him that he had no recollection of what happened after he left the Banana Boat, and that he had confessed to cover up for his brother, who had children whereas he did not. R796-98. Dr. Castillo's opinion (based on a single interview of Mr. Sochor in 1987, R793) was that the "lack of

recollection was sort of a type of selective amnesia." R798. Dr. Castillo concluded that Mr. Sochor was sane at the time of the killing, he knew it was wrong to kill, he had an anti-social personality, and he lacked empathy. R799. He testified that Mr. Sochor is an alcohol and drug abuser, R808, and that, when arrested in Georgia, Mr. Sochor called the arresting officer an asshole. R811. Defense counsel elicited from Dr. Castillo Mr. Sochor's statement that the night before his arrest he was drinking with a male or female stripper, and when arrested he was under the influence of alcohol and cocaine. R811-12.

D. The State's Evidence in the Penalty Phase.

The state's first witness was Patricia Neal, Mr. Sochor's former wife. She testified that he did not treat her well, and was really violent with her on New Year's Eve, 1974. R953. She testified to over 30 acts of violence by him, R953-54, saying that he would become violent if he did not get sex: "his eyes would kind of glaze over, and he would just get wild." R954, 963-64. When he became angry he just went after anybody who was around. R955. The couple lived in Italy when Mr. Sochor was stationed there in the Army. Ms. Neal testified that Mr. Sochor would frequently disappear at night, and that when one night she saw purses in the trunk of the car when he returned, he said he "got them from the whores." R956. One of the whores scratched him when he tried to snatch her purse. R965. On cross-examination, defense counsel elicited testimony from Ms. Neal about a rape committed on her by Mr. Sochor at a campground. R962.

The state's second witness was Ronald Wright, a pathologist, who testified about strangulation. Asked whether such a death is slow, he replied: "Yes, it is, relatively speaking." R968. The amount of pain suffered depends on the person; there are two major components: bending and tearing of the neck structure, and the inability to get one's breath, which "causes a panic reaction ordinarily." R696. The minimum length of time to effect death is 13 seconds if the person is short of breath. R971-72. It can be a very quick death without pain. R972-73.

Detective Schlein testified at length and in detail about a violent rape supposedly committed by Mr. Sochor in Michigan, for which charges were still pending. R975-76.

Detective Russo testified about a sexual battery committed by Mr. Sochor in Broward County for which Mr. Sochor was placed on probation. R990-97. Detective Russo would have recommended a psychiatric evaluation. R998-99.

The written reports of the mental health experts who testified at trial were admitted into evidence. R1004.

E. <u>Defense Evidence in the Penalty Phase</u>.

Family members testified at length that Dennis's father beat him frequently and savagely when he was growing up. Gary testified that "Dennis took a lot of my beatings," R1005, and that the father would "just beat, beat, beat" the children with a big belt. R1006. Dennis always got the worst beatings. R1007 ("I could tell that Dad seemed to swing a little harder at

him"). When the father lost his job, Dennis supported the family. R1008. Dennis left home when his father erroneously accused him of stealing a collection of silver coins. R1009-1010.

Kathy Cooper, Dennis's sister, testified that all of the parents' frustrations were taken out on Dennis. R1021. The father was a boxer, very strong with a quick and violent temper; there were times when he had to be pulled off of Dennis. R1022. He would force Dennis into a corner so that he could not get away, and beat him. Id. He once had Dennis in a corner and smashed his head into the wall until he slid to the floor, and then started kicking him. R1022-23. Dennis was once placed in a mental hospital for beating his brother Bryan. R1028-29.

Charles Sochor, Dennis's father, admitted to frequently beating Dennis. R1038. He testified that Dennis has a violent temper when under the influence of alcohol, but is otherwise very loving and kind. R1049. Dennis once was drunk on New Year's Eve; when Charles took Dennis's drink away, Dennis went berserk and hit his father. R1043,1057.

Rose Sochor, Dennis's mother, testified to being an abusive mother and treating Dennis horribly. R1064. Although all of the children had problems, "he was the nuttiest." R1069.

SUMMARY OF THE ARGUMENT

I. Guilt Issues.

The evidence is insufficient to support the convictions. The evidence was that Ms. Gifford got into the truck voluntarily and that Mr. Sochor killed her in a fit of rage when she refused to

have sex with him. This evidence does not make out a case of first degree murder. There was also no proof of kidnapping. The state failed to prove venue, and its evidence gave rise to reasonable doubts as to Mr. Sochor's sanity at the time of the offense, so that the verdicts are illegal.

The case was tried principally on evidence of Mr. Sochor's bad character and Ms. Gifford's good character and on unsupported opinions. Added to this was the prosecution's reliance on improper arguments and perjured testimony, all of which matters, individually and collectively, made the trial unfair.

The jury instructions on crucial issues were so incorrect as to diminish confidence in the correctness of the verdict. Although the defense relied on a valid defense of voluntary intoxication, the trial court instructed the jury incorrectly that voluntary intoxication was a defense only to premeditated murder and not to felony murder or kidnapping. The evidence gave rise to an absolute defense to kidnapping, but the trial court did not instruct the jury on this defense. The evidence gave rise to doubts whether Ms. Gifford was killed by Mr. Sochor, yet the trial court refused to instruct the jury on non-death lesser offenses. The trial court instructed the jury on felony murder theories not supported by the evidence, and gave incomplete instructions on excusable homicide (and hence on manslaughter) and third degree murder.

On the face of the indictment, the statute of limitations barred Mr. Sochor's kidnapping and felony murder convictions. The case was submitted to the jury on an uncharged theory of

kidnapping, which effected an illegal amendment to the indictment and violated the sixth amendment right to notice of the nature of the charges. Similarly, submission of the case to the jury on felony murder theories not charged in the indictment violated the sixth amendment.

II. Penalty Issues.

The penalty verdict of death and the resulting death sentence are the product of vigorous presentation and argument of nonstatutory aggravating circumstances. Hence Mr. Sochor's death sentence is illegal.

The sentence is also illegal where the jury instructions on crucial issues were incorrect so that the death verdict is illegal.

The death verdict is also improper because the jury was misled as to the gravity of its task.

The aggravating and mitigating circumstances were improperly applied. The evidence did not support the felony murder, "heinous, atrocious or cruel," and "cold, calculated and premeditated" aggravating circumstances found by the trial court judge. The argument of the prosecutor misled the jury as to the nature of the statutory mental mitigating circumstances, and the trial judge's findings reflect ignorance as to their application. All this notwithstanding that the state's main evidence was that Mr. Sochor was berserk at the time of the incident. The trial court also erred by failing to give any weight to the unrebutted nonstatutory mitigating evidence.

The death penalty is disproportionate in this case. The state's evidence was that Mr. Sochor was in a blind rage, that he seemed to be possessed by the devil at the time of the incident. The evidence was that he suffered from vicious abuse during an impoverished childhood and was a hard worker, but suffered the results of years of substance abuse. This is not an appropriate case for imposition of the death penalty.

Florida's death penalty has failed to meet the requirements of evenhanded, nonarbitrary application under Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). The standard jury instructions are constitutionally infirm, the reporters are chock full of cases recording the derelictions of attorneys in capital cases, trial judges commit reversible error with astonishing regularity, and the use of technical bars to appellate review has turned death penalty litigation into a maze of traps for the unwary.

The kidnapping sentence is illegal because in 1982 one could not be sentenced for the underlying felony in a felony murder case.

ARGUMENT

I. GUILT ISSUES

A. SUFFICIENCY OF THE EVIDENCE

1. First Degree Murder

Gary Sochor testified that Dennis and Ms. Gifford were kissing before the three of them entered Appellant's truck. R314,316. After driving for five minutes, they stopped and Dennis exited the truck. R316-317. The next thing Gary knew, Ms. Gifford was hollering for help. R317. He ran around the truck to see that Dennis had her hands pinned down. R317. Gary did not indicate that she was alive or struggling. R317. She was "just laying there." R317. The pupils of Dennis's eyes were rolled back and all that one could see was the white of his eyes. R318. He looked to be possessed by the devil. R318.

In the taped statements Mr. Sochor said he kissed Ms. Gifford a few times and started to become stimulated. R499. He asked her if she would consent to have sex with him. R499. She said "no." R499,520. He repeated his question. R520. She yelled at him and he grabbed her. R499,520. She then started screaming and hitting him. R500,520. He panicked. R500.[12] He began choking her. R500. Then she didn't move. R500. She was not breathing. R501,521. He believed that she was dead. R501,521. He laid her down in some bushes. R501. The body may have been covered with a blanket. R501.

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[12] She may have scratched him, but he was not sure that this occurred. R500,520.

a. Premeditated Murder.

The evidence only allows for conjecture as to whether Mr. Sochor had a premeditated design to kill. A premeditated design to kill is more than simply an intent to murder, it is a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind, both before and at the time of the homicide. McCutchen v. State, 96 So. 152 (Fla. 1957). The length of time of deliberation is not prescribed, a few moments reflection will suffice.

There is no presumption that murder is in the first degree. Rather, there is a presumption that a lower degree murder occurred. In Phippen v. State, 389 So.2d 991 (Fla. 1980), this Court wrote:

> ... premeditation, like other factual circumstances, may be proven by circumstantial evidence. Among the circumstances from which premeditation may be inferred are such matters as (1) previous difficulties between the parties, (2) the manner in which the homicide was committed, and (3) the nature and manner of the wounds inflicted.

389 So.2d at 993. In the present case the circumstances were not sufficient to prove a premeditated design by Mr. Sochor to murder Gifford. For instance, prior to the time of the fatal fight between Ms. Gifford and him, there had been no evidence of any difficulties between them. Compare Phippen (within 48 hours of killing defendant stated he was going to kill victims). In fact, Mr. Sochor and Ms. Gifford only met that night. The actual killing appeared to be in a heat of passion rather than from a premeditated design due to prior difficulties. Also, the manner of

the killing during an argument is more consistent with second degree murder rather than a murder in the first degree. Compare Nibert v. State, 508 So.2d 1 (Fla. 1987) (victim made to get on knees and then fatally stabbed). The evidence simply did not show that Mr. Sochor had a premeditated design to effect the death of Ms. Gifford.

Where the circumstantial evidence is consistent with the lack of premeditation, as a matter of law the evidence is not capable of supporting a first degree murder conviction on the basis of premeditation. In Hall v. State, 403 So.2d 1319 (Fla. 1981) this Court wrote:

> Although it is clear that one of the men shot Coburn, the evidence presented is not sufficient to prove premeditation beyond a reasonable doubt. Coburn was wearing a bulletproof vest, but the sides of the vest were open. He was shot through the opening in the vest with his own gun from a distance, as opined by one expert, of two to five feet. The evidence of the defendants' homicidal intent is subject to conflicting interpretations. One is that Hall or Ruffin seized Coburn's gun intending to kill him, took aim, and fired. If this were true, then this killing was premeditated. There are other interpretations, one of which is that Coburn struggled with one or both of the defendants until either Hall or Ruffin pulled the trigger without intending to kill. If this were true, then the killing was not premeditated.
>
> To prove a fact by circumstantial evidence, the circumstances must be inconsistent with any reasonable hypothesis of innocence. McArthur v. State, 351 So.2d 972 (Fla. 1977); Davis v. State, 90 So.2d 629 (Fla. 1956). While the circumstantial evidence in this case is inconsistent with any reasonable hypothesis of innocence as to the homicide of Deputy Coburn, it is not inconsistent with any reasonable exculpatory hypothesis as to the existence of premeditation. Therefore, the evidence is insufficient to prove premeditation, and the convic-

> tion for first-degree murder is reversed. We do find, however, sufficient evidence to sustain a conviction of second degree murder.

403 So.2d at 1320-1321. The state's evidence is consistent with a lack of premeditation. Killing Ms. Gifford during an argument is consistent with a killing in a heat of passion, not with a planned design. The fact that the killing was by manual strangulation is not sufficient to prove premeditation. State v. Bingham, 719 P.2d 109 (Wash. 1988).[13] In fact, the evidence that a weapon was not used, or obtained, makes more likely a lack of premeditation. Cf. Preston v. State, 444 So.2d 939, 944 (Fla. 1984) ("deliberate use of this type weapon [knife of four or five inches in length] so as to nearly decapitate the victim

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[13] In Bingham, the government argued that the strangulation took three to five minutes and therefore an opportunity for reflection existed and thus premeditation existed. The Washington Supreme Court rejected this argument:

> ... to allow a finding of premeditation only because the act takes an appreciable amount of time obliterates the distinction between first and second degree murder. Having the opportunity to deliberate is not evidence the defendant did deliberate. Otherwise, any form of killing which took more than a moment could result in a finding of premeditation, without additional evidence showing reflection. Here, no evidence was presented of deliberation or reflection before or during the strangulation, only the strangulation. The opportunity to deliberate is not sufficient.

It should be noted that in the present case in addition to showing a lack of reflection and deliberation, the evidence did not show the amount of time it took to effect death. However, during the penalty phase Dr. Wright indicated that death by strangulation could occur in as little as thirteen seconds. R971. In any event, the evidence presented was not inconsistent with the choking occurring in the heat of passion, without reflection.

clearly supports a finding of premeditation"); Roberts v. State, 510 So.2d 885 (Fla. 1987) (prior to killing defendant obtained a baseball bat, returned, and bludgeoned victim to death).

During trial the state emphasized Mr. Sochor's actions after the commission of the offense. Regardless whether Mr. Sochor's actions after the killing indicate that he was conscious of the fact he had committed a homicide, the evidence is consistent with awareness that he committed only a homicide rather than a murder in the first degree. A defendant's actions after the killing to avoid detection and punishment are not relevant for the purpose of showing premeditation and deliberation, as they only go to show the defendant's state of mind at the time of flight and not before or at the time of the killing. Austin v. United States, 382 F.2d 129 (D.C.Cir. 1967) (evidence of dragging victim to river, fleeing, and denying crime, although sufficient for second degree murder, insufficient for first degree premeditated murder); Wilson v. State, 493 So.2d 1019, 1021 (Fla. 1986) (state's evidence consistent with death resulting from heated quarrel and lack of premeditation even where defendant told police that another person, "an intruder," killed the victims). The jury could only speculate that there was a planned design rather than a killing in the heat of anger. The evidence was insufficient to prove a premeditated design to commit the murder rather than actions of a depraved mind acting without premeditation.

b. Felony Murder

The prosecution's alternative theory was that the killing occurred during the commission of kidnapping or attempted sexual battery, so that Mr. Sochor was guilty of first degree felony murder.

Kidnapping consists of abducting or confining another person against his or her will with the intent to hold for ransom, commit a felony, or inflict bodily harm or terrorize. § 787.02, Fla. Stat. (1981). It does not exist if the confinement is incidental to the commission of another crime. Faison v. State, 426 So.2d 963 (Fla. 1983). Here the confinement, if any, of Ms. Gifford was incidental to the killing.

The state's evidence demonstrated that Ms. Gifford entered the truck voluntarily. R316,498.[14] In denying the motion for judgment of acquittal the trial court noted that she was in the truck on her own volition, "but then there came a point when she was not there willingly. " R821. This interesting conjecture is contrary to the state's evidence. Except for the time that Mr. Sochor choked Ms. Gifford, there is no evidence that she was being confined against her will.

The instant situation is virtually identical to that in Hrindich v. State, 427 So.2d 212 (Fla. 5th DCA 1983) wherein the victim voluntarily entered the defendant's automobile. There was no evidence that she was confined or attempted to leave until the point she was confined during an attempted sexual battery. Thus,

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[14] Appellant and Gifford were kissing immediately before they entered the truck. R314,316.

the court held that there was no kidnapping. See also Jenkins v. State, 433 So.2d 603 (Fla. 1st DCA 1983) (kidnapping conviction improper where victim murdered immediately upon confinement since confinement was inconsequential to the commission of further criminal acts).

Finally, the evidence did not establish an attempted sexual battery. The evidence was that Mr. Sochor asked Ms. Gifford if they were going to have sex and she said, "no." This reflects only a rejection of consensual sex. Thus, a felony murder conviction cannot stand with attempted sexual battery as the underlying felony. The evidence was insufficient for a first degree murder conviction under either the theory of premeditation or of felony murder.

A conviction based upon insufficient evidence is a denial of due process. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Consequently, the conviction and sentence for murder in the first degree must be vacated.

c. **Corpus delicti**

Admissions or confessions are not admissible until the corpus delicti of the crime is proven independently of the confession.[15] E.g. Jefferson v. State, 128 So.2d 132 (Fla. 1961).

The elements of the corpus delicti in a homicide case are: (1) the fact of death; (2) the identify of the decedent; and (3)

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15 The sufficiency of the evidence of corpus delicti must be reviewed even when not raised by the defense. Dawson v. State, 139 So.2d 408, 412 (Fla. 1962). See also Pentecost v. State, 14 FLW 319 (Fla. June 29, 1989) (sufficiency of evidence reviewed even though not raised).

the criminal agency of another person as a cause of death. Jefferson. The issue at hand is the sufficiency of evidence to establish the fact of death and death by criminal agency.

In the present case the state wholly failed to show that Patricia Gifford was, or is, in fact dead. Gary Sochor testified that the last time he saw Ms. Gifford she was outside the truck, had been hollering, and Dennis had her down on the ground. Soon after this time Gary and Dennis left in the truck. No mention was made that Ms. Gifford was dead or even injured. In other words, the evidence is lacking that Gifford was or is dead, or that her death occurred by the criminal agency of another. Consequently, it was error to allow the confession in evidence, and the convictions and sentences must be reversed.

2. **Kidnapping**

As already noted, the state failed to prove that a kidnapping occurred. The state also failed to prove a corpus delicti of kidnapping independently of Mr. Sochor's statements -- in its sentencing order the trial court relied entirely on Mr. Sochor's statements in finding proof of intent for kidnapping. R1233. Of course even with the statements there was no proof of kidnapping. Hence, Mr. Sochor's conviction and sentence for kidnapping should be reversed and the trial court should be directed to enter a judgment of acquittal on that charge.

3. **Venue**

The state's proof of venue was as follows:

Q. Approximately how far did you go, Gary?

A. It seemed about approximately five minutes

> Q. You were still in Broward County, Florida though; is that correct?
>
> A. Five minutes. I am not sure what you know where the countyline [sic] is.

R 315.

Article 1, section 16 of our Constitution guarantees to the accused the right to be tried in the crime where the crime was committed.[16] 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 resulting conviction must be reversed and the defendant discharged. See Pennick v. State, 453 So.2d 542 (Fla. 3rd DCA 1984). Compare the facts at bar with those in Crittendon v. State, 338 So.2d 1088 (Fla. 1st DCA 1976) and Barclay v. State, 343 So.2d 1266 (Fla. 1977).

4. **Sanity**

Where the evidence gives rise to a reasonable doubt as to the defendant's sanity at the time of the offense, the state has the burden of proving sanity beyond a reasonable doubt. Yohn v. State, 476 So.2d 123 (Fla. 1985). In Johnson v. State, 57 Fla. 18, 49 So. 40 (1909), this Court wrote:

> All persons are presumed to be sane; and when insanity at the time of committing an alleged offense is relied on as defense, and the evidence for the state does not raise a reasonable doubt as to the sanity of the defendant when the offense was committed, it is incumbent upon the defendant to submit evidence sufficient to

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[16] Mr. Sochor also contends that the venue provision of the sixth amendment applies to the states. See State v. Valentine, 506 S.W. 2d 406, 410 (Mo. 1974). But see Cook v. Morill, 783 F.2d 593 (5th Cir. 1986).

raise a reasonable doubt of his guilt. If such doubt is raised by the evidence, the defendant should be acquitted.

Where the evidence cannot sustain a conviction for the offense charged at the close of the state's case, the trial court must reduce the offense charged or enter a judgment of acquittal. State v. Pennington, 534 So.2d 393 (Fla. 1988). Where its witness makes out a defense, the state is bound by that testimony. D.J.G. v. State, 524 So.2d 1024 (Fla. 1st DCA 1987).

In the state's case in chief, the only eyewitness, Gary Sochor, testified that Dennis was berserk at the time of the incident. This was corroborated by Dennis's statements. The state is bound by the testimony of Gary, which corroborated Dennis's statements. Hence, the state's evidence gave rise to a reasonable doubt as to Dennis's sanity at the time of the offense, and the evidence could not support the guilty verdicts.

It is conceded that trial counsel did not file a notice of intent to rely on insanity as a defense under rule 3.216(b) Florida Rules of Criminal Procedure. The failure to file such a notice, however, serves only to bar the presentation of defense evidence of insanity. Here, it was the state's evidence which gave rise to a reasonable doubt as to Mr. Sochor's sanity.

B. UNFAIRNESS OF THE GUILT PHASE OF THE TRIAL.

As already noted, the prosecutor's case was weak. Why then did the jury unanimously convict Mr. Sochor as charged? Largely because he was tried on his bad character rather than on the facts of the case. The trial was unfair because the jury was

diverted from its task of deciding the case on its merits. The convictions violate the rights to due process, to jury trial, and to nonarbitrary application of the death penalty under article 1, sections 9, 16, 17, and 22 of the state constitution and the fifth, sixth, eighth and fourteenth amendments to the federal constitution.

This Court faces two obstacles in reviewing the fairness of the trial: first, the general absence of objections by defense counsel; and second, some damaging evidence came from witnesses presented by the attorney that the court had appointed to represent Mr. Sochor. Mr. Sochor argues that use of these legal technicalities to uphold what occurred here would be unjust.

The contemporaneous objection rule. Section 90.104, Florida Statutes provides:

> **Rulings on evidence.--**
>
> (1) A court may predicate error, set aside or reverse a judgment, or grant a new trial on the basis of admitted or excluded evidence when a substantial right of the party is adversely affected and;
>
> (a) When the ruling is one admitting evidence, a timely objection or motion to strike appears on the record, stating the specific ground of objection if the specific ground was not apparent from the context; or
>
> (b) When the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer of proof or was apparent from the context within which the questions were asked.
>
> (2) In cases tried by a jury, a court shall conduct proceedings, to the maximum extent practicable, in such a manner as to prevent inadmissible evidence from being suggested to the jury by any means.

> (3) Nothing in this section shall preclude a court from taking notice of fundamental errors affecting substantial rights, even though such errors were not brought to the attention of the trial judge.

This statute is in conformance with the general principle that appellate review be predicated on a contemporaneous objection in the trial court, unless fundamental error has occurred.

Mr. Sochor contends first that the trial was so unfair that fundamental error occurred and second that the contemporaneous objection rule has less force in capital litigation.

As to the first argument, he relies on Pait v. State, 112 So.2d 380 (Fla. 1959) for the general principle that fundamental error occurs where there is argument or evidence presented that is so prejudicial to the rights of the accused that neither rebuke nor retraction can eradicate it.[17] The trial at bar contains an insinuation that Mr. Sochor had poisoned Ms. Harville as part of a clever scheme to isolate and kill Ms. Gifford, an assertion that the prosecution considered Mr. Sochor another Ted Bundy or Gerald Schaefer who "killed a whole bunch of girls," an assertion of a captain of the Sheriff's Office as to his agency's belief that Dennis and Gary Sochor "abducted, raped and murdered" Ms. Gifford contrary to the testimony of the state's eyewitness, repeated references to prior rapes and other bad acts committed by Mr. Sochor, and prosecutorial argument denigrating the consequences of the jury's verdict. Any one of these matters would be

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17 In its most pungent form, the rule is that "if you throw a skunk into the jury box, you can't instruct the jury not to smell it." Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962).

so damaging as to constitute fundamental error. Taking them as a whole, one wonders that the jury did not lynch Mr. Sochor on the spot, regardless of the lack of proof of the offense charged.

As to the second issue, Mr. Sochor relies on the principle that the trial judge's role is not entirely that of a passive observer of the trial. Section 90.104(2) and the Constitution impose on the judge the affirmative duty to ensure that the accused receive a fair trial on the merits of the case. Standard 6-1.1(a) of the ABA Standards for Criminal Justice provides that the trial judge has "the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial." The commentary to this Standard notes that "it is appropriate for the trial judge from time to time to intervene in the conduct of a case."

The Constitution imposes a higher standard in capital cases. The general doctrine that waiver can be inferred from a silent record sometimes does not apply in capital cases, so that the trial court has an affirmative duty to act to ensure a fair trial. See, e.g., Jones v. State, 484 So.2d 577 (Fla. 1986) (in a capital case, the court must obtain a personal waiver from the defendant of the right to instruction on lesser included offenses), and Elledge v. State, 346 So.2d 998 (Fla. 1977) (contemporaneous objection rule does not apply to presentation of nonstatutory aggravating circumstances because of "special scope of review by this Court in death cases"). This principle derives in part from the doctrine set out in, e.g., Proffitt v.

Wainwright, 685 F.2d 1227, 1253 (11th Cir. 1982), that the eighth amendment requires great reliability in fact finding. Many, if not most, states have relaxed preservation requirements in capital cases. See 41 C.J.S., Homicide §414, n. 23-28. Accordingly, the eighth amendment and Florida's capital review statute require the relaxation of the strict requirements of the contemporaneous objection rule in capital cases where there is a substantial likelihood that improper comments and evidence have diverted the jury from consideration of the merits of the case.

Evidence from defense witnesses. As has already been noted, some damaging evidence came from defense witnesses. Mr. Sochor argues first that even without the testimony presented by the defense, the improper prosecution evidence and argument was such as to require a new trial; second, that the prosecutor's cross-examination and argument exacerbated the ill effects of the defense testimony to such an extent as to require a new trial; and third, that the trial court failed in its duty to vindicate his right to a fair trial.

Some elaboration is required as to this third argument. In Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1974), the court noted that the trial court has an affirmative duty under the Due Process Clause to intervene to assure that the accused receive a fair trial. This constitutional principle has continuing vitality. See U.S. v. Malekzadeh, 855 F.2d 1492 (11th Cir. 1988). At bar, the trial court should have acted when defense counsel presented incompetent and immaterial evidence that directly and adversely affected Mr. Sochor's right to a fair trial.

1. Comments on Facts Outside the Evidence

In his argument to the jury the prosecutor argued facts not brought out in evidence. During closing argument he asserted repeatedly that Mr. Sochor had dragged Ms. Gifford out of the truck. The following is an example:

> ...Gary told you there was a struggle because Patty tried to get him to help and pleaded for him to help, and that man dragged her out of the pick-up, dragged her out, so there was a struggle in there...the evidence doesn't tell you how brutally she was beaten, and how she was murdered, and if she was raped or not, but we know that he had to force himself, and this is what this case is all about, ladies and gentlemen.
>
> It shows how cheap life is, how cheap it really is that that man could drag out some eighteen year old girl and take her to the back of the truck in some abandoned road to rape her, and he had audacity to think that he could leave Fort Lauderdale...

R915-917.[18]

Similarly, the prosecutor insinuated in his opening statement that Ms. Harville had been drugged. R22. It is reversible error for the prosecutor to comment on matters unsupported by the evidence. Huff v. State, 437 So.2d 1087 (Fla. 1983).

Mr. Sochor was on trial for kidnapping and for felony murder (with kidnapping as the underlying felony). Part of the offense of kidnapping includes the abduction of another against his will. In closing argument the prosecutor stated five times that Mr. Sochor forcibly dragged Ms. Gifford from the truck. R 847, 913,

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[18] The prosecutor's remarks were sufficiently convincing to persuade the trial court judge that Mr. Sochor had dragged Ms. Gifford from the truck notwithstanding the lack of evidence. See paragraph 2 of the sentencing order at R1232.

915, 917, 918. There was no evidence to support this assertion. The violation of the rule that argument of counsel be channeled by the evidence produced at trial was egregious and fundamental where it went to the heart of the issue at trial -- whether there was a kidnapping. As this Court noted in Washington v. State, 86 Fla. 533, 98 So. 605 (1923), a new trial should be granted where the prosecutor attempts to influence the jury by a statement of facts not supported by the record.

2. Opinions of Government Witnesses.

The prosecutor presented extensive testimony from Captain Schlein that he and Detective Lauria disbelieved Mr. Sochor's statements, and were convinced of Mr. Sochor's guilt.

> Q How long was that statement?
>
> A Approximately twenty or twenty-five minutes as I remember. It was clear to Paul and I [sic], after we left Georgia, that he wasn't telling us the whole story. It was a beginning, but clearly, there was a lot he was holding back.

R492-93.

> Q (By Mr. Hancock) Now, why did you take another statement from Dennis Sochor?
>
> A Because frankly, I wasn't convinced he was telling me that whole truth, and in situations like this, as the truth begins to emerge, you can sometimes learn more about it, as the days pass. In this particular case, though, we were satisfied that this wasn't the whole story.

R510.

> Q Now, you indicated that, when Mr. Rich asked you about him coming clean, why didn't you feel he wasn't coming clean with you?

> A I basically, after examining the case, feel we know pretty much what happened, and we don't believe to this day that he has admitted completely what happened for a variety of reasons.
>
> Q What were those reasons?
>
> A Well, in my experience, it's very difficult for someone who's committed a murder in many cases to admit, number one, to the police. That's obviously difficult, but subconsciously, it's important to come out with a version that you can live with, with a certain amount of pride. In this particular case, as I sit here, I believe the girl was abducted, raped, and murdered out in a remote area. To admit to a rape and murder is much more vial [sic] than simply admitting that she was choked while resisting his advances, almost accidentally, and I think it's important in Dennis' case, since he is so emotional, to admit a version that he can live with, and that's exactly the way we see it. There is no doubt in our mind that both he and Gary were present, that she was raped and murdered.

R560-61.

The prosecutor also presented testimony from Detective Lauria as to his opinion of Gary's sincerity. R442-43.

The opinion of a witness as to the guilt of the accused is not admissible. E.g. Gibbs v. State, 193 So.2d 460, 463 (Fla. 2d DCA 1967) (witness's statements that defendant murdered victim). Such testimony should be stricken by the court on its own motion. Id. Testimony that the police or prosecutors are of the opinion based on investigations and discussions that the accused is guilty is fundamental error. See Pait v. State, 112 So.2d 380, 384-389 (Fla. 1959) (not appropriate to give the jury the benefit of judgment of the state attorney's office). See also Ryan v. State, 457 So.2d 1084, 1090 (Fla. 4th DCA 1984) (argument that law enforcement officers believe defendant is guilty).

Testimony and opinions from police officers carry a great amount of weight with a jury. See Perez v. State, 371 So.2d 714, 717 (Fla. 3d DCA 1979) (police officers are generally "regarded by the jury as disinterested and therefore highly credible... [thus] the danger of improperly influencing the jury becomes particularly grave"). See also United States v. Bass, 593 F.2d 749, 755 (5th Cir. 1979) (assertion of personal belief that defendant is guilty also implies that assertion is based on knowledge and experience not shared by jury). In this case among the key issues to be decided by the jury were whether the killing was premeditated or occurred during a kidnapping or rape. Captain Schlein's testimony that there was "no doubt in our mind" that an abduction, rape, and murder occurred would certainly influence the jury. Schlein's statement is particularly inappropriate when he had no proof or evidence to justify the opinion.

3. Another Ted Bundy

Mr. Sochor was also denied a fair trial where the jury was made aware that the prosecutor's office considered him another Ted Bundy or Gerald Schaefer who killed a "whole bunch of girls."

Defense witness Genevieve Hardwich testified on cross-examination regarding what an investigator from the state attorney's office, David L. Patterson, told her about Mr. Sochor:

> Q [Assistant State Attorney]: If you need to explain, feel free.
>
> A [Ms. Hardwich]: Okay, yes, sir, he did, but he told me that Dennis was another Ted Bundy.
>
> Q Well, see, I didn't ask that.

> A See, he shouldn't have said things, nasty things like that he didn't know that wasn't true. I didn't even know who Ted Bundy was. They said something like Schaefer (phonetic), where I'm from, Martin County, a tiny town, which Schaefer was a police officer in Wilton Manors, a deputy that was killing a whole bunch of girls, so someone told me that Ted Bundy was another one that killed a whole bunch of girls from here.

R786-787. The prejudice from testimony, that an investigator from the state attorney's office believed Mr. Sochor had "killed a whole bunch of girls" as Ted Bundy did, is obvious.

A remarkably similar situation arose in People v. Kelley, 370 N.W.2d 321 (Mich. App. 1985). There the defendant was on trial for the charge of sexually assaulting a young boy. During the trial an implied comparison between the defendant and John Wayne Gacey was made. On appeal the state argued that the reference did not deprive the defendant of a fair trial. The appellate court disagreed:

> ...standing alone, the prosecutor's reference to John Wayne Gacey, the Chicago man who murdered more than a few boys after perpetrating homosexual assaults, clearly is prejudicial and improper.

370 N.W.2d at 322 (emphasis added).

At bar the jury's knowledge that an investigator from the state attorney's office compared Mr. Sochor to Ted Bundy denied Mr. Sochor a fair trial.[19] This improper evidence created a real chance that the jury would act on that passion rather than reason in evaluating the evidence.

4. Other Improper Arguments

The prosecutor began his closing argument by asserting that this would be the only time the state could try Mr. Sochor:

> * * * I think most importantly, I should thank each one of you for presiding on this case as being jurors because it's an extremely important case because this is the only time the state has to try Mr. Sochor for this senseless and heartless and atrocious crime that he committed against Patty . . .

R831-32 (emphasis supplied). Similar comments about the jury's heightened responsibility to the state because of the state's inability to appeal was held to be fundamental error in Pait v. State, 112 So.2d 380 (Fla. 1959).

The prejudice to Mr. Sochor was further exacerbated when the prosecutor denigrated the role of the jury by arguing that the giving of instructions on lesser offenses was a mere formality[20] and that if convicted Mr. Sochor would merely face the possibility of a twenty-five year sentence:

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19 It is also prejudicial to the defendant for the jury to learn of the beliefs of the state attorney's office as to his alleged character. See Pait v State, 112 So.2d 380 384-385 (Fla. 1959) and Ryan v. State, 457 So.2d 1084, 1090 (Fla. 4th DCA 1984).

20 Such arguments were disapproved in Cooper v. State, 413 So.2d 1244 (Fla. 1st DCA 1982).

> Now, the Judge, by law, is required to instruct on some lessors. He is going to do that. They don't apply in this case. This is premeditated first degree murder. He is also going to tell you that if you are convicted of first degree murder, there's a mandatory twenty-five years that you have to serve. Big deal. If you do the crime, you have to do the time.

R917. This type of denigration of the jury's responsibility, while arguing that the state had but one opportunity to try Mr. Sochor, effectively denied him of due process and a fair trial.

5. <u>Other Evidence of Mr. Sochor's Bad Character, and Ms. Gifford's Good Character, Beauty, and Family.</u>

In his opening statement, the prosecutor began to try the case on Mr. Sochor's character:

> You will learn then there was a nationwide search for Dennis Sochor, who was known down here as Dennis Grant. The police talked to a few people down here that knew him. You will learn that in fact he had told people that he was a born again Christian, and that he would condemn people that drank, condemn people that smoke, yet he drank, and yet he smoked, and you will hear that he had a great dislike, even to the point of hatred for women, and that he thought women were less than men.

R31-32.

The state's witnesses could not say enough bad about Mr. Sochor. Ms. Berman did not like his looks and thought he would be a problem for Ms. Gifford. R39-40. Oscar Ziel testified that Mr. Sochor stole his truck. R243. Detective Ward testified that the police looked for Mr. Sochor in places frequented by transients. R252. Randy Eckman testified that Mr. Sochor used the false name "Dennis Grant." R255. Susan Campbell testified that he made her nervous.

R303. Gary Sochor testified about prior acts of violence committed by Dennis, R317-18, and his fear of Dennis. R327-28. Detective Lauria testified to Mr. Sochor's use of the alias "John McGloffin." R408. Captain Schlein testified that Mr. Sochor said he had "problems with girls." R460.

The first taped statement played by the captain for the jury contained repeated references to prior acts of violence against women: "when a girl says no," Mr. Sochor loses control, R474; "in the past, when it's happened" he felt guilt, R475; in the morning he was afraid because "the night before was one of those nights," R476; "there's a possibility that something happened, that had happened previously other times.... [t]hat I might of [sic] forced myself on another woman," R476; "Q:....what did you think had happened? A: I had committed another rape possibly, probably," R477; "Q ...what do you think you did to that girl, as you sit here right now talking to me? A: That I raped her, another girl," R477; "Q: Okay. Why do you do that kind of thing? Why do you think that you do this kind of thing, that you attack these girls? What causes it? A: I only wish I knew. Cause if I knew, it would never happen. I -- I don't, I don't know. I know I feel terrible and innherhurt [sic] when they have happened," R481; "Q Have you felt the urges since this New Year's Eve in Fort Lauderdale with this girl? A: Yes." Id. See generally R481-86. We have already noted

Captain Schlein's repeated assertions that he felt that Mr. Sochor lied to him, and his colleagues' belief in Mr. Sochor's guilt.

Over defense counsel's objection, the prosecutor presented testimony from Paul Jones about Mr. Sochor's attitude about a killing[21]: "He said it didn't bother him at all. He said that death was death, life is life, when your [sic] gone, your [sic] gone." R565-66. He testified that Mr. Sochor threatened to kill him if he told anyone about the conversation. R566. Although the trial court had previously sustained an objection and advised the prosecutor to stay away from the area of inquiry, R261-64 (sustaining defense objection to question about Mr. Sochor's attitude towards women), the prosecutor felt emboldened to pursue the matter again, and elicited testimony from Mr. Jones that to Mr. Sochor "women were more or less a sexual tool, nothing more." R566. Mr. Hickey testified that Mr. Sochor was trying to concoct a defense, R578, that Mr. Sochor was trying to prevent Gary's testimony, R582, and that Mr. Sochor was making it "pretty rough for Mr. Keen in jail. R618.

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21 "A killing" because as defense counsel pointed out, Mr. Jones's testimony could be taken as referring to a separate homicide. R443-49. The trial court was untroubled that the jury could take Mr. Jones's testimony to mean that Mr. Sochor was a serial killer. R447 ("That's going to be your problem, I guess....").

Dr. Castillo, the "rebuttal" witness, testified that Mr. Sochor termed the first girl with whom he had sex "a bitch, a dog," R794-95, that Mr. Sochor had "selective amnesia," R798, that he was anti-social and lacked empathy, R799, and that he called the officer who arrested him an asshole. R811.

Thus, from the outset of the trial the prosecutor diligently sought to obtain a conviction founded more on the defendant's character than on the slim facts of the case. Our law forbids such tactics. Section 90.404, Florida Statutes and the Due Process Clause forbid the use of improper character evidence to obtain a conviction.[22] The eighth amendment requires yet a higher standard of reliability in fact-finding in capital cases. Mr. Sochor's convictions violate these protections.

Compounding the prejudice from the prosecution's presentation was evidence from the defense witnesses. In reviewing their testimony, it is worthwhile to recall that a conviction "after a trial that is fundamentally unfair, whatever the cause of such unfairness, violates Fourteenth Amendment due process." Fitzgerald v. Estelle, 505 F.2d 1334, 13367 (5th Cir. 1974).

The first defense witness, Dr. Zager, while not responding to any particular question from defense counsel,[23] testified on direct examination about anti-social behavior, including theft, by Mr. Sochor as a child. R653-54. In response

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22 Of course the state gave no notice of its intent to rely on evidence of other criminal offenses as required by section 90.404(b). R448.

23 Defense counsel had never met Dr. Zager before the latter took the stand. R659.

to the question, "what's Baker Act, Doctor?", Zager gave his opinion of Mr. Sochor "that criminally, he can be extremely dangerous to the public in view of my observations and psychiatric examination." R657-58.

Although the nonresponsive testimony of Dr. Zager on direct examination hurt somewhat, the prosecutor's cross-examination of him emphasized that Dr. Zager knew many terrible secrets about Mr. Sochor which he would not specifically mention. R663 ("Q: Did you know any other facts of this case? A: I know other facts with regard to other legal history of this gentleman."); R665 (The probable cause affidavit mentioned "other legal issues that this gentleman was involved in at that time.... Q: What do you mean by legal history? A: In terms of whether there were any other legal difficulties, criminal or civil."); R675 ("he confided in me other personal issues with regard to aberrant behaviors being before, that I have not certainly brought up today. Q: Other things that he has done that you have not brought up today; correct? A: Yes."); R687 ("I do know about his past history in regard to women, which you know, I have been advised not to discuss in my testimony today."), ("I am aware of difficulties that he has had with women prior to this present charge."). Over defense objection, the prosecutor during Dr. Zager's cross-examination brought out a hearsay statement by Mr. Sochor's father to the police to the effect that the father did not think that Mr. Sochor had an alcohol problem.[24] R669-70.

24 When he testified at the penalty phase, the father said that what he meant was that Dennis was not an alcoholic, but he had a problem when he drank alcohol. R1050.

The second defense witness was Dr. Ceros-Livingston, whose occupation was a surprise to defense counsel.[25] Defense counsel elicited from her testimony about an incident in which Mr. Sochor became angry at a waitress in which his "clothes came flying off," R702-703, that he once poured a pitcher of beer on a woman's head, R706, that he had been convicted as a juvenile for involvement in a break-in at a doctor's office, R710, that he had previously been arrested and sentenced for sexual battery or rape, R711, and that psychological testing showed a "fake-bad profile." R714. This was not enough for the prosecutor, who brought out testimony that Mr. Sochor had been in quite a few altercations with other inmates, R726-27, and could never cope with a job because he would "just blow up." R732.

The last defense witness was Genevieve Hardwich. In response to defense counsel's question, "when you say he, who's he?" (referring to the State Attorney investigator who came to see her), she replied that Mr. Patterson had told her that Mr. Sochor was "another Ted Bundy." R782. Not satis-

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[25] As with Dr. Zager, Dr. Ceros-Livingston had never discussed the case with defense counsel. R698. As a matter of fact, defense counsel had also not spoken with the other two defense witnesses at least until the day before the trial began, R637-38, apparently did not speak with Gary Sochor, the only eyewitness, prior to trial, S34-35, had trouble getting in touch with Dr. Castillo, R638, and had trouble communicating with Mr. Sochor. R889. On the other hand, he had vivid plans for conversations with the Deity. R1094, 1105-1106, 1110.

fied with that, the prosecutor had Ms. Hardwich elaborate on the Ted Bundy remark at some length, R786-87, as already noted in this brief.

In summary, the prosecution of this case was focused on evidence of Mr. Sochor's bad character as much as on the merits. The character evidence was a feature of the case, and Mr. Sochor should receive a trial free of such evidence, especially in light of the extensive improper prosecutorial argument and evidence as to Ms. Gifford's good character, beauty, and close family.[26]

6. Perjured testimony

Mr. Hickey ("Mike" to the prosecutor, R575) testified that he met Mr. Sochor while waiting in jail to testify for the state in the trial of Michael Keen. Defense counsel questioned Mr. Hickey about his involvement in the Keen case:

> Q: So, the State of Florida, more or less, has given you nothing for your testimony in the Keen case?
>
> A: There was nothing they can give me. I have got two years discharge requirements of parole serving twenty percent of the sentence. I have served over fifty.

R588 (emphasis added). He also questioned him about his criminal record:

> Q: You don't have a second degree murder felony?

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26 This improper argument and evidence respecting Ms. Gifford is set out in Point II D of this brief. Mr. Sochor contends that this argument and evidence deprived him of a fair trial on guilt as well as on the penalty.

> A: No, sir. I haven't got any violent convictions or charges.

R585.

Mr. Keen's conviction and sentence are presently before this Court in case number 71,358. A review of the transcript of Mr. Hickey's testimony there reveals that he had had a pending charge for a violent felony and that Mr. Hancock's colleague William Dimitrouleas intended to confer a substantial benefit on him because he "did a bang-up job":

> Q: Okay. And the charges that you were brought back from Iowa on in 1984, are they still pending now in Broward County now in 1987?
>
> A: Yes, sir.
>
> Q: And do they stem from a 1980 incident?
>
> A: Yes, sir.
>
> Q: And without going into the nature of the charges, are the charges basically a robbery and a grand theft?
>
> A: Yes, sir.

Pages 790-91 of the record in case 71,358.

> MR. DIMITROULEAS: I mentioned to Mr. Williams that I was willing to enter into the stipulation and I enter it because it's in my best interest later on so that there isn't any Brady - or I reduce the Brady issues.
>
> I think it's very likely that Mr. Hickey's disposition is going to be a favorable one to him. I have not promised him anything, but I am willing to stipulate in front of this jury that although he's never been promised anything, I expect his pending charges to be resolved in a favorable fashion to him.
>
> MR. WILLIAMS: Okay.

> MR. DIMITROULEAS: And if you want to announce that as a stipulation, I am willing to do that so that when he does get those favorable dispositions, we don't have any allegations --
>
> THE COURT: Why don't you write it on the back of something and I'll say it the way you all want me to. Can you use something else other than "favorable"?
>
> MR. DIMITROULEAS: All right. What do you think? That's probably what I'm going to do.
>
> THE COURT: Let it run concurrent.
>
> MR. DIMITROULEAS: I'm going to work with him on it. I think he did a bang-up job.

Pages 882-83 of the record in case 71,358.

Where the state, although not soliciting it, lets perjured testimony go uncorrected there is a denial of due process. Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). This principle applies to evidence which goes only to the credibility of a witness, regardless whether there is other evidence tending to impeach the witness's credibility. Id. 360 U.S. at 269, 270. The Due Process Clause mandates a new trial where there is any reasonable likelihood of an effect on the verdict.

At bar, the evidence of Mr. Sochor's guilt as charged was slim. Mr. Hickey's pungent testimony that Mr. Sochor claimed to have killed and buried the "slut, bitch" certainly helped the state's cause. The prosecutor dwelled on Mr. Hickey's testimony at some length in his final argument. R855-56, 861-62, 911-13. Hence it can scarcely be claimed that his credibility was tangential to the case.

C. JURY INSTRUCTIONS.

Another likely reason for Mr. Sochor's conviction on such slim evidence is that the jury instructions were substantially erroneous. The trial court instructed the jury that the defense of voluntary intoxication went only to premeditation, and did not apply to any other offense charged; it charged the jury on an uncharged theory of kidnapping; it failed to instruct the jury on the statute of limitations defense apparent on the face of the indictment; it refused to instruct the jury as to non-death lessers where the proof of Ms. Gifford's death at Mr. Sochor's hand was weak; it instructed the jury on felony murder theories not supported by the evidence; and it gave an incorrect instruction as to excusable and justifiable homicide and third degree murder. These instructions and lapses, individually and collectively, denied Mr. Sochor due process, effective assistance of counsel, and trial by a jury properly instructed on the law, and subjected him to cruel and unusual punishment in violation of article 1, sections 2, 9, 16, and 17 of the Florida Constitution, and the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

Admittedly, there was no objection on most of these matters as required by rule 3.390(d), Florida Rules of Criminal Procedure. Nevertheless, Mr. Sochor argues that these errors were fundamental and require appellate review.

Materially erroneous jury instructions which adversely affect a defense constitute fundamental error. E.g. Smith v. State, 539 So.2d 514 (Fla. 2d DCA 1989). Fundamental error occurs in the failure to define the underlying felony in the felony-murder prong of first degree murder, e.g., Franklin v. State, 403 So.2d 975 (Fla. 1981), and in the failure to instruct on premeditation. Anderson v. State, 276 So.2d 17 (Fla. 1973). The "failure of counsel does not relieve the court of the duty to give all charges necessary to a fair trial of the issues." Robles v. State, 188 So.2d 789, 793 (Fla. 1966).

Instruction errors regarding kidnapping and felony murder were independently prejudicial in the sentencing phase. The jury was instructed that if the homicide occurred during a kidnapping this was an aggravating factor. R1112. The prosecutor explicitly argued for this aggravating factor, relying on the conviction for kidnapping. R1080-81. The jury may well have relied on this aggravating circumstance, or given it more weight than it deserved, based on a misunderstnding of the law of kidnapping resulting from erroneous instructions. Assuming arguendo, that this Honorable Court does not require a new trial, resentencing before a new jury is required. The incorrect jury instructions also reflect the trial judge's erroneous understanding of kidnapping. Thus his finding of this aggravating circumstance is suspect.

1. Kidnapping and Felony Murder

a. Voluntary Intoxication

The trial court erroneously instructed the jury that voluntary intoxication is not a defense to kidnapping or felony murder. This constitutes fundamental error in a case such as this where voluntary intoxication was a key element of the defense. Thus, a new trial is mandated.

The following instruction was given:

> A defense asserted in this case is voluntary intoxication by use of alcohol.
>
> The use of alcohol to the extent that it merely arouses passions, diminishes perceptions, releases inhibitions or clouds reason and judgment does not excuse the commission of a criminal act.
>
> However, where a certain mental state is an essential element of a crime, and a person was so intoxicated that he was incapable of forming that mental state, the mental state would not exist and therefore the crime could not be committed.
>
> As I have told you, premeditated design to kill is an essential element of the crime of Murder in the First Degree.
>
> Therefore, if you find from the evidence that the defendant was so intoxicated from the voluntary use of alcohol as to be _incapable of forming premeditated design to kill_, or you have a reasonable doubt about it, you should find the defendant not guilty of Murder in the First Degree.
>
> _Voluntary intoxication is not a defense to lesser included crimes or other crimes charged in the indictment_.

R934-935 (emphasis supplied). Thus, the jury was instructed that voluntary intoxication is not a defense to kidnapping or to felony murder.

Voluntary intoxication was a major defensive issue throughout this case. Defense counsel questioned virtually every potential juror concerning his or her ability to accept the defense of voluntary intoxication. First Supplemental Record at 111-119, 158-163, 165-166, 169, 199, 201-204, 230, 232, 243-244, 248-249. There was considerable evidence of intoxication. Mr. Sochor had spent the entire evening in a bar. R307-310. Gary Sochor testified that generally when they went out Dennis drank heavily. R 357-358. He testified that on the night in question Dennis Sochor "was moderately drunk." R358. Officer Paul Lauria, testified that in Mr. Sochor's first statement he had stated that he was "very well drunk" on the evening in question. R438. The prosecution introduced Dennis Sochor's taped statement into evidence, in which he stated that he drank several drinks that night and "got very well drunk." R472. The statement also shows that alcohol causes him to lose control. R482. The prosecution also introduced Mr. Sochor's third police statement in which he stated "I was very drunk that night." R517. He reiterated that he had been "drunk" and that this affected his ability to control himself. R520. He went on to state then he had drunk for 3 to 5 hours that night. R529-520.

Dr. Zager corroborated the existence of intoxication, testifying as follows. Mr. Sochor had a drug and alcohol problem going back to age 15 or 16. R646. At one time this problem had so depressed him that he had contemplated suicide. R648. Alcohol dramatically changed Mr. Sochor's behavior, R650, and he suffered from alcohol blackout concerning the alleged incident.

R651, 656. Mr. Sochor was being treated with lithium (a common treatment for manic depression) and Sinequan (an antidepressant) while awaiting trial. R654. The clinical evidence was consistent with Mr. Sochor's longstanding drug and alcohol problem. R656, 671. Mr. Sochor was intoxicated during the alleged incident. R658. Under the influence of alcohol he "would simply act without giving it any logical thought beforehand." R659. A small amount of alcohol could have an extreme effect on his reasoning process and behavior. R667-668.

Dr. Ceros-Livingston, a psychologist appointed to examine Mr. Sochor, also testified as follows. Mr. Sochor had a long-term drug and alcohol problem. R699, 701-703. Alcohol and drugs had dramatically altered his behavior in the past. R762-763. He had a depressive desire to commit suicide, which was connected to his alcohol problem. R786-787. He had alcoholic blackouts, including one concerning the alleged incident. R708-709. Psychological testing corroborated Mr. Sochor's having a drug and alcohol problem. R712. Dr. Castillo, a court appointed expert, and prosecution witness, also testified that Mr. Sochor had a long history of drug and alcohol problems. R805, 808. Thus, all the psychiatric testimony indicated that Mr. Sochor had a long history of drug and alcohol problems and Dr. Zager specifically stated that it was his professional opinion that Mr. Sochor was intoxicated during the alleged incident.

The importance of the issue of intoxication continued throughout the closing arguments. The prosecution specifically argued against the intoxication defense. R836-839, 850-851,

857-861, 909-910, 913, 916-917. Defense counsel repeatedly argued intoxication. R874, 877-882, 886-887, 900-901. Thus, the issue of voluntary intoxication was a significant issue during the entire case, from voir dire through closing argument.

Kidnapping is a specific intent crime, to which voluntary intoxication is a defense. Heddleson v. State, 512 So.2d 957 (Fla. 4th DCA 1987). It is also a defense to felony murder, if the underlying felony is a specific intent crime (such as kidnapping). Linehan v. State, 476 So.2d 1262 (Fla. 1985). Thus, the jury instructions concerning kidnapping (and the kidnapping prong of felony murder) were erroneous. If there is any evidence to support the defense of intoxication the jury must be instructed on voluntary intoxication. Heddleson. This is true even if the evidence comes out only from the cross-examination of prosecution witnesses. Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA 1981) ("any evidence" rule applies even if defendant takes stand and affirmatively denies being intoxicated; instruction required if there any evidence supports it, even though trial court is not convinced by the evidence).

The failure to instruct on the defendant's theory of defense is tantamount to directing the jury to return a guilty verdict and effectively denies a defendant due process of law. Motley v. State, 155 Fla. 545, 20 So.2d 798 (1945). Such a failure can never be said to be harmless. Id.

In Harris v. State, 438 So.2d 787 (Fla. 1983) this Court held that a capital defendant can waive lesser included offenses but that it must be an express waiver, personally made by the

defendant, and the record must reflect that it is knowingly and intelligently made. 438 So.2d at 796-797. The erroneous jury instruction, in this case, completely negated voluntary intoxication as defense to kidnapping and felony murder based on kidnapping. This severely impaired Mr. Sochor's right to a fair consideration of lesser included offenses on both counts. Any waiver of this theory would have to be personally made and be knowing and intelligent under Harris. Thus, this affirmative misinstruction constitutes fundamental reversible error.

In the present case, it is very likely that the jury relied on felony-murder with kidnapping as the underlying felony in order to convict of first degree murder. This is shown by the fact that the jury convicted Mr. Sochor of kidnapping. R944. It must also be noted much of the evidence was contrary to premeditation. There was extensive evidence of intoxication as previously outlined. Additionally, alleged prosecution eyewitness, Gary Sochor, testified that during the alleged incident that Mr. Sochor appeared "possessed" and his pupils rolled back in his head. R318. This is far more characteristic of a "depraved mind" required for second degree murder than the premeditated design required for first degree murder. This fact, combined with the jury's guilty verdict on kidnapping, makes it very likely that the jury relied on a kidnapping theory to convict of felony murder. The premeditation evidence here is akin to that in Christian v. State, 272 So.2d 852 (Fla. 4th DCA 1973). There the defendant was attempting to have oral sex with the deceased, met resistance, and began striking her and killed her.

The court held that an erroneous felony murder instruction required a new trial, as the evidence of premeditation "was exceedingly scant." Id. at 856-857. Here, the evidence showed the same sort of impulsive rage as reflected in prosecution witness Gary Sochor's testimony.

It must also be noted that the evidence of sexual battery (or attempted sexual battery) as a theory of felony murder was very weak. This is reflected in the fact that Mr. Sochor was never charged with any sexual offense. Presumably the prosecution and/or grand jury felt there was insufficient evidence for a sexual battery charge. Gary Sochor did not describe any discussions of forced sex or other evidence of sexual battery. R314-318. In Dennis Sochor's police statement he originally said that he did not remember what had happened but that there was "a possibility" he had raped her. R476. In his second and third statements he said they argued about having sex and she started to hit him and he got angry and began choking her. R499-500, 520-521. He specifically said he did not have sex with her. R501-502.

b. Kidnapping to inflict bodily harm or terrorize

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding.

Cole v. Arkansas, 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948). This basic constitutional right was violated in this case.

The indictment for kidnapping, in this case only alleged intent to commit a sexual battery:

Count II

> that DENNIS SOCHOR on the 1st day of January, in the year of our Lord One Thousand Nine Hundred and Eighty-Two, in the County of Broward, State of Florida, did unlawfully and forcibly, secretly, or by threat, confine, abduct or imprison PATRICIA MARIE GIFFORD against her will and with intent to commit or facilitate commission of a felony, to-wit: sexual battery, against the form of the statute in such case pursuant to Section 787.01 of the Florida Statutes, made and provided to the evil example of all others in the like case offending, and against the peace and dignity of the State of Florida.

R1143. Nevertheless, the jury was instructed on two different theories of kidnapping:

> You have three elements that must be proved beyond a reasonable doubt: One, Dennis Sochor forcibly, secretly, or by threat, confined, abducted or imprisoned Patricia Marie Gifford against her will; two, Dennis Sochor acted with intent to: A, commit or facilitate commission of sexual battery, <u>or B, inflict bodily harm upon or to terrorize the victim</u>.

R928-929 (emphasis supplied). The jury was also instructed on kidnapping as a theory of first degree murder. R923.

i. Notice

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 require that an indictment state the elements of the offense charged with sufficient clarity to apprise the defendant what he must be prepared to defend against. <u>E.g.</u> <u>Cole</u>, <u>supra</u>; <u>Russell v. United States</u>, 369 U.S. 749, 763-

769, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962); Government of Virgin Islands v. Pemberton, 813 F.2d 626 (3rd Cir. 1987); United States v. Thomas, 444 F.2d 919 (D.C. Cir. 1971); Watson v. Jago, 558 F.2d 330 (6th Cir. 1977); Gray v. Raines, 662 F.2d 569, 570-572 (9th Cir. 1981); United States v. Rojo, 727 F.2d 1415, 1418 (9th Cir. 1981); Givens v. Housewright, 786 F.2d 1380, 1381 (9th Cir. 1986); United States v. Kurka, 818 F.2d 1427 (9th Cir. 1987).

The federal courts have applied this principle in a wide variety of circumstances. Watson involves prosecution on a felony murder theory on an indictment only charging premeditation. Givens involves a prosecution on murder by torture, when the indictment only alleged premeditation. Kurka involved the failure to allege "willfulness" in a destruction of a motor vehicles case. Pemberton and Thomas involve failure to allege what offense the defendant intended to commit upon entry in a burglary case. Gray involved a jury instruction on statutory rape when the indictment charged only forcible rape. Thus, the strict sixth and fourteenth amendment notice requirements have been applied in a wide variety of circumstances. Our courts have recognized the need for strict notice requirements in the context of kidnapping and the related offense of false imprisonment. In Grant v. State, 390 So.2d 341 (Fla. 1980) this Court reversed a false imprisonment conviction for failure of the information to specifically allege intent to secretly confine.

The error allowed the jury to convict Mr. Sochor on a theory of kidnapping with which he was never charged and of which had no notice to be prepared to defend against. The error at bar is similar to that held to be fundamental in Tarpley v. Estelle, 703 F.2d 157 (5th Cir. 1983). Tarpley was indicted for credit card abuse. However, the jury instructions contained elements of this offense and of receiving property or services from illegal credit card use, which was forbidden by another sub-section of the same statute. The court held this was fundamental error as the jury could have convicted Tarpley on the uncharged theory. The same error occurred here. Mr. Sochor's conviction for kidnapping must be reversed he was tried on a theory which was not charged.

The jury was instructed on kidnapping and sexual battery as underlying felonies for felony murder. R923-924. This Court has found fundamental error in the failure to define the underlying felony in a felony murder case, e.g., Franklin v. State, 403 So.2d 975 (Fla. 1981), and in the failure to instruct on premeditation. The failure of counsel does not relieve the court of the duty to give all charges necessary to a fair trial of the issues. Robles v. State, 188 So.2d 789, 793 (Fla. 1966).

Supreme Court precedents are of a like tenor.

> With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not another, and

the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict.

Mills v. Maryland, 108 S.Ct. 1860, 1866 (1988). In capital cases, the Court has required heightened certainty that the verdict rest on proper grounds, even where the error occurs at the guilt phase of the proceeding. Beck v. Alabama, 447 U.S. 625, 643, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) ("uncertainty and unreliability [in] the fact finding process cannot be tolerated in a capital case").

As already noted, it is likely that the jury relied on felony murder with kidnapping as the underlying felony in order to convict of first degree murder. Hence this Court should order a new trial on both kidnapping and murder.

iii. Definition of Terrorize

The trial court gave no definition "terrorize." This verb is subject to variable definition.[27] Compare State v. Bodenschatz, 662 P.2d 1, 3 (Or. App. 1983) ("The term was included in the code to cover vengeful or sadistic abductions accompanied by taunting threats of torture, death or other severely frightening experience") with State v. Prevette, 345 S.E.2d 159, 164 (N.C. 1986) (kidnapping with intent to terrorize entails "putting that person in some high degree of fear, a state of intense fright or apprehension"). Under section 775.021, Florida

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[27] The need to define the word becomes obvious when one considers that a statute that read simply "It is a third degree felony to terrorize another person" would surely be unconstitutional.

Statutes, and the due process rule of lenity,[28] this Court must adopt the most restrictive definition. The failure to define an essential element of the crime constitutes fundamental error because it violates due process. Screws v. United States, 325 U.S. 91, 107, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945) (willfully depriving one of civil rights; term "willfully" not defined; HELD, fundamental error). The fact that there were other theories of kidnapping does not save the conviction, since we do not know what theory the jury adopted. See State v. Moore, 340 S.E.2d 401 (N.C. 1986) and, more generally, Mills v. Maryland, 108 S.Ct. 1860 (1988).

c. Statute of Limitations.

Mr. Sochor was indicted for first degree murder and kidnapping on October 9, 1986 for an incident allegedly occurring on January 1, 1982. R1143. Kidnapping is a first degree felony. Section 787.01, Florida Statutes (1981). Attempted kidnapping is a second degree felony. Section 777.04(4), Florida Statutes (1981). Sexual battery with great force is a life felony. Section 794.011(3), Florida Statutes (1981). Thus, attempted sexual battery with great force is also a second degree felony. Section 777.04(4), Florida Statutes (1981). The statute of limitations for first degree felony is four years. Section 775.15(2)(a), Florida Statutes (1981). It is three years for a second

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28 See Dunn v. United States, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979).

degree felony. Section 775.15(2)(b). Thus, the statute of limitations had run for kidnapping, attempted kidnapping, and attempted sexual battery.

The expiration of the statute of limitations constitutes an absolute defense to a prosecution. Failure to prove that the felony occurred within the limitation period constitutes a failure to prove the felony, just like the failure to prove any other necessary element of the felony.

The note to Standard Jury Instruction 3.02 states that, when applicable, the trial judge must instruct on the statute of limitations. See also Lear v. Equitable Life Assurance Society of the United States, 798 F.2d 1128, 1132-1133 (8th Cir. 1986).

The failure to instruct on the statute of limitations denied Mr. Sochor an absolute defense to the kidnapping count. Thus, a new trial is required on the kidnapping count. A new trial is also required on the first degree murder count as the statute of limitations would have operated as a defense to three theories of felony murder: kidnapping, attempted kidnapping, and attempted sexual battery.

2. Non-Death Lessers

The jury was not given instructions on any non death lessers, over defense counsel's objection, even though Ms. Gifford's body was never found and there was a question whether Mr. Sochor actually caused the death of Ms. Gifford or whether Ms. Gifford is even dead.[29]

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[29] Even if there were no request, the failure to instruct on

In the present case, defense counsel requested all non-death lessers which were supported by the evidence. R824-825. He specifically mentioned battery and assault. R824. He also specifically objected to the failure to give non-death lessers. R825. Attempted first degree murder and aggravated battery were required to be given as a lesser included offenses of first degree premeditated murder, and attempted murder, sexual battery, attempted sexual battery, and kidnapping were required to be given as lesser included offenses of felony murder. Non-death lessers must be given, if there is any evidence to support them. Drotar v. State, 433 So.2d 1005 (Fla. 3d DCA 1983).

The failure to instruct on attempted murder, sexual battery, and other non-death lessers was harmful in this case. The jury was given no verdict which would effectuate possible doubts about the proof of cause of death. A verdict of second degree murder or manslaughter would not serve such a purpose as both of those deal with doubts about intent, not cause of death. The failure to instruct on the one-step removed offenses of attempted first degree murder, sexual battery, attempted sexual battery, and kidnapping constitutes reversible error as a matter of law. See, e.g., Herrington v. State, 538 So.2d 850 (Fla. 1989). Failure to instruct on non-death lessers violates the Constitution. See Vujosevic v. Rafferty, 844 F.2d 1023 (3rd Cir. 1988).

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lesser included offenses would constitute reversible error. In a capital case, lessers must be personally waived by the defendant. Harris v. State, 438 So.2d 787 (Fla. 1983). No such waiver appears at bar.

3. <u>Homicide Instructions</u>

a. Theories not Supported by the Evidence

The indictment charged Mr. Sochor with the premeditated murder of Ms. Gifford. R1143. Nevertheless, the case was submitted to the jury on six different theories of felony murder -- that the killing occurred during: 1) kidnapping; 2) attempted kidnapping; 3) escape from the scene of kidnapping; 4) sexual battery; 5) attempted sexual battery; 6) escape from the scene of sexual battery. R923.

As shown elsewhere in this brief, and as the trial court found in its sentencing order,[30] there was no proof of completed sexual battery. Kidnapping was also an improper theory for felony murder because there was no proof of kidnapping and because the statute of limitations had expired as to kidnapping. It was never seriously contended that the killing occurred during an escape or during an attempted kidnapping. Finally, the state did not prove an attempted sexual battery, or premeditated murder.

"With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict."

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30 The court wrote: "Even though there is no evidence the Defendant actually sexually assaulted the victim as the body was never found, the Defendant's admissions prove the death occurred as he was attempting to sexually assault her." R1232.

Mills v. Maryland, 108 S.Ct. 1860, 1806 (1988). Capital cases require a heightened degree of certainty that the verdict rest on proper grounds, even where the error occurs at the guilt phase of the proceeding. See Beck v. Alabama, 447 U.S. 625, 643, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).

Here, the judge's instructions directed that the jury could find Mr. Sochor guilty of first degree murder on theories unsupported by the evidence. The jury's verdict is simply a general finding of guilt on first degree murder. Under these circumstances, this Court cannot be certain that the verdict rests on a valid theory, and the first degree murder conviction must be reversed.

b. Excusable Homicide and Manslaughter

The excusable homicide instruction was inaccurate and incomplete. It was:

> The killing of a human being is excusable, and therefore lawful, when committed by accident and 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.

R921-922.

The phrase "without any dangerous weapon and not done in a cruel or unusual manner" is misleading and can lead a jury to believe that excusable homicide cannot exist when the killing is done in a cruel or unusual manner. Kingery v. State, 502 So.2d

1199 (Fla. 1st DCA 1988). The unusual manner restriction only applies to the sudden combat prong of the instruction and not to the other prongs of the instruction. Id.

The instructions were also erroneous in that the trial court failed to give the following standard "long form" excusable homicide instruction:

EXCUSABLE HOMICIDE

> An issue in this case is whether the killing of (victim) was excusable.
>
> The killing of a human being is excusable if committed by accident and misfortune.
>
> In order to find the killing was committed by accident and misfortune, you must find the defendant was:
>
> in the heat of passion brought on by a sudden provocation sufficient to produce in the mind of an ordinary person the highest degree of anger, rage or resentment that is to intense as to overcome the use of ordinary judgment, thereby rendering a normal person incapable of reflection.

This instruction is required if there is any basis in the evidence to support it. Kingery.

The trial court's instructions on manslaughter was also erroneous. Although the trial court explained that the killing cannot be manslaughter, if it was justifiable or excusable, it failed to define justifiable or excusable homicide in conjunction with manslaughter or to give the long form excusable homicide instruction at any time. R926-927. This instruction is erroneous in that it does not define justifiable and excusable homicide in conjunction with manslaughter. Ortagus v. State, 500 So.2d 1367

(Fla. 1st DCA 1987). The failure to give the form excusable homicide instruction is also erroneous. Alejo v. State, 483 So.2d 117 (Fla. 2d DCA 1986).

The erroneous jury instructions were prejudicial, as there was evidence to support the "heat of passion" prong of excusable homicide. The failure to give the long form instruction was prejudicial in two respects: (1) the jury was given no basis to understand that a killing in the heat of passion was excusable homicide; and (2) the jury may have erroneously believed that killing in a "cruel or unusual" manner forbids application of the heat of passion doctrine.

c. Third Degree Murder

The trial court failed to give any underlying felony in its instruction on third degree murder, effectively depriving Mr. Sochor of proper jury consideration of a lesser included offense supported by the evidence. This denied Mr. Sochor due process of law, the effective assistance of counsel, and trial by jury, and subjected him to cruel and unusual punishment pursuant to article I, sections 2, 9, 16, and 17 of the Florida Constitution and the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

The jury was told that third degree murder applied to any felony, except those defined in the first degree murder statute, R925-26, but was given no idea what acts could constitute other felonies. Hence, the third degree murder instruction was improper. When there is evidence to support any third degree murder theory, as a lesser included offense, the jury must be

instructed on each underlying felony which would support third degree murder. State v.Barnes, 182 So.2d 260 (Fla. 2d DCA 1966). See also Green v. State, 475 So.2d 235 (Fla. 1975).

At bar there was evidence to support false imprisonment and aggravated battery as theories of third degree murder. The trial judge recognized that the evidence supported false imprisonment by instructing on this as a lesser of kidnapping. It is equally logical that third degree murder, based on false imprisonment, would be required when first degree felony murder, based on kidnapping, be given.

Aggravated battery, as a theory of third degree murder, was also supported by the evidence. The jury was given sexual battery with great force as a theory of felony murder. Aggravated battery is a "category two" lesser of sexual battery with great force. Fla. Std. Jury Instr. (Crim). Thus, third degree murder, based on aggravated battery, would also be a category two lesser of first degree felony murder based on sexual battery. The evidence gave rise to a theory that, if Dennis Sochor injured the deceased, he did not have a premeditated design to kill her and was not acting to force her to have sex, but simply acted out of a rage which created an intent to injure, but not to kill. There was extensive evidence of intoxication as previously outlined. Hence, an instruction on aggravated battery as an underlying felony for third degree murder was required. See Johnson v. State, 423 So.2d 614 (Fla. 1st DCA 1982).

The failure to explain that a killing during false imprisonment or an aggravated battery constituted third degree murder effectively prevented jury consideration of third degree murder as an option in the case. Aggravated battery had not been mentioned in the case, thus there was no conceivable way the jury could have connected it to third degree murder. False imprisonment had only been instructed on as a lesser included offense of kidnapping.[31]

In the present case third degree murder is only one step removed from first degree felony murder, as there was no jury instruction on second degree felony murder. Second degree murder would only be a logical lesser to a premeditation theory, not a felony murder theory. There is a great likelihood of reliance on felony murder, as shown by the kidnapping conviction. The failure to give a proper third degree murder instruction effectively eliminated any lesser included offenses on first degree felony murder.

D. OTHER GUILT ISSUES

1. Kidnapping

a. Statute of Limitations

As shown a point I.C.1.c above, the statute of limitations had run on kidnapping. This requires Mr. Sochor's discharge from his kidnapping conviction, and a new trial on the murder count as kidnapping was invalid as a theory of felony murder.

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[31] The error from this instruction compounded the previously argued erroneous instruction that voluntary intoxication is not a defense to kidnapping and thus to kidnapping as a theory of first degree felony murder.

The indictment does not allege any basis for tolling the statute of limitations. R1143. In Sturdivan v. State, 419 So.2d 300 (Fla. 1982) this Court wrote at pages 301-302 (emphasis supplied):

> The state must show in the information or indictment that the prosecution "for the offense charged" has begun within the statute of limitations. Horton v. Mayo, 153 Fla. 611, 15 So.2d 327 (1943); Rouse v. State, 44 Fla. 148, 32 So. 784 (1902). The charging document may meet this requirement by showing on its face the date of the crime and the date the document issued. If, however, it appears from the date shown on the charging document that the statute of limitations may have run, the state must allege facts necessary to show the statute was tolled for the offense charged before prosecution commenced.

Sturdivan's unambiguous language controls this issue. The statute of limitations must be liberally construed in favor of defendants. State v. King, 282 So.2d 165 (Fla. 1973). The burden is on the state to show that the prosecution began within the limitation period. Id. 164. The defense of the statute of limitations can only be personally waived by the defendant, Tucker v. State, 459 So.2d 306 (Fla. 1984), and can be raised at any time. State v. King.

Mr. Sochor's prosecution for kidnapping was barred by the statute of limitations and constitutes a denial of due process, the effective assistance of counsel, and subjects him to cruel and unusual punishment in violation of article

I, sections 2, 9, 16, and 17 of the Florida Constitution and the fourth, fifth, sixth, eighth and fourteenth amendments to the United States Constitution.[32]

b. Amending the Indictment

As already noted, the indictment charged kidnapping with intent to commit sexual battery. It stands to reason that the state should be limited to what it charged. The sixth amendment demands as much. Nevertheless, as already noted, the jury instructions afforded the state the luxury of an additional theory: kidnapping with intent to cause great bodily harm or to terrorize. This was in effect an unauthorized amendment to the indictment. See Watson v. Jago, 558 F.2d 330, 338-39 (6th Cir. 1977) and United States v. Mollica 849 F.2d 723, 729-31 (2d Cir. 1988). Only the grand jury can amend the indictment. State ex rel.

[32] Mr. Sochor's raising of this issue does not mean that he is barred from requesting proper jury instructions on lesser included offenses. Rembert v. Dugger, 842 F.2d 301 (11th Cir. 1988). In Rembert the court wrote that Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) requires that a capital defendant must be allowed to waive the statute of limitations on the lesser included offenses of first degree murder. This is true even though Rembert had previously invoked the statute of limitations on other counts. See Rembert v. State, 476 So.2d 721 (Fla. 1st DCA 1985).

In the present case, there was no discussion wit the defendant concerning the statute of limitations on the lesser included offenses of first degree murder. This is required. Mr. Sochor would have to personally waive his right to lessers. Mack v. State, 537 So.2d 109 (Fla. 1989); Harris v. State, 438 So.2d 787 (Fla. 1983). The statute of limitations defense must also be personally waived. Tucker, supra, at 309. This is consistent with the statement in Spaziano v. Florida, 468 U.S. 447, 456-57, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) that it is the "defendant's choice" whether to invoke or waive the statute of limitations on the lesser included offenses in a capital case.

Wentworth v. Coleman, 121 Fla. 13, 163 So. 316 (1935). An unauthorized amendment of an indictment is, in effect, a nolle prosequi divesting the court of jurisdiction over the cause. Id.

Hence, the convictions and sentences are illegal.

2. Murder

a. Statute of Limitation for Underlying Felonies

The jury was instructed on kidnapping, attempted kidnapping, and attempted sexual battery as theories of felony murder. As already noted at point I.C.1.c above, the statute of limitations had expired on these felonies. Thus, Mr. Sochor had an absolute defense to both of these as substantive crimes or as theories of felony murder. Thus, a new trial is required.

Expiration of the statute of limitations is an absolute defense to a prosecution. Failure to prove that a felony occurred within the limitations period is a failure to prove the felony, just like the failure to prove any other necessary element of the felony.

A properly instructed jury would have had to acquit Mr. Sochor of kidnapping, attempted kidnapping, and attempted sexual battery. Such a verdict, would have been inconsistent with reliance on felony murder. In Mahaun v. State, 377 So.2d 1158, 1161 (Fla. 1979), one of the appellants had been convicted of third degree murder, but had been acquitted of the underlying felony. The court held these to be inconsistent verdicts and discharged the appellant from third degree murder. In the present case, a properly instructed jury would have had to acquit on

kidnapping, attempted kidnapping, and attempted sexual battery. This would be inconsistent with any of these as underlying felonies on first degree murder.

The trial court's submission of underlying felonies barred by the statute of limitations constitutes fundamental error and denied Mr. Sochor of his rights under article I, sections 2, 9, 16, and 17 of the Florida Constitution and the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

b. Alternative Theories of First Degree Murder

The indictment charged Mr. Sochor with premeditated murder. That charge was converted into alternative premeditated and felony murder theories, as permitted by this Court's decision in Knight v. State, 338 So.2d 201 (Fla. 1976). The jury was told that it could find Mr. Sochor guilty of first degree murder on either premeditated or felony murder theories. The jury returned a general verdict of guilty of first degree murder.

i. Insufficient Evidence of Felony Murder

As already shown, the evidence was insufficient to support a conviction for felony murder. A verdict "must be set aside if it could be supported on one ground but not another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict." Mills v. Maryland, 108 S.Ct. 1860, 1866 (1988). Capital cases require a heightened degree of certainty that the verdict rest on proper grounds, even

where the error occurs at the guilt phase of the proceeding. Beck v. Alabama, 447 U.S. 625, 643, 100 S.Ct. 382, 65 L.Ed.2d 392 (1980).

Here, the judge's instructions and prosecutor's argument told the jury it could find Mr. Sochor guilty of first degree murder on insufficient felony-murder theories. The jury's verdict is simply a general finding of guilt on first degree murder. Under these circumstances, this Court cannot be certain on which theory the verdict rested, and the first degree murder conviction must be reversed.

ii. Jury Unanimity

While the jury was told its finding of guilt must be unanimous, it was never required to unanimously agree on precisely what Mr. Sochor was guilty of: premeditated murder or one of several different theories of felony murder. The Court has "declared that there do exist size and unanimity limits that cannot be transgressed if the essence of the jury trial right is to be maintained." Brown v. Louisiana, 447 U.S. 323, 331, 100 S.Ct. 2214, 65 L.Ed.2d 159 (1980). In Gorham v. State, 521 So.2d 1067, 1070 (Fla. 1988), this Court rejected a similar unanimity challenge in a post-conviction proceeding, alternatively finding it waived and that the instruction was correct anyway. This Court said "a careful reading of the transcript reveals that the jury was instructed that its verdict must be unanimous." Id. at 1070. Mr. Gorham raised the issue post-conviction, and did not have an insufficient underlying felony, so it may be distinguished here on those grounds. Additionally, Gorham only in-

volved one potential underlying felony. In any event, Mr. Sochor argues that this Court should recede from Gorham. A requirement of jury unanimity on the "verdict" is insufficient where the jury is instructed on seven theories and its verdict is a general one. In such cases, as here, the jury was not required to find the defendant guilty of a single, cognizable incident or "conceptual grouping." See United States v. Acosta, 714 F.2d 577, 581 (11th Cir. 1984). As the Court explained in Scarborough v. United States, 522 A.2d 869 (D.C. Ct.App. 1987) (en banc):

> [T]he unanimity issue under a single count of an information or indictment does not turn only on whether separate criminal acts occurred at separate times (although in some cases it may); it turns, more fundamentally, on whether each act alleged under a single count was a separately cognizable incident -- by reference to separate allegations and/or to separate defenses --whenever it occurred.

In this case jurors could have relied on premeditation, kidnapping, attempted kidnapping, escape from a kidnapping, sexual battery, attempted sexual battery, or escape from a sexual battery. Thus, there were seven conceptual groupings. A separate unanimity instruction was thus unquestionably required.

We have no way of knowing if there was unanimous jury agreement (or even agreement by a majority) on any of these. This denied Mr. Sochor his rights under article I, sections 2, 9, 16, and 17 of the Florida Constitution and the fifth, sixth, eighth and fourteenth amendments.

iii. Failure to Charge Felony Murder

The trial court unlawfully allowed the prosecution to pursue a felony-murder theory, despite the fact that the indictment contains no notice of a felony murder theory.

The Constitution requires that an indictment or information state the elements of the offense charged with sufficient clarity to apprise the Defendant what he must be prepared to defend against. Russell v. United States, 369 U.S. 749, 763-769, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962); Government of Virgin Islands v. Pemberton, 813 F.2d 626 (3rd Cir. 1987); Givens v. Housewright, 786 F.2d 1380-1381 (9th Cir. 1986). 1987).

In Givens, a Nevada information charged willful murder, a form of first degree murder analogous to our premeditated murder. The jury was also instructed on murder by torture which is analogous to our felony murder. Like felony murder in Florida, murder by torture in Nevada does not require an intent to kill. The Ninth Circuit Court held it a violation of the sixth amendment to allow a jury instruction and prosecutorial argument on murder by torture as a theory of first degree murder even though the information listed a statutory subsection which included both willful murder and murder by torture. See also Watson v. Jago, 558 F.2d 330 (6th Cir. 1977) (federal constitutional violation to allow the prosecution to proceed on felony murder theory when the indictment only alleged a premeditation theory).

The indictment in this case contains the same defect condemned in Givens and Watson. The indictment only alleged premeditated murder and failed to allege felony murder. Nevertheless,

the jury was instructed on six different theories of felony murder as well as premeditated murder. R922-924. The jury was presented with all of these possible theories of felony murder and Mr. Sochor had no notice to defend against them. This deprived Mr. Sochor of his rights under article I, sections 2, 9, 16, and 17 of the Florida Constitution and the fifth, sixth, eighth and fourteenth amendments to the Constitution.

Mr. Sochor is aware that this Court has rejected a related claim in Knight v. State, 338 So.2d 201 (Fla. 1976). However, Knight was well before Givens, which holds the reasoning of Knight to be contrary to the sixth amendment.[33] This Court should overrule its holding in Knight.

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33 This is especially true in a capital case involving the heightened need for reliability.

II PENALTY ISSUES

A. PRESENTATION AND ARGUMENT OF NONSTATUTORY AGGRAVATING CIRCUMSTANCES

Presentation of evidence of a nonstatutory aggravating circumstance is error subject to appellate review without regard to the contemporaneous objection rule because of the special scope of review used in death cases. Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977). In Elledge this Court held that the harmless error rule does not apply to consideration of such evidence unless there are no mitigating circumstances. There the trial court did not find the existence of any mitigating circumstances. Nevertheless, it wrote in the sentencing order: "...after weighing the aggravating and mitigating circumstances, being of the additional opinion that insufficient mitigating circumstances exist to outweigh the aggravating circumstances...." This Court held that the foregoing phrases showed that the trial court had found the existence of at least some aggravating circumstances. Hence, a new sentencing trial was ordered to vindicate the eighth amendment's mandate that the sentencing authority's discretion be guided and channeled so as to eliminate arbitrary and capricious application of the death penalty. Id. 1003.

As shown below, the prosecution at bar presented and argued improper aggravating circumstances, so that error occurred under Elledge. Further, as in Elledge, the trial court weighed the mitigating evidence. Although the trial court found no mitigating evidence,[34] the sentencing order states: "In Summary [sic],it

[34] Mr. Sochor argues elsewhere that the trial court erred by not

is the conclusion of the Court, after carefully and conscientiously weighing the aggravating and mitigating circumstances, that there are sufficient aggravating circumstances to justify and warrant the imposition of the death penalty and there are no mitigating circumstances to outweigh the aggravating circumstances." R1235. Hence harmless error analysis should not apply and a new sentencing trial should be ordered. Even if the harmless error rule did apply here, the prosecution's actions were such as to require a new sentencing trial under Trawick v. State, 433 So.2d 1235, 1240-41 (Fla. 1985) ("because the jury heard evidence and argument that did not properly relate to any statutory aggravating circumstance the jury recommendation is tainted"). The totality of the prosecutor's argument was such as to render doubtful the quality of the fact-finding in the sentencing phase and to void the eighth amendment's mandate that the sentencing authority's discretion be guided and channeled so as to eliminate arbitrary and capricious application of the death penalty. Hence the prosecutor's actions render the instant death sentence illegal under article I, sections 9, 16, 17, and 22 of the state constitution, and the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

1. **Victim impact information**

Our law does not recognize as an aggravating factor that the killing of a young woman from a close family is more reprehensible than the killing of, say, an elderly homeless person.

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finding mitigating evidence.

Indeed, such an idea is repugnant. Yet that is what the prosecutor argued to the jury in this cause. R1087. Florida law has long recognized that the accused is entitled to a trial free of undue sympathy for the deceased. See, e.g., Adan v. State, 453 So.2d 1195 (Fla. 3d DCA 1984) (discussing the rule concerning identification of the decedent by a family member). The eighth amendment imposes a like rule. Booth v. Maryland, 107 S.Ct. 2529 (1987). Booth is the law in Florida. Patterson v. State, 513 So.2d 1257, 1263 (Fla. 1987).

The prosecution at bar could scarcely have more vigorously violated these principles. The prosecutor compared Ms. Gifford to Jessica McClure:

> If you do a certain type of crime that's heinous and atrocious and against the State and against the government, then rightfully you should be executed, but your job is to consider all the circumstances, and in this past week, we heard a lot of tears in the courtroom, and in this sentencing phase, and as I said before, whatever tears are shed, are much easier to shed than the blood of Patricia Gifford, much easier, but we all remember the little girl, just recently last week, little Jessica McClure, I believe her name was, the little eighteen month old girl that fell down the little tunnel, the little well.
>
> She was down there -- I think she was down there like forty or fifty-eight hours. She was down there without any food. She was down there without any water at all, and I am sure everyone felt for her. There were prayers for her, and no one knows what that little girl went through, but fortunately, she was rescued, and she was saved, and she suffered a life and death situation, and fortunately for her family and everyone else's, her life was saved, and what we have here, we have also a life and death situation.

> We have a life and death situation that occurred back on January 1st, 1982. Patricia had the similar experience, and we can't go back there, and I can't take you back there to that evening, to the pain and the horror that she suffered that evening. We can't go back there, and you can't experience that, but you have to base your decision on the facts and the law.

R1077-79. He emphasized her character and bright outlook on life:

> ...there is no question from the evidence that she was innocent, that she was an innocent eighteen year old girl that was very beautiful, very sweet. She had a lot of promises, and he took away her most precious right, and that was her right to live, and there is no question that this crime that he committed on Patty was atrocious and cruel, and that's the third aggravating circumstance.

R1082. He pointed the loss to Miss Gifford's family:

> [The Sochor family] can't understand how her family feels. She was only eighteen years old. She had her whole life ahead of her. She was very beautiful, and there is a difference between when you kill someone young, and when you kill someone old. Someone old, they have already had their life mostly. See, someone young, all they have is their hopes and their dreams ahead of them, and he took that away from Patty.

R1087. See also R1089 ("he had no mercy on Patty and Patty wasn't involved in any child abuse when she was younger or anything like that"), and R1090 ("he called her a slut, a bitch, Patty, this eighteen year old girl, this is the way he described her. He gave her no mitigation, whatsoever.")

The prosecutor set this improper argument up during the guilt phase by emphasizing Ms. Gifford's character. In his opening statement he said that the Gifford family told the

police:

> ...what a sweet, loving girl and caring girl she was, that she would never, never just disappear. She was liked by everyone, and that wasn't her style, just to leave and not tell anyone.

R25.

> ...and you will learn that due to the fact that Patty had a very close family, that the whole family came down here.
>
> The mother and her brother and them [sic] all came down here to search for Patty. You will hear that they searched the woods around here. They searched swamp. They put out fliers. They searched all the areas. They went to restaurants. They went to bars, to try to find out the whereabouts of their loved-one Patty.
>
> You will learn that in fact Gary Sochor even talked to Barbara Ryan, who's the mother of Patty, and he said he broke down, cried, very emotional and said he would try and take them to where Patty's body was because Barbara told him all she wanted was a body to bury her, so he tried to take them to find the body and couldn't find the area, attempted to, but could not find it.

R30-31.

> ...Then the years went by. You will hear that the investigation slowed down, that the parents and the family of Patty, they continued to pray, and they continued to hope that Patty would somehow come back, but you will in fact learn that finally they could accept that in fact she was dead....

R32.

He then proceeded to present to the jury corroboration of this picture of Ms. Gifford. Mr. Vasel, the high school sweetheart, testified that Ms. Gifford was very loyal and would not go to bars and pick up guys. R106. He testified that she had a very good, excellent relationship with her family, and that the

family came down to look for her. Captain Schlein testified about Ms. Gifford's mother's concern: "Yes, the family, of course, as you would imagine, was very concerned. As a matter of fact, I will never forget the mom. She spent more time in my office than I did, really. She was there everyday [sic]. She was absolutely determined that the case would continue, and that it wouldn't lose interest, although technically, it was still a missing persons case." R455. Ms. Ryan, the mother and the state's final witness, testified about her close ties to her daughter, and about her emotional meeting with Gary Sochor. R625-27. The prosecution stirred up the emotions raised by this moving testimony, reminding the jury that the "sweetheart boy-friend" had become emotional and that it was very difficult for him and Ms. Ryan to testify. R839-40.

2. Lack of remorse

Lack of remorse is an improper aggravating circumstance. See Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983). Nevertheless, the prosecutor presented evidence of lack of remorse, and argued to the jury that it be used in determining Mr. Sochor's sentence.

Over defense counsel's objection that the evidence constituted improper character evidence, the prosecutor elicited the following from Paul Jones in the guilt phase:

> Q (By Mr. Hancock) What did he say about his feelings, how he felt about choking this person in Fort Lauderdale?
>
> A He said it didn't bother him at all. He said that death was death, life is life, when your [sic] gone, your [sic] gone.

> Q Now, did he mention anything to you about if you, in fact, told anyone what he had told you about choking this person?
>
> A He had told me that he would do the same to me.
>
> Q Now, after he told you about this, what did he do?
>
> A Shortly afterwards, he went to put the stereo on and danced and singed [sic], and as if nothing ever happened.
>
> Q Now, did he ever tell you about what his thoughts were on women?
>
> A To him, women were more or less a sexual tool, nothing more.

R565-66. No slouch, the prosecutor used this testimony again and again in his final argument in the guilt phase. R855. ("...he says how easy it was, that it didn't bother him.... that women are a tool to be used for his sexual pleasure and sexual gratification, and that after that, that's it"); R904 ("...he tells him that life is life and death is death, and when you're gone, you're gone, that it's easy to kill"); R905-906 (Gary Sochor is "not a man that tells you that life is life, death is death, when you're gone, you're gone. It's easy to kill.").

Having thus set the stage, the prosecutor urged the jury to consider this lack of remorse as an aggravating factor in sentencing, ending his argument in the sentencing phase as follows:

> ...I don't think there is any question that this is one of those atrocious, most crule [sic], one of the most senseless, one of the most heartless crimes that there can be, and if you take all that in, you see that the aggravating circumstances definitely outweigh the mitigating circumstances, and remember, you can

consider the other testimony that you have heard in this case, and remember Paul Jones, what Paul Jones said, what he said about that it's easy, and if you remember this, he said it was easy to kill, and he said that life is life, and death is death, and when you're gone, you're gone.

It was easy for Dennis Sochor to do what he did, and that's what he said, and in fact, even Hickey said that he called her a slut, a bitch, Patty, this eighteen year old girl, this is the way he described her. He gave her no mitigation, whatsoever.

So, go back there and do your duty, like you did before, and you have an opportunity to do something. You have no opportunity to come back with what you think is the proper recommendation and not only an opportunity, you have a duty to do that, and you have an opportunity to bring justice to a sometimes very unjust society, and to go back there and come back, and tell Dennis Sochor that he had no value for life. In fact, he said life is life, and death is death, when it's gone, it's gone.

It's easy, he said, and he could do it again. So, go back there and tell him that his life, that the crime that he committed against not only Patty, but against the State of Florida, that he deserves only one sentence, and your recommendation should be twelve to zero is what it should be, if you take the law and apply it to the facts, and don't be emotional about it, and remember the tears of the family because he has forfeited his right to live in a human society by what he did.

So, go back there and listen to everything and listen to Mr. Rich, and decide if this is the type of case that we have capital punishment in Florida for, and it is, and the reason we have capital punishment in the State of Florida sits right there, and that's Dennis Sochor.

Thank you. Thank you, Judge.

R1090-92.[35]

3. Prior Criminal or Anti-Social Behavior.

Although prior conviction of a violent felony is a statutory aggravating circumstance, there is no provision in the statute for consideration of non-violent criminal behavior or of violent behavior for which there has been no conviction. Nevertheless, under the guise of rebutting the statutory mitigating circumstance of no significant history of prior criminal activity,[36] the prosecutor presented evidence of such prior criminal activity and emphasized it in his argument to the jury.

The prosecution presented graphic evidence to the jury regarding various bad acts committed during his marriage to Patricia Neal. She testified that Mr. Sochor committed acts of violence on her over 30 times, including various rapes and batteries. R953-54. She testified in some detail about one such violent episode at a campground, R962,[37] and testified concern-

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35 Of course the prosecutor's argument that Mr. Sochor would kill again in and of itself requires a new sentencing hearing. See Teffeteller v. State, 439 So.2d 840, 845 (Fla. 1983) and the cases cited therein. Also improper was arguments that "the criminal justice system doesn't always work, that it didn't work at all" when Mr. Sochor previously received leniency by being released on probation. R1080.

36 The prosecutor told the judge that the defense attorney "requested to argue number one, for the mitigating circumstances, number two, number four, number five, number six and number eight." R949. Defense counsel did not respond to this ambiguous assertion. He presented no evidence or argument on the statutory mitigating circumstance of no significant history of prior criminal involvement. Hence there was nothing to rebut.

37 Admittedly, this testimony was elicited by defense counsel on cross-examination. R962.

ing another violent episode on New Year's Eve 1974. R953. She testified he had a trunkful of purses stolen from prostitutes, and that a prostitute had scratched him during one of the purse-snatchings. R956, 965.

The prosecutor then presented a detailed hearsay summary and taped confession of Mr. Sochor to a brutal rape episode in Michigan for which there was apparently no conviction.[38] In that episode he choked a woman to unconsciousness, raped her while she was defecating, and then raped her two more times and forced her to commit an oral sex act. R976, 977-82. The taped statement played in the sentencing phase contained indications that Mr. Sochor had committed other rapes. R980. Mr. Sochor's statement played in the guilt phase contained repeated references to prior rapes. R474, 475, 476, 477, 479, 485-86.

The prosecutor emphasized these matters to the jury in his argument in the sentencing phase:

> One is Dennis Sochor has no significant history of prior criminal activity. Ladies and gentlemen, that doesn't apply at all, and that's why we called Captain Schlein, to testify about the pending sexual battery case he still has in Michigan, and you heard about that one, how he takes her from the bar. In fact, she even throws up in the car, when he is taking her back, so there is no question.

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[38] This hearsay summary, as well as hersay about the sexual bttery for which Mr. Sochor was on probation violated The Confrontation Clause. See Rhodes v. State, 14 FLW 343 (Fla. July 6, 1989). The details of the terrible suffering of Ms. Neal nd the two rape victims was also irrelevant to sentencing. Id. These errors alone make the relibility of the death verdict and resulting sentence so unrelible as to violate the Cruel and Unusual Punishment Clause.

R1083-84.

> In fact, Dr. Zager's report indicates that in fact he was involved in like three different sexual batteries....

R1084.

> They can't get up here and say it's alcohol, that the reason he committed these violent crimes was because of alcohol, because you heard from Patricia Neal, and Patricia Neal was married to him for about a year, and she told you about the beatings that she suffered, and she said that he wasn't under the influence of alcohol then, that he didn't even drink alcohol, so they can't come up and say that that applies in mitigation because when he drank alcohol, he became violent because he became violent, when he didn't drink alcohol.

R1085-86.

The prosecutor also urged consideration of Mr. Sochor's failure to accept help from his family, his flight, and his transiency:

> They tried to get him help. The parents even tried to get him help, and it's indicated on the one record that, in fact, he received probation in Michigan, and part of that probation was that he receive treatment, and what does he do, he doesn't voluntarily go get that treatment. He takes off, and that's when he starts changing his name. He was on the run. He takes off.
>
> Shortly after that, you hear that he commits this rape in Michigan, and then be comes down to Florida and changes his name, then he commits a rape down in Florida, so he then has to change his name again, and then he goes to these other states.

R1088.

4. Other Improper Argument

The prosecutor asserted to the jury his personal belief that the death penalty was appropriate in this case:

> You have got to consider that in making a determination of what the proper recommendation is, and if you live by the sword, you must die by the sword, and he had no mercy on Patty, and Patty wasn't involved in any child abuse when she was younger or anything like that, and a lot of times it's very hard to get up here and give a recommendation, and I am not a big fan of capital punishment. I am not a big proponent of capital punishment. I think is applies just in certain select cases, and only in those select cases, and the State's recommendation in this case is death because you have to decide if this is a type of crime that deserves the worst type of punishment, and I don't think there is any question that this is one of those atrocious, most crule, one of the most senseless, one of the most heartless crimes that there can be, and if you take all that in, you see that the aggravating circumstances definitely outweigh the mitigating circumstances, and remember, you can consider the other testimony that you have heard in this case, and remember Paul Jones, what Paul Jones said, what he said about that it's easy, and you remember this, he said it was easy to kill, and he said that life is life, and death is death, and when you're gone, you're gone.

The foregoing is an improper, unethical form of argument. See rule 4-3.4(e), Rules Regulating the Florida Bar. Astonishingly, the prosecutor successfully objected to an attempted rebuttal:

> MR. RICH: I think it's perfectly proper. This top gun here always asks for the death penalty.
>
> MR. HANCOCK: Judge, that's not true. Mr. Rich knows that. I ask for a sidebar, Your HOnor.
>
> THE COURT: Gentlemen, let's just keep this off a personal level and speak to the jury.
>
> MR RICH: It's the policy of his office to always ask for death.
>
> MR. HANCOCK: Judge, I object to that, Your

> Honor. That's not so, and Mr. Rich knows it, and I would respectfully object. I ask the Court to rule on that. That's not proper argument, Your Honor.
>
> THE COURT: I don't know what all these facts are. It's not a proper comment. I don't think there is any evidence on that.

R1110-11.

The prosecutor's reliance on such improper argument, and the trial court's refusal to permit its rebuttal, created substantial likelihood of an erroneous death verdict in violation of the fifth, sixth, eighth, and fourteenth amendments to the federal constitution and article I, sections 9, 16, and 17 of the state constitution.

B. JURY INSTRUCTIONS

The penalty jury instructions were so incorrect and incomplete as to undermine confidence in the reliability of the death verdict. Hence they violate due process and the eighth amendment.

1. <u>Aggravating Circumstances</u>

a. Felony Murder.

The jury instructions defined this aggravating circumstance as follows: "The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of or an attempt to commit the crime of Sexual Battery and/or Kidnapping." R1221. The instructions did not define the underlying felonies, and did not tell the jury that it could apply this circumstance only if it had found Mr. Sochor guilty of premeditated murder.

In the guilt phase of a felony murder trial, the elements of the underlying felony must be sufficiently defined to assure a fair trial. Franklin v. State, 403 So.2d 975 (Fla. 1981). Instructions which fail to define aggravating circumstances violate the eighth amendment. Maynard v. Cartwright, 108 S.Ct. 1853 (1988). An aggravating circumstance violates the eighth amendment unless it genuinely narrows the class of death eligible. Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). The felony murder aggravating circumstance does not serve this function: it makes all who commit felony murder eligible for the death penalty. Hence it is constitutional only where it applies to persons convicted of premeditated murder. Cf. Lowenfield v. Phelps, 108 S.Ct. 546 (1988) (upholding aggravating circumstance of premeditated murder committed during the course of a felony.). Hence the instant instruction failed to meet the foregoing and violated the eighth amendment.

b. Heinous, Atrocious or Cruel

The jury was instructed on this factor: "The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel." R1221. This instruction violated the eighth amendment under the teachings of Maynard v. Cartwright, 108 S.Ct. 1853 (1988). It is not a correct statement of the strict standards of State v. Dixon, 283 So.2d 1 (Fla. 1973).

c. Cold, Calculated and Premeditated

The jury was instructed on this circumstance: "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." R1221. This is not a correct statement of the strict definition of this circumstance under Rogers v. State, 511 So.2d 526 (Fla. 1987). It is so vague as to give rise to completely contradictory constructions. Compare Herring v. State, 446 So.2d 1049 (Fla. 1984) with Rogers. Hence it does not supply the definiteness required by the eighth amendment and invites irrational and arbitrary application in violation of the teachings of Maynard v. Cartwright, 108 S.Ct. 1853 (1988).

2. Mitigating Circumstances

a. Nonstatutory Mitigating Evidence

The jury was instructed that it could consider: "Any other aspect of the defendant's character or record, and any other circumstance of the offense." R1222 (emphasis supplied). The jury could reasonably have concluded that this instruction allowed only consideration of character traits other than mental illness or defects, and forbade consideration of mental or emotional disturbance or duress less than "extreme," and forbade consideration of impairment of the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law that was less than substantial. Similarly, it could have taken it to forbid consideration that although Mr. Sochor's criminal history may have been significant, it may not have been such as to mark him for death. Indeed the prosecutor and the trial court showed just such misunderstandings -- they took consideration of nonstatutory mitigating evidence to be limited to the testimony about Mr. Sochor's childhood. Hence

they took it to preclude (and it is therefore reasonable to believe that the jury took it to preclude) other broad areas of mitigating evidence in violation of the teachings of Hitchcock v. Dugger, 107 S.Ct. 1821 (1987).

What is more, the instruction told the jury that all nonstatutory evidence, however varied, constituted but a single mitigating circumstance to be factored into the sentencing equation. This in itself constituted a limitation of the use of nonstatutory mitigating evidence in violation of the eighth amendment.

b. Other Mitigating Circumstances

The use of such qualifiers as "no significant" (history of prior criminal activity), "extreme" (mental or emotional disturbance; duress), and "substantially" (impaired appreciation of criminality and ability to conform conduct) so sharply limit the application of the statutory mitigating circumstances as to prevent the broad use of mitigating evidence required by the eighth amendment. Hence the instructions on the statutory mitigating circumstances were improper.

Further, the instructions on the mental mitigating circumstances were so vague as to mislead the prosecutor and the trial court (and hence, one assures, the jury) into misapplying them in violation of Mines v. State, 390 So.2d 332 (Fla. 1980). See the discussion at point II.D.2 below.

c. Burden and Standard of Proof

The jury was instructed: "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists,

you may consider it as established." R1222. This instruction precluded consideration of mitigating evidence that did not amount to "a mitigating circumstance" in violation of the teaching of Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) that the eighth amendment requires consideration of all relevant mitigating evidence. The "reasonably convinced" standard also unduly restricts consideration of relevant mitigating evidence.

3. Presumption of Death

Under Florida law there is a presumption of death upon the finding of a single aggravating factor. Florida's aggravating circumstances are so broad as to cover practically every first-degree murder. Every felony murder has the felony murder circumstance. Many if not most premeditated murders have the premeditation circumstance, depending on which definition of it is applied.[39] Any case left over is pretty much covered by the "heinous, atrocious or cruel" circumstance. Once this presumption attaches -- as it does in almost every case -- the jury is instructed (and was instructed here, R1222) to return a death verdict unless the mitigating evidence outweighs the aggravating. Such an instruction is unconstitutional. See Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

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

C. THE JURY'S ROLE

The jury was repeatedly told that its role in the sentencing process was merely advisory. The prosecutor, in his initial remarks during voir dire examination, called the second phase of trial "the advisory or the sentencing phase," S44, and called the jury's verdict in the penalty phase a "recommendation." S45. The questioning of individual veniremen was of the same tenor. See, e.g., S50 ("advising or sentencing phase"), S51 ("recommendations"), S70 ("recommend"). The judge's instructions to the jury gave no clue as to the importance of the role of the jury in sentencing:

> Final decision as to what punishment shall be imposed rests solely with the judge of the this [sic] court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.

R950. The final instructions at the penalty phase also repeatedly referred to the jury's role as only being "advisory," R1111-12, and to the verdict as but a "recommendation." R1115-16.

In Caldwell v. Mississippi, 472 U.S. 320, 1055 S.Ct. 2633, 86 L.Ed. 2d 231 (1985) the Court ruled that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere." Id. at 328-29. This has long been the law in Florida. E.g. Pait v. State,112 So.2d 380, 383-84 (Fla. 1959) (misinforming the jury of its role constitutes reversible error).

Although there was no objection to these matters, Mr. Sochor argues that they are nevertheless subject to appellate review under the special scope of review in capital cases articulated in Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977). The error was of constitutional magnitude and was such as to distort the fact-finding role of the jury in violation of the eighth amendment's requirement of certainty in fact-finding in capital cases. Hence, this Court should order a new sentencing trial before a new jury.

D. AGGRAVATING AND MITIGATING CIRCUMSTANCES

The record shows considerable confusion regarding aggravating and mitigating circumstances in the trial court. The evidence does not support findings made by the trial court, and the prosecutor argued and the trial court applied incorrect standards regarding them.

The eighth amendment requires certainty in the application of aggravating circumstances. See, e.g., Maynard v. Cartwright, 108 S.Ct. 1853 (1988) and Mills v. Maryland, 108 S.Ct. 1860, 1866 (1988) ("In reviewing death sentences the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."). Where, as here, there were substantial errors in the application of the aggravating and mitigating circumstances, the defendant is entitled to a new sentencing hearing.

1. Aggravating Circumstances

The trial court found four aggravating circumstances: that Mr. Sochor had previously been convicted of a felony involving use or threat of violence, namely sexual battery; that the killing occurred during the attempted or actual commission of sexual

battery or kidnapping, or during flight therefrom; that the killing was heinous, atrocious, or cruel; and that the killing was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. R1232-33. Mr. Sochor argues that the last three findings were incorrect.

a. Felony Murder

The trial court wrote in the sentencing order:

> The Court finds, according to Florida Statutes 921.141(5)(d), that the crime for which the Defendant is to be sentenced was committed while the Defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit any Sexual Battery or Kidnapping. The jury convicted the Defendant of Kidnapping in Count II of the Indictment. There is sufficient evidence to prove the victim was taken from the Banana Boat and at some point held against her will. She was forcibly dragged out of the truck as she resisted and pleaded for help. As to the attempt to commit Sexual Battery, the Defendant, from his own statements to law enforcement officers, indicated he wanted sex and when the victim refused him he became angry and the fight ensued. The Defendant said he had these urges for sex. Even though there is no evidence the Defendant actually sexually assaulted the victim as the body was never found, the Defendant's admissions prove the death occurred as he was attempting to sexually assault her. The Court finds that both of these felonies were committed or attempted to be committed but the Court considers this as only one aggravating circumstance.

R1232.

i. Leaving aside the other problems regarding the claimed kidnapping,[40] the evidence does not support the trial court's

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[40] Since, as is shown elsewhere, the jury should have acquitted Mr. Sochor because of the lack of evidence of the elements of the offense charged and because the absolute defense under the statute of limitations, kidnapping could not support this aggravating circumstance. This problem and others regarding

findings concerning it. The state's evidence refutes the trial court's apparent finding that there was sufficient evidence that Ms. Gifford was taken from the Banana Boat against her will. The evidence was that Ms. Gifford left the Banana Boat voluntarily. There was evidence that Ms. Gifford was "at some point held against her will," but this confinement was merely incidental to the killing. That "[s]he was forcibly dragged out of the truck as she resisted and pleaded for help" has no support in the record.

As in Scull v. State, 533 So.2d 1137, 1142 (Fla. 1988), it was improper for the trial court to adopt a theory of the case not supported by the evidence. See also the discussion in Hardwick v. State, 521 So.2d 1071, 1075-76 (Fla. 1988).

ii. The trial court's findings respecting sexual battery are similarly flawed. In the first place, the trial court relied entirely on Mr. Sochor's statements in making its findings on this point. Mr. Sochor argues that the state must establish the aggravating factor independently of his statements as required by the corpus delicti rule. Although there is no case on point on this issue, legal analysis bears out this position.

The corpus delicti rule is a settled doctrine of our law traceable ultimately to incidents such as Perry's Case in which a servant confessed to and was hung for a murder which never occurred.[41] See Wigmore on Evidence §867, n.1. It seems to apply in

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the kidnapping are addressed elsewhere in this brief.

41 The deceased, who had been abducted, returned several years after the hanging.

every American jurisdiction except Wisconsin. Id. §2070. Hence, the rule is required by the Due Process Clause and by the eighth amendment. Cf. Ferguson v. Georgia, 365 U.S. 570, 81 S.Ct 756, 5 L.Ed.2d 783 (1961) (common law bar to testimony by defendant violated due process where abolished by all but one American jurisdiction), Thompson v. Oklahoma, 108 S.Ct. 1687 (1988) (indicating that execution for crime committed by child under age of 16 would violate eighth amendment if there is a national consensus against it) and the discussion in Coker v. Georgia, 433 U.S. 584, 593-97, 97 S.Ct. 2861, 58 L.Ed.2d 982 (1977). There being no corpus delicti of attempted sexual battery, the trial court should not have used Mr. Sochor's statements in an attempt to bridge the gap in the state's proof.

In any event, Mr. Sochor's statements do not make out a case of attempted sexual battery. As the trial court stated, Mr. Sochor "indicated he wanted sex and when the victim refused him he became angry and the fight ensued. The Defendant said he had these urges for sex." These facts, do not make out an attempted sexual battery. As the trial court found, "there is no evidence the Defendant actually sexually assaulted the victim." Hence, the trial court's finding on this point was not supported by the evidence.[42]

b. Heinous, Atrocious or Cruel

The trial court wrote in the sentencing order:

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42 Of course the trial court did not even find an attempted sexual battery -- it found an attempted sexual assault. Whatever attempted sexual assault may be, it is not an aggravating circumstance under our law.

> The Court finds, according to Florida Statutes 921.141(5)(h), that the capital felony was especially heinous, atrocious or cruel. The evidence indicated that the victim was forcibly removed from the truck while she pleaded for help and even begged for her life. Even though Patricia Gifford's body was never recovered and no one knows how badly she was beaten, the Defendant admitted in his statements that as he choked her she resisted and fought him. There were several fingernail marks on his face which substantiates that violent struggle ensued as confirmed by the Defendant's statements to the police officers. Dr. Wright testified that asphyxiation is a slow and painful death. Fear and emotional trauma preceeding the victim's death may be considered as contributing to the heinous nature of the capital felony. It is clear there was fear and definitely emotional trauma before her death.

R1232-33.

Leaving aside the question of the constitutionality of this aggravating factor (that issue is discussed elsewhere in this brief), Mr. Sochor points out that the trial court's factual findings are not supported by the evidence. There was no evidence that Ms. Gifford "was forcibly removed from the truck while she pleaded for help and even begged for her life." As the trial court admitted "no one knows how badly she was beaten" -- in fact there is no evidence of a beating. Dr. Wright's testimony was that the degree to which asphyxiation "is a slow and painful death" depends entirely on the circumstances.

A serious problem in discussing this aggravating circumstance is that the cases are pretty much "all over the map." Nevertheless, the following is clear. To meet this aggravating circumstance, the crime must be "accompanied by such additional facts as to set the crime apart from the norm of capital felonies

-- the conscienceless or pitiless crime which is unnecessarily torturous to the victim." E.g., Brown v. State, 526 So.2d 903, 906 (Fla. 1988). To meet this requirement, the crime must be "committed so as to cause the victim unnecessary and prolonged suffering." Id. 907. The evidence here is that Mr. Sochor was in a blind rage. There is no showing of a torturous intent or of facts which set the crime apart from the norm of capital felonies. Indeed, the evidence was most consistent with a second degree murder.

In making his argument, Mr. Sochor is aware of the following in Doyle v. State, 460 So.2d 353, 357 (Fla. 1984):

> In particular, the finding that the murder was heinous, atrocious and cruel was based on the evidence that the victim died of strangulation which occurred over a period of up to five minutes and that prior to losing consciousness the victim was aware of the nature of the attack and had time to anticipate her death. Murder by strangulation has consistently been found to be heinous, atrocious and cruel because of the nature of the suffering imposed and the victim's awareness of impending death.

He is also aware of the following from Johnson v. State, 465 So.2d 499, 507 (Fla. 1985):

> The instruction on and finding that the murder was especially heinous, atrocious, or cruel were also proper. The victim was murdered by means of strangulation, a method of killing to which this Court has held the factor of heinousness applicable. Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). It is permissible to infer that when perpetrated upon a conscious victim, strangulation involves foreknowledge of death, extreme anxiety, and pain. Furthermore, Thomas testified that appellant told him that after he began to choke

her, the victim escaped from his car, that he chased her and caught her again, and that he had to resume strangulation three times to make sure she was dead.

Leaving aside the obvious factual differences between Doyle and Johnson and the case at bar, Mr. Sochor contends that those cases do not stand for the proposition that every strangulation constitutes a heinous, atrocious, or cruel murder. In order to meet the statute, the killing must be conscienceless or pitiless and must be done with a torturous intent. The evidence at bar does not support such a conclusion.

c. Cold, Calculated, and Premeditated

The evidence was that Mr. Sochor was in a blind fury at the time of the crime. Gary Sochor testified that Dennis was in the state that he would reach when extremely angry: his pupils rolled back, his voice strangely altered, he was a man possessed. R317-18, 361-62. Mr. Sochor told the police that he committed the crime in a state of panic and anger while he was under the influence of an uncontrollable feeling. R499-500, 520.[43]

For a murder to be cold, calculated and premeditated, it must be the result of a careful plan or prearranged design. Rogers v. State, 511 So.2d 526 (Fla. 1987). This aggravating circumstance "was intended to apply to execution and contract-style killings." Garron v. State, 528 So.2d 353, 361 (Fla. 1988). A finding of this aggravating circumstance is to be set

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[43] Lest it be asserted that the psychiatric experts rebutted this evidence, it is worthwhile to recall that they were unaware of the facts of the case, of the contents of Gary's eyewitness account and of Dennis's statements to the police.

aside when the evidence is susceptible to conclusions other than finding it was committed in a cold, calculated, and premeditated murder. Harmon v. State, 527 So.2d 182, 188 (Fla. 1988). Cf. Bryan v. State, 533 So.2d 744, 748-49 (Fla. 1988) (finding that murder cold, calculated and premeditated proper where it was the "only conclusion that can be drawn from the evidence"). This circumstance does not apply where there is a pretense of moral or legal justification. Such a pretense is a claim of justification or excuse that, though insufficient to reduce the degree of homicide, rebuts the otherwise cold and calculating nature of the homicide. Banda v. State, 536 So.2d 221, 225 (Fla. 1988). In determining the existence of an aggravating circumstance, the trial court cannot accept theories unsupported by the record. See Scull v. State, 533 So.2d 1137, 1142 (Fla. 1988).

At bar the evidence was susceptible to conclusions other than that the killing was cold, calculated and premeditated. Indeed, the evidence was that Mr. Sochor was in a state of panic and anger amounting to a blind rage. There was no evidence of the sort of careful plan or design contemplated by Rogers, no evidence of the sort of underworld slaying spoken of in Garron. The record shows a pretense of justification under Banda: although the evidence of this rage may have been insufficient to absolve Mr. Sochor of first-degree murder, it rebutted the contention that the homicide was cold and calculating. A killing in the heat of panic and anger is scarcely a cold, calculated murder.

The judge's written findings underscore the weakness of the evidence:

> The Court finds, according to Florida Statute 921.141(5)(i), that 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. The evidence indicated that Defendant pulled the victim out of the pickup at night along an abandoned road and proceeded to strangle her. He disposed of the body so it could never be found. The Defendant had previously been put on probation for Sexual Battery and knew the consequences if the victim survived and notified the Police Department. There is no question that it was committed in a cold and calculating manner as the Defendant told a witness who testified that he had choked someone to death in Fort Lauderdale, Florida and how easy it was to do. Furthermore, a cellmate testified that the Defendant had stated he had "killed the fucking slut bitch". There is no pretense of moral or legal justification.

R1233. Contrary to the teaching of Scull, this finding was but a hypothesis concerning the facts of the case: the evidence did not show that Mr. Sochor pulled Ms. Gifford from the truck, or that he killed her to prevent her notifying the police. The trial court did not find a careful plan or prearranged design as required by Rogers.

This case presents problems arising both from the amorphous nature of the aggravating circumstance of cold, calculated, and premeditated murder, and from the ambiguous relationship between the judge's determinations in the sentencing order and the jury's determinations in reaching its verdict on guilt. The result of these problems is that this aggravating circumstance is unconstitutional.

As is noted above, the state's evidence of premeditation was weak at best. It appears that Mr. Sochor became angry when Ms. Gifford opposed his sexual advances, and that he killed her in a fit of rage and panic such that he seemed as though possessed by the devil. The jury may well have found him not guilty of premeditated murder. But, because there was no special verdict on this issue, and because the judge improperly refused to remove premeditated murder from consideration by the jury, it cannot be said with certainty that the jury made such a finding.

Now if, as is likely, the jury found that the murder was not premeditated, then, under the collateral estoppel principles articulated in Yates v. United States, 354 U.S. 298, 335-38, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957),[44] it would have been improper to have considered or found the premeditation aggravating circumstance. Where a factual determination may have been predicated on either a proper or an improper ground, but it is impossible to tell which ground underlay the determination, the determination must be set aside. Yates, 354 U.S. at 312 (verdict must be set aside where it is supportable on one ground but not another, and it is impossible to tell which ground jury selected). This requirement of certainty is greater still in capital cases. Mills v. Maryland, 108 S.Ct. 1860, 1866 (1988). At bar it is impossible to tell whether consideration of this aggra-

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44 These principles are incorporated in the due process and double jeopardy clauses of the state and federal constitutions. See United States v. Oppenheimer, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed.2d 161 (1916) and Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970).

vating circumstance was improper because barred by a finding of no premeditation. Hence, the finding of this circumstance must be set aside. It may well be that, for instance, a minority of jurors felt that there was premeditation (so that a verdict of guilty of first-degree murder was improper) and that only that minority found this aggravating circumstance and yet the vote of this minority coupled with that of another minority finding other aggravating circumstances, produced an improper majority recommendation of death. All of this, in turn, may well have led to the trial court's improper consideration of this aggravating circumstance. Such an unclear situation makes Mr. Sochor's death penalty unconstitutional under Mills.

The foregoing problem of uncertainty is directly related to a problem arising from the undefined nature of the phrase "cold, calculated, and premeditated without a pretense of legal or moral justification." This very Court has at different times given different meanings to the phrase. Compare Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984) with Rogers v. State, 511 So.2d 526, 533 (Fla. 1987) (disapproving of Herring), and Amoros v. State, 531 So.2d 1256, 1261 (Fla. 1988) (same). It stands to reason that some jurors might take the phrase to be more or less the equivalent of simple premeditation, as this Court did in Herring, whereas others might take it to require a careful plan or prearranged design, as this Court did in Rogers. Hence one cannot say with any certainty that the jurors understood and applied the correct standard.

In Maynard v. Cartwright, 108 S.Ct. 1853 (1988), the Court

ruled that the "especially heinous, atrocious, or cruel" aggravating circumstance was unconstitutionally vague, as it did not offer sufficient guidance to the jury in deciding whether to impose the death penalty. The Court wrote at page 1858:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Under the teachings of Maynard the instant aggravating circumstance violates the eighth amendment because it is so vague as to result in the kind of open-ended discretion forbidden by Furman.

The Court also wrote in Maynard that its cases "have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." 108 S.Ct. at 1858. The instant aggravating circumstance does not channel and limit the sentencer's discretion, since it can be taken to mean nothing more than simple premeditation, so that it would apply to all premeditated murders. An aggravating circumstance may be identical to an element of the murder only where that element itself serves the narrowing function. See Lowenfield v. Phelps, 108 S.Ct. 546 (1988).

The consitutional principles of substantive due process and

equal protection requires that a provision of law be rationally related to its purpose. Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). See also Moore v. City of East Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). This principle applies to criminal enactments. See State v. Walker, 461 So.2d 108 (Fla. 1984). Thus 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). The purpose of the aggravating circumstance here at issue is to apply to "execution and contract-style killings." Garron. But as written and applied since, it has lost any rational relationship to its objective. Hence, it is unconstitutional and violative of substantive due process and equal protection.

2. Statutory Mental Mitigating Circumstances

a. What Happened Below

The state's evidence showed that Mr. Sochor was berserk at the time of the crime. The expert witnesses testified that he was sane, but they were not familiar with the facts of the incident. They did not and could not rebut the eyewitness testimony of Gary Sochor, since they were unaware of it.

The prosecuting attorney argued against application of mental mitigating circumstances as follows:

> Here's another: The crime for which the defendant is to be sentenced was committed while under extreme or emotional disturbance. That doesn't apply either, and take the doctors' reports back and you will see and read them in a little more depth. The doctors testified.

> You seen what they found him to be, a sexual offender.
>
> In fact, Dr. Zager's report indicates that in fact he was involved in like three different sexual batteries, but they all concluded the same thing, that he knew it was wrong to kill, and I even think his mother and father indicated that, that he would know it's wrong to kill, and so I don't think that one applies at all.
>
> And the doctor said he even tried to fool them. You remember Livingston said about the face profile. He was trying to fool the doctors, and one doctor said he had selective amnesia.
>
> I think all murders that occur, there is something wrong, there is some psychological problem, or he wouldn't kill, but that doesn't mean your [sic] emotional to the state you don't know what's going on, and that you're so disturbed you don't know it's wrong to kill, and it's wrong to rape.
>
> Many people have emotional problems and disturbances, and they don't go out and rape and murder.
>
> Another one is that the defendant's capacity to appreciate his conduct and conform to the law was substantially impaired, as the doctors told you. That one doesn't apply either. They can't get up here and say it's alcohol, that the reason he committed these violent crimes was because of alcohol, because you heard from Patricia Neal, and Patricia Neal was married to him for about a year, and she told you about the beatings that she suffered, and she said that he wasn't under the influence of alcohol then, that he didn't even drink alcohol, so they can't come up and say that that applies in mitigation because when he drank alcohol, he became violent because he became violent, when he didn't drink alcohol.

R1084-86 (emphasis supplied).

The trial court instructed the jury on this subject as follows:

> Among the mitigating circumstances you may consider, if established by the evidence, are:....Number two, the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance....
>
> Number five, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired.

R1113-14.

The trial court wrote in the sentencing order:

> 2. The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance. This mitigating circumstance does not apply. The doctors who testified all found the Defendant competent and that he did not meet the criteria for involuntary hospitalization pursuant to the Baker Act. However, he was diagnosed as extremely dangerous and violent. Even though the Defendant claimed to the doctors he could not remember what happened, the Court finds as Dr. Castillo testified that the Defendant suffered from "selective amnesia" and attempted to mislead the doctors as to his recollections of the murderous incident.

R1234.

> 6. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. This mitigating circumstance does not apply. All the credible evidence indicates that the Defendant was able to appreciate the criminality of his conduct and was able to conform his conduct to the requirements of law if he so desired. He told a witness who testified during the trial, that he had choked someone in Fort Lauderdale, Florida and it was so easy that he could do it again. Even though the Defendant maintained he was intoxicated during the crime, the testimony from all the witnesses showed, though he may have had some alcoholic drinks, he was still in control of

> his actions and behavior and knew what was happening. His ex wife testified that he acted violently even when he was not under the influence of alcohol.

R1234-35.

B. Why What Happened Below Was Wrong.

The foregoing shows substantial errors: first, the prosecutor's argument presented an improper standard for the consideration of the evidence; second, the court's order applies a wrong standard; and third the trial court's findings are contrary to the evidence.

i. The prosecutor argued against application of the mental mitigating circumstances primarily because the expert witnesses testified that Mr. Sochor knew right from wrong and was therefore legally sane at the time of the offense and because he could go berserk when not under the influence of alcohol.[45] This argument was sufficiently persuasive to convince the trial judge, who equated the standard for mental mitigating evidence with that for involuntary commitment under the Baker Act,[46] or for a defense of voluntary intoxication. The prosecutor's argument was as wrong as it was persuasive.

Legal sanity is not the standard for the mental mitigating circumstances. In Mines v. State, 390 So.2d 332 (Fla. 1980), this Court wrote at page 337:

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[45] The prosecutor's argument as to non-alcoholic berserk behavior was based on the testimony of Ms. Neal. It is to be remembered that her testimony ws substantially similar to Gary Sochor's -- that Mr. Sochor's eyes would glaze over and he would go berserk.

[46] §394.463(1), Fla. Stat.

> From the record it is clear that the trial court properly concluded that the appellant was sane, and the defense of not guilty by reason of insanity was inappropriate. The finding of sanity, however, does not eliminate consideration of the statutory mitigating factors concerning mental condition.

Logic dictates such a conclusion. If the defendant is legally insane at the time of the offense, then he should be found not guilty, so that there is no sentencing proceeding and the statutory mitigating circumstances would never apply. Thus a limitation of the statutory mitigating circumstances to instances of legal insanity would make them a nullity. The prosecutor's argument gave the jury a false standard and the trial court's jury instructions did nothing to clarify the issue.[47]

ii. The trial court was similarly confused about the correct standard, placing emphasis on Dr. Zager's conclusion that Mr. Sochor did not meet the criteria for involuntary commitment under the Baker Act. The fact that Mr. Sochor did not meet the Baker Act criteria when interviewed several years after the alleged offense and while being medicated with lithium and Sinequan at the jail, R654, 806, had no bearing on the issue of his mental condition at the time of the offense. See the discussion at page 336 of Mines. The trial court's application of the voluntary intoxication standard is flawed for the same reason as the pro-

47 The propriety of the jury instructions are discussed elsewhere in this brief.

secutor's argument about legal insanity: to require the defendant to make out a complete defense to the crime would prevent the mitigating circumstances from ever being applied.[48]

iii. As already noted, the testimony of Gary Sochor, the only eyewitness, was that Dennis was out of his mind at the time of the alleged offense.[49] He was a state witness whose testimony was crucial to the prosecution. The state is bound by the testimony of this crucial eyewitness. See, e.g., D.J.G. v. State, 524 So.2d 1024 (Fla. 1st DCA 1987). Although the experts concluded that Mr. Sochor was sane at the time of the offense, they did not know about the only eyewitness's version of the facts, and were unfamiliar with Dennis's taped statements. In any event, they had no opinion on the mental mitigating circumstances.

From the foregoing, it was improper for the prosecutor to argue that, contrary to the testimony of the state's main witness, mental mitigating circumstances did not apply. It was also improper for the trial court to find no statutory mitigating circumstances, and for the trial court to find that "[a]ll the credible evidence" indicated that Mr. Sochor appreciated the criminality of his conduct and was able to conform his conduct to the requirements of the law if he so desired.

c. Why There Should Be a New Sentencing Hearing.

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48 It may be that the trial court was confused about the standard of proof as to mitigating evidence. As shown at point II.F.1 below, Florida's standard of proof violates the Constitution.

49 Dennis's taped statements are to the same effect.

The trial court judge and the prosecutor had an erroneous understanding of the statutory mental mitigating circumstances. Presumably defense counsel had an equally erroneous understanding, or he would have objected to the foregoing. How then was the jury to know how to apply these statutory mitigating circumstances? Mr. Sochor should receive a new sentencing hearing before a new jury or (at a minimum) a new sentencing hearing before the trial court, since the errors respecting these mitigating circumstances were so serious as to be contrary to the requirement of heightened reliability in fact-finding in capital cases under the state and federal constitutions.

3. Nonstatutory Mitigating Circumstances

Limitation of consideration of nonstatutory mitigating evidence violates the eighth amendment. Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). Uncontroverted factual evidence of nonstatutory mitigating evidence must be considered in mitigation. See Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988) and R.C. Waters, "Uncontroverted Mitigating Evidence in Florida Capital Sentencings," Florida Bar Journal (January 1989) 11. At bar the trial court erred by giving little or no consideration to substantial mitigating evidence in the record.[50]

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[50] It may be that here also the trial court was confused concerning the burden of proof respecting mitigating circumstances. What is more, the prosecutor's argument and the jury instructions told the jury that sympathy could play no role in reaching the penalty verdict. The prosecutor argued that the jury could not be emotional in sentencing Mr. Sochor. R1079-1091. The trial court instructed that the verdict "must be based upon the facts as you find them from the evidence and the law." R1223. This had the effect of misleading the jury as to the role of sympathy and mercy in reaching its verdict and in considering the mitigating evi-

a. At bar, Mr. Sochor's family presented substantial, uncontroverted testimony evidence that he was repeatedly and brutally beaten by his father, that he financially supported his family when his father was out of work, and that he grew up in a large poor family. Our law recognizes such matters as constituting nonstatutory mitigation. See, e.g, Pickens v. Lockhart, 714 F.2d 1455, 1466 (8th Cir. 1983) ("there is no dispute that evidence of a turbulent family background, beatings by a harsh father, and emotional instability may be relevant in mitigation"); Porter v. Wainwright, 805 F.2d 930, 933 (11th Cir. 1986) (stepfather inflicted mental and physical abuse on defendant, who cared deeply about his mother, sister, wife, and daughter); Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985) (defendant used her earnings to help care for her family); and Fead v. State, 512 So.2d 176 (Fla. 1987) (defendant provided for his family).

The trial court gave little regard to this substantial, unrebutted evidence, writing in the sentencing order:

> Any other aspect of the Defendant's character or record and any other circumstance of the offense. There were several members of the Defendant's family who tearfully and grievously testified. However, after considering their testimony, this Court finds no nonstatutory "mitigating" circumstances.

R1235. The trial court erred by giving no weight to this evidence also erred by giving no consideration at all to other mitigating evidence in the record.

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dence, in violation of the teaching of Parks v. Brown, 860 F.2d 1545, 1557-58 (10th Cir. 1988) (en banc). But see Byrne v. Butler, 847 F.2d 1135 (5th Cir. 1988).

b. The trial court strictly limited its consideration of nonstatutory mitigating evidence to evidence presented by Mr. Sochor's family. In this the trial court followed the lead of the prosecutor, who limited the argument on nonstatutory evidence to the family testimony about abuse of Mr. Sochor as a child. R1086-88. It is safe to say that the jury was similarly limited in it consideration of the nonstatutory mitigating circumstances.[51] The trial court erred by failing to consider the following mitigating circumstances.

Influence of alcohol. The evidence was that the consumption of alcohol was directly related to triggering the homicidal rage. The influence of alcohol is a recognized mitigating factor. See, Buckrem v. State, 355 So.2d 111 (Fla. 1978) (defendant, who was drinking on the night in question, "was obviously disturbed as well as intoxicated"), and Fead v. State, 512 So.2d 176 (Fla. 1987) (defendant acted "under the effects of alcohol").

Heat of passion. The evidence was that Mr. Sochor acted in the heat of passion and could not control his emotions. These facts constitute a nonstatutory mitigation. See Ross v. State,

51 Apparently, the prosecutor and trial court were confused because of the curious phrasing of the jury instruction on nonstatutory mitigating circumstances. It speaks of "any other aspect of the defendant's character or record, and any other circumstances of the offense." R1114 (emphasis added). The prosecutor and trial judge apparently concluded that this forbade consideration of, for instance, a state of mental or emotional agitation at the time of the offense insufficient to meet the criteria of the statutory mental mitigating circumstances. Presumably, the jury was similarly confused.

474 So.2d 1170, 1174 (Fla. 1985) (killing was result of angry domestic dispute in which victim realized the defendant had trouble controlling his emotions).

Emotional and mental instability. There was substantial evidence of Mr. Sochor's emotional instability. He was manic-depressive, had trouble holding down jobs, had trouble with women, contemplated suicide, and at times seemed to be possessed. He began to exhibit signs of instability while still a child. Such instability is a recognized mitigating circumstance. See Pickens v. Lockhart, 714 F.2d 1455, 1466-67 (8th Cir. 1983) and Magill v. Dugger, 824 F.2d 879, 889 (11th Cir. 1987) (defendant began to exhibit signs of serious emotional problems at age 13; more than just impulsive, he was "explosive," a "time bomb").

Long term use of drugs and alcohol. The record shows that Mr. Sochor suffered from alcohol and drug abuse from his childhood up to the time of his arrest. It is improper not to consider such evidence. See Lockett v. Ohio, 438 U.S. 586, 594, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (prior use of heroin).

E. PROPORTIONALITY

"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. 1988). Its application is reserved solely for "the most aggravated, the most indefensible of crimes." State v. Dixon, 283 So.2d 1, 8 (Fla. 1973). Substantive proportionality must be maintained in order to

ensure that the death penalty is administered evenhandedly." Fitzpatrick, 527 So.2d at 811. Substantive proportionality is also required by the Cruel and Unusual Punishment Clause.

The death penalty is disproportionate in this case, due to a wide variety of mitigating evidence including, but not limited to, severe beatings as a child, long term alcoholism and drug abuse, manic depression resulting in suicidal thoughts, and genuine remorse. Dennis Sochor grew up in poverty and violence. His parents, Charles and Rosemary Sochor, admitted beating him extensively as a child. R1038, 1072. This included banging his head against the wall. R1032. Gary Sochor testified that Dennis was beaten severely. R1006-1008. He described an incident where Dennis' mother threw a fork at him and it stuck in his chest. R1007-1008. Dennis's sister elaborated on the brutal beatings Dennis received. R1022. These included kicking him and banging his head against the wall. R1022. Gary Sochor confirmed that Dennis was often beaten for things which Gary had done. R1005. Gary described the emotional and material poverty which Dennis grew up in as one of ten children. R1018. Dennis's brother and sister both stated that they felt all of Dennis's problems stemmed from the beatings he received as a child. R1012, 1026.

Alcoholism and drug abuse exacerbated the problems caused by the beatings. Both of Dennis's parents testified that his violence was associated with alcohol. R1043, 1067. The prosecution and defense mental health experts all testified that Mr. Sochor had a long standing drug and alcohol problem. R648-650, 658-659, 667-668, 671, 698-699, 701-702, 706, 710-711, 795=796, 808. Dr.

Zager also testified that he suffered from alcoholic blackouts, including on the night in question. R649-651. Dr. Zager also testified that a small amount of alcohol had a great effect on Mr. Sochor, inducing unusual aggressiveness. R649-650, 656, 658-659, 667-668. Dr. Zager also testified that under the influence of alcohol, Mr. Sochor would act on impulse, without any logical thought. R658-659. The police statements of Dennis Sochor, introduced by the prosecution also confirm the devastating role played by alcohol in this incident. In his first police statement, he stated that he was very drunk and did not remember most of the evening. R472-473. He described his feelings that night as a "rage triggered by alcohol." R482. Mr. Sochor's third police statement also says that he had been "very drunk" that night and had trouble remembering things. R517-518. Thus, there is uncontested evidence of long term drug and alcohol abuse, as well as substantial evidence of intoxication on the night of the incident. This evidence came from the prosecution's own evidence, by which it is bound.

There was considerable evidence that mental illness helped produce this alleged incident. Also there was unrefuted evidence that Appellant had been prescribed, and was taking, lithium carbonate and Sinequan in the jail. R654, 806-807. There was testimony the Sinequan is commonly prescribed for depression and lithium carbonate is commonly prescribed for manic depression. R654, 806-807. Indeed, manic depression is listed in accepted texts as the only usage for lithium carbonate. Physician's Desk Reference, p. 1789 (1985). Dennis Sochor's statements to the

mental health experts also confirm mental illness. He consistently described suicidal thoughts. R648, 704, 706. This is entirely consistent with depression and/or manic depression. Indeed, the prosecutor described Dennis Sochor's voice as that "of a mad man [sic]." R854.

The testimony of Gary Sochor confirmed that mental illness played a role in this incident:

> [GARY SOCHOR]: The pupils would roll back, and all I'd see is white in his eyes, and he'd be very --real furious, and in a voice that wasn't his. It would be deep, and would scare you.
>
> [PROSECUTOR]: And can you describe this look?
>
> [GARY SOCHOR]: He looked to be possessed.
>
> [PROSECUTOR]: What do you mean by "he looked to be possessed?"
>
> [GARY SOCHOR]: Well, I don't know. It wasn't him. He was possessed by something, you know. I always looked at it as the devil.

R318.

Gary Sochor's testimony concerning the madness during the incident is corroborated by the testimony concerning prior incidents in his life. Dennis's father and sister both stated that when he was in a rage he did not know right from wrong and that he reached the point of insanity. R1034, 1057. There is substantial evidence of mental illness during and before the incident.

There was also evidence that this is not the sort of cold, calculated incident for which the death penalty is normally reserved. This is seen by the previously described evidence of drug and alcohol abuse, mental illness, and severe child abuse.

Additionally, all of the evidence of the actual incident points to a lack of any pre-planning. Gary Sochor stated that Ms. Gifford was voluntarily kissing Dennis prior to entering the truck. R314. He also stated that it was his (Gary's) idea that the woman get in the truck. R315-316. The next thing he described was the truck being stopped and Dennis looking "possessed," with his eyes rolled up in his head. R316-326. In Dennis Sochor's police statement, he described his feelings as "rage triggered by alcohol." R482. Thus, the prosecution's own evidence shows that this was a chance encounter, brought on by alcohol and mental illness. This is not the sort of case for which the death penalty is normally reserved.

There was additional, unrebutted mitigating evidence that Dennis Sochor was an excellent worker who supported the family when his father was out of work. R1066.

This case contains many of the same elements that have caused this Court to reduce cases to life imprisonment. In Fitzpatrick, the jury had recommended death and the judge had found five aggravating circumstances. 527 So.2d at 810-811. This Court reduced the sentence to life imprisonment and stated:

> Fitzpatrick's actions were those of a seriously emotionally disturbed man-child, not those of a cold-blooded, heartless killer.

Id. at 812. The same reasoning applies to Mr. Sochor. This offense is the product of child abuse, mental illness, and alcohol, not of cold-blooded planning. In Wilson v. State, 493 So.2d 1109 (Fla. 1986) this Court relied on the short duration of premeditation to order life imprisonment for a double murder.

Here, premeditation is highly questionable and only one death occurred. In Livingston v. State, 13 FLW 187 (Fla. March 10, 1988) this Court reduced a sentence to life based on child abuse and use of alcohol. In Smalley v. State, 14 FLW 342 (Fla. July 6, 1989) this Court reduced a death sentence to life imprisonment based on "minor marijuana use," life pressures, and a good work record. In Ross v. State, 474 So.2d 1170 (Fla. 1985) this Court reduced a sentence to life imprisonment based on alcohol and inflamed emotion. All of these cases involved death verdicts by the jury. This case contains many of the same elements. The imposition of the death penalty is disproportionate. Mr. Sochor's offense is the sort of unplanned offense which is the product of alcohol, child abuse, and mental illness which requires life imprisonment under Fitzpatrick.

F. CONSTITUTIONALITY OF THE FLORIDA DEATH PENALTY STATUTE

Our death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Our law has failed to meet these requirements and therefore violates the eighth amendment.

1. The Jury

The jury plays a crucial role in capital sentencing. Its penalty verdict is to be overridden only where no reasonable person could agree with it. Nevertheless, the jury instructions are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict. Pope v. State, 441 So.2d 1073

(Fla. 1984) forbids jury instructions limiting and defining the meaning of the "heinous, atrocious or cruel" aggravating factor under State v. Dixon, 283 So.2d 1 (Fla. 1973). This assures arbitrary application of this aggravating circumstance in violation of the dictates of Proffitt and Maynard v. Cartwright, 108 S.Ct. 1853 (1988).[52] The standard instruction regarding the "cold, calculated and premeditated" aggravating factor is similarly infirm. It simply tracks the vague terms of the statute. The vagueness of the statute, and hence its susceptibility to uneven application, is shown by the fact that this Court has been unable to apply and construe it consistently, as shown in points II.D.1.c and II.F.4 of this brief.

The jury instruction respecting nonstatutory mitigating circumstances provides:

> Among the mitigating circumstances you may consider, if established by the evidence, are:
>
> * * *
>
> 8. Any other aspect of the defendant's character or record, or any other aspect of the offense.

Florida Standard Jury Instructions in Criminal Cases, West's Florida Criminal Laws and Rules (1989) 806 (emphasis supplied). A jury can reasonably take this to constitute but a single mitigating circumstance, even though the evidence may (and in this case did) support several distinct nonstatutory mitigating cir-

52 Through use of the contemporary objection rule, a procedural technicality, the state has thwarted appellate review of the improper standard jury instruction on this point. Smalley v. State, 14 FLW 342 (Fla. July 6, 1989). This insitutionalizes arbitrary application of the aggravating circumstance.

cumstances. A reasonable jury can also take this to mean that this circumstance allows only consideration of character traits other than mental illnesses or defects, and forbids consideration of mental or emotional disturbance or duress less than "extreme," and forbids consideration of impairment of the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law that is less than substantial. Similarly, a reasonable jury can take the instruction to mean that the instruction forbids consideration of a history of prior criminal activity which, while significant, is not such as to mark the defendant for death. Hence, reasonable jurors in some cases will take the instruction to allow consideration of a broad range of nonstatutory mitigating circumstances while others will take it to mean that broad classes of nonstatutory mitigating circumstances are off limits for consideration.

The jury instruction on the standard of proof as to mitigating evidence is improper. The standard instructions provide (and the jury at bar was instructed):

> A mitigating circumstance need not be proven beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

Florida Standard Jury Instructions in Criminal Cases, West's Florida Criminal Laws and Rules (1989) 806. The constitution requires consideration of all relevant evidence in capital sentencing. Jurek v. Texas, 428 U.S. 262, 271, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). But the instruction limits the jury's consideration to such evidence as is so reasonably convincing as to

establish a mitigating circumstance. Further, the "reasonably convincing" standard itself violates the eighth amendment. The phrase "reasonably convinced" instructs the jury to disregard much of the evidence which the United States Supreme Court has recognized as vital for an individualized sentencing hearing. In defining a similar phrase, this Court has noted:

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered...The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief and conviction, without hesitation, as to the truth of the allegation sought to be established.

State v. Mischler, 488 So.2d 523, 525 (Fla. 1986). Much of the evidence in mitigating a capital crime consists of the life history of the defendant. The witnesses who most often testify to these circumstances are usually family members or old friends of the family. Their testimony is always open to impeachment as biased. Instructing the sentencer not to consider such evidence unless "reasonably convinced" that the testimony of family members establishes "a mitigating circumstance" severely restricts the defendant in presenting a case for life in violation of the eighth amendment and article I, section 17 of our Constitution.

Further, the jury is not informed of the great importance of its penalty verdict, that it is to be overridden only if no reasonable person could agree with it. Instead, in violation of

the teachings of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) it is told that its verdict is just "advisory."

2. Counsel

Ignorance of the law and ineffectiveness have been the hallmarks of counsel in Florida capital cases from the 1970's through to the present. See, e.g., Elledge v. State, 346 So.2d 998 (Fla. 1977) (no objection to evidence of nonstatutory aggravating circumstance), Grossman v. State, 525 So.2d 833 (Fla. 1988) (no objection to victim impact information forbidden by eighth amendment), Smalley v. State, 14 FLW 342 (Fla. July 6, 1989) (no objection to jury instruction forbidden by eighth amendment), Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984) (counsel acted under actual conflict of interest in 1977 appeal, to appellant's detriment), Rutherford v. State, 14 FLW 300 (Fla. June 15, 1989) (failure to object to improper evidence used to support aggravating factor), Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988), (failure to develop and present mitigating evidence), Spaziano v. State, 14 FLW 302 (Fla. June 15, 1989) (failure to assert grounds in first motion for post-conviction relief), Alvord v. Dugger, 541 So.2d 598 (Fla. 1989) (failure to argue and present nonstatutory mitigating evidence in 1974 trial), Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989) (presuming that appellate counsel will purposely fail to present arguable issues). Of course a complete list would fill a volume. The quality of counsel is so bad that this Court has excoriated appellate capital attorneys as a class for failing to serve their clients by filing briefs containing

"weaker arguments." Cave v. State, 476 So.2d 180, 183, n.1 (Fla. 1985) ("neither the interests of the client nor the judicial system are served by this trend").[53]

Notwithstanding this pathetic history, Florida law makes no provision for the appointment of adequate counsel in capital cases. The failure to provide adequate counsel assures uneven application of the death penalty in violation of the Constitution.

3. The Trial Judge

The trial court has an ambiguous role in our capital punishment system. On the one hand, it is pretty much bound by the jury's penalty verdict under, e.g., Tedder v. State, 322 So.2d 908 (Fla 1975). On the other hand, it is considered the ultimate sentencer so that constitutional errors in reaching the penalty verdict can be ignored under, e.g., Smalley v. State, 14 FLW 342 (Fla. July 6, 1989). This ambiguity and other problems minimize evenhanded application of the death penalty.

As an initial matter, trial court judges do not seem to be up to the demands of capital litigation. For instance, the first quarter of the fourteenth volume of Florida Law Week reports seven direct appeals from death sentences. In six of those seven cases, this Court has been compelled to reverse by trial court errors, notwithstanding the strong appellate presumptions against reversal. And it is small wonder that our conscientious trial

[53] See also Rose v. Dugger, 508 So.2d 321, 325 (Fla. 1987) (appellate counsel "has either not clearly read the record or has not accurately presented its contents to this Court").

judges are in trouble. Our capital punishment statute is couched in such vague terms as to constitute a maze of traps for the unwary, and the courts are ill served by attorneys of doubtful competence or professionalism. See, e.g., Cave v. State, 476 So.2d 180, 183, n. 1 (Fla. 1985), Rose v. Dugger, 508 So.2d 321, 325 (Fla. 1987), and Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984).

As already noted, the trial judge is largely bound by the jury's recommendation. The result is that the great likelihood of error built into the penalty verdict procedure (improper standard instructions and the lack of competent attorneys to challenge them) becomes a great likelihood of error by the judge bound by the jury's verdict.[54]

That our law forbids special verdicts as to theories of homicide and as to aggravating and mitigating circumstances makes problematic the trial court's role in deciding whether to override the penalty verdict. The trial court has no clue as to which circumstances the jury considered or how they applied them, and has no way of knowing whether the jury acquitted the defendant of premeditated murder (so that a sentencing order finding of cold, calculated and premeditated murder would be improper), or whether it acquitted him of felony murder (so that

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[54] For example, if the trial court gives the vague standard instructions on "heinous, atrocious or cruel" and "cold, calculated, and premeditated," and defense counsel (as is typical) fails to object, there is a substantial likelihood of jury error in the application of these standards to situations to which they should not apply. Yet the trial judge is pretty much bound by a resulting improper death verdict.

a finding of killing during the course of a felony would be inappropriate). Similarly, if the jury found the defendant guilty of felony murder, and not of premeditated murder, then application of the felony murder aggravating circumstance would fail to serve to narrow the class of death eligible persons as required by the eighth amendment under, e.g., Lowenfield v. Phelps, 108 S.Ct. 546 (1988).

4. Appellate Review

In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (Fla. 1976), the Court upheld Florida's capital punishment scheme in part because state law required a heightened level of appellate review:

> The statute provides for automatic review by the Supreme Court of Florida of all cases in which a death sentence has been imposed. § 921.141(4) (Supp. 1976-1977). The law differs from that of Georgia in that it does not require the court to conduct any specific form of review. Since, however, the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible and the Supreme Court of Florida like its Georgia counterpart considers its function to be to "[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great." State v. Dixon, 283 So.2d 1, 10 (1973).

428 U.S. at 250-51.

> The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which

> the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted." Songer v. State, 322 So.2d 481, 484 (1975).

Id. 252-53.

> Finally, the Florida statutes has a provision designed 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 death sentence to ensure that similar results are reached in similar cases.
>
> Nonetheless the petitioner attacks the Florida appellate review process because the role of the Supreme Court of Florida in reviewing death sentences is necessarily subjective and unpredictable. While it may be true that that court has not chosen to formulate a rigid objective test as its standard of review for all cases, it does not follow that the appellate review process is ineffective or arbitrary. In fact, it is apparent that the Florida court has undertaken responsibly to perform its function of death sentence review with a maximum of rationality and consistency.

Id. 258-59.

Mr. Sochor respectfully submits that what was true in 1976 is no longer true today. History has shown that intractable ambiguities in our statute have prevented the sort of evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt. Hence the statute is unconstitutional.

Attempts at construing the vague statutory aggravating standards has led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious, or cruel" (HAC) aggravating circumstances. Hence, these aggrvting circumstances

are unconstitutional because they do not narrow the class of death eligible persons, or channel the discretion of the sentencer. See Lowenfield v. Phelps, 108 S.Ct. 546, 554-55 (1988). Florida's aggravating circumstances mean pretty much what one wants them to mean. The statute itself is therefore unconstitutional. See Herring v. State, 446 So.2d 1049 (Fla. 1984) (Ehrlich, J., dissenting). As to CCP, compare Herring 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.2d988 (Fla. 1989) (re-interring Herring). Compare also Provenzano v. State, 497 So.2d 1177, 1183 (Fla. 1986) ("Heightened premeditation necessary for this circumstance does not have to be directed toward the specific victim." CCP applied to killing of bailiff who came out of courtroom while defendant was trying to kill two police officers), with Amoros v. State, 531 So.2d 1256 (Fla. 1988) (CCP improperly applied to killing of woman present when defendant sought to kill girlfriend). As to HAC, compare Raulerson v. State, 358 So.2d 826 (Fla. 1978) (finding HAC), with Raulerson v. State, 420 So.2d 567 (Fla. 1982) (rejecting HAC on same facts). Compare also Mills v. State, 476 So.2d 172, 178 (Fla. 1985) (focus is on "intent and method" of defendant) with Pope v. State, 441 So.2d 1073, 1078 (Fla. 1984) ("nor is the defendant's mindset ever at issue").[55] Compare also Herzog v. State, 439

[55] In Stano v. State, 460 So.2d 890 (Fla. 1985), this Court refused to apply Pope retroactively. This result scarcely promotes the evenhanded application of the death penalty required by Proffitt.

So.2d 1372 (Fla. 1983) (HAC rejected where victim semi-conscious), with Jennings v. State, 453 So.2d 1109, 1115 (Fla. 1984), vacated 470 U.S. 1002, rev'd on other grounds 473 So.2d 204 (1985) (HAC applied where victim unconscious). Compare Brown v. State, 526 So.2d 903 (Fla. 1988) (HAC rejected where victim police officer in agony begged his assailant not to kill him), with Grossman v. State, 525 So.2d 833 (Fla. 1988) (HAC applied where victim police officer beaten and killed during struggle for gun and must have known she was fighting for her life).[56]

Further, Florida does not have the independent appellate reweighing of aggravating and mitigating circumstances envisioned in Proffitt. Such matters are left to the trial court. See Smith v. State, 407 So.2d 894, 901 (Fla. 1981) ("the decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rest with the judge and jury").

Through use of the contemporaneous objection rule, Florida has institutionalized disparate application of aggravating and mitigating circumstances.[57] See, e.g., Rutherford v. State, 14

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[56] For extensive discussion of the problems with these circumstances, see Kennedy, Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L. Rev. 47 (1987), and Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstances: Narrowing the Class of Death-Eligible Cases Without Making it Smaller," 13 Stetson L. Rev. 523 (1984).

[57] In Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977), this Court held that consideration of evidence of a non-statutory aggravating circumstance is error subject to appellate review without objection below because of the "special scope of review" in capital cases. Mr. Sochor contends that a retreat

FLW 300 (Fla. June 15, 1989) (absence of objection barred review of use of improper evidence of aggravating circumstances); Grossman v. State, 525 So.2d 833 (Fla. 1988) (absence of objection barred review of use of victim impact information in violation of eighth amendment); and Smalley v. State, 14 FLW 342 (Fla. July 6, 1989) (absence of objection barred review of penalty phase jury instruction which violated eighth amendment). Use of retroactivity principles works similar mischief.

5. Other Problems With the Statute

a. Lack of Special Verdicts

Our law provides for trial court review of the penalty verdict. Yet the trial court is in no position to know what aggravating and mitigating circumstances the jury found because the law does not provide for special verdicts. This necessarily leads to double jeopardy and collateral estoppel problems where the jury has rejected an aggravating circumstance but the trial court nevertheless finds it. It also ensures uncertainty in the fact finding process in violation of the eighth amendment. Especially troublesome is that our law lets the trial court apply the premeditation aggravating circumstance where the jury may have rejected it.

Our law in effect makes the aggravating circumstances into elements of the crime so as to make the defendant death eligible. Hence, the lack of unanimous jury verdict as to any aggravating circumstance violates article I, sections 9, 16, and 17 of the

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from the special scope of review violates the eighth amendment under Proffitt.

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). It is conceded that in Hildwin v. Florida, 109 S.Ct. 2055 (1989), the Court rejected a similar sixth amendment argument.

b. No Power to Mitigate

Unlike someone serving a sentence for anything ranging from a life felony to a misdemeanor, 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. Whatever the reason for this bizarre provision, it 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.

c. Presumption of Death

Florida law creates a presumption of death where but a single aggravating circumstance appears. This creates a presumption of death in every felony murder case (since felony murder is an aggravating circumstance) and in almost every premeditated murder case (depending on which of several definitions of the premeditation aggravating circumstance is applied to the case[58]). If there is anything left over, it is covered by that omnium gatherum, "heinous, atrocious or cruel."

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